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After the Hague Convention on Choice of Court Agreements: China's Role in the Future World of International Commercial Dispute Resolution

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Submitted in fulfilment of the requirements of the Degree of LL.M by research

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ABSTRACT

This dissertation will analyse the framework of international commercial dispute resolution in China after China signing the 2005 Hague Convention. Firstly, it will discuss the Hague Convention from a Chinese perspective and will explore potential conflicts between the Convention and Chinese law. Since China has not yet ratified the Hague Convention, the issues around the ratification of the Convention will also be discussed. Secondly, the dissertation will examine international commercial arbitration, which is an important and popular international commercial dispute resolution method in China. This part will not only discuss arbitration agreements, arbitration procedure and the effects of arbitration awards in China, but will also explore both the "international" and "Chinese" characteristics in arbitration law and practice. It attempts to answer the question of whether or not international commercial arbitration in China is a success. Thirdly, the dissertation will focus on the Chinese International Commercial Court (CICC) and will make a detailed examination of the essential elements of the CICC. It will assess its future role in international commercial dispute resolution. Then the dissertation will provide a number of recommendations based on Chinese legal reality and culture by analysing international commercial courts in other countries. Lastly, the dissertation will look into the future of international commercial dispute resolution in China. It is concluded that after the signature of the Hague Convention, some modification of Chinese legal framework should be made to apply the Convention. Although there has been a creation of numerous international commercial courts, including new China International Commercial Courts (CICC), it is still too early to tell whether CICC will become a genuine competitor of arbitration and a preferred venue of dispute resolution for parities in international commercial business.

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DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Yujie Zhu

LIST OF ABBREVIATION

Abbreviation	Meaning
BPC	Basic People's Courts
BRI	Belt and Road Initiative
CCPIT	China Council for the Promotion of International Trade
CICC	China International Commercial Courts
CIETAC	China International Economic and Trade Arbitration Commission
CPL	Civil Procedure Law of the People's Republic of China
CMAC	China Maritime Arbitration Institution
DIFC	Dubai International Financial Centre
FTAC	Foreign Trade Arbitration Commission
HPC	High People's Courts
ICC	International Chamber of Commerce
IPC	Intermediate People's Courts
NCC	Netherlands Commercial Court
NPC	National People's Congress
PCT	China Procedure of the Conclusion of Treaties
PRC	People's Republic of China
SAR	Special Administrative Regions
SICC	Singapore International Commercial Court
SPC	Supreme People's Court
UNCITRAL	United Nations Commission on International Trade

Chapter 1 Introduction

On 12 September 2017, the People's Republic of China (China) signed the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "Hague Convention"). It currently binds 36 contracting parties, including the EU.[1] As an international agreement with the purpose of unifying different rules of various countries, the Convention received firm endorsements from international dispute resolution communities and has the potential to achieve for litigation what the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") achieved for arbitration.[2] There used to be a heated debate among Chinese private international law scholars as to whether China should sign the Hague Convention; opponents argued that signing the Convention would cause an outflow of cases which should have entered Chinese courts and thus would harm the interests of Chinese parties.[3] In other words, according to the Hague Convention, it is actually very hard to invalidate the choice of court made by the parties. The argument was that if China became a contracting party to the Convention, Chinese courts would lose a large number of cases because the parties may not choose Chinese courts due to the lack of judges with professional skills on international commercial law. Besides, as the courts not chosen, Chinese courts may need to bear more obligations of enforcing the judgments made in other contracting state courts.

By contrast, proponents believed that accession to the Convention could change the unsatisfactory *status quo* regarding jurisdiction agreements and enforcement in Chinese courts and recognition and enforcement of foreign judgments.[4] In practice, a foreign judgment can be recognized and enforced only under certain conditions: there must be either a treaty requiring Chinese courts to recognize the foreign judgment or reciprocity between China and the respective foreign country.[5] In addition, recognition and enforcement of the

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[1] See the status table,< https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 15 March 2020.

[2] RA Brand and PM Herrup, *The 2005 Hague Convention on Choice of Court Agreement: Commentary and Documents*, Cambridge University Press, 2008, p11.

[3] L Chen, *Comments on Hague Convention of 2015 on Choice of Court Agreements*, Wuhan Tushu Press, 2009,53; J Wang, *Thoughts about Feasibility to Ratification of 2005 Hague Convention on Choice of Court Agreement for China*, Wuhan University International Law Review,2012, p53.

[4] G Tu, *The Hague Choice of Court Convention—A Chinese Perspective*, American Journal of Comparative Law 2007,347,p365; ZS Tang, *Effectiveness of Choice of Court Clauses in Chinese Courts: A Pragmatic Study*. International and Comparative Law Quarterly 459, 2012, p 482-84; Y Gan, *Foreign-related Choice of Court Agreement in China, Problems and Improvements.* Chinese Review of International Law, 2014, p57-68.

[5] Civil Procedure Law of People's Republic of China (CPL), 27,June,2017. Art 282. Also see the Supreme People's Court's opinions on the Implementation of Civil Procedure Law (2015 SPC's Opinions on CPL), Art 544.

foreign judgment must not offend basic principles of law, sovereignty and security, or public interests of China.[6] However, there is no such treaty between China and its main business partners, such as Japan and the USA. There are 37 countries which have bilateral judicial assistance agreements with China. Even fewer countries have reciprocal relations with China with respect to judgment recognition and enforcement.[7] Hence, under the current legal system, it is difficult to recognize and enforce a foreign judgment successfully in China.

The discussion on whether China should sign the Hague Convention ended with signature by China on 12 September 2017. Question of how China would ratify the Convention, along with the question of how to implement the Convention in China have arisen. The latter question is a more complicated issue because Chinese law and practice treat Chinese and foreign jurisdiction agreements differently, even though superficially all jurisdiction agreements are subject to the same rule in the Civil Procedure Law of the People's Republic of China (CPL). However, in practice, Chinese judges have dispensed with the "actual connection" requirement as to Chinese jurisdiction agreements while still adhering to such a requirement on foreign jurisdiction agreements. This requirement means if the chosen court is located in any place in the list provided by the CPL, the actual connection between the court and the dispute is established successfully. However, Chinese judicial practice imposes the "actual connection" requirement on foreign jurisdiction agreements, but not on choice of Chinese court agreements. This different treatment produces a conflict between Chinese law, judicial practice and the Convention. Therefore, it is necessary for China to make careful declarations under the Hague Convention and modify Chinese law to a reasonable extent.

On 1 July 2018, the Supreme People's Court (the SPC) of China's 'Regulations on Several Issues regarding the Establishment of International Commercial Court (the "Regulations") came into effect.[8] The Regulations set out the scope and operation of two new international commercial courts in China (CICC), one in Xian and the other in Shenzhen. These steps follow the recent rise of international commercial courts throughout the world, like the Singapore International Commercial Court (SICC), the Dubai International Financial Centre (DIFC) courts and the Netherlands Commercial Court (NCC), which opened its door in

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[6] See *id.*

[7] Those countries include France, Italy, Spain, Bulgaria, Hungary, Morocco, Tunisia, the United Arab Emirates, Poland, Mongolia, Romania, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Egypt, Greece, Cyprus, Kyrgyzstan, Tajikistan, Uzbekistan, Vietnam, Laos, Lithuania and North Korea.

[8] Regulations on Several Issues regarding the Establishment of International Commercial Court, the Supreme People's Court, 1 July 2018.

January 2019. The establishment of CICC represents China's prolonged attempt to update its judicial system to meet the international challenge. It is also an important part of China's judicial reform to increase the reliability and competitiveness of Chinese courts by providing a committee of experts on international commercial disputes, more effective measures of property preservation and more skilled judges.[9] It attempts to provide a more attractive and effective dispute resolution for parties in international commercial business, especially for the parties involved in the project of Belt and Road Initiative (BRI). [10] The worldwide increase in international trade and commerce has inevitably led to a corresponding increase in commercial disputes. Such disputes are often more complex that disputes involving only a single jurisdiction, usually being subject to at least two different legal systems, cultures and laws. The growth and complexity of international commercial disputes brings a considerable demand of a more reliable, efficient and practical system of international dispute resolution. [11] The exponential growth of international trade has given rise to a corresponding increase in transnational commercial disputes. In the last fifty years, arbitration has become the most important mechanism for resolving international commercial disputes. [12] However, it is not without defects, such as high cost and lack of effective sanctions during the arbitral process. In China, a foreign party typically prefers to resolve a dispute by seeking arbitration through the China International Economic and Trade Arbitration Commission (CIETAC). The CIETAC, which was formed in 1956, is a leading arbitration institution in China for the settlement of commercial disputes arising from interactions between foreign and domestic Chinese businesses. Its operations are informed by both domestic and international law and is nominally independent of the state, existing under the framework of the China Council for the Promotion of International Trade (also known as the China Chamber of International Commerce), a non-governmental organization. [13]

The CIETAC is distinguished from other international arbitration centres because of the following unique characteristics: there is a high level of institutional centrality; there are

[9] *See id.*
[10] The concept of "Belt and Road Initiative (BRI)" was proposed by China in 2013 and it comes from the ancient Silk Road that symbolized communication and cooperation between the East and the West. BRI aims to create a trade and infrastructure network connecting Asia, Europe and Africa and promote the economic prosperity of the countries along the Belt and Road and regional economic cooperation, strengthen exchanges and mutual learning between different civilizations, and promote world peace and development.
[11] Rutledge, Peter, *Convergence and Divergence in International Dispute Resolution*. J.Disp,Resol, 2012,p49.
[12] T Varady , International Commercial Arbitration, West Academic Press, 3d ed, 2006,p21-22.
[13] Q.Xiong & Y.Shang, *International Arbitration in China,* International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis, 2016, p270-271.

rules containing a provision allowing mediation-arbitration which is a reflection to Chinese legal culture; there is an imperative to maximize efficiency in the arbitration process and the role of tribunals as inquisitorial in which the decision maker conducts investigation to gain full information of the dispute, not rely on the submission of the interested parties.[14] Besides, the 6th Amendment of the Penal Code, which came into effect on 29 June 2006, introduced "the crime of twisting the law when making a ruling in arbitration" into the current Chinese Penal Code. [15] The new clause of the Chinese Penal Code reads:

"Where a person, who is charged by law with the duty of arbitration, intentionally runs counter to facts and laws and twists the law when making a ruling in arbitration, if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not more than three years for criminal detention; and if the circumstances are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years." [16]

This change has provoked criticism from scholars, since it permits interference by state organs and oversimplifies the complicated process of arbitration.[17] It is undeniable that some demerits of international arbitration may be improved through voluntary efforts in the community of arbitration institutions, such as the high cost and the lack of efficient sanctions during the arbitration procedure. Moreover, it is highly possible that improvements will occur because the creation of international commercial courts trigger the functioning of the principle of competition.[18] In practice, both the merits and flaws of international arbitration will be considered in the process of designing an international commercial court. As will be argued in this paper, international commercial arbitration and international commercial courts are developing a cooperative and competitive relationship in which commercial parties have more choices. [19]

When it comes to the establishment of the CICC, it is not only a symbol of China's determination to play a better role in dispute resolution in respect of international business, but also an innovation in the history of Chinese judicial reform. It has the potential to

[14] J Miller, *International Commercial Arbitration in China, Locating the Development of CIETAC in the Context of International and Domestic Factors*. 22 Dalhousie J. Legal Stud, 2013,p76.
[15] The 6th Amendment of Penal Code of Criminal Law of the People's Republic of China. 29 June,2006. Art20.
[16] Criminal Law of the People's Republic of China, last amended on 4 November, 2017, Art399.
[17] Q Xu, *The Criticism of Arbitrators Legal Responsibility II*. 11 Arbitration Study 25, 2006, p25-26.
[18] M Hwang, *Commercial Courts and International arbitration—Competitors or Partners?* Arbitration International 31,2015, p193-212.
[19] See *id.*

enhance the accessibility of Chinese courts to foreign parties. It is undeniable that the two courts (one in Xi'an and one in Shenzhen) are "international" in outlook; for example, they will have an "International Commercial Expert Committee", which will consist mainly of foreign nationals with a particular emphasis on experts from other jurisdictions. [20] This committee will provide legal services to parties, such as mediation and will offer professional advice to the judges. It will also help the Supreme People's Court to make judicial guidance for lower courts. However, driven by China's desire to facilitate the resolution of disputes related to President Xi Jinping's Belt and Road Initiative, the CICC project is also a reflection of national goals and identity. Any reforms to a court system should take into consideration the national goals which are defined by the Chinese Communist Party. The two recent national goals that the Chinese government launched were "harmonious society" in 2006 and "Chinese dream" in 2012. The former refers to "preserving social harmony at all costs" while the latter means "working assiduously to make a contribution to Chinese prosperity". In response, the Chinese legal system has undergone several reforms, such as "preferring mediation over adjudication", "making effort to ensure stability at all costs", "ruling the society by law with Chinese characteristics". [21] The CICC is no exception. As part of the Supreme People's Court of China, one unique feature of the CICC is linking mediation, arbitration and litigation to make a "one-stop" commercial dispute resolution mechanism with the aim of promoting harmony and efficiency of the whole Chinese society. [22] This mechanism will be composed of the international commercial courts, the arbitration institutions and mediation institutions which are appointed by the Supreme People's Court. In this "one-stop" mechanism, the courts will provide procedural support to arbitration institutions, such as preservation of property and evidence, and will grant arbitration awards enforceability by confirming them in the form of judgment or mediation agreement. [23] It only took five months to set up the proposed special courts, complete with the appointment of judges, selection of the court sites and coordination with central and provincial governments. Yet, while the physical establishment of the courts is complete, the rules of the CICC are extremely sketchy and more questions quickly emerged. Firstly, will there be a proper fusion of the international commercial court and alternative dispute resolution mechanisms? Will the judges be able to make judgments of high quality but at low cost? Will the judgments be recognised and enforced efficiently and

[20] See *Supra* note 2.
[21] Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform, adopted at the Third Plenary Session of the 18th Central Committee of the Communist Party of China on November 12, 2013.
[22] See *id*.
[23] *Id.*

effectively abroad? Secondly, will this court reform achieve its objectives and promote a real change for the Chinese legal system? What experience can be learned from the world's other international commercial courts?

This dissertation will be divided into seven parts: Chapter 1 will make a brief introduction to the whole dissertation. Chapter 2 will discuss the Hague Convention from a Chinese perspective, and will explore potential conflicts between the Convention and Chinese law. Chapter 3 will examine international commercial arbitration in China, aiming to answer the question of whether or not international commercial arbitration is a success. This part will not only discuss arbitration agreements, arbitration procedure and the effects of arbitration awards in China, but will also explore both the "international" and "Chinese" characteristics in arbitration law and practice. Chapter 4 will focus on the Chinese International Commercial Court (CICC) and will make a detailed examination of the essential elements of the CICC, and will assess its future role in international commercial dispute resolution. Chapter 5 will provide a number of recommendations based on Chinese legal reality and culture by analysing international commercial courts in other countries.[24] Chapter 6 will consider the future of international commercial dispute resolution in China. The final chapter will bring together the research by making a conclusion.

This dissertation will mainly take a doctrinal approach with elements of comparative research. To answer the research questions above, it is necessary to carry out an in-depth analysis of the legislation in relation to the Hague Convention, jurisdiction agreements, Chinese domestic laws concerning civil and commercial jurisdiction, and recognition and enforcement of judgments, rules of international commercial arbitration and courts, along with some case study. This analysis will be enhanced by the examination of secondary sources. This dissertation will investigate approaches used by international commercial courts under other legal systems-for example, Singapore-and try to make some practical recommendations for the Chinese international commercial courts.

[24] For a full understanding of the Chinese legal culture, see Fan Zhongxin, Major Concerns and Wisdom of the Chinese Legal Culture, 1 China Legal Sci. 3, 2013. In China, the objective of a "harmonious society" is *de facto* the goal of the rule of law and rite. The ultimate purpose lay in the establishment of a harmonious society in which morality improved in every stratum and cooperation with mutual benefit. It differs substantially from legal culture of the western law whose order is based on the advocacy of individuality.

Chapter 2 Overview of the Hague Convention from a Chinese Perspective

On 12 September 2017, China signed the Hague Convention and the ratification by China is expected in the near future. This chapter will explore how China should implement the Convention. Firstly, it will discuss jurisdiction agreements in Chinese private international law and the conflicts between Chinese practice and the Hague Convention. Several available options for China to implement the Hague Convention will be provided as well. Secondly, issues regarding ratification of the Hague Convention and its legal status in Chinese domestic law will be explored.

2.1 Jurisdiction Agreements in Chinese Private International Law

In international commerce, effective dispute resolution is one of the key factors contributing to the success of international business parties. The function of dispute resolution agreements is to direct the parties to use the agreed method (litigation, adjudication, arbitration or mediation), to resolve their disputes.[25] Jurisdiction agreements are frequently used by sophisticated and well-advised international business parties to enhance legal certainty and reduce expense and delay in litigation.[26] However, jurisdiction agreements are different from normal contract terms because both private rights and public power are involved in jurisdiction agreements, which leads to complexity. If a jurisdiction agreement is exclusive, it aims to restrict the jurisdictional options of contracting parties to the type of dispute resolution and the venue for it.[27] The rules governing jurisdiction agreements vary from legal system to legal system. The Hague Convention has received firm endorsements from international dispute resolution communities and it is promising that major trading nations in the world have signed it, including the USA, the EU, the UK and China.[28] States like Australia, Canada and New Zealand are contemplating accession.[29]

[25] For a general introduction to dispute resolution, see Fentiman, Richard, *International commercial litigation*. Vol. 2. Oxford: Oxford University Press, 2010.

[26] Haines, Avril D. "Choice of court agreements in international litigation: their use and legal problems to which they give rise in the context of the interim text." *The Hague Conference on Private International Law*. The Hague. 2002. https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court.

[27] ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law*, Routledge Research in International Commercial Law, 2014, p2.

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

[29] Joint Standing Committee on treaties, Parliament of Australia*, Convention of choice of court-Accession*. Report No 166, November 2016, 23 [3.21].

With the Chinese government's signature of the Hague Convention on 12 September 2017, the debate on whether or not China should sign the Hague Convention has ended to some extent. The question of how China will apply the Convention in practice has aroused interest among practitioners. Before answering this question, it is necessary to have a thorough understanding of jurisdiction agreements in the Chinese legal system, from both theoretical and practical perspectives. Although China has twenty-three provinces, five "autonomous regions", four "municipalities" and two "special administrative regions" (SAR),[30] it is still a country with a unified legal system, except that Hong Kong, Macao and Taiwan have their own legal systems.[31] Besides, China is a country which has inherited the civil law tradition. The law in China comes essentially from the legislature; the National People's Congress (the NPC) and its Standing Committee.[32] Judges cannot make law, but the Supreme People's Court (the SPC) can fulfil the function of making law by publishing judicial interpretations/guidance. Under current Chinese domestic law, the regime regulating jurisdiction agreements exists in the Civil Procedure Law (the CPL)[33], a number of judicial interpretations published by the SPC,[34] adjudicatory guidelines[35] and typical cases published in the form of the Gazette of the SPC.[36] However, these cases only provide guidance for inferior courts and do not have binding effect.

2.1.1 Exclusivity of Jurisdiction Agreements

An exclusive jurisdiction agreement restricts the options of the contracting parties to bring such disputes to the courts of one jurisdiction. Choosing non-exclusive jurisdiction agreement, in principle, provides for disputes to be heard in the courts of a particular jurisdiction but without prejudice to the right of one or other of the parties to take a dispute to the courts of any other jurisdiction if appropriate. [37] Article 1 of the Hague Convention

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[30] See http://www.xzqh.org/quhua/index.hem.
[31] Due to historic reasons, the laws in Hong Kong, Macao and Taiwan are different from those in the Mainland. In this dissertation, "China" only refers to the Mainland, and "Chinese laws" only refer to the laws applicable in the Mainland, unless otherwise specified.
[32] Art 58 of the Constitution Law of the People's Republic of China.
[33] The Civil Procedure Law of the People's Republic of China, adopted at the 4th session the seventh National People's Congress on 9 April 1991. Last amended at the 28th session of the Standing Committee of the 12th National People's Congress on 27 June 2017.
[34] SPC's Opinions on the Implementation of CPL, 4, Feb, 2015; SPC's Opinions on the Implementation of Marine Special Procedure Law (MSPL), 1, Feb,2003.
[35] Minutes on SPC's three national conferences on adjudication of foreign-related maritime and commercial cases in 1989,2005 and 2010; The replies on the Fourth Division of SPC to Practical Questions in Foreign-related Maritime and Commercial Adjudication of 2004.
[36] Since 1985, SPC has published some typical cases regarding civil procedure law after the deliberation of the Judicial Committee of SPC.
[37] J Fawcett, *Non-exclusive Jurisdiction Agreements in Private International Law*, Lloyd's Mar. &Com.L.Q.2001, p234-235.

states that the Convention applies, in principle, only to exclusive jurisdiction agreements.[38] Article 22, however, allows Contracting States to make a declaration for the recognition and enforcement of judgments resulting from non-exclusive jurisdiction agreements.[39] Furthermore, the Convention states that, if parties do not expressly stipulate that a choice of court is non-exclusive, it will be deemed to be exclusive.[40] This statement will expand the application of the Convention in practice because it will also cover agreements that bear neither the expression "exclusive" nor "non-exclusive".

