

# New Developments of the PRC Intl. Commercial Court

Authors | Cheng Chen, Partner; Sabine Neuhaus, Counsel

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## Introduction

The Judicial Committee of the Supreme People's Court of China has adopted *Provisions of the Supreme People's Court on Several Issues Concerning the Establishment of International Commercial Courts* (hereinafter referred to as "Several Provisions") on June 27, 2018. The enactment of Several Provisions is based on the *Organic Law of People's Courts of the People's Republic of China* (hereinafter referred to as "Organic Law of People's Courts"), *Civil Procedural Law of the People's Republic of China* (hereinafter referred to as "Civil Procedural Law") and other relevant laws and aims to serve and safeguard the "One Belt One Road" project. On June 29, 2018, the first and second International Commercial Court of the Supreme People's Court were officially established in Shenzhen and Xi'an respectively. Several Provisions came into effect on July 1, 2018, providing the legal basis for the establishment and operation of the China International Commercial Court (CICC) as a permanent court in the system of the Supreme People's Court.

Based on Several Provisions, the Supreme People's Court issued three supporting normative regulations on November 21, 2018, including the *Notice of the General Office of the Supreme People's Court on Determining the First Batch of International Commercial Arbitration and Mediation Institutions Included in the One-Stop Diversified Dispute Resolution Mechanism for International Commercial Disputes* (hereinafter referred to as "Notification"), the *Rules of the Supreme People's Court on International Commercial Court Procedure (Trial Implementation)* (hereinafter referred to as "Trial Regulation") and the *Working Rules of the International Commercial Expert Committee of the Supreme People's Court (Trial Implementation)* (together with Several Provisions, hereinafter collectively referred to as "CICC System"). The focus of the analysis in this article is on the jurisdiction of CICC. This article will consider the new CICC System and compare it with existing civil procedural legal provisions. On this basis, this article will examine the CICC System in light of the continuous development and adaptation of the existing legal system of the People's Republic of China as well as the room for further clarification and development of CICC and the CICC System.

According to Several Provisions, there are four main categories of cases that fall within the jurisdiction of CICC:

### **I. Consensual jurisdiction (Article 2.1 of Several Provisions)**

Before the promulgation of Several Provisions, the Supreme People's Court denied jurisdiction over any foreign-related commercial cases of first instance, except for "cases with a significant impact nationwide" and "cases that the Supreme People's Court deems within its jurisdiction" (Article 16 of Organic Law of the People's Courts, Article 20 of Civil Procedure Law). This practice was based on the existing Organic Law of People's Courts, Civil Procedural Law and related judicial interpretation as well as other special civil procedure laws (e.g. the *Law of the People's Republic of China on the Special Procedure for Maritime Litigation*, etc.), which govern the jurisdiction of certain courts mainly depending on the amount and subject matter in dispute (hereinafter referred to as: "Specific Jurisdiction")<sup>1</sup> and exclusive jurisdiction.

The new Article 2.1 of Several Provisions, however, stipulates that the concerned parties can agree to subject their dispute to the jurisdiction of the Supreme People's Court if the amount in dispute of a first-instance international commercial case amounts to or exceeds RMB 300 million. The legal basis of such an agreement is Article 34 of Civil Procedure Law, which states: "The litigants of a contract dispute or other property rights dispute may agree in writing on the selection of the People's Court at the location of the area that has an actual connection with the dispute, such as the defendant's domicile, the place of performance of the contract, the place of execution of the contract, the plaintiff's domicile, the location of the subject matter, etc., but such an agreement shall not violate the provisions on Specific Jurisdiction and exclusive jurisdiction herein." Because the jurisdiction of the Supreme People's Court extends to the entire Mainland of China, the parties to any international commercial case with an amount in dispute equaling or exceeding RMB 300 million and with an actual connection to Mainland China may choose CICC as their competent court of first instance. It is noteworthy that according to the *Notice of the Supreme People's Court on Adjustments to Standards Regarding Jurisdiction of Higher People's Courts and Intermediate People's Courts over Civil Cases of First Instance* issued on April 30, 2019, a higher people's court shall have

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<sup>1</sup> Reference is made to Articles 17 to 20 Civil Procedure Law, the *Notice of the Supreme People's Court on Adjustments to Standards Regarding Jurisdiction of Higher People's Courts and Intermediate People's Courts over Civil and Commercial Cases of First Instance*, etc.

jurisdiction over cases involving an amount in dispute equaling or exceeding 5 billion RMB or other first-instance civil cases that have a significant impact in the jurisdiction. This judicial interpretation greatly raises the threshold for the higher people's court to accept such cases. As a result, for international commercial cases with an amount in dispute between 300 million RMB and 5 billion RMB, the parties can either choose to submit their dispute to the intermediate people's court (first instance) followed by the higher people's court (second instance), or directly agree to submit their dispute to the jurisdiction of CICC. Accordingly, Article 2.1 of Several Provisions provides the parties with the possibility to submit their dispute to the jurisdiction of the Supreme People's Court in cases which previously would not have been accepted by the Supreme People's Court. Therefore, the consensual jurisdiction as stipulated in the CICC System is a significant breakthrough in the system of Specific Jurisdiction in the current civil litigation practice of the People's Republic of China.