In China, the CPL keeps silent regarding the distinction between exclusive and non-exclusive choice of court agreements. It also does not mention how to determine whether an ambiguous jurisdiction agreement should be viewed as exclusive or non-exclusive. However, in Chinese judicial practice, the approaches of Chinese courts depend on different situations. If a jurisdiction agreement includes the expression "exclusive", Chinese courts will find that agreement confers sole jurisdiction.[41] If the jurisdiction agreement includes the expression "non-exclusive", Chinese courts' jurisdiction would be upheld. In other words, the word "non-exclusive" does not exclude the jurisdiction of Chinese courts automatically. Controversy arises when a jurisdiction agreement bears neither the expression "exclusive" nor the expression of "non-exclusive". Most legal systems in the USA presume that, a forum-selection clause is treated as exclusive *only if* it contains clear, unambiguous language of the parties' intent to make the specified forum exclusive.[42] Most European courts, by contrast, adopt an exclusive presumption.[43] However, there is not a clear standard for Chinese courts to follow and only one case has been decided on the basis of a presumption of exclusivity. In *Suzhou Branch of Standard Chartered v Xingyu Ltd. & She*,[44] a loan contract stated that governing law should be Taiwanese law and disputes resulting from the contract should be submitted to Taipei District Court. When Suzhou Branch of Standard

[38] Art 1 of the Convention.
[39] Art 22 of the Convention.
[40] Art 3 of the Convention.
[41] See *Wenzhou Foreign Trade Co. of Arts and Crafts v Compagnie Maritime d'Affretement(France)*,Fujian Province High Court; *Sojitz v Xiao*, Shanghai Municipal High People's Court ,No 72, 2004; *Yacheng Automobile Fittings v HSBC Holding Plc*, Jiangsu Province, Wuxi Municipal Intermediate People's Court, No23, 2006.
[42] K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (BMW), 314 F. 3d 494,499(10th Cir.2002); N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F. 3d 1034, 1036-37 (9th Cir. 1995); John Boutari & Son, Wines & Spirits, S. A. v. Attiki Imps. & Distribs. Inc., 22 F. 3d 51, 52-53 (2d Cir. 1994); XXeroxx Corp. v. Premiere Colors, LLC, No. 3:10-CV-412, 2010 U.S. Dist. LEXXIS 106566, at* 5 (E.D. Va. Oct. 4, 2010); Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG, 560 F. Supp. 2d 432, 436 (W.D.N.C. 2008); Hsu v. OZ Optics Ltd., 211 F.R.D. 615, 618 (N.D. Cal.2002); Intermetals Corp. v. Hanover Int'l Aktiengesellschaft Fur Industrieversicherungen, 188 F. Supp. 2d 454, 460-61 (D.N.J.2001).
[43] Article 25.2 of Brussels I Regulation (recast), 12 December 2012.
[44] *Suzhou Branch of Standard Chartered v Xingyu Ltd. & She,* Jiangsu Province High People's Court ,No 0052,2010.

Chartered sued the defendant in the Jiangsu Province Suzhou Intermediate People's Court, the court asserted that neither the expression "exclusive" nor "non-exclusive" featured in the jurisdiction clause in the contract. In the light of Article 3 of the Hague Convention, because the parties did not expressly provide otherwise, the choice of court clause was deemed to be exclusive. The plaintiff appealed to Jiangsu Province High People's Court, which supported the Suzhou Intermediated People's Court.

2.1.2 The Scope of Jurisdiction Agreements

Under Article 34 of the CPL, the matters subject to jurisdiction agreements must be "contractual or other proprietary rights and interests".[45] Family matters, inheritance matters and legal capacity of natural persons are excluded from the scope of Article 34. Tort claims, even if they arise from the contract containing the jurisdiction agreement, cannot be covered by the jurisdiction agreement.[46] The Convention excludes a long list of matters which would qualify as "contractual or other proprietary rights and interests" under Chinese law, for example, carriage contracts, maritime matters, intellectual property rights other than copyright and related rights, rights *in rem* in immoveable property and so on.[47] The range of subject matter to which the Convention applies is narrower. In other words, the Hague Convention poses a stricter requirements on the scope of jurisdiction agreements. As a result, there is no necessity to make a change of current Chinese law because Chinese law and practice do not conflict with the Convention is this respect.

The Convention does not address two matters which are covered by the CPL: disputes arising out of harbour operation and disputes arising out of performance of foreign investment contracts in China.[48] But Article 21 of the Convention allows a Contracting State to make a declaration that it does not wish the Convention to apply if these matters are "clearly and precisely defined, and the exception is necessary".[49] As mentioned above, China is a country with a unified legal system, except for Hong Kong, Macao and Taiwan. Article 28 of the Convention permits a Contracting State to choose the Convention's geographic scope, by declaring to apply the Convention only to one or more of its territorial units.[50] This provision

[45] Art 34 of the CPL.
[46] *Xiamen Haoli Apparel Ltd. v Shishi Municipal Oriental Fishing Ltd.*, Xiamen Maritime Court, No 108,1998; *Jiangsu Guanyuan County International Economic Trade Co. v Compagnie Maritime D'affretement France,* Guangzhou Maritime Court, No 41, 1999.
[47] Art 2 of the Convention.
[48] Art 34 & 266 of the CPL.
[49] Art 21 of the Hague Convention
[50] Art 28 of the Hague Convention

provides a way for China to confirm the application of the Convention in Hong Kong and Macao.

2.1.3 The Validity of Jurisdiction Agreements

2.1.3.1 Chinese Laws and Judicial Practice

Before a court considers the effectiveness and enforceability of a jurisdiction agreement in a given case, the first step is to confirm that there is a valid dispute resolution clause between the parties. In a contract, a dispute resolution clause is a special contractual term. The principle of severability means the invalidity of the main contract will not automatically affect the dispute resolution clause.[51] In China, there is no explicit legislative provision or judicial guidance on determining the existence of jurisdiction agreements. In practice, most courts adopt the theory of *lex fori*,[52] while a few courts choose the theory of *lex loci contractus*.[53] The theory of *lex fori* refers to the laws of the country in which a legal action is brought. Since jurisdiction issues are procedural in nature, they should be governed by the law of the forum. The *lex loci contractus* theory means that the governing law of the contract should be the law applicable to determine the validity of a jurisdiction agreement. It is argued that Chinese courts are most familiar with Chinese law and can make quick decisions on preliminary issues. Nevertheless, Chinese law has provided relatively restrictive requirements for jurisdiction agreements to be valid; there is a "Practical connection requirement" and a rule of "No violation of Chinese courts' exclusive jurisdiction".

According to Article 34 of CPL, the courts designated by jurisdiction agreements shall (1) have practical/actual connection with the dispute, and (2) should not violate the provisions of this Law on jurisdiction by forum level and on exclusive jurisdiction.[54] "Jurisdiction by forum" refers to the hierarchy of the courts which allocates jurisdiction within one territory to different levels of authorities. In China, the hierarchy of courts in civil and commercial matters consist of two parts; courts of general jurisdiction (which includes Supreme People's

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[51] ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law*, Routledge Research in International Commercial Law, 2014, p18-19.

[52] *Mares Associates Ltd., etc v Haier Group Corp,.* SPC , No.1095,2009; *Advance Iron Qxide Ltd,.v Hop Investment Corp;. Ltd,.* SPC, No 417, 2010; Shandong *Jufeng Network Co. v Mgame Corp., SPC*, No4, 2009.

[53] Shandong *Jufeng Network Co. v Mgame Corp.,* Shandong Province Higher Court ,No4, 2008.

[54] "Jurisdiction by forum level" allocates jurisdiction within one territory to different levels of authorities, formed by the basic people's courts, Intermediate People's Courts, High People's Courts and Supreme People's Court.

Court, High People's Court, Intermediate People's Court) and courts of special jurisdiction (which includes Maritime Courts, Military Courts and Railway Transport Courts).

Article 34 of the CPL also clarifies the "practical/actual connection" requirement: if the chosen court is located in any place in the stated list, the practical/actual connection between the court and the dispute is established successfully. The list includes: *the place where the defendant has his domicile; or where the contract is performed; or where the contract is concluded; or where the claimant has his domicile; or where the subject matter is located; or other places which have practical connections to the dispute*. Since the CPL does not make any difference between domestic and foreign jurisdiction agreements,[55] the two requirements apply to jurisdiction agreements in favour of Chinese courts and to those in favour of foreign courts. Article 531 of SPC's Opinions on CPL reaffirmed that the foreign courts chosen by the parties must have an "actual connection" to the dispute, but adds to the list "the place where the tort happened".[56] However, several problems have stood out regarding the application in practice of the requirement of "practical connection" and the rule of "no violation of Chinese courts' exclusive jurisdiction".

The first question is whether the selection of the governing law of the contract should be treated as a sufficient factor to establish the "practical/ actual connection". In *Shandong Jufeng Network Company, Ltd. v. South Korea Mgame Company and the Third Party, Tianjin Forugame Company*,[57] the licence contract stipulated that the contract should be governed by Chinese law and should be interpreted in accordance with such law. Meanwhile, the contract also confirmed that all the disputes which may arise or have arisen shall be solved in the jurisdiction of Singapore. When the plaintiff (hereinafter "Jufeng Company") brought the case to the Shandong Higher People's Court, the defendant (hereinafter "Mgame Company") objected to the jurisdiction of the Shandong Higher People's Court, pointing out that the jurisdiction agreement should be valid and enforceable. Shandong Higher People's Court dismissed Mgame Company's objection by holding that: *Jufeng Company and Mgame Company agreed on a jurisdiction in Singapore, where neither party is domiciled in Singapore; nor is it the place where the parties signed the agreement, performed it or where the disputes arose. Therefore, the Singapore court does not have a practical connection to this case, i.e. it goes beyond their stipulated jurisdictional area, leading the agreement as to*

[55] Under Chinese law, unless there is special clarification, the expression "foreign" means the territory outside the Mainland, including Hong Kong, Macao and Taiwan.
[56] Art.531 of the 2015 SPC's Opinions on the Implementation of the CPL.
[57] *Shandong Jufeng Network Company, Ltd. v. South Korea Mgame Company and the Third Party, Tianjin Forugame Company* , Supreme People's Court, No 4, 2009.

jurisdiction to be void. Then Mgame Company appealed. The Supreme People's Court agreed with the reason given by Shandong Higher People's Court and decided that the Singapore courts have no actual connections with the dispute. *Besides, the governing law chosen by the parties is not Singapore law and the parties have no proof of any connection. Hence, the jurisdiction agreement is null and void.* [58] It is worth noting that the SPC actually added one factor to the list of "actual connections" in this case: the place whose law is chosen as the governing law of the contract.

However, the SPC changed its trial rules in *Delixy Energy Private Ltd., v Dongming Sino-oil Petroleum Chemistry Ltd.,*[59] where the contract was governed by and interpreted under English law and each party expressly agreed to submit disputes to the London High Court. The SPC held that *even where the two parties have chosen English law as the governing law of the contract, there is no evidence to prove that English courts have connection with the dispute*. As a result, the SPC annulled the choice of court clause in favour of Dongming Sino-oil Petroleum Chemistry Ltd. Those two cases illustrate that Chinese judicial practice deals with Chinese and foreign jurisdiction agreements differently and asymmetrically. If a Chinese court is chosen, even if it does not have any connection with the dispute, the jurisdiction agreement will be held valid. However, if a foreign court is chosen, the Chinese court will hold the choice to be invalid. As a result, the legal practice in China actually works in favour of Chinese courts.

The other problem comes from the second requirement: even if a Chinese court clause violates the 'jurisdiction by forum level', such clause will not be invalidated automatically. For example, in *Xu v Yan,*[60] a Chinese resident and a Hong Kong citizen chose Fujian Province Quanzhou Municipal Intermediate Court (hereinafter Quanzhou Intermediate Court) in an exclusive jurisdiction agreement in a private loan contract. However, Quanzhou Intermediate Court had no actual connection with the dispute so it should not have jurisdiction on this case. The claimant then sued the defendant in another intermediate court in Fujian Province-Zhangzhou Municipal Intermediate Court (hereinafter Zhangzhou Intermediate Court) which met the requirement of " practical connection" under Article 34 of the CPL. Zhangzhou Court took the jurisdiction, meaning Zhangzhou Intermediate Court accepted that the claimant actually changed the jurisdiction from Quanzhou Intermediate Court to Zhangzhou Intermediate Court. Moreover, in practice, even if Zhangzhou

[58] *Ibid.*
[59] *Delixy Energy Ltd., v Dongming Sino-petrol Oil Chemistry Ltd.*, Supreme People's Court , No213, 2011.
[60] *Xu v Yan* , Fujian Province Higher People's Court, No78, 2010.

Intermediate Court refused to take the jurisdiction, Quanzhou Intermediate Court would transfer the case back to the Zhangzhou Intermediate Court. In other words, Chinese courts have taken a flexible approach to allow parties to a contract to change the jurisdiction clause.[61]

Although the CPL allows the parties to choose a foreign court, it explicitly forbids foreign jurisdiction agreements from violating Chinese courts' exclusive jurisdiction as provided under the CPL.[62] Specifically, Article 34 of the CPL grants Chinese courts exclusive jurisdiction over foreign-related disputes concerning rights in immovable property in China, disputes resulting from operation actions in ports in China, and inheritance dispute in which the heritage is located in China. Article 266 of the CPL grants Chinese courts exclusive jurisdiction over disputes relating to the performance of contracts for Sino-Foreign ventures, Sino-foreign cooperation and Sino-foreign exploration and cooperation of natural resources in China. In summary, in Chinese judicial practice, the validity of foreign jurisdiction agreements is more complicated than Chinese jurisdiction agreements.

2.1.3.2 Relevant Rules of the Hague Convention

The Hague Convention requires the chosen court of a Contracting State to hear a dispute unless the choice of court agreement is null and void under the law of that State.[63] A court not-chosen shall respect the parties' choice of court, unless the agreement is null and void under the law of the State of the chosen court; or a party does not have the capacity to conclude the agreement under the law of the State of the court seised; or if giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.[64] In other words, the *law of the State of the court seised* can invalidate a foreign jurisdiction. However, under Chinese law, the *law of the court seised* can invalidate a foreign jurisdiction agreement on two more grounds, namely, if the chosen court has no "actual/practical connection" with the dispute, or if the dispute violates Chinese courts' exclusive jurisdiction. If a Chinese court wants to use either of these two grounds to refuse a foreign jurisdiction agreement, it needs to prove that breaching the "practical/actual connection" requirement or Chinese courts' exclusive jurisdiction can fit into Article 6 of the Hague Convention.

[61] ZS Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law*, Routledge Research in International Commercial Law, 2014, p116-117.
[62] Art 34 of the CPL.
[63] Art 5 of the Hague Convention.
[64] Art 6 of the Hague Convention.

As elaborated above, the requirement of "actual/practical connection" only applies to a foreign jurisdiction agreement in Chinese judicial practice. Chinese law requires that the chosen court must have some "connections" with the dispute, it is not consistent with the international trend to respect party autonomy, and it may evince arbitrariness of judges in Chinese courts' practice. The parties make the choice of court after sophisticated consideration, for example, to avoid some national legal system, enhance legal certainty and improve efficiency of legal procedure. Their choice should be respected. Besides, the use of the term "public policy" is quite limited in Chinese judicial practice; a legal action can be treated as a violation of public policy only when it breaches the Constitutional law, or harms China's judicial sovereignty or conflicts with public safety or order.[65] Hence, violating the "practical/actual connection" requirement should not be characterised as breaching the Chinese public policy.

As for the Chinese courts' exclusive jurisdiction, it is more complicated to decide whether a violation of exclusive jurisdiction is against "public policy". The disputes concerning rights in immovable property within China and disputes arising from port operation are not contrary to the Convention. Cases involving rights in immoveable property fall outside the scope of the Convention explicitly. Article 2 of the Hague Convention states that the Convention shall not apply to rights *in rem* in immovable property, and tenancies of immoveable property.[66] Moreover, disputes arising out of port operation mostly involve carriage of good or passengers, which are excluded from the Convention as well. The Convention further states that the Convention shall not apply to the carriage of passengers and goods.[67] Nevertheless, problems may arise from disputes relating to foreign investment contracts because if parties designate foreign courts in such cases, Chinese law would regard the choice of court as a violation of Chinese courts' exclusive jurisdiction.

In contrast, disputes arising from foreign investments contracts mostly fall into the scope of the Convention. Some scholars argue that foreign investment contracts involve national interests, for example, contracts regarding foreign exploration and cooperation of immoveable natural resources within the territory of China should be heard by Chinese courts exclusively.[68] However, some scholars contend that as foreign investment contracts are mainly concluded between private parties, there is no State interest involved.

[65] Y Xiao & Z Huo, *Order Public in China's Private International Law*, American Journal Comparative Law, 54, 2005, p653-675.
[66] Art 2 of the Hague Convention.
[67] *Ibid.*
[68] Q He, *International Civil Litigation from a Comparative perspective*, Higher Education Press of China, 2015,p132-133.

Accordingly, even if the parties' choice of court agreement violates the exclusive jurisdiction granted by Chinese law, this violation will not be manifestly contrary to public policy.[69] If this agreement was to reach the courts it has the potential to lead to conflict between the Convention and Chinese law.

In light of this potential conflict, China has two options to solve the problem. The first is to change the Chinese domestic law and remove the "practical/actual connection" requirement and the exclusive jurisdiction on foreign investment contracts. The second is to make a declaration under Article 21 of the Convention. However, it is not suggested that China should take the second option. If China declares the Convention inapplicable to specific matters, with regard to that matter, other Contracting States could refuse to honour the jurisdiction agreements pointing to Chinese courts.[70] With the rise of international investment and trade, China is changing from a capital importer to a capital exporter. More and more Chinese enterprises choose to invest abroad and always choose Chinese courts in their jurisdiction agreements. If China makes such a declaration under the Article 21 of the Convention to refuse a jurisdiction agreement in favour of a foreign court, other Contracting States may also refuse to recognize the validity of such a jurisdiction agreement in favour of a Chinese court. As a result, there will be harm for both Chinese investors and Chinese courts. Adjusting the domestic law is likely a better option for China to implement the Hague Convention.

2.2 Recognition and Enforcement of Foreign Judgments

2.2.1 Chinese Laws and Judicial Practice

As a "double convention" addressing both jurisdiction and judgment recognition, recognition and enforcement of foreign judgments resulting from proceedings pursuant to exclusive jurisdiction agreements is another primary focus of the Convention. Under current Chinese law, there are three grounds for Chinese courts to recognise and enforce a foreign judgment. First, through international judicial assistance conventions; secondly, by way of reciprocity;[71] and thirdly through special agreement, for example, the Agreements on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between the

[69] Ibid.

[70] Art 21(2) of the Hague Convention; T Hartley and M Dogauchi, Hague Conference on Private International Law Convention of 30 June 2005 on Choice of Court Agreement Explanatory Report, https://www.hcch.net/en/publications-and-studies/details4/?pid=3959

[71] Art 282 of the CPL; Art 544 of the SPC's Opinions on the implementation of the CPL.

Mainland and Hong Kong SAR.[72] Article 282 of the CPL provides that a foreign judgment can be recognised and enforced only under certain conditions. There must be either a treaty requiring Chinese courts to recognise the foreign judgment, or reciprocity between China and the respective foreign country.[73] In addition, recognition and enforcement of a foreign judgment cannot offend the basic principle of law, sovereignty and security, or public interest of China.[74] Moreover the foreign judgment cannot be inconsistent with a Chinese court's judgment or another foreign judgment that has, or could have, been recognized or enforced by a Chinese court.[75]

In practice, it is very rare for Chinese courts to recognise and enforce foreign judgments, because only 37 countries have concluded bilateral judicial assistance agreements with China[76]. There is no such judicial assistance convention between China and its main trading partners, like the USA and Japan. The number of countries which have reciprocal relationships with China regarding judgment recognition and enforcement is even smaller and it is complex for Chinese courts to identify "reciprocal relationship" in practice. In *NKK (Japan) v Beijing Zhuangsheng*, the SPC confirmed that there was no judicial assistance convention between China and Japan, besides, because Japanese courts had never recognised and enforced a judgment from Chinese courts, it was concluded that a "reciprocal relationship" did not exist.[77] These barriers cause difficulties for Chinese courts to enforce judgments resulting from jurisdiction agreements designating foreign courts.

2.2.2 Relevant Rules of the Hague Convention

The Convention requires that one Contracting State court shall recognise and enforce judgments rendered by another Contracting State court if designated in a valid exclusive jurisdiction agreement.[78] The court addressed is prohibited from reviewing the merits of the judgment given by the original court and shall be bound by the findings of fact on which the original court based its jurisdiction. Article 9 sets forth the grounds for refusing recognition or enforcement, including that the agreement was invalid; a party lacked the capacity to

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[72] Agreements on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters between the Mainland and Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, 1 August, 2008.
[73] Art 282 of the CPL.
[74] *Ibid.*
[75] Art 533 of the SPC's Opinions on the implementation of the CPL.
[76] Those countries include France, Italy, Bulgaria, Hungary, Morocco, Tunisia, the United Arab Emirates, Poland, Mongolia, Romania, Russia, Turkey, Ukraine, Cuba, Belarus, Kazakhstan, Egypt, Greece, Cyprus, Kyrgyzstan, Tajikistan, Uzbekistan, Vietnam, Laos, Lithuania, and North Korea.
[77] *NKK (Japan) v Beijing Zhuangsheng*, Beijing Municipal High Court ,No 919,2008.
[78] Art 8 of the Hague Convention.

conclude the agreement, procedural defects; the judgment was obtained by fraud; recognition or enforcement of the judgment would be incompatible with public policy; or the judgment is consistent with other judgments amenable to recognition or enforcement in the requested State.[79] A foreign judgment which qualifies for recognition and enforcement under the Convention may be rendered from an entire domestic case which means there are no international elements except a foreign choice of court. Article 20 permits a Contracting State to refuse to recognise or enforce a judgment given by a court of another Contracting State if all the other elements relevant to the dispute, except the location of the chosen court, were connected to the requested State.[80]

Chinese law forbids parties from submitting domestic disputes to foreign arbitration institutions because it will cause a loss of cases for Chinese domestic arbitration institutions.[81] Even though there is no such rule in litigation, it is foreseeable that the same approach will be taken by Chinese courts. Hence, China could enter a declaration under Article 20 of the Convention to prevent Chinese courts from recognizing and enforcing a judgment rendered by foreign courts but based on a domestic Chinese case.

2.3 The Ratification of the Hague Convention and its legal status in Chinese domestic law

Under current Chinese law, all international treaties/conventions shall be concluded in accordance with the provisions of the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties (hereinafter the PCT) and must fulfil necessary domestic legal procedures. How these international treaties are implemented depends on the legal system of each Contracting State and the way in which the State handles relations between international treaties and domestic law. As mentioned above, China is a unitary State. There is no provision regarding the legal status of international treaties and their hierarchy in domestic legal system, either in the Chinese Constitution Law or in the basic laws which prescribed under the Legislation Law of the People's Republic of China. In fact, international treaties or agreements do not automatically become part of national law or have domestic legal effect.

[79] Art 9 of the Hague Convention.
[80] Art 20 of the Hague Convention.
[81] *Beijing Chaolai Xinsheng Sports & Recreation Ltd,. v Beijing Suowang Zhixin Investment Consultation Co.,* Beijing Municipal Second Intermediate People's Court , No 10670, 2013.

According to Chinese Constitutional Law and the Trade Procedure Law, the Standing Committee of the National People's Congress (hereinafter "the NPC") shall decide upon ratification and denunciation of international treaties and important international agreements.[82] The term "treaties and important agreements" includes: friendship and cooperation treaties, peace treaties and other treaties of a political nature; treaties and agreements on territories and the delimitation of boundaries; treaties and agreements on judicial assistance and extradition; and treaties and agreements that include provisions inconsistent with national laws. Obviously the Hague Convention falls into the category of "important international agreements" and its ratification should be decided by the Standing Committee of the NPC. In addition, the Legislation Law of the People's Republic of China (hereinafter the Legislation Law) decides the hierarchy of Chinese Domestic Law. The Constitution Law ranks the highest, followed by laws, administrative regulations and local regulations.[83] Article 5 of the Constitution Law provides that "no laws or administrative regulations or local regulations shall contravene the Constitution Law". Although there is no such provision about international treaties in Chinese law, it is generally accepted that international treaties or agreements should not contravene the Constitution Law, unless China has made amendments to the Constitution Law.[84]

Under the Legislation Law, matters relating to certain important issues shall be governed exclusively by laws adopted by the NPC and its Standing Committee. These issues include: national sovereignty; criminal offences and punishment; matters that are related to the legal systems on civil affairs, finance, taxation, customs and trade; judicial system and arbitration. The Hague Convention falls into the category of "important issues" under the Legislation Law and should be subject to the domestic legal procedure of the Standing Committee of the NPC for ratification or accession. The Hague Convention can apply in China only through specific domestic legislative procedures. In general, there are three approaches to implementing treaty obligations: executing the treaty by administrative measures, transforming the treaty obligations and applying the treaty directly by making special national legislation.

The first approach is implementing treaty obligations through administrative measures. This approach was used for a large number of bilateral cooperation agreements concluded by the Chinese government and government departments, for example, the Memoranda of

[82] Art 7 of the People's Republic of China on the Procedure of the Conclusion of Treaties.
[83] The Legislation Law of the People's Republic of China, enacted in 2000.
[84] T Wang, *Introduction to International Law* ,Beijing University Press, 1998, p209.

Understanding on education and cultural exchange between governments, the Agreement on Cooperation on Public Health. These treaties normally take the form of administrative measures, such as administrative policy, orders or regulations.

The second approach is transforming treaty obligations through domestic legislation. This approach is usually used in two ways; making special provision in national laws and amending existing national laws. The first way generally occurs when the subject matter is not covered by existing domestic laws. For example, after China became a party to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, the Standing Committee of the NPC promulgated the Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities in 1986 and the Regulations of the People's Republic of China Concerning Consular Privileges and Immunities in 1990. Moreover, as a member of the 1969 Vienna Convention on the Law of Treaties, China should comply with its treaty obligations in good faith and shall not evade its international obligations by using its domestic laws.[85] In other words, the provisions of the Vienna Conventions are directly applicable even though the subject matter is not covered by domestic law. After China joined the World Trade Organization (hereinafter the WTO) in 2001, it commenced a plan to systematically revise its relevant domestic laws. More than 3000 domestic laws, administrative regulations and administrative orders have been replaced, abrogated, revised and enacted.

The third approach is applying international treaties directly. Pursuant to Article 142 of the General Principles of the Civil Law, if any international treaty is concluded or acceded to by the People's Republic of China, the provisions of the international treaties shall apply, unless the provisions are ones on which the People's Republic of China has declared reservations. Chinese courts have directly applied a number of international treaties. *In Abdul Waheed v. China Eastern Airlines,*[86] the plaintiff who was a Pakistani passenger claimed compensation for losses caused by the delay of the defendant's flight. The court decided that the 1955 Hague Protocol and the 1961 Guadalajara Convention should be applied because both China and Pakistan are parties to both conventions. Accordingly, the court decided that the defendant should compensate the plaintiff for the loss. Another case is *Shanghai Zhenhua Port Machinery Co.Ltd v. United Parcel Service of America*[87] in which the Shanghai

[85] Art 27 of the 1969 Vienna Convention.
[86] *Abdul Waheed v. China Eastern Airlines Group,* People's Court of Pudong New Area in Shanghai, No12164,2005.
[87] *Shanghai Zhenhua Port Machinery Co.Ltd v. United Parcel Service of America,* People's Court of Jingan District in Shanghai, No14, 1994.

company claimed a refund of carriage fee and compensation for the direct economic losses. The court affirmed that China is a party both to the 1929 Warsaw Convention and to the 1955 Hague Protocol. The provisions of those conventions were stated on the back of the airway bill. Hence, the defendant should compensate the plaintiff's monetary loss for an amount up to the limits of the carrier's liability prescribed in the 1955 Hague Protocol.

Under the Chinese judicial system, the Supreme People's Court (the SPC) can issue circulars and notice which have binding effect on the lower courts. Such circulars and notice serve as judicial instructions on the interpretation and application of law. In 1987, China joined the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). In order to implement the New York Convention, the SPC issued the Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the same year. The Circular explained the meaning of the term "contractual and non-contractual commercial legal relations", specified the courts which have jurisdiction to review foreign arbitral awards and clarified the legal basis for judicial review.[88] The SPC also established a special report mechanism in 1995, aiming to supervise the enforcement of arbitral awards with foreign elements and the recognition and enforcement of foreign arbitral awards in the lower courts. It is likely that the implementation of the Hague Convention will also be accompanied by circulars and notice which are issued by the SPC and the lower courts may need to report the case involving the Hague Convention to the SPC in practice.

2.4 The 2019 Hague Judgments Convention

On 2 July 2019, 83 member states of the Hague Conference on Private International Law signed the Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('the 2019 Hague Judgments Convention'). Following the 2005 Hague Convention, this new Convention enhances the legal certainty and predictability that is so important in international legal matters especially in international trade.[89] This new Hague Convention seeks to establish a framework for the international recognition and

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[88] The Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Supreme People's Court, 1987.

[89] Speech by the Minister of Foreign Affairs, Stef Blok, at the closing ceremony of the signing of the Final Act of the 2019 Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 2 July 2019, available at https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/speeches/2019/07/02/speech-by-the-minister-of-foreign-affairs-stef-blok-at-the-closing-ceremony-of-the-signing-of-the-final-act-of-the-2019-convention-on-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters

enforcement for the judgment by national courts, which is comparable to New York Convention. The latter successfully simplified procedure and improved the efficiency for the recognition and enforcement of international arbitration awards, forming the foundation that helped international arbitration flourish until the present day. The Convention aims to provide more efficient and low-cost judicial guarantees for international civil and commercial activities, including international trade and cross-border business.

In general, the 2019 Hague Convention applies to judgments relating to civil or commercial matters and requires recognition and enforcement in one contracting state of a judgment given by a court in another contracting state. However, some specific areas are excluded from the scope of application in Article 1, such as tax, custom and administrative decisions. Article 2 goes into further specifics, containing *clausus numerus* of the other areas which are excluded from the scope of application. Besides, Article 2 of the new Convention excludes arbitral awards and other dispute resolution decisions from the scope of application. One important aspect of the new Convention is that the convention is applicable towards civil and commercial judicial decisions in which one of the parties is a state, government, governmental institution or a person acting in the name of the state, but excluding the aspects regarding the immunity and privilege of the states and international organizations.

Under current law in China, regarding the recognition and enforcement of a decision made by a foreign court, the CPL states that a party may directly apply for recognition and execution to the Intermediate People's Court. Alternatively, the foreign court may, pursuant to the provisions of an international treaty concluded between or acceded to by the foreign state and the People's Republic of China, or in accordance with the principle of reciprocity, request the people's court to recognize and execute the judgment or ruling. Nevertheless, up to the end of 2019, China has signed bilateral agreements on civil and commercial judicial assistance with 39 countries, of which 37 have entered into force. The recognition and enforcement of foreign judgments can be only found in 34 bilateral agreements. There are no bilateral agreements between China and its main trade partners, such as the USA, Japan and South Korea. Besides, the application of the principle of reciprocity is extremely limited in practice. For example, if one party applies for recognition and enforcement of a foreign judgment in Chinese court, the foreign country shall have had the precedent on recognising and enforcing a Chinese judgment. Hence, if China signed the new 2019 Hague Convention, with the ratification of an increasing number of member states and accession of non-member states, the scope of countries that mutually recognize and enforce court judgments with

China would be greatly expanded. Secondly, the category of judicial documents for recognition and enforcement of foreign courts under the CPL are only judgments and rulings. The 2019 Hague Judgments Convention judicial settlements shall be enforced under the Convention in the same manner as a judgment. Article 3 of the new Convention also confirms that the definition of "judgment" includes a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court).[90] As a result, the scope of legal instruments that can be recognized and enforced will be expanded to a certain extent.

The 2019 Hague Judgements Convention will come into force once two signatories ratify it, as well as the expiry of a twelve-month period within which the first state may object to relations being established with the second state. Uruguay became the first state to sign the new Convention. Given China has not yet ratified the 2005 Hague Convention, the ambitious framework and content of the 2019 Hague Convention are still a far step for China at present. Accordingly, this dissertation will not include examination of the detail of the 2019 Hauge Convention within its scope.

Chapter 3 International commercial Arbitration in China

This chapter will focus on a popular choice for the resolution of international commercial disputes: international commercial arbitration. Chinese arbitration system has become an important safeguard for international trade and the continuation of economic relationships between Chinese parties and foreign parties. This chapter will analyse international commercial arbitration in China, its advantages, shortcomings and specific Chinese characteristics of arbitration practice.

3.1 Judicial Organization

Before examining arbitration law and practice in China, it is necessary to give an overview of the legal framework for arbitration in China. It is worth noting that Hong Kong, Macao and Taiwan are deemed to be "foreign" in terms of civil procedure and arbitration. Jurisdiction in civil and commercial cases involving parties from Hong Kong, Macao and Taiwan are dealt with in accordance with the special stipulation issued by the Supreme

[90] Art 3 of the new 2019 Hague Convention.

Court.[91] Hence, the term "the PRC" or "China" in this dissertation only refers to mainland China.

According to the Constitution Law of the PRC and the Organic Law of the People's Courts in China, the people's courts are the judicial organs and judicial authority is exercised by three kinds of courts: first, various levels of local people's courts; second, military courts, maritime courts and other special courts; and third, the Supreme People's Court (the SPC).[92] Furthermore, the local people's courts are divided into three levels: the basic people's courts (the BPC), the intermediate people's courts (the IPC) and the high people's courts (the HPC). The SPC is the highest judicial organ in China. Its main functions include: (i) supervising the trial work of all the other levels of people's courts and the special people's courts;[93] and (ii) interpreting specific questions concerning the application of laws and issuing guidance cases.[94] According to the Civil Procedural Law, a party in any civil or commercial case may bring an appeal only once to the people's courts at the higher level. If no party makes an appeal within the prescribed period for appeal, judgments and awards of the courts of first instance become legally effective. Judgments and awards of the court of second instance are final.[95]

Regarding the relationship between arbitration and the people's courts, there are three main aspects. First of all, the SPC issues important judicial interpretations of the Arbitration Law, the Civil Procedure Law and other relevant laws which provide more legal basis for resolving arbitration-related issues in practice. The SPC usually organizes workshops and seminars when drafting such interpretations. For interpretations involving public interest, such as national security, municipal construction or the education sector, it is common for the SPC to report them to the public and invite comments.[96] Secondly, the people's courts

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[91] The Stipulations on Certain Issues regarding Judicial Jurisdiction over Foreign-related Civil and Commercial Cases, issued by the SPC, 1 March, 2003.

[92] The Organic Law of the People's Courts of the PRC, adopted at the Second Session of the Fifth National Congress on July 1, 1979, promulgated by Order No.3 of the Chairman of the Standing Committee of the National People's Congress on July 5, 1979 and effective as of January 1, 1980; amended in accordance with the Decision of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China adopted at its 2nd Meeting on September 2, 1983, the Decision of the Standing Committee of the Sixth National People's Congress on Amending the Organic Law of the Local People's Congresses and the Local People's Governments of the People's Republic of China adopted at its 18th Meeting on December 2, 1986, the Decision of the Standing Committee of the Tenth National People's Congress on Amending the Organic Law of the People's Courts of the People's Republic of China adopted at its 24th Meeting on October 31, 2006.

[93] Art 10 of the Organic Law of the People's courts.

[94] Art 18 of the Organic Law of the People's courts.

[95] Art 10 of the Civil Procedural Law of the PRC.

[96] Art 17 of Provisions of the Supreme People's Court on the Judicial Interpretation Work, fafa (2007) No.12, adopted by the Judicial Committee of the SPC on 11 December 2006.

offer necessary administrative assistance to arbitration proceedings. According to the Arbitration Law, if there is a dispute as to the validity of an arbitration agreement, the dispute can be decided by the tribunal or a relevant people's court. If one party submits the issue to the tribunal and the other submits to the relevant people's court, the court's decision should prevail.[97] Besides, the people's courts play an important role in the preservation of evidence, property and so on. Thirdly, upon the application of the parties, the relevant people's court should scrutinize the arbitral award and determine whether to set it aside or recognize and enforce it. It should be noted that different rules are used for different types of arbitration in China, for example, when the court is facing a foreign-related arbitral award that needs to be recognized and enforced, only the procedural aspects of a foreign-related arbitral award should be examined, but both procedural aspects and substantive aspects can be examined for a domestic arbitral award.[98]

3.2 Legal sources

In China, two national laws are directly relatable to international commercial arbitration; the Arbitration Law of the PRC[99] and the Civil Procedure Law of the PRC[100]. Additionally, since the Arbitration Law came into force, the SPC has issued a series of judicial interpretations for lower courts concerning the application of the Arbitration Law and issues not addressed by that Law.[101]

A number of international conventions are also important. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was

[97] Art 20 of the Arbitration Law.

[98] Art 237 and Art 274 of the Civil Procedure Law.

[99] Arbitration Law of the People's Republic of China, adopted by the 9th Meeting of the Standing Committee of the eighth National People's Congress on August 31, 1994, promulgated by the Decree No.31 of the president of the People's Republic of China on August 31, 1994, and effective as of 1 September 1995.

[100] Civil Procedure Law of the People's Republic of China, adopted at the Fourth Session of the Seventh National People's Congress and promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991; amended in accordance with the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the PRC as adopted at the 30th Session of the Standing Committee of the 10th NPC on 28 October 2007; amended in accordance with the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the PRC as adopted at the 28th Session of the Standing Committee of the 11th NPC on 31 August 2012.

[101] For example, SPC's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, promulgated on 10 April 1987; SPC's Reply Regarding Several Issues Relating to the Validity of Arbitration Agreements, promulgated on 26 October 1998; Interpretation of SPC on Several Issues Regarding the Application of the Arbitration Law, fa shi NO 7/2006, promulgated on 26 December 2005, effective from 8 September 2006.

acceded to by China and entered into force in 1987.[102] Upon accession to the New York Convention, China adopted a reciprocity reservation and a commercial reservation. Pursuant to the reciprocity reservation, China will only recognize and enforce awards made in the territory of another contracting state. In the event of discrepancy between the stipulations of the New York Convention and those of Chinese law, the Convention prevails. Pursuant to the commercial reservation, China will apply the New York Convention only to awards in cases where the underlying dispute arises out of a contractual or commercial legal relationship. Disputes between a foreign investor and the government of the host state are excluded.[103]

In China, *ad hoc* arbitration is not yet statutorily recognized. Hence, the rules of arbitration institutions play a fundamental role in arbitration practice by providing guidance for those institutions. Having been formed in 1956, the China International Economic and Trade Arbitration Commission (CIETAC) is by far the most significant and longstanding arbitration institution in China. CIETAC is a neutral arbitration institution for resolving commercial disputes arising from interactions between foreign and domestic Chinese businesses. It is nominally independent of the state and operated under the framework of the China Council for the Promotion of International Trade (the CCPIT) which is a non-government organization.[104] As one of the major permanent arbitration institutions in the world, the guiding rules of CIETAC have undergone seven revisions since 1978.

The following table summarises the timing and main content of each revision:

Time	Main change
1989	Prior to 1989, all CIETAC arbitrators were PRC citizens. Membership of the CIETAC Panel was broadened in 1989 to encompass individuals of other nationalities.
1992&1995	CIETAC assimilated further norms and practice from established international arbitration bodies, such as the International Chamber of Commerce (ICC) and United Nations Commission on International Trade Law (UNCITRAL).

[102] On 2 December 1986, the decision on China’s accession to the New York Conventions of the Standing Committee of the NPC was issued and became effective from 22 April 1987.
[103] Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, issued by the SPC on 10 April 1987.
[104] Lijun Cao, CIETAC as a Forum for Resolving Business Disputes, Oxford: The Foundation for Law, Justice and Society, 2010, p2.

2000	The CIETAC Arbitration Rules of jurisdictions were expanded to encompass purely domestic arbitrations.
2005	• Parties were given the ability to select the rules under which the arbitration would be administrated. •The appointment of arbitrators from outside of the prescribed CIETAC panel was allowed, subject to the discretion of the CIETAC secretariat. • The CIETAC Arbitration Rules permitted the parties to choose between an inquisitorial approach or an adversarial approach. However, the tribunal retained the ability to initiate investigation at its own discretion.
2012	• Parties were able to consolidate related arbitration proceeding into a single proceeding. • CIETAC's authority to hold arbitration proceeding outside of the PRC was formalized. • Parties' agreement on the language of the proceeding was allowed. If the parties have agreed to choose another language different from Chinese (Mandarin), their agreement shall prevail.
2015	• The Emergency Arbitration Procedure ("EA" Procedure) was introduced. • New rules were introduced that in existing arbitration proceedings, a party could request CIETAC to join an additional party if the requesting party could establish a *prima facia* case that the additional party was also bound by the arbitration agreement. • Under the new rules, parties could apply for a single arbitration in respect of multiple contracts. • Since the CIETAC Hong Kong was established in 2012, a new chapter was added regarding special provisions for Hong Kong arbitration.

3.3 Development of foreign-related arbitration legislation in China

Before reviewing the development of foreign-related arbitration, it is necessary to clarify the various types of arbitration in China. Generally, there are three types of arbitration in China: purely domestic arbitration, foreign-related arbitration and purely foreign arbitration.

Purely domestic arbitration refers to an arbitration taking place in China where all the elements are within the territory of China. An arbitration taking place in China with "foreign elements" is considered to be a foreign-related arbitration. In respect of the definition of

"foreign elements", the SPC said: a dispute involves a "foreign element" if (i) either or both parties is a person with a foreign nationality or a stateless person or a company or organization domiciled in a foreign country; (ii) the permanent residence of one or both parties is situated in a foreign country;(iii) the legal facts which establish, change or terminate the legal relationship between the parties took place in a foreign country; (iv) the subject matter of the dispute is situated in a foreign country; (v) there are other circumstances that can be identified as "foreign-related" .[105] Moreover, civil disputes involving parties from Hong Kong, Macao and Taiwan shall be considered as foreign-related disputes.[106] In respect of purely foreign arbitration, the Civil Procedure Law uses the term "an award made by a foreign arbitration institution".[107] However, the New York Convention states: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal."[108] In other words, "foreign arbitral awards" in the Convention refer to arbitral awards made in a foreign state. However, the lack of a clear definition of the seat of arbitration in Chinese law has caused confusion in judicial practice. For example, when facing an arbitral award made by the International Chamber of Commerce in Shanghai or Beijing, it is difficult for Chinese courts classify such an award because it is issued by "a foreign arbitration institution" but in a city in the territory of China. Although the CIETAC Rule provides that the arbitral award shall be deemed to be made at the place of arbitration,[109] this rule has not caused any national legislation change in China. Hence, when the domestic courts face an arbitral award issued by an office of a foreign arbitration institution, it is difficult to define the type of arbitration and then choose the proper applicable rules.

As mentioned above, the Arbitration Law became effective on September 1, 1995. Prior to that, the foreign-related arbitration system was separate from the domestic arbitration system. Domestic arbitrations were regulated by domestic bodies while foreign-related arbitrations were dominated by the two international arbitration commissions: CIETAC and the China Maritime Arbitration Institution (CMAC). The regulations on domestic arbitration permitted the establishment of administratively subordinated arbitration commissions, in other words,

[105] Art 522 of the SPC Interpretation Concerning Implementation of the Civil Procedure Law of the PRC, *Fashi* (2015) No.5, adopted by the Judicial Committee of the SPC on 18 December 2014.
[106] Art 5 of the SPC Provisions on Several Issues Concerning the Jurisdiction of Foreign-related Civil and Commercial Disputes, *Fashi* (2002) No.5, adopted by the Judicial Committee of the SPC on 25 December 2001.
[107] Art 283 of the Civil Procedure Law of PRC.
[108] Art 1 of the New York Convention.
[109] Art 7 of the CIETAC Rules 2015.

the arbitration bodies were affiliated to governmental administrative authorities. Additionally, the domestic arbitral institutions were attached to different administrative organs of the governments, such as harbours, labour and inspection of medical products. Accordingly, domestic arbitration commissions accepted arbitration applications based on administrative laws and regulations rather than an arbitration agreement between the two parties. Moreover, arbitration awards were not finally binding and if either party does not agree with the award, either party is permitted to file a suit in the people's courts. Due to the limited space and the focus of the dissertation, only foreign-related arbitration will be discussed comprehensively.

It is generally accepted that foreign-related arbitration has its roots in the Protocol for General Conditions of Delivery of Goods signed by China and the Soviet Union in April 1950. In this Protocol, any dispute arising from a contract should be settled through arbitration and should not be filed with a court. If the respondent was a Chinese enterprise or organization, the arbitration would be undertaken in China. If the respondent was a Soviet enterprise or organization, the arbitration would be conducted in the Soviet Union.[110] In order to deal with disputes between two countries, it was necessary to establish a dedicated arbitration body separate and distinct from the domestic arbitration commissions which were administrative in nature.[111]

On 6 May 1954, the PRC Government Administration Council (presently the State Council) adopted the Decision of the Government Administration Council of the Central People's Government Concerning the Establishment of a Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (the "Decision").[112] The Decision authorised the China Council for the Promotion of International Trade (CCPIT) to establish the Foreign Trade Arbitration Commission (FTAC) and detailed some basic rules for the FTAC. For instance, FTAC would exercise jurisdiction based on the agreement of the parties; arbitrators would be appointed by the disputing parties; and Chinese courts deemed such arbitral awards final and enforceable. This Decision served as the first de facto arbitration regulation before the promulgation of the Arbitration Law in China.

[110] The Protocol on the Delivery of Goods by the People's Republic of China to the Union of Soviet Socialist Republics and by the Union of Soviet Socialist Republics to the People's Republic of China ,1955, 5 CHINESE L. & GOV'T 31,1972.
[111] Jingzhou Tao, Arbitration Law and Practice in China, 2nd den, The Hague Kluwer Law International, 2008, p7.
[112] The decision was adopted on 6 May 1954 at the 215th Session of the Government Administration Council and promulgated on and effective from 5 May 1954.

The Arbitration Law was adopted at the 9th Session of the Standing Committee of the eighth National People's Congress (NPC) of the PRC on 31 August 1994 and came into force on 1 September 1995. The Arbitration Law clearly laid down basic principles for the development of arbitration in China.