Further, Article 15 of Several Provisions stipulates that "Judgments and rulings issued by CICC are legally effective judgments and rulings.", while Article 16 of Several Provisions stipulates that "With respect to the judgments, rulings and mediation documents issued by CICC that have become legally effective, the parties concerned may apply to the headquarter of the Supreme People's Court for review in accordance with the Civil Procedure Law." This means that CICC decisions are subject to the so-called "first instance limitation". As opposed to judgments which are subject to the so-called "second instance limitation" - where a) a first instance decision may be appealed to the next higher instance which is obliged to hear the appeal, and b) if an appeal is filed, the first instance decision is not yet legally effective and is therefore not yet enforceable - an CICC decision will be enforceable immediately upon being rendered, irrespective of the possibility to apply to the Supreme People's Court for review. In other words, there is no higher instance of appeal between CICC and the Supreme People's Court. In addition, under the current Civil Procedure Law, the right to file an application for review does not entail a right of the applicant that the case will be heard by a higher Chinese court, including the Supreme People's Court. Instead, the competent court will first decide on whether to accept such an application for review. Past court practice suggests that the prerequisites for a successful application for review are high. However, there is no caselaw which has been rendered under the new CICC System which would allow to assess the consequences of the "first instance limitation" as foreseen in the Several Provisions.

In summary, we believe that under the premise of consensual jurisdiction, the first instance limitation for trials may constitute an advantage for parties, because the

duration until an enforceable decision is rendered is shorter when compared to the second instance limitation. A further positive aspect for the parties may be the professional qualifications of judges and experts of the new CICC. However, because of CICC's high threshold of the amount in dispute, its immature procedural rules as well as the confidentiality of traditional arbitration procedures still speak in favor of traditional international commercial arbitration. We therefore estimate that the cases subjected to the jurisdiction of CICC based on consensual jurisdiction will not increase rapidly in the near future.

## **II. Application by a high People's Court to submit a case to the jurisdiction of the Supreme Court (CICC) (Article 2.2 of Several Provisions)**

Article 38 of Civil Procedure Law, which has entered into force before the enactment of Several Provisions and continues to apply, stipulates that "A superior People's Court is entitled to hear first-instance civil cases which are subject to the jurisdiction of the lower People's Court. A lower People's Court is entitled to apply to its superior People's Court that a first-instance civil case under its jurisdiction is heard by the superior People's Court, if such lower People's Court considers it necessary." Pursuant to Articles 16, 21 and 23 of Organic Law of People's Courts in the version in force as of January 1, 2019, both high People's Courts and intermediate People's Courts are entitled to handle "first-instance cases submitted to them by lower people's courts". However, these provisions do not confer this competence upon the Supreme People's Court. Based on the provisions of both the aforementioned Civil Procedure Law and Organic Law of People's Courts, we conclude that the transfer of jurisdiction stipulated in Article 38 of Civil Procedure Law mainly applies to the transfer of first instance civil cases from the lower courts to the intermediate or high People's Courts. The protection of the system of second instance limitation for trials means that, in principle, the Supreme People's Court does not accept cases of first instance courts transferred from a lower People's Court, including a high People's Court. Past judicial practice has confirmed this point of view.

Article 2.2 of Several Provisions makes it clear for the first time that a high People's Court may, when it considers that the first-instance international commercial case under its jurisdiction is more appropriate to be heard by the Supreme People's Court, take the initiative to transfer such a case to the Supreme People's Court upon the approval of the Supreme People's Court. Article 10 of Trial Regulation provides that where a high People's Court submits a case to the Supreme People's Court for trial, it shall provide detailed reasoning and enclose the relevant materials. CICC shall handle

such a case upon the approval of the Supreme People's Court. Several Provisions thus confer the procedural right to apply for a transfer of certain cases to the high People's Courts.

We are of the view that the possibility to transfer first-instance international commercial cases from high People's Courts to the CICC of the Supreme People's Court without any agreement on the jurisdiction of CICC by the concerned parties is a change from the second instance limitation to the first instance limitation for trials. As explained above, the first instance limitation for trials means that the decision rendered by CICC is enforceable immediately upon being rendered with the consequence that such a transfer to the CICC may unexpectedly deprive the parties of the possibility to appeal their case to a court of higher instance. This transfer possibility significantly affects the procedural rights of the concerned parties. Therefore, we still see room for further discussion of this change and its effect on the parties' procedural rights, such as the right to be informed about the transfer of jurisdiction, the possibility to challenge a transfer as well as the limitations to and the exact procedure to be followed for a transfer application by a high People's Court under Article 2.2 Several Provisions.