The first principle is party autonomy; the arbitration application should be based on both parties' free will and an arbitration agreement reached between them.[113] The arbitration institution shall be selected by the parties through arbitration agreement[114] and the parties are free to appoint arbitrators.[115] If the parties agree that the arbitral tribunal shall be composed of three arbitrators, they shall each appoint or entrust the chairman of the arbitration commission to appoint an arbitrator. The parties shall jointly select or jointly entrust the chairman of the arbitration commission to appoint the third arbitrator who shall be the presiding arbitrator.

The second principle is priority of arbitration which means the people's court shall not accept the case if there is an arbitration agreement between the parties.[116] However, if the arbitration agreement is invalidated by people's courts, the people's court can exercise jurisdiction.

The third principle is independence of arbitration which refers to the independence of arbitration institutions. There shall be no subordinate relationships between the arbitration commission and administrative organs or between arbitration institutions.[117] Each arbitration commission shall be independent.

The last principle is the final binding effect of arbitral awards. This principle forbids the people's court or other arbitration institution from accepting a case where an arbitral awards has been rendered.[118]

3.4 Arbitration Agreement

The first concern when determining the validity of an arbitration agreement is the scope of the arbitration agreement. If a dispute is not arbitrable, then an arbitrator or arbitration body

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[113] Art 4 of the Arbitration Law.
[114] Art 6 of the Arbitration Law.
[115] Art 31 of the Arbitration Law.
[116] Art 5 of the Arbitration Law.
[117] Art 14 of the Arbitration Law.
[118] Art 9 of the Arbitration Law.

would have no jurisdiction over the case. Under the Arbitration Law in China, certain disputes are not arbitrable, namely (1) marital, adoption, guardianship, fosterage and succession disputes;[119] (2) administrative disputes which must be handled by administrative authorities under law;[120] (3) situations where the arbitration agreement was concluded by persons with no or only limited civil capacity,[121] or where the arbitration agreement was obtained by coercion or intimidation.[122] The Arbitration Law does not define "administrative disputes". It seems clear that the term refers to disputes between a government department/ officer and a citizen, a legal person or an organization.[123] The question of whether disputes involving validity and infringement of patents, trademarks and copyright are arbitrable under current Chinese law is still unsolved. Although the SPC has confirmed in *Jiangsu Materials Group Light Textile Corporation v. (Hong Kong) Top Capital Holdings Ltd. and (Canada) Prince Development Ltd* that intellectual property infringement disputes can be brought to an arbitration institution,[124] disputes involving other intellectual property issues are not arbitrable under current Chinese law.

The second critical aspect of an arbitration agreement is its form. Under Chinese law, an arbitration agreement must be in writing, either as an arbitration clause contained in a contract or as a separate agreement concluded before or after a dispute arises.[125] An arbitration agreement must include: (1) an expression of the intention to arbitrate; (2) the subject matter for arbitration; and (3) a designated arbitration commission.[126] The parties need to clarify the accurate name and place of the arbitration institution they have chosen in their arbitration agreement or clause. If an arbitration agreement contains no or unclear provisions concerning the matter for arbitration or the arbitration commission, the parties may subsequently make an additional agreement.[127] Failure to reach agreement on these matters will render the entire agreement void.[128] Reading these articles together, the designation of an arbitration institution is a compulsory requirement for a valid arbitration agreement.

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[119] Art 3 (1) of Arbitration Law.
[120] Art 3 (2) of Arbitration Law.
[121] Art 17 (2) of Arbitration Law.
[122] Art 17 (3) of Arbitration Law.
[123] Art 2 of the Administrative Procedure Law of the PRC, adopted at the second session of the 7th NPC on April 4, 1989 and effective as of 1 October, 1990. Amended in 1 November, 2014 and 27 June, 2017.
[124] *Jiangsu Materials Group Light Textile Corporation v. (Hong Kong) Top Capital Holdings Ltd. and (Canada) Prince Development Ltd*, the Supreme people's court, Gazette,Issue 3,1998.
[125] Art 16 of Arbitration Law.
[126] *Id.*
[127] Art 18 of Arbitration Law.
[128] See *id.*

In practice, the Chinese courts tend to adopt a strict interpretation of defective arbitration clauses. As a result, *ad hoc* arbitration is excluded in China. This requirement creates doubts as to the enforceability of awards rendered in China under the auspices of foreign arbitration institutions.[129] For example, if the *ad hoc* arbitral tribunal renders an award on the foreign party defeat, the losing party may apply to the court to set aside the arbitral award because there was no designated arbitration commission in an arbitration and the arbitration agreement is null and void. Hence, an arbitral award based a void arbitration agreement cannot be recognized and enforced by Chinese people's courts. According to the Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, Chinese courts shall recognize and enforce arbitral awards made in Hong Kong, including in the form of *ad hoc* arbitration. However, Hong Kong courts only recognize and enforce arbitral awards made by mainland arbitration commissions which are specified in the list of the Agreement.[130]

One of the fundamental principles of international arbitration is the independence of the arbitration agreement, which is generally referred to as 'separability' or 'severability'.[131] In judicial practice, prior to the Arbitration Law, the people's courts held that if a contract was found to be void due to fraud, the arbitration clause was void as well. The Shanghai HPC confirmed this in *China National Technical Import Corporation v Swiss Industrial Resources Company Incorporated.*[132] After this case, the principle of severability of arbitration agreement has been tested in numerous cases. For instance, a Chinese company and a Hong Kong Company signed a joint equity venture contract and confirmed that any dispute over the contract should be settled by the China International Economic and Trade Arbitration Commission. Before the administrative authority approved the contract, a dispute occurred and the Chinese party submitted it to Huizhou Intermediate People's Court.[133] The court held the arbitration clause to be invalid due to the fact that the main contract had not come into force. The court can exercise jurisdiction in this case. This

[129] Kang Ming, *Ad hoc and its development in China*, Arbitration and Law, 2000, 4, p14.

[130] Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, adopted by the 1069th meeting of the Judicial Committee of the Supreme People's Court on June 18, 1999 and effective from February 1, 2000.

[131] See Nigel Blackaby et al, Redfern and Hunter on International Arbitration, 5th edition, Oxford, Oxford University Press, 2009, p117-121.

[132] *China National Technical Import Corporation v Swiss Industrial Resources Company Incorporated,* Gazette of the SPC, 1989, No.1, p26-27.

[133] According to the Sino-Foreign Equity Joint Venture Law, a joint venture contract is not valid until it is approved by the relevant administrative authority.

decision was appealed to the Guangzhou High People's Court, which held that since the existing arbitration agreement was not subject to the approval of an administrative authority, the courts had no jurisdiction over the dispute.[134] In *Hong Kong Longhai v Wuhan Zhongyuan*,[135] the original Joint Venture contract containing an arbitration clause was signed between Hong Kong Longhai and Wuhan Donghu Import and Export Company (Donghu). Donghu assigned all its rights and duties to Zhongyuan and Hong Kong Longhai signed a new joint venture contract with Zhongyuan. When a dispute arose, Hong Kong Longhai applied to CIETAC for arbitration while Zhongyuan challenged the arbitral jurisdiction in Wuhan IPC. The Wuhan IPC held that 'because the arbitration clause has independent characteristics so the clause in the original contract has no legal binding force upon the new assignee'.[136] On appeal, the Hubei HPC held that the arbitration clause should survive the contract assignment and CIETAC should have jurisdiction over the dispute. These decisions by lower courts raised concern and controversy regarding the misunderstanding of modern arbitration norms in China. Lower courts often fail to understand and interpret the independence of an arbitration agreement accurately, and they always cause the delay of the whole legal procedure.

Conflicting judicial interpretations and practice on the issue of severability were finally addressed by the SPC in *Jiangsu Materials Group Light Textile Corporation v. (Hong Kong) Top Capital Holdings Ltd. and (Canada) Prince Development Ltd.*[137] The Jiangsu HPC denied the validity of an arbitration clause on the ground that the contract was invalid due to fraud. On appeal, the SPC overturned the decision of the HPC and invoked the court's jurisdiction over the case on the basis of the separate and independent existence of a valid arbitration agreement.[138] Thus, the SPC has affirmed the severability of an arbitration clause subsumed within a contract, irrespective of the nature or validity of the main contract. Moreover, in the SPC Interpretation 2006, the SPC also clarified that 'an arbitration agreement shall bind a transferee of any creditor rights and debts transferred whether in whole or in part, unless the parties agreed otherwise, or where the transferee clearly objected

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[134] Guo Xiaowen, *The Validity and Performance of Arbitration Agreement in China*, Journal of International Arbitration, No.1, 1994, p53 and Neil Kaplan, Jill Spruce and Michael J. Moser, *Hong Kong and China Arbitration, Cases and Materials*, Butterworths, 1994, p341.

[135] *Hong Kong Longhai Company v Wuhan Zhongyuan Scientific Company,* Wuhan IPC, 1998, No.0277.

[136] Ibid.

[137] *Jiangsu Materials Group Light Textile Corporation v. (Hong Kong) Top Capital Holdings Ltd. and (Canada) Prince Development Ltd*, the Supreme people's court, 1998, Gazette,Issue 3.

[138] See *id.*

or was unaware of the existence of a separate arbitration agreement at the time of the transfer'.[139]

3.5 Arbitrator and tribunal

Under Chinese law, arbitration proceedings may be conducted by a tribunal comprising one arbitrator or three arbitrators. An arbitration tribunal composed of three arbitrators shall have a presiding arbitrator.[140] The Arbitration Law sets out detailed requirements that need to be met if a candidate wants to be appointed to the panel of arbitrators of any arbitration institution in China. An arbitrator shall meet one of the conditions set forth: (1) to have passed the national examination for legal professional qualifications and obtained legal professional qualifications, and have been engaged in arbitration work for at least eight years, such as an arbitration secretary or a member of experts committee; (2) to have worked as a lawyer for at least eight year; (3) to have served as a judge for at least eight years; (4) to have been engaged in legal research or legal education, possessing a senior professional title; or (5) to have acquired the knowledge of law, engaged in professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level.[141] This provision not only imposes moral qualifications, but also details relatively high levels of professional qualification in law.

One of the major advantages of arbitration is the parties' autonomy to submit the settlement of their dispute to a tribunal of their choice. They can appoint persons in whom they have confidence, and who have the necessary legal and technical expertise for the determination of the particular dispute. They can decide whether their dispute should be decided by a tribunal of one or more arbitrators, and how those arbitrators should be appointed.[142] Hence, compared to modern arbitration laws which generally do not stipulate specific qualifications of arbitrators[143], Chinese law actually sets statutory qualification requirements for arbitrators. This practice can be viewed as an improper restriction on party autonomy to appoint their own arbitrators.

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[139] Interpretation of SPC on Several Issues Regarding the Application of the Arbitration Law, SPC, *fa shi* No 7/2006, promulgated on 26 December 2005, effective from 8 September 2006.
[140] Art 30 of Arbitration Law.
[141] Art 13 of Arbitration Law.
[142] Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p224.
[143] For example, Arts 10 and 11 of the Model Law, Article 179 of the Swiss PIL 1987 and Section 15 and 10 of the English Arbitration Act, there is generally no substantive rule governing the appointment of the arbitrators other than the parties' freedom of choice.

However, such requirements do not apply to arbitrators with a foreign nationality. The special provisions of Arbitration Law for arbitration involving foreign element states that: 'a foreign-related arbitration commission may appoint arbitrators from among foreigners with special knowledge in the fields of law, economy and trade, science and technology, etc'.[144] There is no reference to the requirements listed in article 13 of the Arbitration Law, which means that foreign-national arbitrators (including Hong Kong, Macao and Taiwan) only need sufficient knowledge in relevant fields.

Another important issue is the independence and impartiality of arbitrators. The Arbitration Law requires an arbitrator to disclose relevant information concerning his personal interest in a case and he /she must withdraw from the appointment if: (1) the arbitrator is a party in the case or a close relative of a party or of an agent in the case; (2) the arbitrator has a personal interest in the case; (3) the arbitrator has another relationship with a party or his agent in the case which may affect the impartiality of arbitration; or (4) the arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.[145] If an arbitrator is involved in the circumstances above and the circumstances are serious, he shall assume legal liability according to law and the arbitration commission shall remove his name from the register of arbitrators.[146] Similar provisions can be found in CIETAC Rules: an arbitrator must sign a declaration of impartiality and independence and disclose to CIETAC in writing 'any facts or circumstance likely to give rise to justifiable doubts as to his/her impartiality or independence'.[147] CIETAC will communicate the declaration and the disclosure information to the parties.[148] In 2004, CIETAC established a supervisory department to monitor the arbitrators' conducts.

Regarding the concern is about the constitution of arbitral tribunal in mainland China. CIETAC does not exclude a person who has the same nationality as a party from being the sole arbitrator or the chairman of the arbitral tribunal. If no agreement about the appointment of presiding arbitrator is reached between the parties, CIETAC Rules provide default power for the CIETAC Chairman to appoint the presiding arbitrator of the tribunal. However, the Chairman usually, with very few exceptions, appoints a Chinese citizen as the presiding arbitrator.[149] In fact, only a small portion of foreign arbitrators on the panel have served as arbitrators in CIETAC proceedings. Hence, if the Chinese party has appointed a Chinese

[144] Art 67 of Arbitration Law.
[145] Art 34 of Arbitration Law.
[146] Art 38 of Arbitration Law.
[147] Art 31 of CIETAC Rules 2015.
[148] See *id*.
[149] Jingzhou Tao, *Arbitration Law and Practice in China*, 3rd edition, Kluwer Law International, 2004, p123.

national candidate, there will be two Chinese arbitrators on the panel. This scenario creates a home-court advantage over the foreign party, especially Westerners, because two thirds of the panel share the same culture, language and legal background.[150]

Although Chinese legislation has made impressive progress to improve the impartiality and independence of arbitration panels in China, the above discussion demonstrates the restrictions on party autonomy in the matter of constitution of the arbitral tribunal. The reason behind such a phenomenon is the high degree of state control over the quality of arbitrators in China. The Chinese legislature believes that dispute resolution relates to "social order" needs to be controlled by state authorities.[151]

3.6 Setting Aside, Recognition and Enforcement of an Arbitral Award

In China, the Arbitration Law and Civil Procedure Law set out different rules with respect to setting aside, recognition and enforcement of arbitral awards, including domestic, foreign-related and foreign awards.

3.6.1 Grounds for Setting Aside an Arbitral Award

A domestic arbitral award may be set aside by the people's courts if: (1) there is no arbitration agreement; (2) the matters decided in the award exceed the scope of the arbitration agreement or are beyond the arbitral authority of the arbitration commission; (3) the formation of the arbitration tribunal or the arbitration procedure was not in conformity with the statutory procedure; (4) the evidence on which the award is based was forged; (5) the other party has withheld the evidence which is sufficient to affect the impartiality of the arbitration; or (6) the arbitrators have committed embezzlement, accepted bribes or there is malpractice for personal benefit or they have perverted the law in the arbitration of the case.[152] The provision also provides that if the people's court determines that the arbitration award violates the public interest, it shall set aside the award.[153] During the proceeding for annulment of a domestic award, the people's courts can review the merits of the dispute and examine the evidence submitted to the arbitration institution.

[150] Micheal I. Kaplan, *Solving the Pitfalls of Impartiality When Arbitrating in China: How the Lessons of the Soviet Union and Iran Can Provide Solution to Western Parties Arbitrating in China*, 110 Penn St. L. Rev. 769, 2005, p760.
[151] Xin Qiao, *The Research on Power of Arbitration -The Due Process of Arbitration and the Right Protection*, Beijing Legal Press, 2001, chapter3.
[152] Art 58 of Arbitration Law.
[153] See *id*.

For a foreign-related award, article 70 of the Arbitration Law sets out the grounds for setting aside by making reference to the Civil Procedure Law: (1) there is no arbitration clause in the parties' contract and no subsequent written arbitration agreement between them; (2) the party against whom the application for enforcement is made was not given notice of the appointment of an arbitrator or of the initiation of the arbitration proceedings or was unable to present its case due to causes beyond its responsibility; (3) the formation of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or (4) matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution.[154] This provision also provides that: 'if the people's court determines that the enforcement of the arbitral award is against social and public interest, it shall rule against enforcement'.[155] People's courts do not always review the merits of an award, except for the consideration of social and public interest. There is no provision regarding the setting aside of a purely foreign arbitration award, under this situation, a party shall apply for setting aside an arbitration award to the intermediate people's court where the arbitration commission is located.

3.6.2 Grounds for Refusal to Recognize and Enforce an Arbitral Award

Under current Chinese law, according to Article 63 of the Arbitration Law, and referring also to the Civil Procedure Law, the grounds for refusal to enforce a "domestic" award are: (1) the parties have neither included an arbitration clause in their contract nor subsequently concluded a written arbitration agreement; (2) the matters decided exceed the scope of the agreement or are beyond the authority of the arbitration institution; (3) the formation of the tribunal or the arbitral procedure was not in conformity with the statutory procedure; (4) the main evidence for ascertaining the facts was insufficient; (5) the application of law was incorrect; or (5) while arbitrating the case, the arbitrators have committed embezzlement, accepted bribes, engaged in malpractice for their personal benefit or perverted the law.[156] It is also provided that 'if the people's court determines that the enforcement of the arbitral award is against social and public interest, it shall rule against enforcement'.[157] Apart from the procedural review, Chinese courts can examine the evidence and the application of the law when determining the enforcement of a domestic arbitral award.

[154] Art 274 of the CPL.
[155] See *id*.
[156] Art 237 of the CPL.
[157] See *id*.

For a “foreign-related” award, article 71 of the Arbitration Law sets out the grounds for refusing to enforce an award by making reference to the Civil Procedure Law: (1) there is no arbitration clause in the parties’ contract and no subsequent written arbitration agreement between them; (2) the party against whom the application for enforcement is made was not given notice of the appointment of an arbitrator or of the initiation of the arbitration proceedings or was unable to present its case due to causes beyond its responsibility; (3) the formation of the arbitral tribunal or the arbitration procedure was not in conformity with the rules of arbitration; or (4) matters decided in the award exceed the scope of the arbitration agreement or are beyond the authority of the arbitration institution.[158] This provision also provides that: ‘if the people’s court determines that the enforcement of the arbitral award is against social and public interest, it shall rule against enforcement’.[159] Similar to the setting aside procedure, people’s courts do not always review the merits of an award, except for the consideration of social and public interest.

Although the grounds for setting aside an arbitral award and for refusing recognition and enforcement of an arbitral award are similar, there are some differences in practice. First of all, when the people’s courts are deciding whether or not to set aside an arbitral award, they will focus on the evidence of the award, and when they are deciding the refusal of recognition and enforcement of an arbitral award, they will examine both the application of law and evidence. Secondly, either party can apply for setting aside of an arbitral award, while only the losing party can apply for the refusal of recognition and enforcement of an arbitral award. Thirdly, a party shall apply for setting aside an arbitral award to the intermediate people’s court where the arbitration commission is located. If a party wants to apply for the refusal of recognition and enforcement of an arbitral award, he needs to apply to the intermediate people’s court where the debtor resides or the property is located. During the process of setting aside an arbitral award, the people’s courts can require the arbitration institution to arrange another hearing if they find necessary.

Pursuant to the Civil Procedure Law, the legal bases for the recognition and enforcement of “foreign” awards are the international treaties to which China has acceded or the principle of reciprocity.[160] In China, the relevant international treaties include bilateral treaties on civil and commercial judicial assistance and multilateral international conventions to which China has acceded. On 2 December 1986, China decided to ratify the New York Convention.

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[158] Art 274 of the CPL.
[159] See *id*.
[160] Art 283 of the CPL.

On 10 April 1987, the SPC issued a Notice of the SPC on the Implementing of the New York Convention, which provides the basis for implementation of the New York Convention in China. The Notice also states that China makes the reciprocal reservation and commercial reservation pursuant to Article I of the New York Convention.

3.6.3 Review of Typical Cases

Parties	Application	Grounds	The courts' decisions	Reasons for the decisions	Remarks
Pan Asia Trading Co, Ltd (China) v Newport Trading Co (Hong Kong)[161]	Enforcement of a foreign-related arbitral award	Violation of Due Process	Refusal to enforce the award (Jiangmen IPC)	The respondent did not receive the notice for arbitration and was deprived of the opportunity to present its case.	The parties did not appeal.
Dongfeng Garments Factory of Kaifeng City and Tai Chun International Trade (HK) Co, Ltd v Henan Garments Import and Export Group Company[162]	Enforcement of a foreign-related arbitral award (one party was from Hong Kong)	Social and Public Interest	Refusal to enforce the award (Zhengzhou IPC)	The enforcement would seriously harm the economic influence of the State and public of the society, and adversely affect the foreign trade order of the State.	The decision was reversed by the SPC by holding that a very restrictive approach should be used when reviewing the public interest.
Aiduoladuo (Mongolia) Co, Ltd v Zhejiang Zhancheng Construction Group Co, Ltd[163]	Enforcement of a foreign arbitral award	Invalidity of an arbitration agreement	Approval to enforce the award (SPC)	Only under conditions of the New York Convention, can an award be refused enforcement. Zhejiang HPC's ground that arbitration agreement was invalid to Chinese Law was unacceptable.	
Hemofarm DD et al v Jinan Yongning Pharmaceutical Co.[164]	Enforcement of a foreign arbitral award	Social and Public Interest	Refusal to enforce the award (SPC)	One party submitted the dispute to the Jinan IPC while the other applied for arbitration in ICC. The tribunal has violated China's judicial sovereignty and the jurisdiction of the Chinese courts.	

[161] *Pan Asia Trading Co, Ltd (China) v Newport Trading Co (Hong Kong),* Jiangmen IPC, unreported, cited at Wang, '*The Practical Applications of Multilateral Conventions Experience with Bilateral Treaties Enforcement of Foreign Arbitral Awards in the People's Republic of China*', 481.
[162] *Dongfeng Garments Factory of Kaifeng City and Tai Chun International Trade (HK) Co, Ltd v Henan Garments Import and Export Group Company*, cited in ibid, 491.
[163] *Aiduoladuo (Mongolia) Co, Ltd v Zhejiang Zhancheng Construction Group Co, Ltd*, the SPC, 2009, No.46.
[164] *Hemofarm DD et al v Jinan Yongning Pharmaceutical Co,* the SPC, 2008, No.11.

North American Foreign Trading Corporation v Shenzhen Laiyingda etc[165]	Enforcement of a foreign arbitral award	Procedure not in accordance with arbitration Agreement or the relevant law	Approval to enforce the award (Guangdong HPC)	The timetable the parties agreed does not constitute an amendment of the arbitration rules and cannot exclude the tribunal's discretion in postponing the hearing date.	The decision of HPC was approved by the SPC.

From the cases above, it can be noted that there are three main concerns with respect to enforcement of foreign-related and foreign arbitral awards. Firstly, the uneven development of judicial practices in different parts of China has caused insistent decisions. Unlike economically developed municipalities (Beijing, Shanghai or Shenzhen), some lower-level courts are not familiar with international arbitration norms and some of the judges cannot use English as the working language. Sometimes the SPC has corrected mistakes made by lower-level courts because judges of higher-lever courts are generally more experienced with international arbitration. Secondly, some cases reveal that enforcement of an award will become more difficult for the winning party if there is state-owned or local interest involved. For some lower-level courts which are subject to financial resources from local government, the enforcement of an arbitral award may destroy a medium-sized local enterprise and cause unemployment. Hence, from the perspective of local protectionism, the courts would choose to refuse to enforce the award by invoking the social or public interest consideration. To reduce the risk of decisions being affected by local protectionism and court corruption, a Report System was established in 1995.[166] Under this Report System, where an IPC considers that a foreign-related award or a foreign award should be set aside or denied enforcement, it must report its finding to the HPC before issuing a decision. Then the HPC should report the case to the SPC and wait for the SPC's determination. However, this whole procedure has caused problems of delays or difficulties discovering assets. A few cases even lasted for more than two years during which the debtor had been declared bankrupt or transferred assets.

[165] *North American Foreign Trading Corporation v Shenzhen Laiyingda Co, Ltd, Shenzhen Laiyingda Technology Co, Ltd, Shenzhen Cangping Import and Export Co, Ltd, Shenzhen Light Industry Import and Export Co, Ltd,* the SPC, 2009, No.30.

[166] Notice of the SPC on Several Issues Regarding the Handling by the People's Courts of Certain Issues Pertaining to Foreign-related Arbitration and Foreign Arbitration, issued by the SPC on and effective from 28 August 1995.

3.7 Characteristics of Arbitration in China

As an alternative to domestic courts, CIETAC has grown into an organization with generally accepted international norms and practice, advancing its own, unique model of arbitration.[167] On the one hand, the remarkable progress that China has made in the development of arbitration should not be underestimated, but on the other hand, it is undeniable that international arbitration in China is still at an early stage of development. There are unique "Chinese characteristics" in the Chinese arbitration system, namely: 1) strong administrative intervention, 2) combination of arbitration and mediation, 3) inconsistencies in the implementation of laws in practice.[168] There are more than 200 arbitration institutions all over China, and so it is not possible to examine each of them. This chapter examines the example of CIETAC, which is the oldest and leading arbitration institution in China.

In the founding period of CIETAC, the initial financial support from the government was given to help the arbitration institution. The intention was that it should become independent from financial support gradually. CIETAC was financially independent and not affiliated to any government agency, it spent and allocated its own revenues freely. However, four departments of the State Council issued a regulation in 2003 which required all arbitration institutions to hand over their revenues to the Ministry of Finance, make an annual budget for their expenditures and submit the budget to the Ministry for approval.[169] According to this regulation, the 'arbitration fee' should be defined as an 'administrative fee' and should be fixed and distributed by the Ministry of Finance. Circular No 29 appears to be in conflict with the promise that China made when entering into the WTO in 2001. China had stated clearly that arbitration fees should fall into the category of 'commission fee'.[170] Specifically, the arbitration fee were to allocated by the arbitration institutions based on their own revenues. The lack of financial independence not only gives rise to doubts about CIETAC's independence, but also undermines the development of CIETAC because the allocation by the state is often much less than the revenue that CIETAC generated and handed over.[171]

[167] Jeff Miller, *International Commercial Arbitration in China: Locating the Development of CIETAC in the Context of International and Domestic Factors*, 22 Dalhousie J. Legal Stud.76 , 2013, p84.
[168] K Fan, Arbitration in China— A legal and Cultural Analysis, Oxford and Portland, Oregon, 2013, p126-127.
[169] Circular No 29 Concerning the Amendment of the Arbitration Fee for 'the Separation of Distribution and Income' Financial System, issued by the Ministry of Finance, National Development and Reform Commission, Ministry of Supervision and Audit Commission, Circular No 29, 2003.
[170] See report of the Working Party on the Accession of China in document WT/ACC/CHN/49.
[171] Moser and Yu, CIETAC and its Work- An Interview with Vice Chairman Yu Jianlong, Journal of International Arbitration 24(6), 2007,p555- 564.

Another typical reflection of administrative intervention is the structure of CIETAC. CIETAC is composed of a Chairman, a number of vice-Chairmen and members. Besides, four committees are set up to perform different functions: 1) the arbitrator's qualification review committee, which is responsible for recruiting new arbitrators and reviewing the arbitrators' behaviour to ensure that they comply with the Code of Ethics; 2) the case editing committee, which is responsible for selecting and editing cases for publication; 3) the experts consultation committee, which is responsible for providing professional advice on complex legal matters, both substantive and procedural; and 4) the development committee which is responsible for making plans for further development of CIETAC.[172] The daily work of CIETAC is conducted through the Secretaries in the Beijing headquarters and in the Shanghai and Shenzhen sub-commissions. There is one General Secretary and two or three Deputy Secretaries. The staff at the Secretariat are selected from all over China and most of them are bilingual in Chinese and English. The Secretariat of CIETAC plays an important role in arbitration proceedings; the secretaries are in charge of arranging hearings, taking notes during the hearing, providing translation, collecting evidence and conducting research under the arbitral tribunals' instructions. In practice, when a claimant requests an arbitration, the reception department will make sure that the claimant has met all the formal requirements and then will transfer the case to the procedural administration department, which will give notice of the arbitration to both parties and appoint a manager for the case. The case manager will be responsible for helping the arbitrators on procedural matters. In short, CIETAC has exercised some functions that arbitrators should perform and the institution is actually more than just an organiser or facilitator. [173]

With respect to the scrutiny of the draft arbitral awards, a scrutiny team, which is composed of several case managers and CIETAC secretariats, is in charge of the scrutiny process. The team may examine problems both on procedural issues and substantive issues for the arbitrators' consideration. The expert consultation committee also renders professional advice on certain legal issues for the arbitral tribunal. According to the Arbitration Law, written conciliation statements and arbitral awards shall both be signed by the arbitrators and sealed by the arbitration institution. These regulations illustrate that the power to deal with arbitration cases is exercised jointly by the arbitral tribunal and the arbitration institution.[174] In addition, the Arbitration Law requires that the People's government of the cities shall arrange for the relevant departments and chambers of commerce to organize

[172] See the CIETAC Organizational Structure, available on the CIETAC website at cn.cietac.org
[173] See Junwu Liu, Establishing and Perfecting the Arbitration System with Chinese Characteristics—A comment on the Chinse Arbitration System, China Development, Vol.8, 2008, No.2.
[174] Art 52&54 of Arbitration Law.

arbitration commissions in a unified manner.[175] In practice, some heads of government departments are appointed as vice chairmen in arbitration institutions.

While CIETAC permits parties to adopt other arbitration rules, this permission does not apply to Chapter 2 CIETAC Rules—Arbitration Proceeding, which governs the initiation, composition and conduct of tribunals.[176] This article also provides restriction for the application of arbitration rules different from those clarified in CIETAC Rules where they are "inoperative or in conflict with a mandatory provision of the law applicable to the arbitral proceedings." The Chinese term for "inoperative" is a point of ambiguity in Chinese law and can be interpreted in a broad way, for example, the proposed ad hoc rules in UNCITRAL Rules may be more likely to be found invalid by the people's courts because the latter has a higher standard for finding ad hoc rules to be invalid.[177] As a result, although the CIETAC Rules permit parties to choose other procedural rules, there are some points of ambiguity in Chinese law and practice. CIETAC is more "institutional" than many other arbitration institutions. Arbitration in China is still largely subject to administrative control, from the establishment of the arbitration institutions, to financial resources and staffing in arbitration institutions.

The last defining feature of CIETAC is that it provides a combination of mediation with arbitration under the framework of the commission. Article 47 of the CIETAC Rules sets forth a scheme whereby parties can agree to use a tribunal convened under CIETAC as mediators, with the understanding that the same panel will adjudicate the subsequent arbitration if the conciliation fails.[178] This combined approach is a unique facility among international commercial arbitration institutions.

However, this approach has elicited criticism for compromising the impartiality of arbitrators and undermining the integrity of both the mediation and arbitration for the efficiency of arbitration procedure.[179] The ability of tribunals to objectively assess the positions of the parties in an arbitration will be adversely influenced by the comparatively

[175] Art 10 of the Arbitration Law.
[176] Article 4.3 of the CIETAC Rules.
[177] Justin D' Agostino, Making and matching arbitration rules in mainland China- the pros and cons of using the UNCITRAL Rules in CIETAC arbitration, see Kluwer Arbitration Blog, http://www.kluwerabitraitonblog.com,March 15 2011.
[178] Article 47 of the 2015 CIETAC Rules.
[179] Jeff Miller, International Commercial Arbitration in China: Locating the Development of CIETAC in the Context of International and Domestic Factors, 22 Dalhousie J. Legal Stud.76, 2013, p84.

unstructured disclosure of information during the mediation.[180] In practice, the mediation and arbitration components are not viewed in isolation, and the restoration of harmony between the parties is prioritized over the protection of autonomy.[181] In addition, the integration of the two mechanisms may affect the evolution and integration of CIETAC into the international commercial arbitration system.

Although the enforcement of arbitral awards in foreign jurisdictions is provided for under the New York Convention, domestic courts retain the right to reject arbitration decisions on the grounds of procedural unfairness. In *Gao Haiyan v Keeneye Holdings Ltd*, the court rejected the decision of CIETAC because of the appearance of bias arising from the combined role of mediator and arbitration. The court remarked that although the mechanism is not fundamentally unsound, it is subject to a high degree of risk from actual or perceived bias.[182] However, this approach still serves as a useful tool that maximizes efficiency of the arbitration procedure, maintaining harmony between the parties.

Although it is hard to conclude that international commercial arbitration in China is under severe pressure, there are increasing complaints about commercial arbitration. Except for the length and cost, strong administrative intervention makes the arbitration in China more "institutional" than many other arbitration institutions, limiting its function fully play. In part because of the desire to compete with arbitration, the world has been witnessed the creation of numerous international commercial courts in recent years (Dubai, Amsterdam, Paris, Frankfurt, Brussels, China and Singapore). The next chapter will look in more detail at the new China International Commercial Court.

Chapter 4 The China International Commercial Court framework

This chapter will turn to consider the new Chinese international commercial courts and provide a picture of its framework, including its jurisdiction, process for selection of judges, enforcement of judgments and use of foreign lawyers. It will be argued that, although the establishment of the CICC represents an essential step to improve international commercial dispute resolution in China, in order to achieve its goals, the CICC still has a long way to go.

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[180] Carlos de Vera, Arbitration harmony, 'Med-arb' and the confluence of culture and rule of law in the resolution of international commercial disputes in China, 18:1 Columbia Journal of Asian Law 149 ,2004, p166.

[181] *Ibid*.

[182] *Gao Haiyan v Keeneye Holdings Ltd,* ,2011,HKEC 514.

4.1 An overview

Over the past four decades, Chinese law has undergone a modernization programme, with results that are impressive but uneven. Chinese legal institutions have been primarily oriented towards servicing domestic disputes and those disputes regarding inbound investments from foreign investors. As early as the 1970s, China resurrected its legal system as it moved from the chaos of domestic cultural revolution[183] and its isolation to join the world market economy. China started to create a system of civil laws to govern its market economy and protect individuals' legal rights. Due to the fact that foreign investors and trading partners were and are crucial to Chinese economic development, foreign investment was officially welcomed with the adoption of the Law on Sino-Foreign Equity Joint Ventures (EJV Law) in July 1979. In 1988, the legal framework for foreign-invested enterprises was basically completed with the adoption of the Law on Sino-Foreign Cooperative Joint Ventures (CJV Law), which allowed for joint ventures with more flexible features than those allowed under the EJV Law.[184] In essence, China's legal institutions have been oriented toward servicing domestic disputes, while also trying to be consistent with international standards for commercial disputes involving foreign parties. However, the "Belt and Road Initiative" (BRI) marks a change of this direction.

The plan to establish the CICC was driven by China's desire to facilitate the resolution of disputes related to Chinese President Xi Jinping's Belt and Road Initiative (BRI).
The BRI project was announced by President Xi Jinping in 2013 and comprises two main concepts: a 'Silk Road Economic Belt' ("the belt") which is a trans-continental passage that links China with south east Asia, south Asia, Central Asia, Russia and Europe by land. The other is a '21st Century Maritime Silk Road'[185] ("the road") which refers to a sea route connecting China's coastal regions with south east and south Asia, the South Pacific, the Middle East and Eastern Africa, all the way to Europe. This multi-trillion dollar project connects Asia with Africa and Europe via land and maritime networks along six corridors, with the aim of improving regional integration, increasing trade and stimulating economic

[183] The Cultural Revolution was a socio-political movement in China from 1966 until 1976. Launched by Mao, then Chairman of the Communist Party of China, its stated goal was to preserve Chinese Communism by purging remnants of capitalist and traditional elements from Chinese society, and to re-impose Mao's Thought as the dominant ideology in the Communist Party of China.
[184] Donald Clarke, *Legislation for a Market Economy in China*, 191 China Quarterly 2007, 567-85.
[185] The original silk road was established during the Han Dynasty 2,000 years ago. It was an ancient network of trade routes that for centuries connected China to the Mediterranean via Eurasia.

growth.[186] The BRI envisages the construction of new roads, railway, power plants, pipelines, ports, airports and telecommunication links, and firmly proves that China has become a major source of outward international investment.

Over the past five years of development, apart from the economic dimension, one dimension of the BRI which has received less attention relates to legal and regulatory concerns. Geographically, the BRI crosses many common law, European civil law and Islamic law states, as well as various hybrids of the foregoing, and a collage of customary and local rules. The BRI will encounter formidable legal challenges with many international dimensions because it will comprise commercial dealings between parties from different legal systems and traditions. Moreover, the countries within the BRI map are at different stages of legal development, and some of them continue to struggle with corruption, instability and lack of transparency in their political and legal systems.[187] Given the complex nature of project finance and construction deals, as well as the different domestic issues in the BRI countries, the BRI will generate an abundance of disputes.

In order to deal with these legal challenges, on 1 July 2018, the Supreme People's Court (SPC) published 'Regulations on Several Issues regarding the Establishment of International Commercial Courts' (the Regulations). The Regulations set out the scope and operation of two new international commercial courts in China : one in Xi'an and the other in Shenzhen (the CICC).[188] It is envisaged that the CICC in Xi'an, Shaanxi Province will focus on disputes arising from projects on land as Xi'an is the starting point of the ancient Silk Road. The CICC in Shenzhen, which is in the Guangdong-Hong Kong-Macau Greater Bay Area, will focus on disputes arising from infrastructural developments along the coastline of the maritime routes.

The Regulations include just nineteen articles and less than 1300 words of substantive text. Judges from the SPC have pointed toward the Singapore International Commercial Court (SICC) and the Dubai International Financial Centre Courts (DIFC Courts) as models for

[186] See "Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road", issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization on 28 March 2015.

[187] See Corruption Perception Index 2018, Transparency International 30 January 2019. https://www.transparency.org/cpi2018

[188] Regulations on Several Issues regarding the Establishment of International Commercial Courts, issued by the Supreme People's Court on 1 July 2018.

the CICC.[189] In addition, Article 11 of the Regulations implies that the CICC project is part of China's ambition to build up a "one-stop" international commercial dispute mechanism. Three key points can be extracted from the Regulations. First, China plans to create an "international commercial court" which would comprise a forum for international commercial cases and its design would differ from a conventional Chinese court. Second, the CICC will act as a "dispute resolution platform" on which "mediation, arbitration and litigation are efficiently linked."[190] What is clear for the moment is that the CICC will not be a dispute resolution platform for foreign investors seeking relief against their host states under international investment law.[191] Third, the SPC will take charge of the CICC program with assistance from a committee of international commercial experts.

It is interesting to note that, unlike the creation of international commercial courts in other jurisdictions, there was no constitutional amendment or any other legislative action to legitimise the creation of the specialist courts. Instead, the SPC will take the lead in establishing the CICC and the BRI dispute resolution mechanism. It is more efficient for the SPC to issue judicial guidance on the implementation in judicial practice, which in effect, will result in the creation of new rules in a systematic and comprehensive manner.[192] In addition, the legal professionals of the SPC have the capacity and experience to handle complex international commercial cases.

4.2 Jurisdiction

As a permanent adjudication organ of the SPC, the CICC has jurisdiction over five categories of case:[193]

(a) First instance international commercial cases in which any parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute exceeding 300 million Chinese yuan (approximately £34 million) ;

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[189] See Interview with Gao Xiaoli, Vice President of the Fourth Court of Civil Trials of the Supreme People's Court, 10 March 2018; *Building the "One Belt and One Road" International Dispute Resolution Mechanism: Content of the Second East Lake International Law Forum*, 27 November 2017.

[190] Article 11 of the Regulations.

[191] See Guixiang Liu (member of the SPC Judicial Committee), Opinion Concerning the Establishment of the Belt And Road International Commercial Dispute Resolution Mechanism and Institutions, Opening Conference of State Council Office, 28 June 2018.

[192] Article 32 of Law of the People's Republic of China on the Organization of the People's Courts, promulgated by the Standing Committee of NPC, 31 October 2006.

[193] Article 1 &2 of the Regulations.

(b) First instance international commercial cases which are subject to the jurisdiction of the High People's Courts which nonetheless consider that the cases should be tried by the Supreme People's Court, for which permission has been obtained;
(c) First instance international commercial cases that have a nationwide significant impact;
(d) Cases involving application for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards within the CICC one-stop shop; and
(e) Any other international commercial cases that the SPC considers appropriate to be tried by the CICC.

Under these rules of jurisdiction, parties are now actually permitted to choose the SPC to hear their international commercial disputes. This is a significant improvement in Chinese law and judicial practice. Before the creation of the CICC, even though the Civil Procedure Law ("CPL") allowed litigants to choose a Chinese court by agreement, their choice was subject to various limitations. One limitation is that parties' choice must be consistent with the jurisdiction requirements of different levers of courts.[194] In practice, first instance commercial cases, including international commercial cases, are usually heard by the Basic People's Courts. "Important" first instance international cases are heard by the Intermediate People's Courts. In exceptional cases, High People's Courts may hear first instance international cases with significant impact in the jurisdiction where they arose. The SPC may exercise its jurisdiction only 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.[195] However, in practice, the SPC has never heard a first instance commercial case. According to an official document issued by the SPC in 2017, jurisdiction over first instance international commercial cases is allocated to the Basic People's Courts, Intermediate People's Courts or High People's Courts.[196] Hence, the jurisdiction of the CICC changes Chinese legal practice by allowing parties to choose the SPC, specifically the CICC, to hear their international commercial disputes, without being bound by the rules of the CPL. Given the fact that SPC judges are perceived to be more highly qualified and experienced than those in lower People's Courts, resolving international commercial disputes before the CICC is not without its attraction for parties who are reluctant to choose a lower Chinese court. Nevertheless, a written agreement in favour of the CICC is not sufficient to confer

[194] Articles 17 to 20 of the CPL.
[195] Ibid.
[196] Notification of the Supreme People's Court on Clarifying the Standards of Tire 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.

jurisdiction on the CICC; there are two more conditions need to be met: first, the CICC does not have jurisdiction over cases with no actual connection to China. The actual connection that has mentioned in Chapter 2 still needs to be applied. Second, the quantum in dispute must exceed 300 million Chinese yuan (approximately £34 million). In other words, simply in terms of cases size, the CICC will not hear small or minor first instance cases that can be resolved before lower People's Courts, or by arbitration or mediation.

In addition to consensual jurisdiction, the CICC may hear a first instance international commercial court in three other situations.[197] First, when it is a dispute that would have been heard by a High People's Court, but which has been referred to the CICC by the High People's Court with the approval of the SPC. This situation involves the exercise of power allocation between Chinse courts. Secondly, when the case is an international commercial matter that has a significant nationwide impact in China. However, it is not entirely clear what kind and degree of impact would constitute such 'significant nationwide impact'.[198] The third situation involves any other international commercial cases that the SPC deems apt for the CICC to hear. To date, no rules or criteria have been prescribed to guide the SPC in determining such cases. Official guidelines should be issued by the SPC to clarify the standard of 'significant nationwide impact' in China and the sort of cases the SPC will consider appropriate for the CICC to hear.

The *in personam* jurisdiction of the CICC is necessarily bound up with its subject matter jurisdiction: international and commercial actions. The definitions of 'international' and 'commercial' are prescribed in the Regulations. According to Article 3 of the Regulations, a claim is 'international' if any of the following requirements is met:
(a) one or both parties is/are foreign has/have foreign citizenship, stateless persons, foreign enterprises or other organizations;
(b) one or both parties have their habitual residence outside the territory of the People's Republic of China;
(c) the subject matter in dispute is outside the territory of the People's Republic of China;
(d) legal facts that create, change, or terminate the commercial relationship have taken place outside the territory of the People's Republic of China.[199]

[197] Article 2 of the Regulations.
[198] Z Tang, *Conflict of Laws in the People's Republic of China*, Edward Elgar 2016, p53.
[199] Article 3 of the Regulations.

It should be noted that apart from the above four definitions, the SPC added a catch-all clause through two judicial interpretations in 2012 and 2015.[200] In fact, the definition of 'foreign/international' has been expanded to 'any other commercial relationship that can be treated as a foreign/international commercial relationship'. Hence, it is unclear that why the CICC adopt a more rigorous method than the one currently applied by other Chinese courts.

On the meaning of 'commercial', unlike the definition of 'international', the Regulation does not prescribe a clear definition in the judicial interpretation on CICC. At the CICC press conference held on 28 June 2018, Justice Liu, a senior judge of the SPC, commented that two categories are excluded from the jurisdiction of the CICC: (1) disputes 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.[201] Hence, the meaning of 'commercial' is intended to be very broad compared to the meaning of 'international'. The absence of such a clear definition of 'commercial' may cause problems when testing if a claim is commercial in nature. Under current Chinese law, commercial cases are heard by civil courts. If parties by express agreement could present their otherwise non-commercial claims as commercial claims, the CICC could find itself having *prima facie* jurisdiction over claims involving matters such as foreign sovereignty or even matrimonial disputes which, in essence, are not suitable the CICC to adjudicate upon.

Looking at the framework of the CICC, there are two implications about its jurisdiction: first, the CICC is intended for cases not limited to those stemming from the BRI. Second, the CICC is not mandatory for BRI disputes. There were no constitutional or legislative amendments relating to this matter and the Regulations were issued in advance of the Forum on the Belt and Road Legal Cooperation, held by the Ministry of Foreign Affairs on 2-3 July, 2018, in Beijing. The jurisdiction of the CICC is still constrained by existing Chinese law. Since China operates a modified civil law system, the CICC is likely to have less discretion to develop its jurisdiction through its own judicial decisions. Secondly, it is uncertain

[200] 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; 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, promulgated by the Supreme People's Court, 18 December 2014; effective on 4 February 2015.

[201] The State Council Information Office held a press conference on the Opinions on the Establishment of ''The Belt and Road'' International Commercial Disputes Settlement Mechanism and Institutions, China International Commercial Court, 28 June 2018.

whether the CICC has exclusive jurisdiction over all disputes related to the BRI. Article 2 of the Regulations confirms that the CICC has jurisdiction over first instance international commercial cases in which the parties have chosen the jurisdiction of the Supreme People's Court according to Article 34 of the Civil Procedure Law, with an amount in dispute of at least 300,000,000 Chinese yuan. From this statement it is unclear whether parties must specify in their contracts that the CICC has exclusive jurisdiction for deals for the specified amount, or if the CICC will be the default forum for such cases. Moreover, it is uncertain whether parties have the right to opt out of the CICC jurisdiction in their choice of forum clauses. A question remains as to whether states can opt out of the CICC altogether. It is suggested that the CICC judges should have the power to exercise discretion to assess the eligibility of a case for the jurisdiction, as in other international commercial courts.[202] However, CICC will always be subject to the SPC and as a result, it is more likely that the SPC will produce more judicial guidance on these questions.

4.3 Selection of Judges

Article 4 of the Regulations states that judges of the CICC will be selected and appointed by the SPC from the existing corps of senior judges. The eight judges should be experienced in trial work, familiar with international treaties, international practice, international trade and investment, and capable of using Chinese and English proficiently as working languages.[203] However, under the current Chinese Laws on Judges, members of the judiciary must be Chinese nationals.[204] The Regulations do not change this provision or any other provision of current Chinese law relating to the matter, thus the CICC's judiciary seemingly will comprise exclusively of Chinese judges. Moreover, cases shall be heard by a tribunal consisting of three or more judges and evidence to the tribunal can be submitted only in English.[205] However, the whole trial procedure will still be governed by Civil Procedure Law which requires that a language commonly used in PRC should be used in the trial

[202] For example, the Rules of Procedure for the International Commercial Chambers of the Amsterdam District Court (Netherland Commercial Court) and the Amsterdam Court of Appeal (Netherland Commercial Court of Appeal) (The NCC Rules) 1.2.4 provides that ' The NCC will determine whether it has jurisdiction and is the proper venue in the action and whether the requirements set out in art 1.2.1 (a) through (d) have been satisfied. The court must test the satisfaction of art 1.2.1 (b) and (c) of its own initiative.' Also the Singapore International Commercial Court has discretion in deciding whether a case is subject to its jurisdiction or not.

[203] Art 4 of the Regulations.

[204] Art 12 of Judges Law of the People's Republic of China, promulgated by the Standing Committee on National People's Congress, 28 February 1995, effective from 1 July 1995.

[205] Art 5 & 9 of the Regulations.

process.[206] In China, English is not a commonly used language. Hence, it is simply impracticable for there to be no Chinese translation of evidence in foreign languages due to the fact that both judges and counsel in CICC proceedings will need to refer to the evidentiary materials in the course of proceedings, for example, in the cross-examination of witness. In addition, the absence of international judges significantly diminishes the attraction of the CICC to foreign parties and severely weakens its competitiveness as an international commercial dispute resolution forum.

To remedy the lack of international judges on the CICC panel, an International Commercial Expert Committee has been established to support the judges of the CICC. The Expert Committee is designed to support the CICC's construction of foreign law and members of the Expert Committee may serve as mediators in international commercial disputes.[207] The first Expert Committee has already been appointed for a four-year term and its members are a selection of professors, practitioners and justices from across the globe. The Expert Committee is composed of 26 men and 6 women, 11 of them hailing from common law jurisdictions and 21 from civil law jurisdictions. Turning to nationality, 18 experts come from Asia, (including 12 Chinese experts), 4 experts are from North America, eight from Europe, and one each from the Middle East and Africa. There are no experts from South America.[208] However, the Regulations do not specify how procedurally the panel of judges relates to the Expert Committee in resolving disputes. Besides, it is not clear what will happen in the event of a difference of opinion between the Chinese judges and the International Commercial Expert Committee. However, the opinion of the Expert Committee is not binding and only for reference. In fact, the Expert Committee is a concession by China to allow limited international influence on the CICC. Its role in making up for the absence of foreign judges on the CICC panel remains to be seen.

4.4 Judgments and Enforcement

While the SPC has translated the institution's English name as "courts", in fact, they are "tribunals" as the SPC has authority to establish only tribunals and not real courts. CICC judgments are final and conclusive, and there is no appeal body.[209] The absence of a court

[206] Art 190 of the CPL.
[207] Art 8.4 & art 12 of the Regulations.
[208] See List of Experts, China International Commercial Court, http://cicc.court.gov.cn/html/1/218/226/234/index.html
[209] Art 16 of the Regulations.

of appeal may be attractive to commercial parties who desire finality and speed in dispute resolution. However, the deprivation of the parties' right to appeal may trigger a constitutional challenge. Under Chinese law, the right to appeal is confirmed by Chinese legislation, including Civil Procedure Law and Law on the Organisation of the People's Courts. When the CICC takes its jurisdiction on a non-consensual basis, for example, a case transferred from other courts, it will be difficult to determine if the parities' have agreed to exclude a right of appeal.

Article 5 of the Regulations provides that a panel of three judges will be constituted for every dispute. The judgment of the CICC is to be reached by majority decision. Any dissenting opinion may be incorporated into the judgment.[210] This is a remarkable change of Chinese legal tradition, which treats each court judgment as the collective decision of the tribunal. By allowing the publication of a dissenting opinion, the independence of judges may be promoted, judicial transparency maybe enhanced and the credibility of the CICC may be improved.

Another feature of the CICC model can be found in Article 15 of the Regulations, which provides that the CICC may issue judgments or arbitral award.[211] Both judgments and arbitral awards are legally binding, the CICC may also make a conciliation statement that has the same legal effect as a judgment or an arbitral award after its receipt signed by the parties.[212] China is party to the 1958 New York Convention, which provides for recognition and enforcement of Chinese arbitral awards in other state parties. Nevertheless, China has not entered into treaties for mutual overseas recognition and enforcement of its judgments with its major trading partners of BRI, although it has entered into Sino-foreign judicial assistance treaties with 36 countries of which 33 include enforcement of foreign judgments.[213] China signed the Hague Convention in 2017, but the signature is still waiting ratification by the National People's Congress (NPC). Therefore, if the CICC mainly issues arbitral awards, the conventional problems for international commercial arbitration in China will remain, including high cost and recovery of assets outside the seat of the arbitration.

According to the "Notice Regarding the First Batch of 'One-Stop Shop' International Commercial Disputes by an International Commercial Arbitration and Mediation Organ

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[210] Art 5 of the Regulations.
[211] Art 15 of the Regulations.
[212] *Id.*
[213] King Fung Tsang, Chinese Bilateral Judgment Enforcement Treaties, 40 Loy. L.A. Int'l & Comp. L. Rev.1, 2017, p6–7.

under the Plural Resolution Mechanism",[214] the CICC coordinates with other arbitral and mediation institutions, including the China International Economic and Trade Commission, the Shanghai International Arbitration Centre (SHIAC), the Shenzhen Court of International Arbitration, the Beijing International Arbitration Centre, the China Maritime Arbitration Commission, the China Council for the Promotion of International Trade (CCPIT) Mediation Centre, and Shanghai Commercial Mediation Centre. However, no international arbitration institution is mentioned in this list. This constraint severely diminishes the 'international' character of the CICC one-stop shop. Besides, the relationship between the CICC and the existing institutions is still unclear. For instance, if an award is given by a body like SHIAC, would it be converted into or recognized as a judgment of the SPC? Additionally, according to the "(Trial) Notice of the SPC on the Rules of Procedure of the International Commercial Court",[215] there is a "case management office" to coordinate dispute resolution between the different channels of dispute resolution. The office shall convene the parties and arrange pre-trial mediation after receiving the case materials. Parties may opt out of the pre-trial mediation period. Given that the CICC has privileged party autonomy, the role of the "case management office" is still ambiguous.

On 29 December, 2018, the CICC announced it had received its first batch of cases. To date, the CICC has concluded five cases. All the cases were received by the SPC and subsequently referred to the CICC. In other words, no case yet is the result of choice of the CICC in the their contract. In terms of the nature of disputes, three of the cases concern the validity of arbitration agreements, one is a dispute over product liability and the other concerns unjust enrichment. For the cases that the Xi'an Court received, two concern disputes over liability for damage to a company's interests and the other concern equity determination and profit distribution disputes. It is interesting to find out that none of those cases is necessarily related to the BRI, for example, one case of the Xi'an Court is a continuation of a drawn-out legal battle between Thailand-based Pharmaceutical Industries Co., Ltd and its Chinese counterpart.[216] In an exercise of transparency, the CICC also announced a couple of court actions publicly, including pre-trial meetings, formal inquiries and public hearings.[217] It is

[214] Notice Regarding the First Batch of 'One-Stop Shop' International Commercial Disputes by an International Commercial Arbitration and Mediation Organ under the Plural Resolution Mechanism, issued by the SPC on 5, Dec, 2018.
[215] (Trial) Notice of the SPC on the Rules of Procedure of the International Commercial Court, issued by the SPC on 21, Nov, 2018, art 17.
[216] See Announcement Regarding the Batch of International Commercial Cases Accepted by the CICC, http://cicc.court.gov.cn/html/1/218/149/192/1150.html
[217] For the details of these announcements, see Official Release of the CICC, http://cicc.court.gov.cn/html/1/219/208/210/1213.html

noteworthy that on 31 May, 2019, the CICC in Shenzhen held the first public hearing concerning the product liability dispute between Guangdong Bencao Medicine Group Co., Ltd.(hereinafter as "Bencao"), and Bruschettini S.R.L., domiciled in Genoa, Italy (hereinafter as "Bruschettini"). The court hearing has received extensive public attention, more than 40 people attended the hearing, including representatives of the NPC. From November 2013 to March 2015, Bencao entered into purchase contracts with Aprontech Ltd., for a total of 1,566,632 bottles of drugs named as "Lantigen". On 18 January 2016, the National Medical Products Administration of China promulgated Announcement on Cessation of Importation of Four Drugs including Cerebroprotein Hydrolysis Injection etc. [No.13(2016)], stating that "The actual production process of 'Lantigen' produced by Bruschettini was inconsistent with that of registration process. The laboratory data were found incomplete and there were cross-contamination risks in the production process. The import of ' Lantigen' produced by Bruschettini shall be stopped and the relevant enterprises should recall the products with potential safety hazards." Since then, Bencao has repeatedly sent letters asking Bruschettini to recall "Lantigen", but Bruschettini did not respond. The hearing lasted for over 3 hours, and the parties fully debated on the following three issues: 1) whether Bruschettini is obliged to recall the "Lantigen" in dispute; if yes, whether Bruschettini constitutes inaction to recall the " Lantigen" in dispute; 2) whether Bencao's waiver of claim for damages against Bruschettini agreed in the Exclusive Distribution Agreement and its Annex between Bencao and the non-party Aprontech can be excluded; 3) whether Bruschettini shall compensate for Bencao's loss and how the amount of loss should be determined. On 13 December 2019, the CICC made its first decision on this case, stating that: 1) Although Bencao did not establish a sales contract relationship with Bruschettini, its request for Bruschettini to fulfil the product recall obligation should be supported. 2) As Bruschettini is the subject of the recall obligation of " Lantigen", it should bear the ultimate responsibility for the recall of "Bacteria solutes" product. However, Bruschettini has not taken the recall measure for a long time, its failure to perform statutory recall obligation is an act of infringement and a failure. As a result, Bruschettini shall bear tort compensation liability for the losses caused.[218] This is the first decision regarding substantive matters made by the CICC since its establishment; it clarified that in the absence of a contractual relationship, as sellers who have fulfilled its recall obligations, they should be able to seek relief in accordance with the relevant recall rules. The judgment fully safeguarded the rights and interests of consumers and further clarified the rights and obligations of market participants.

[218] *Guangdong Bencao Medicine Group Co., Ltd. v Bruschettini S.R.L.*, SPC, 2019 shangchu No.1.

4.5 Foreign Lawyers

Under CIETAC's rules, a party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to arbitration.[219] However, this provision appears to conflict with the Law of the People's Republic of China on Lawyers. The latter defines a lawyer under the Chinese legal system as a "professional who has acquired a lawyer's practice certificate pursuant to Law of the People's Republic of China on Lawyers, and is authorised or designated to provide the parties with legal service."[220] Article 28 stipulates that a lawyer's services include "accepting authorization to participate in mediation or arbitration''. That practice certificate is only available to individuals who have passed the National Judicial Examination, which is only available to Chinese citizens. In addition, according to the CPL of China, foreigners and foreign enterprises shall only be represented by Chinese law-qualified attorneys.[221] As a result, permitting foreign attorneys to represent their clients before the CICC may require legislative reform in China.

Although foreign lawyers are allowed to enter the court, they are restricted to the subject matters to be litigated. For example, according to the Administrative Regulations on the China-based Representative Offices of Foreign Law Firms, foreign law firms with representative offices in China may not serve clients on topics relating to "legal affairs on Chinese law".[222] The definition of "legal affairs on Chinese law" can be found in the Provision of the Ministry of Justice on the Execution of the Administrative Regulations on the China-based Representative Offices of Foreign Law Firms. It includes: (1) participating in litigation activities within China as lawyers; (2) providing opinions or certifications on the specific issues governed by Chinese laws in contracts, agreements, articles of association or other written documents; (3) providing opinions or certifications on the acts or events governed by Chinese laws; (4) presenting agent opinions or comments on the application of Chinese laws and the facts involving Chinese laws as agents in arbitration activities; (5) handling, on the trustor's behalf, the procedure for registration, alternation, application or putting on record, and other procedures as the government organs of China or other

[219] Art 22 of the CIETAC Rules.
[220] Law of the People's Republic of China on Lawyers, promulgated by the Standing Committee National People's Congress, 28 Oct, 2008, effective from 1 June, 2008, art 2.
[221] Art 191 of the Civil Procedure Law of PRC.
[222] Article 15 of the Administrative Regulations on the China-based Representative Offices of Foreign Law Firms, promulgated by the State Council on 22 Dec, 2001, effective from 1 Jan, 2002.

organizations authorized by laws and regulations with administrative authorities.[223] Combing these regulations, it would seem that under current Chinese law, foreign lawyers may not be allowed to represent their clients before the CICC. The role of foreign lawyers in CICC is limited to indirect participation, such as supporting Chinese counsel in the proceedings.

Chapter 5 Proposals for change to the CICC

Having provided a detailed and critical review of the CICC and identified its major challenges, improvements will be proposed to the CICC framework in this chapter. The following suggestions are anchored in a comparative approach, using the Singapore International Commercial Court (SICC) as a comparator, which is another Asian international commercial court situated within the BRI territory. This chapter will be divided into five parts and the following topics will be discussed: Jurisdiction; Process of Internationalisation; Determining Foreign Law; Enforceability of CICC Judgments; and the Relationship among the CICC, Mediation and Arbitration Institutions.

5.1 Introduction

Before proposing changes, it is necessary to consider different international commercial courts. The English Commercial Court in London is a sub-division of the Queen's Bench Division of the High Court of Justice and the model the SICC has tried to emulate. It is a very successful forum which attracts international litigants and legal work from around the world, but Brexit seems to have triggered a desire in many continental European countries to compete with London. One example is the new Netherlands Commercial Court and Court of Appeal (the "International Commercial Chamber" of the Amsterdam District Court and Court of Appeal), which opened its door at the end of 2018. The main objective of the Dutch court is to provide an alternative forum for parties who want to litigate in the English language, but who wish to avoid expensive forums such as London or the United States. The Netherlands Commercial Court is also an alternative for those parties who do not want to

[223] Article 32 of the Provision of the Ministry of Justice on the Execution of the Administrative Regulations on the China-based Representative Offices of Foreign Law Firms, promulgated by the Ministry of Justice, 24, Jul,2002, effective from 1 Sep, 2002.

submit to arbitration, where proceedings are costly and outcomes may not be as predictable as before national courts.[224]

Beyond Europe, the Dubai International Financial Centre Courts (hereinafter "DIFCC") were created under Dubai Law 9 of 2004 and Law 12 of 2004. The jurisdiction of the Court of First Instance and the Court of Appeal was originally rather limited—only for matters relating to the Dubai International Financial Centre. In 2011, the jurisdiction of the court was extended to "any civil or commercial claims or actions where the parties agree in writing to file such claim or action".[225] It is interesting that the Chief Justice of the DIFCC is Michael Hwang from Singapore, and all the proceedings of the courts are conducted in the English language.[226] The United Arab Emirates are not yet a party to the Hague Convention, but the Court's judgments are enforceable in the countries of the Gulf Cooperation Council[227] and in most Arab countries.[228]

The key premise of the SICC, as articulated by the Singapore International Commercial Court Committee, was to enable Singapore 'to enhance its status as a leading forum for legal service and commercial dispute resolution' and to become 'an Asian dispute resolution hub catering to international disputes with an Asian connection'.[229] Additionally, the establishment of the SICC is not only a response to the perceived shortfalls of international commercial arbitration, but also an acknowledgement that courts must more readily accommodate the needs of parties to international commercial disputes.[230] The CICC is presently designed solely to provide a forum for the resolution of BRI disputes. Reviewing the whole process of the CICC, it is obvious that the CICC is mainly designed to meet the urgent need of instituting legal safeguards for the implementation of the BRI.

The main reasons for choosing the SICC as the comparative model are as follows: firstly, having been officially launched in 2015, the SICC is still a relatively new international

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[224] *A First Guide to Commercial Litigation in the Netherland*, NETH. COM.CT., http://netherlands-commercial-court.com

[225] Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 Concerning Dubai International Financial Centre Court (2010) (codified as amended at Law No.12 of 2004 in Respect of the Judicial Authority at Dubai International Financial Centre, art. 5(A)(2)(2004)(U.A.E).

[226] Rules of the Dubai International Financial Centre Courts, r. 2.2 (2014) (U.A.E).

[227] The GCC Convention for the Execution of Judgments, Delegations and Judicial Notification, DUBAI INT'L ARB.CTR.

[228] Riyadh Arab Agreement for Judicial Cooperation, League of Arab States, Arp.6.1983, REFWORLD.

[229] Singapore International Commercial Court ('SICC') Committee, '*Report of the Singapore International Commercial Court Committee*' (Reports, SICC Committee, November 2013) 5 (*'SICC' Committee Report'*).

[230] A Godwin, I Ramsay and M Webster, International Commercial Courts: The Singapore Experience, Melbourne Journal of International Law, Vol 18, 2017, p222.

commercial court, which shares some similar aims to the CICC. For example, both of them are designed to cater for the expected growth in cross-border, multi-jurisdictional dispute resolution services as Asia becomes an increasingly popular destination for foreign trade and investments. Second, both China and Singapore have been learning from western experience when reforming their legal systems. The inherited common law based legal system in Singapore is a legacy of British colonial past, which began when the British East India Company founded Singapore in 1819.[231] The former Chief Justice of the SICC believed that Western models are not entirely appropriate for Singapore and it is important to evolve 'a body of autochthonous case law, capable of responding to the needs and concerns of the people who live and do business in Singapore'.[232] The SICC is a reflection of the 'Singapore way': a model of development that is coterminous with Singapore's social values and development objectives, in contrast to prevailing Western norms.[233]

In China, the judicial reforms also follow the strategy of integrating Chinese tradition and Western experience. However, due to the political and cultural differences, Chinese tradition and national conditions also need to be taken into consideration.[234] Any foreign model should be copied and adapted in line with Chinese reality instead of being transplanted directly and mechanically. As a result, suggestions will be based on the general conditions of the current Chinese legal system.

5.2 Jurisdiction

Parties may by written agreement submit an international commercial dispute to the CICC, as the CICC is part of the Supreme People's Court. Parties are now permitted to choose the SPC to hear their international commercial disputes. This a significant development in Chinese law and judicial practice. However, a written jurisdiction agreement in favour of the CICC is not by itself sufficient to confer jurisdiction on the CICC. Agreement regarding the choice of the CICC needs to meet the "actual requirement" of Article 34 of the Civil Procedure Law. Under the current Chinese legal framework, it is difficult to remove this requirement from the current CPL.

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[231] Helena H M Chan, *The Legal System of Singapore*, Singapore: Butterworths Asia, 1995.
[232] Lee T Yuan, *Singapore: Re-engineering Success*, Singapore: Oxford University Press, 1998.
[233] Tan Eugene K.B, Law and Values in Governance: The Singapore Way. *Hong Kong Law Journal*. 30, (1), 2000, p91-119.
[234] D.S. Liao, *Judicial Civilization and Judicial Reform in Contemporary China*, China: Central Compilation and Translation Press, 2007.Also see The Second Five Year Reform Plan of the People's Courts, the SPC, effective form 26 Oct 2005.

Firstly, one of the objectives of this requirement is protecting weaker parties in contract negotiations. For example, if there is no "actual connection" requirement, the party in the position of strength may take advantage of the choice of court agreement and choose the court which is favourable to it. The stronger party may force the other party to accept such a jurisdiction agreement by fraud, coercion, abuse of economic power, or other improper means, which may lead to circumvention of the law and damage the interests of the weaker party.[235] The requirement of "actual connection" can limit the choices of the stronger party and protect the weaker party to a certain extent.

Secondly, jurisdiction in civil and commercial disputes is one manifestation of national sovereignty. In China, the power and rights of the state overweigh party autonomy and the People's Courts are reluctant to permit parties to choose courts and governing law freely. In respect of jurisdiction agreements, the Rules of Court specify that SICC may exercise jurisdiction where there is a written jurisdiction agreement in favour of the SICC, and the parties are not seeking any form of prerogative relief.[236] Unlike the CICC, a written jurisdiction agreement in favour of the SICC is a sufficient basis for the SICC to be seized of jurisdiction. The dispute need not have any other connection with Singapore. Furthermore, the SICC can decline jurisdiction only where 'it is not appropriate' for the case to be heard by the SICC.[237] The SICC cannot refuse jurisdiction on the sole basis that the case is 'connected to a jurisdiction other than Singapore'.[238] However, there is no published guidance on how the SICC and the High Court will determine when it is or is not appropriate for them to assume (or decline) jurisdiction. This presumably will be clarified in due course by judicial decision-making. The Hague Convention does not impose a requirement for a connection with the jurisdiction on a choice of court agreement.

Unlike the CICC, the philosophy behind the SICC approach is that party autonomy is paramount. It can be seen that the SICC jurisdiction rules are designed to promote active forum shopping by potential users and are not generally concerned with connections to Singapore. Additionally, now that *Singapore's Choice of Court Agreement Act 2016* has come into force, implementing the *Hague Convention on Choice of Court Agreement*, parties must be very clear if they want their dispute to be heard only by the High Court and not the SICC. If they fail to specify their preferred court, their dispute shall be construed as including

[235] Q He, *The Difference and Consideration of the Rules of China Joining the Hague Convention on Choice of Court Agreement*, Wuhan University Journal, Vol4, 2016, p83.
[236] Rules of Court, Order 110, rule 7.
[237] Rules of Court, Order 110, rule 8(3).
[238] Rules of Court, Order 110, rule 8(2).

a submission to the SICC.[239] Considering the objectives of the CICC, the use of the 'actual connection' requirement should be removed. Chinese law should respect the autonomy of the parties and their right to choose a neutral court.

Firstly, there is no theoretical and practical need for setting such a requirement. Article 34 of the CPL provides that 'the parties to a contract or other property rights dispute may, in written agreements, choose the jurisdiction of a People's Court in a place where the defendant resides, the contract is executed, the contract is signed, the plaintiff resides, the subject is located, etc., or other places where the dispute has actual connection(s)'. Here the reference to 'etc' theoretically provides unlimited choices for the parties concerned and allows discretion to the People's Courts to determine the meaning of 'etc'. In practice, Chinese Courts have had a different understanding of the term and there are inconsistent decisions concerning the enforcement of the 'actual connection' requirement. If there is no coercion by one party of the other, an overseas jurisdiction where the non-Chinese claimant/defendant's domicile is located may be recognised as the forum.

Secondly, Chinese law permits the parties to choose the applicable law/governing law for foreign-related civil relations and there is no requirement that the foreign law need be connected to the dispute.[240] Choice of foreign law by itself does not constitute an 'actual connection' for the purpose of choice of forum. For instance, if the parties choose English law as the applicable law, but seek to commence litigation in China because of the connection requirement, it would lead to concerns regarding proof of English law in Chinese courts. Proving foreign law is a time-consuming and resource-intensive process, especially for the Chinese judges who are not proficient in English.

In addition to consensual jurisdiction, the CICC may hear a first instance international commercial case when it is a dispute that would have been heard by a High People's Court, but which has been referred to the CICC by that High People's Court with the approval of the SPC.[241] This approach involves the exercise of the power internally to allocate jurisdiction between two Chinese courts.[242] Under the framework of the SICC, a case may be transferred from the High Court to the SICC if the High Court considers that the following

[239] Rules of Court, Order 110, rule 1(2)(ca).
[240] Art 3 of the Law of the PRC on Application of Laws to Foreign-Related Civil Relations and Art 7 of the Regulations.
[241] Article 1 &2 of the Regulations.
[242] According to Article 36 of the CPL, if a people's court finds that a case it has entertained is not under its jurisdiction, it shall refer the case to the people's court that has jurisdiction over the case.

requirements are met: (1) the claims are 'of an international and commercial nature' and 'the parties do not seek any relief in the form of, or connected with, a prerogative order'; (2) it is 'more appropriate' for the case to be heard in the SICC; and (3) either a party to the case has applied for the transfer (with the consent of every party to the case) or the High Court after hearing the parties, orders that transfer on its own motion.[243]

Comparing the two different approaches, it is obvious that party autonomy plays an important role in the case-transferring process of the SICC. Under the Chinese legal system, case transfers are mostly executed in an administrative way which means the parties do not have a voice in such a process. Allocation of cases is mainly decided by the president of the court with administrative authority. Only when the case is accepted, can the judge know what case has been assigned or transferred. For the parties, there is no way to know what rules are used in such case transfers. In relation to the CICC 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. Besides, in the process of case transferring, parties should have the right to apply for a transfer from the High People's Court to the CICC. The SPC's concern about abusing legal resource by dealing with too many disputes is understandable. After all, the CICC is a constituent part of the SPC and the SPC does not hear first instance claims in practice. Resources of the CICC should not be spent on resolving disputes that may be resolved effectively by lower courts, arbitration or mediation. However, the Regulations have set up another restriction on the claims that the CICC should hear: only claims the value of which is above 300,000,000 Chinese Yuan (approximately £34,640,603). The disputes arising from the BRI mostly involve high value contracts concerning roadways, railways, maritime ports, power grids, gas pipelines and associated infrastructure projects. Moreover, the High People's Courts in China only hear claims the value of which is between 100,000,000 Chinese Yuen and 500,000,000 Chinese Yuen (approximately £11,314,052.11and£56,570,260.55 respectively), the restriction on the claims heard by the CICC is reasonable and will prevent cases of insubstantial economic significance from being brought before the CICC.

In the initial stage of the CICC, it is more urgent to improve its competitiveness by allowing party autonomy to choose the forum court and play a more important role in determining the CICC's jurisdiction.

[243] Rules of Court, Order 110, rule 12(4).

5.3 Internationalisation

As illustrated in Section 3 of Chapter 4, the CICC is in a disadvantaged position in terms of its composition of judges. It has no 'international' judges and all judges are Chinese citizens. Although the judges appointed to the CICC are well-regarded senior judges in Chinese courts, the diversity of judges of the CICC is still not significant enough to alleviate the possible concerns of foreign parties regarding the lack of neutrality of Chinese domestic judges. In order to alleviate the possible concerns, it is suggested that the CICC framework should be more internationalised. The first approach should be recognising English as one of the permitted languages for proceedings. However, the Regulations are circumscribed by the CPL which states that proceedings in cases involving foreign elements shall be conducted in 'language commonly used in China'.[244] As judicial interpretation, the Regulations cannot override the legislation. Although the parties could submit evidence in English without the need for Chinese translations, it is unlikely in practice. Firstly, the Regulations merely set up the basic requirements of the CICC judges. Nevertheless, there is no specific selection standard for evaluating the oral and written English ability of the judges. Given that foreign judges cannot be appointed to the CICC, a proper and transparent procedure for the appointment of CICC judges is critical to establishing the credibility of the CICC. Secondly, not only the judges but also the lawyers or legal representatives of both litigants would need to refer to the evidence submitted in the course of the proceedings. For example, in the cross-examination proceeding of witness and appraiser, it is not practicable for them to read evidence in a foreign language without Chinese translation.

When comparing the SICC with the CICC, a distinctive advantage of the SICC is its composition of judges. To date, the SICC has appointed 16 international judges, 7 from the United Kingdom, 4 from Australia, 1 from Canada, 1 from France, 1 from Hong Kong, 1 from Japan and 1 from the USA.[245] The foreign judges are drawn from both civil and common law jurisdictions. It is obvious that judges from the English common law jurisdiction play a leading role in the SICC commercial disputes resolution. It is a common knowledge that English law's reputation in international commercial dispute resolution lies in three key factors, including the calibre and experience of the judges, a relatively informal and flexible procedure, and a cohort of specialised solicitors and barristers.[246] Following the model of the English commercial court, English has been chosen as the working language

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[244] Article 262 of the CPL.
[245] See http://www.sicc.gov.sg/about-the-judges.
[246] R Southwell, *A Specialist Commercial Court in Singapore*, 2 Singapore Academy Law Journal 275, 1990.

and a foreign lawyer can represent parties for any purpose in a SICC dispute. In addition, according to the Legal Profession Act (LPA) of Singapore, a foreign lawyer needs to be registered with the Legal Service Regulatory Authority (LSRA) and pass the Foreign Practice Examination.[247] It is interesting that, similar to China, the traditional requirements for granting a foreign lawyer rights of audience before the Singapore High Court on *an ad hoc* basis are extremely stringent. Foreign lawyers who are Queen's Counsel or who hold an appointment of equivalent distinction may be admitted to practice in the Supreme Court of Singapore on an ad hoc basis in a specific case.[248] The court must be satisfied with the foreign lawyer's special qualifications or experience relevant to the case[249] and a foreign senior counsel is a 'necessity'.[250] However, the SICC gives greater latitude for foreign representation in SICC proceedings. A foreign lawyer who is granted full registration is permitted to represent parties in the SICC and appeal proceedings. The scope of a foreign lawyer's rights include appearing and pleading in any relevant proceedings, representing any party in any relevant proceedings or relevant appeal in any matter concerning those proceedings, giving advice, preparing documents and providing any other assistance in relation to, or arising out any relevant proceedings or relevant appeal. By contrast, a foreign lawyer who is granted restricted registration, may only represent parties for the purpose of making submissions on matters of foreign law, as permitted by the SICC or the Court of Appeal.[251] Foreign lawyers must satisfy various requirements in order to be granted registration, including proficiency in the English language and compliance with a code of ethics.[252] Besides, a foreign lawyer must have at least five years of experience in advocacy in order to be granted full registration.[253] To date, 87 foreign lawyers from different jurisdictions have been registered with the LSRA, 85 of them have been granted full registration and 2 English lawyers have been granted restricted registration.[254]

In summation, the SICC embraces participation by foreign judges and foreign lawyers. Many constraint in the CICC framework arise from the inconsistency between the Regulations and current Chinese laws. For example, there are conflicts regarding the participation of foreign judges/lawyers and the use of English. Given that the CICC was created and legitimated

[247] See rule 3 of the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014.

[248] See Section 15 (1) of Legal Profession Act (Singapore, Cap 161, 2009 rev ed).

[249] I*bid* Section15(1)(c).

[250] Legal Profession (*Ad Hoc Admission*) *Notification 2012* (Singapore, cap 161, 132/2012) 3(b).

[251] See Section 36P(1) and (2) of Legal Profession Act (Cap 161, 2009).

[252] See Rule 4-6 of Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (Singapore, cap 161, 851/2014).

[253] *Ibid.*

[254] *See* http://sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyer.

through judicial interpretation, it is necessary to make legislative changes to remedy the defect. Ideally, special legislation for the CICC should be established to pave an easier way for foreign lawyers to participate in the proceedings of the CICC. Nevertheless, China is dealing with international pressure to liberalise its legal service market, while balancing protection of domestic interests. Besides, in the Chinese legal system, the role of the legislature is exercised by the National People Congress (NPC) and its Standing Committee. The NPC is in session for only about two weeks each year, which is a short period of time for remedying statutory gaps and inadequacies.[255] Although the Standing Committee exercises some functions while the NPC is not in session, its capacity is extremely limited. The most important difference between the duties of the NPC and its Standing Committee is that the latter does not have legislative authority. Due to the short time of the NPC session and the limited capacity of its Standing Committee, it is not realistic and efficient for the legislator to issue amendments regarding the CICC. In order to improve the internationalisation of the CICC, it is more practical to put effort into the following matters: firstly, to improve the English proficiency of domestic lawyers and enhance their international experience to meet the needs of the CICC. By providing legal English training courses for Chinese lawyers and law school students, their knowledge of foreign law will be enriched, their cross-board negotiation and communication skills will be enhanced, and their ability to interpret and explain contract clauses will be improved. Secondly, the CICC should make full use of its Expert Committee. This approach will be discussed in detail in the next section.

5.4 Determining Foreign Law

Both Chinese law and the Regulation allow the parties to a foreign-related contract to choose foreign law as the governing law, even where the relevant foreign jurisdiction has no connection with the dispute or the parties concerned.[256] However, if the parties choose English law as the applicable law, but commence litigation before the CICC because of the actual connection requirement, it leads to concerns regarding how English law is to be proved in the Chinese proceedings. The question of how foreign law is determined is of

[255] W Li, Judicial Interpretation in China, 5 Willamette Journal of International Law & Dispute Resolution, 1997, 87, p104.

[256] See Art 3 of the PRC on Application of Laws to Foreign-Related Civil Relations and Art 7 of the Regulations. However, the choice of foreign law by itself only does not constitute a connecting factor for the purpose of choice of forum.

critical importance for every legal system. The approach differs between common law and civil law jurisdictions.

Under the common law, foreign law is generally required to be pleaded as an issue of fact and provided by expert evidence.[257] As courts are deemed to have no knowledge of facts, the law should be interpreted and explained through expert evidence. Previous decisions as to the content of foreign law are not admissible for the purpose of proving foreign law.[258] By contrast, in civil law jurisdictions, the content of foreign law is considered to be a question of law, not a question of fact.[259] In view of the principle that the court knows the law, the parties to a dispute do not need to prove the foreign law. Instead, the courts ascertain and apply the law. If the court does not have sufficient knowledge of the foreign law, it must ascertain the foreign itself, either on the basis of its own investigation or on the basis of evidence provided by the parties. Article 10 of the PRC on Application of Laws to Foreign-Related Civil Relations provides that: "The foreign law applicable to foreign-related civil relations should be determined by the people's court, arbitral body or administrative organ. Any party who chooses to apply the law of a foreign country must provide the law of that country. If the law of the foreign country cannot be determined or the law of that country does not make provisions, the law of the People's Republic of China shall apply."[260] However, even though the judges of the CICC are chosen from the qualified senior judges of the SPC, their ability to determine foreign laws is quite limited. Among the 15 CICC judges, only eight have studied abroad and there are no sufficient details about their studies. The lack of foreign judges and language barrier lead to the CICC judges having difficulties in determining foreign law.

The SICC represents an interesting departure from the traditional common law approach. In SICC proceedings, a party may apply for an order that any question of foreign law shall be determined on the basis of submission of evidence (oral or written or both), instead of proof.[261] Before making such an order, the SICC must be satisfied that 'all parties are or will be represented by counsel who are competent to submit on the relevant question of foreign

[257] For a detailed discussion of the principles in common law jurisdiction, see J McComish, Pleading and Proving Foreign Law in Australia, 31 Melbourne University Review 400, 2007, 427; David Foxton, Foreign Law in Domestic Courts, 29 Singapore Academy of Law Journal 194, 2017, 196.
[258] See Foxton, Foreign Law in Domestic Courts, p203-204.
[259] For a discussion of civil law jurisdictions, see T Hartley, Pleading and Proof of Foreign Law: The Major European Systems Compared 45(2) International and Comparative Law Quarterly, 1996, p271.
[260] See Art 10 of the Application of Laws to Foreign-Related Civil Relations of PRC.
[261] Rules of Court O 110 r 25(1); Supreme Court of Judicature Act s 18L.

law'.[262] Regarding the assessment of the counsel's competence, the SICC may consider the experience of the counsel in practising the foreign law or subject matter in question, the qualifications of the counsel in relation to the foreign law or the subject matter in question, and proficiency in the language of the foreign law in question.[263] In determining the foreign law on the basis of submission, the SICC (or the Court of Appeal in an appeal from the SICC) may have regard to a broad range of sources, including the legislation and decisions of the courts of the foreign country, any judgment of the Singapore Court of Appeal, the Singapore High Court or the SICC relating to similar questions of foreign law, and any other authorities or persuasive materials.[264] The Court of Appeal may determine any question of foreign law on the basis of submissions or on its own motion.[265]

There has been one SICC case in which an issue of foreign law has been determined by the SICC. In *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*, [266] the governing law of two of the relevant agreements was Indonesian law (with Singapore as the governing law of the other agreements).[267] In order to determine Indonesian law, the SICC considered expert reports and also heard oral submissions by one of the defendants' experts and witness evidence by one of the plaintiffs' experts. [268] The expert representing the defendants was a member of the Indonesian Bar and was allowed to make oral submissions under O 110 r 25 of the Rules of Court, which allows a question of foreign law to be determined on the basis of submissions instead of proof. [269] However, the expert chosen by the plaintiffs to make submissions was an academic and not a member of the Indonesian Bar. As a result, the SICC determined that he did not qualify under O 110 r 25 of the Rules of Court to make oral submissions before the SICC. However, based on the parties' agreement, he was allowed to provide oral submissions as a witness, without being subject to cross-examination.[270]

The discussion and case study above illustrate that the SICC has elaborated flexible procedure for determining foreign law. For China, the Regulation sets out a broad range of methods by which the CICC may determine foreign law, including on the basis of submissions of the parties, legal experts from China or abroad, professional institutions

[262] Rules of Court O 110 r 25(2).
[263] Singapore International Commercial Court Practice Directions 2017 (Singapore) 110(4).
[264] Rules of Court O 110 r 26(4), 29(1).
[265] Ibid O 110 r 29(1).
[266] *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* (2016) 4 SLR 1.
[267] Ibid 28 (99), 48-49 (180).
[268] Ibid 49-53 (184)-(194).
[269] Ibid 49-50 (184).
[270] Ibid 50-1 (187).

rendering law finding services (such as universities or mediation centres), members of the International Commercial Expert Committee (ICEC), the central authority of the other contracting party that has entered into a judicial assistance treaty with China, the Chinese Embassy or Consulate in the relevant country and the Embassy of the relevant country in China.[271] Working Rules of the ICEC of the SPC also confirm that the Expert Committee member shall provide advisory opinions on specialised legal issues concerning international treaties, international commercial rules, finding and applying foreign laws involved in cases heard by the SICC and all the People's Courts.[272] Owing to the non-international composition of the CICC judicial panel, the Expert Committee plays an important role in determining foreign law. Among the 31 experts, 9 are from the Chinese Mainland and the other 22 experts come from 14 different jurisdictions.[273] This a significant innovation which allows limited international influence on Chinese courts. If it is utilised well, the Expert Committee could bring international input into the work of the CICC and make up for the absence of foreign judges on the CICC panel. Under the CICC framework, parties are allowed to choose member(s) of the Expert Committee to act as mediators. The parties may jointly choose 1-3 Expert members to conduct the pre-trial mediation. If the parties fail to reach agreement on the choice of mediators, the CICC shall designate 1-3 Expert Members to act as mediators.[274] However, some specific rules for the Expert Members' work need to be clarified and refined. For instance, in terms of their participation in mediation, the current rules require the Expert Members to reply within 7 working days of receiving the request for opinion on entrusted mediation.[275] The whole mediation process should not exceed 20 working days.[276] Since Expert Members are not full-time staff of the Expert Committee and come from different jurisdictions, it is difficult for them to review documents, examine evidence, determine foreign law and form official opinions during this short period of time. It is suggested that it may be more effective to appoint these members as Expert People's Assessors and to sit with the CICC judges in a collegial panel on an ad hoc basis. The experts could provide valuable and timely advice for the CICC judges, but it would remain the CICC judges' responsibility to make the decision and produce the judgment.

[271] Article 8 of the Regulations.

[272] Article 3(2) of Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trail Implement), General Office pf the Supreme People's Court, 30 November 2018.

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

[274] Article 17 of Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trail Implement), General Office pf the Supreme People's Court, 30 November 2018.

[275] Article 9 of Working Rules of the International Commercial Expert Committee of the Supreme People's Court (For Trail Implement), General Office pf the Supreme People's Court, 30 November 2018.

[276] See above n 43.1

The CICC requires all expert opinions on foreign law to be presented during the hearing in accordance with the law, and the parties shall be afforded a full opportunity to be heard.[277] However, this regulation does not expressly state the outcome if there is a disagreement as to the interpretation and application of the foreign law. The most likely outcome is that the court will apply PRC law by default under Article 10 of the Law of the PRC on Application of Laws to Foreign-Related Civil Relations, as explained above. The absence from the bench of international commercial judges leads to the necessity of determining an approach to resolve such a disagreement, for example, there is a difference between the parties' submissions and Expert Members' opinions or an inconsistency between one member's opinion of the Expert Committee and the other member's opinions. It is likely that the SPC will produce more judicial guidance on these matters.

5.5 Enforceability of CICC Judgments

While all courts are concerned with the enforceability of their judgments across borders, the matter of enforcement is more acute in relation to international commercial courts as parties are likely to come from different jurisdictions and their assets may be located in several jurisdictions.[278] The successful party will need the court's judgment to be enforceable in the jurisdiction in which the assets of the unsuccessful party are located.[279] The paramount reason why arbitration remains a popular resolution mechanism for international commercial disputes is the apparent ease of enforcing an arbitral award under the New York Convention. A major challenge for international commercial courts is to "catch up" with international arbitration by overcoming obstacles as to the recognition and enforcement of international court judgments. Since the establishment of the SICC, Singapore has increased the international enforceability of its judgments through a combination of regulations.

Singapore has ratified the Hague Convention, and allows for the enforcement of foreign judgments when the parties have entered into a choice of court agreement. However, cases transferred to the SICC without such an agreement may not be covered by the Convention. According to the Convention, its rules apply to a judgment given by the SICC pursuant to

[277] Article 8 of the Regulations.
[278] Justice Anselmo Reyes, Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court, *2 Journal of International and Comparative Law 337*, 2015, p355-6.
[279] Ibid; Zain Al Abdin Sharar and Mohammed Al Khulaifi, The Courts in Qatar Financial Centre and Dubai International Financial Centre: A Comparative Analysis, *46 Hong Kong Law Journal* 529, 2016, p531.

the transfer of a case from the Singapore High Court.[280] Nevertheless, recognition or enforcement of the judgment may be refused by a party who objected to the transfer. In order to solve the potential problem and assist in the recognition and enforceability of a judgment made by the SICC, the Rules of Court provide that: where an exclusive choice of court agreement designates the Singapore High Court but not the SICC as a chosen court , the High Court may, before transferring the case to the SICC, direct every party to the exclusive choice of court agreement to vary that agreement, so as to designate the SICC as a chosen court for the case.[281]

Additionally, under the Reciprocal Enforcement of Commonwealth Judgments Act 1985 (Singapore)[282] SICC judgments may be may be enforced in ten jurisdictions: Australia, Brunei, Darussalam, India (except the State of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom and Windward Islands. Under the Reciprocal Enforcement of Foreign Judgments Act 2001, [283] the Hong Kong Special Administrative Region is covered. To facilitate the enforcement of money judgments by common law courts, the Supreme Court of Singapore has entered into Memoranda of Guidance as to the Enforcement of Money Judgments with a few courts.[284] In addition, it is possible to enforce foreign judgments based on the principle of reciprocity. On 9 December 2016, the Nanjing Intermediate People's Court issued a decision in which a judgment made by a Singapore court is recognized and enforced in China for the first time. The decision confirmed that since the High Court of Singapore has recognized and enforced a Chinese judgment in 2014, according to the principle of reciprocity, Chinese courts can recognize and enforce a judgment made by a Singapore court. [285]

Under the CICC framework, the Regulations do not make any provision for the enforcement of CICC judgments in foreign jurisdictions. As discussed in the previous chapter, China has signed, but not ratified the 2005 Hague Convention. If China does in the future, the Hague Convention would undoubtedly improve the international enforceability of Chinese

[280] Article 8 (5) of the Hague Convention.
[281] Rules of Court O 110 r 13A(2).
[282] The Reciprocal Enforcement of Commonwealth Judgements Act (Singapore, cap 264,1985 re ed).
[283] The Reciprocal Enforcement of Foreign Judgments Act (Singapore, cap 264, 2001 re ed).
[284] Bermuda-Supreme Court of Bermuda; State of Qatar-Qatar International Court and Dispute Resolution centre; United Arab Emirates, Abu Dhabi-Abu Dhabi Global Market Courts, United Arab Emirates; Dubai-Dubai International Financial Centre Courts.
[285] *Kolmar Group AG v Jiangsu Textile Industry Group Import & Export Co., Ltd*, Su Xie Wai Ren No.3 Civil Ruling, Nanjing Intermediate People’s Court. Dec 9 2016.

judgments. Similar to Singapore, China has signed bilateral judicial assistance treaties in civil and commercial matters with 39 countries. However, according to the interpretation of the SPC, judicial assistance would be more about "investigating and collecting evidence, as well as serving judicial papers or documents".[286] China's general aversion to international judicial assistance is illustrated by the reluctance of the judiciary to recognise foreign decisions and procedures, based on the belief that such recognition might constitute an infringement of the country's territorial sovereignty.[287] As a result, the international enforceability of CICC judgments is currently limited.

The first measure to deal with such problems is to build a legal framework for the recognition and enforcement of foreign judgments based on jurisdiction agreements, both in regional and global scopes. Taking the SICC for example, there are regional agreements that ensure Singapore and other Anglo-Commonwealth jurisdictions can mutually recognize and enforce the judgments each other. In addition, the SICC has entered into mutual recognition and enforcement agreements with the United Kingdom, Australia, New Zealand, Malaysia, Brunei and India. From November 2016, Singapore has become a contracting state of the Hague Convention, which enables qualifying SICC decisions to be recognised and enforced in EU member states. The combination of the traditional common law legal culture of the Anglo-Commonwealth jurisdictions, mutual recognition and enforcement of judicial agreements and the Hague Convention lays the legal ground for the international recognition and enforceability of the SICC judgments. It is proposed that China could use a similar way by establishing a regional legal framework based on jurisdiction agreements, especially among the countries on the map of the BRI.

The second approach is creating a network in which litigation and alternative dispute resolution methods can work together. While international arbitration is law-based and requires a large quantity of evidence and lengthy trial-like procedure, mediation is essentially a dispute resolution method based on negotiations between the parties and resolve a dispute quickly through concessions without causing a break in relations between the parties. In Singapore, a new method called Arbitration-Mediation-Arbitration (Arb-Med-Arb) has received attention. According to the explanation of the Singapore International Arbitration Centre (SIAC), Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If the parties are able to settle their dispute through

[286] See http://english.court.gov.cn/2015-07/21/content_21371231.htm

[287] See T Chen, International Judicial Assistance in China: Plodding into the Twenty-First Century, *The International Lawyer*, Vol.26, No.2, 1992, 387-412.

mediation, their mediated settlement may be recorded as a consent award which is generally accepted as an arbitral award. If the parties are unable to settle their dispute through mediation, they may continue with the arbitration proceeding. Moreover, parties wishing to take advantage of this dispute resolution mechanism as administered by SIAC and Singapore International Mediation Centre (SIMC), may consider incorporating an Arb-Med-Arb clause in their contracts.[288]

The Dubai International Financial (DIFC) Courts began to implement a new practice in 2015 based on a concept that has transcended the efforts of the SICC. This method is devoted to utilising the recognition and enforcement system under the New York Convention, by referring a monetary judgment by the DIFC Courts to the DIFC-LCIA Arbitration Centre (which is an arbitration institution annexed to the DIFC), and converting the monetary judgment into an arbitration award by an expedient arbitration.[289] In practice, if payment is not made pursuant to that demand for any reason, the judgment creditor is able to consider that a "Judgment Payment Dispute" has arisen, and can refer the Judgment Payment Dispute to arbitration at the Arbitration Centre. This method, which was proposed by the Chief Justice Michael Hwang, is a novel and unprecedented practice. It enables a judgment creditor to have an additional option for securing payment of his judgment by taking advantage of the flexibility of international arbitration without losing its right under the judgment.[290] Now, under the Dubai Law, judgments of the DIFC Courts are registrable in the state courts of mainland Dubai without any challenge to the substance of the judgments. Once registered, the judgments of DIFC Courts are translated into Arabic and treated as such in the UAE. In addition, by virtue of the Gulf Cooperation Council (GCC) Convention, which provides for mutual recognition and enforcement of all court judgments among GCC countries, DIFC Courts judgments are fully enforceable throughout the Gulf region. The experience of the SICC and DIFC afford the CICC lessons that merit attention. Transferring a monetary into an arbitral award may assistant the CICC judgments to be recognised and enforced more broadly, especially when the Hague Convention has significantly fewer contracting states than the New York Convention.

[288] See http://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause
[289] DIFC Courts Practice Directions No 2 of 2015- Referral of Judgment Payment Disputes to Arbitration.
[290] Michael Hwang, "The DIFC Courts Judgment-Arbitration - Referral of Judgment Payment Disputes to Arbitration", The DIFC Courts Lecture, 19 November 2014.

Chapter 6 The Future of International Commercial Dispute Resolution in China

The previous chapters have offered an examination of the dispute settlement mechanisms currently available in China in relation to international commercial disputes. Each mechanism has its own features, benefits and drawbacks. This chapter aims to explore the relationship among the different dispute settlement mechanisms, and draws some implications as to the future of international commercial dispute resolution in China.

6.1 Background of Chinese Legal Culture

In contrast to the Western style of dispute management, the fundamental virtue underlying Chinese conflict management and resolution is " harmony first". In China, comprehensive harmony is promoted by traditional philosophies as the ultimate goal of a society. In other words, the harmony of society enjoys priority over other values and requires effort from every member of the society.[291] For a long time in Chinese society, disputes have been regarded as unpleasant disturbances to be avoided as much as possible. As a result, when disputes arose, parties traditionally were encouraged to compromise and focus more on repairing the relationship instead of seeking justice based on contractual provision. Using a formal mechanism for resolving disputes between two individuals, such as litigation, represents unnecessary trouble and relationship failure. For two business partners, bringing disputes to the people's courts normally means the end of their cooperation and relationship. Furthermore, Chinese society's resentment of litigation is rooted in another element: a litigious society is thought, traditionally, to lead to a unpleasant, uncomfortable and unstable situation because it runs against the general pursuit of harmony. Non-litigation methods of resolution, such as arbitration and mediation, are preferred by the parties and are better suited to the Chinese culture and environment.[292]

In modern Chinese society, some elements of traditional philosophies have been replaced by the idea of "Building a socialist harmonious society".[293] It is a clear successor to the

[291] Wang G, Chinese Mechanism for Resolving Investor-State Disputes. *Jindal Journal of International Affairs*, 2011, p222.
[292] Meski Wang, Comparative Law in Global Context: The Legal System of Asia and Africa, Cambridge University Press, 2009.
[293] Decision of the Central Committee of the Communist Party of China on Building Harmonious Society of Socialism, issued on 11 Oct 2006.

traditional pursuit of harmony. Harmony is still taken to be an important principle of society's value system, and individuals are still expected to be self- disciplined and to submerge their personal interests to the greater good of society. Currently, the rule of law is used as one of the basic principles for building a socialist harmonious society,[294] and the enhancement of law is the central theme of socialist harmony.[295]

6.2 The connection between Chinese Culture and Dispute Resolution in China

The "harmony-centred" culture has greatly influenced China's modern legal system, including dispute resolution mechanisms. The SPC has issued several guidance notices on judicial mediation, the latest one is the 2010 Notice on Issuing Several Opinions on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment'.[296] Article 2 of this Notice requires Chinese courts to give priority to mediation at all stages during the civil and commercial court progress, including before and after the commencement of litigation. Where there is a possibility of mediation, mediation should be undertaken. Article 11 provides that the mediator may be selected jointly by the parties or may be nominated by the court with the consent of the parties.[297] However, in general practice, the judge who is hearing a case also acts as a mediator because of their familiarity with the case. In addition, in order to improve the diversified dispute settlement mechanism and enhance the efficiency of non-litigation dispute settlement mechanism, the SPC also issued Provisions on Mediation Invited by People's Courts. Under people's courts' appointment, eligible individuals and organizations can be invited to conduct mediation before or after filling a case.[298] Qualified individuals or organizations can be listed, such as National Party Congress representatives, experts and scholars, lawyers, arbitrators, retired legal professionals, etc.[299]

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[294] Ibid.

[295] Mo Zhang, The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience. *Temple International & Comparative Law Journal 24*, 2010, 42.

[296] 2010 Notice on Issuing Several Opinions on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment', SPC, effective as of 7 June 2010.

[297] Ibid.

[298] Provisions of the Supreme People's Court on Mediation Invited by People's Courts, adopted at the 1684th session of the Judicial Committee of the Supreme people's Court on 23 May, 2016; effective as of 1 July 2016.

[299] Article 6, ibid.

In China, judicial mediation, including pre-trial mediation, is one of several types of mediation. According to the CPL, the legal trial consists of four stages: court investigation, court discussion, court mediation and announcement of the decisions. [300] In most trials, mediation takes place right after the court investigation and discussion. Moreover, if a case is mediated and it fails to bring about agreement between the parties, the mediator will then be the judge, or one of the judges, to decide the case. Reports have noted that Chinese courts are handling more cases that at any time in the past, 6.8 million cases have been heard in 2018, almost double the number heard in 2009.[301] Due to the rising volume of cases, judges are under time-pressure and tend to resolve cases in a more effective way. Accordingly, courts have been revising their incentive mechanisms to encourage judicial mediation.[302] Hence, many courts now require their judges to settle a certain percentage of the cases they handle by using mediation. In fact, the ratio of cases with a mediated settlement has become a criterion in assessing a judge's performance in China.[303]

During the flexible process of mediation, a seasoned mediator does not take sides and knows the importance of playing the role of an impartial listener, especially when one party meets the mediator in the absence of the other party.[304] A skilled mediator can carefully manipulate both the quantity (amount) and quality (level of detail) of information to be exchanged between parties before they speak to each other. By contrast, the formal process of adjudication requires a judge make a decision based on evidence and submission of parties. Although the judge has discretion, such discretion is rather limited because procedure and outcomes are restricted by legal norms and categories.[305] The process turns even more legalistic when lawyers are involved. Lawyers are hired by their clients to stand for their legal rights and maximize their own interests. As legal specialities, lawyers are more familiar with the law than many litigants, they know how to avoid presenting repetitive arguments and providing legal irrelevant information. However, judicial mediation in China allows greater control of the process by the parties and judge-mediator. The mediator (also the judge) assists the parties to have an understanding of various methods, creating chances for both parties to exchange information. Moreover, sometimes the judge-mediator discusses specific legal questions and strategically seeks to

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[300] Chapter 8 of the CPL.

[301] Zhou Qiang, "The Supreme Court Work Report (2018)", 12 March 2019, available at https://www.chinacourt.org/article/detail/2019/03/id/3791943.shtml

[302] The SPC Provision on Court's Civil Mediation Work in 2004, *fashi* (2004) No.12.

[303] Minzner, Carl, "China's Turn Against Law", *American Journal of Comparative* 59 (4) (2011) : p935-84.

[304] Conley, John M., and William M. O'Barr, *Just Words: Law, Language and Power*, 2nd ed. University of Chicago Press, (2012): paras. 1.002-1.004.

[305] Bishop, P et al, The Art and Practice of Mediation, 2nd ed. Emond Montgomery Publications, (2015), p38.

broaden the scope of a dispute in order to identify commonalities shared by the parties, such as feelings, social norms or morality.[306] In the pre-trial process, the mediator (the judge) can explain the basic legal position to the parties and explore settlement possibilities. Hence, the parties are able to evaluate the potential and possible gains and losses based on the information provided by the judge-mediator. The judge-mediator may also rely on substantive law to prepare and revise the mediation scheme for the parties to consult.[307]

The other important characteristic of judicial mediation in China is the enforceability of mediation agreements. With the assistance of the judge-mediator, both parties are inclined to conclude an agreement by making certain compromises in the mediation agreement. Under the CPL, when a mediation agreement is reached, the people's court shall draw up a written mediation statement. A mediation statement should clearly set forth the claims of the dispute, the facts of the case and the result of the mediation.[308] Furthermore, the CPL also states that the parties must perform any written mediation agreement or other legally effective document that is enforceable by the people's courts. Where a party refuses to perform such a document, the party may apply to the people's court for execution.[309] In the light of difficulty for the people's courts to enforce judgments, there are more benefits that the mediation could bring to the parties. Instead of a judgment which may not be fully enforced , both the parties may be able to gain something from the mediation, especially before the formal trial.[310]

In brief, it is obvious that the legal system in China shows a positive attitude towards mediation, enhancing the connection between litigation and non-litigation dispute settlement mechanisms.

6.3 The Example of the SICC

The main aims of the SICC include: to provide a solution to some of the limits of arbitration and to further Singapore's goal of being a legal hub of dispute resolution in Asia. In order to

[306] Kwai Hang Ng; Xin He, Internal Contradictions of Judicial Mediation in China, *Law & Social Inquiry 39*, no.2 Spring, 2014, p285-312.
[307] L Fri, The Role of the Law in Chinese Judicial Mediation: A Case Study, International Journal of Conflict Management 26(4) 2015,p386.
[308] Article 97 of the CPL.
[309] Article 236 of the CPL.
[310] Iwai Nobuaki, Alternative Dispute Resolution in Court: The Japanese Experience, (10) *Civil Justice Quarterly*, 1991, p108.

achieve these aims, it is critical to manage the relationship between international commercial courts and alternative dispute resolutions. First, the SICC is not designed to cannibalize the caseload of the Singapore International Arbitration Centre (SIAC). In fact, the target client pool of the SICC will be parties who do not wish have cases heard by national courts and, at the same time, have reservations about certain features of international arbitration. These reservations would be the lack of an appellate process or restrictions on the scope of arbitration. Hence, the SICC and the SIAC should complement each other in providing dispute resolution options to commercial parities. Secondly, to some extent, the SICC will have to learn from SIAC how to market its services, particularly to overseas parties. The SICC has one significant advantage which would not be available to any new arbitration institution; the High Court can transfer to the SICC cases that meet the requirements of SICC Jurisdiction after consultation with the parities. As a result, assuming that the High Court can secure the consent of the parties there could be a steady pool of cases coming through the SICC. Moreover, compared with the need for confidentiality of arbitration, more public awareness will be given to the SICC than the SIAC. Thirdly, to the extent that some of the features of SICC procedure prove popular, arbitration institutions can re-examine their own procedures and practice. Hence, the conclusion is that the SICC and SIAC will to some degree be competitors of each other because there will be parties who, faced with a choice of the Singapore High Court and the SIAC, might have chosen SIAC, and would now be attracted by some features of the SICC.

On 5 November 2014, the Singapore International Mediation Centre (SIMC) was launched. Chaired by Edwin Glasgow, a distinguished English QC, and having a panel of experienced international mediators, the SIMC is aiming to attract mediation for international disputes. The SIMC will complete the picture of the dispute resolution landscape in Singapore, and which are also available to non-Singapore disputants by opt-in jurisdiction.

6.4 A "One-Stop" Dispute Resolution Platform with Chinese Characteristics

The CICC aims actively to cultivate and improve diversified dispute resolution mechanisms : international commercial litigation, mediation and arbitration, and to resolve international commercial disputes effectively.[311] The CICC will cooperate with selected qualified international commercial arbitration institutions and mediation agencies to establish a "one-

[311] Notice Regarding the First Batch of 'one-stop shop' International Commercial Dispute by an International Commercial Arbitration and Mediation Organ under the Plural Resolution Mechanism, the SPC, 5 Dec 2015.

stop" dispute resolution hub/platform through which different dispute resolution mechanisms are effectively linked.[312] So far, seven arbitration/mediation institutions in China have confirmed that they will join the hub.[313] According to the designer of the CICC, such a dispute resolution hub will comprise the different functions of litigation, arbitration and mediation, and facilitate smooth dispute resolution procedures by offering the parties diverse, impartial, convenient, effective and low-cost dispute resolution mechanisms. The CICC is authorized to issue a judgment based on a mediation agreement where the parties so request.[314]

The CICC will have to compete with international commercial arbitration for now. It will have to learn how to market its services, particularly to overseas parties. The CICC may have to learn not only from other international commercial courts, but also from international commercial arbitration institutions. However, the CICC has one significant advantage which is not available to any new arbitration institution. As explained in previous chapters, the Supreme People's courts and High People's courts can transfer cases that meet the requirements of CICC jurisdiction, and so there could be a steady pool of cases transferred to the CICC. In addition, there is some concern about the degree of international enforceability of CICC judgments as compared to the breadth of coverage of international arbitration awards. China's 2017 signature of the Hague Convention, which guarantees the recognition and enforcement of judgments from other Contracting States subject to a limited number of exceptions, will substantially improve the enforceability of the CICC judgments abroad.

Regarding non-litigation dispute resolution mechanisms, such as arbitration, it is crucial to realise the pressure brought by the new international commercial courts. The emphasis on mediation in Chinese legal culture indicates that mediation will be an indispensable part in international commercial disputes resolution. However, some problems will need to be resolved before mediation can achieve its full potential. For instance, although the dual role of judges and mediators is claimed to contribute to the flexibility of the mediation process by offering obvious convenience and advantages, the mixing of processes remains problematic. First, there is a threat to impartiality of the judge-mediator and confidentiality of process. In mediation, the mediator may discuss a wide range of issues with the parties, including legal, personal, and even emotional issues that might not be discussed in litigation.

[312] Article 11 of the Regulations.
[313] Ibid.
[314] Art 24 of the Regulations.

Sometimes, in order to encourage both parties to reveal hidden concerns, the mediator has a meeting with one of the parties that does not include the other party. However, in the absence of an opponent, a party might be more inclined to disclose confidential information and strategies. The mediator may become more understanding, sympathetic and supportive of one party and inevitably become biased.[315] Besides, there are concerns that the judge might take into account information conveyed during mediation when making a judgment. Such facts which are not proved by evidence and discussed by court debate may help the judge to form his or her own view before the adjudication process. In other words, it is likely that the judge may have a "prediction" or "impression" of the likely adjudicatory outcome of the decision.[316]

The precise substantive and procedural details of such a "one-stop" dispute resolution hub/platform remains to be clarified. Operational a guidance should be published by the CICC or SPC to persuade law firms which have the task of advising international clients, especially those with business or investments related to the BRI, to look seriously at China as a dispute resolution hub to resolve their disputes with their international counterparties. China will be offering a variety of dispute resolution solutions, which should fit the client's needs and preference.

Chapter 7 Conclusion

China's accession to the Hague Convention would provide more certainty for international businesses and reduce their legal risks and costs. Chapter 2 of the dissertation revealed substantial differences between Chinese law and the Hague Convention with respect to exclusivity of jurisdiction agreements, the scope of jurisdiction agreements, the validity of jurisdiction agreements, and the recognition and enforcement of foreign judgments. The ratification of the Hague Convention and its legal status in Chinese domestic law was also discussed in this part. To avoid conflicts between the Hague Convention and Chinese law in judicial practice after China's ratification of the Convention, it is proposed that China should modify Chinese law by removing the actual connection requirement imposed upon foreign jurisdiction agreements. Besides, if China ratifies the Convention, some restrictions to the

[315] Michael Hwang, The Role of Arbitrator as Settlement Facilitators: Commentary, A.J. Van Den Berg (ed), *ICCA Congress Series no 12* , Kluwer Law International, 2005, p573.
[316] Kwai Hang Ng; Xin He, Internal Contradictions of Judicial Mediation in China, *Law & Social Inquiry 39*, no.2, Spring 2014, p285-312.

application of the Hague Convention should be made through declarations under certain articles of the Hague Convention.

The objective of the Hague Convention is to promote international trade and investment through an international regime of judicial cooperation that enhances the certainty and effectiveness of jurisdiction agreements between parties to commercial transactions. It also seeks to replicate the effectiveness that the New York Convention has given to international arbitration. This dissertation then provides a detailed examination of China's international commercial arbitration system, it is argued that China has developed its arbitration system rapidly during the past few decades. However, foreign parties should be aware of the implicit flaws in China's developing arbitration system.

Although China has some influential arbitration institutions, their ability to promote the development of substantive commercial law appears to be limited because of their *ad hoc* nature and the confidential nature of arbitration awards.[317] China has shown a commitment to continuing to improve its legal system continued legislation and SPC's interpretations; not only to overcome the flaws in the current international commercial arbitration system, but also to draw China's legal system closer to international norms.

In order to provide enhanced legal services to the BRI, promote China's participation in global business and better integrate China into global judicial cooperation and recognition, the CICC has been established. Chapter 4 aims to provide a comprehensive and systematic analyse of the framework of the CICC. Then suggestions for the refinement and improvement of the CICC have also been set out in Chapter 5. For example, the CICC needs to improve its competitiveness by allowing more party autonomy, improving the English language proficiency of lawyers and judges and making full use of the Expert Committee of the CICC.

Looking to the future of international commercial dispute resolution in China, after the Hague Convention, it is clear that litigation must compete and cooperate with arbitration and mediation, principally through the CICC "one-stop" platform for dispute resolution. Even though the design of the CICC is conservative because of its restriction on foreign lawyers, working language, and selection of judges etc, it represents China's effort in becoming more

[317] F Tiba, The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia, Loyola University of Chicago International Law Review 31, 2016.

“internationalised” in international commercial dispute resolution. However, it is still too early to tell whether the CICC will become a preferred venue for dispute resolution among other International Commercial Courts. It is also too early to judge whether the CICC will have a negative effect on the popularity of arbitration in China. It is hoped that this dissertation will show some of the differences between different courts, such as SICC, and between the CICC and alternative dispute resolutions. If the CICC could absorb international standards and practices, it is predicted that litigation will likely operate within an increasingly internationalised framework. It is hoped that the new international commercial court will enhance global recognition and enforcement of its judgments, improve the credibility of the Chinese judicial system, help in the development of China’s dispute resolution regime and finally offer parties flexibility and choice in disputes.

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