### **III. Jurisdiction to preserve evidence in arbitration, to set aside or enforce arbitral awards (Article 2.4 of Several Provisions)**

Pursuant to the relevant provisions of Civil Procedure Law and the *Arbitration Law of the People's Republic of China*, which came into force prior to the implementation of Several Provisions and continue to apply, the intermediate People's Court has the following jurisdiction in foreign-related commercial arbitrations: 1) the intermediate People's Court at the place where evidence is located has jurisdiction to preserve such evidence; 2) the intermediate People's Court at the place of respondent's domicile or where property is located has jurisdiction to preserve property or to order a party to undertake or refrain from undertaking a certain action; 3) the intermediate People's Court at the location of an arbitration commission has jurisdiction to set aside an arbitral award issued by this arbitration commission; and 4) the intermediate People's Court at the place of respondent's domicile or where property is located has jurisdiction to enforce an arbitral award. The above civil procedure provisions provide the involved parties as well as third parties in proceedings to preserve evidence or to enforce an arbitration award with a set of relatively complete measures of procedural relief, including the right 1) to object to enforcement, 2) to apply for a review of the enforcement proceedings to a superior court, 3) to file a civil lawsuit in case the

objection to enforcement is unsuccessful and appeal such a decision, as well as 4) to apply for trial supervision procedures.

However, in accordance with Articles 2.4 and 14 of Several Provisions, "Where the parties concerned agree to select an international commercial arbitration agency for arbitration prescribed in Article 11.1 hereof, they may, prior to the application for arbitration or after the commencement of arbitration procedures, apply to CICC to preserve relevant evidence, property or to order a party to undertake or refrain from undertaking a certain action. Where the concerned parties apply to CICC for setting aside or enforcement of the arbitral award issued by an international commercial arbitration agency prescribed in Article 11.1 hereof, CICC shall review this application in accordance with applicable legal provisions including Civil Procedure Law." According to the Notification, the international commercial arbitration agencies include China International Economic and Trade Arbitration Commission, Shanghai International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration, Beijing Arbitration Commission, China Maritime Arbitration Commission (hereinafter collectively referred to as "One-Stop Shop Arbitration Agency"). Based on Several Provisions, and pursuant to Articles 34 and 35 of Trial Regulation, where a party applies to preserve evidence, to set aside or enforce an arbitral award with respect to an international commercial case with an amount in dispute which equals or exceeds RMB 300 million or has otherwise a significant impact and is subject to the jurisdiction of a One-Stop Shop Arbitration Agency, CICC shall accept and review such an application, and issue a ruling pursuant to law.

Therefore, after the implementation of Several Provisions, if the parties have chosen a One-Stop Shop Arbitration Agency for arbitration, requests to preserve evidence or to order a party to undertake or refrain from undertaking a certain action, to set aside or to enforce arbitral awards can be directly addressed to CICC. Compared to the current civil procedural framework, this is a major development, because the parties are offered new options in international commercial arbitration cases.

Pursuant to Article 17 of Several Provisions, "For legally effective judgments, rulings and mediation documents issued by international commercial courts [i.e., CICC]<sup>2</sup>, the parties concerned may apply to international commercial courts for enforcement thereof." According to the institutional system of the Supreme People's Court, said judgments, rulings and mediation documents shall be directly enforced by the Executive Board of the Supreme People's Court. Thus, if a party to an arbitration applies directly

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<sup>2</sup> Clarification added by authors.

to the CICC to preserve evidence, to set aside or to enforce an arbitral award and such application is approved, the respondent and third parties will definitely lose their right to file an application for review of an unsuccessful objection to enforcement as well as their right to file an appeal of an unsuccessful lawsuit in case of an objection to enforcement due to a lack of any superior court above the Supreme People's Court.

We are of the view that the unilateral application of one party to the Supreme People's Court as described above will infringe the procedural rights of the opposing party as well as third parties, in particular creditors; meanwhile, it is undeniable that the efficiency of preserving evidence, setting aside or enforcing arbitration awards in Mainland China will be improved. Parties to an international commercial contract will have to take the above factors into consideration when they agree on a dispute resolution clause opting for a One-Stop Shop Arbitration Agency to resolve their dispute. Thus, the influence of the CICC System on the international competitiveness of One-Stop Shop Arbitration Agencies remains to be seen.

**IV. International commercial cases of first instance that have a significant impact nationwide (Article 2.3 of Several Provisions) and other international commercial cases which the Supreme People's Court considers necessary to be heard by CICC (Article 2.5 of Several Provisions)**

Pursuant to Article 2.3 and 2.5 of Several Provisions, CICC also has jurisdiction over international commercial cases of first instance with a significant impact nationwide, and other international commercial cases that the Supreme People's Court considers necessary to be heard by CICC. As mentioned above in relation to Article 2.1 of Several Provisions (Section I, first paragraph), the Supreme People's Court already had jurisdiction over international commercial cases of first instance with "a significant impact nationwide" and other international commercial cases "which the Supreme People's Court deems within its jurisdiction" under Article 16 of Organic Law of the People's Courts and Article 20 Civil Procedure Law. Articles 2.3 and 2.5 Several Provisions now attribute the same jurisdiction to the CICC as the permanent court of the Supreme People's Court. Therefore, we consider these provisions to be the continuation and development of the jurisdiction of the Supreme People's Court over first-instance cases within the pre-existing legal framework of civil litigation.

**Cases accepted by CICC so far**

Until now, CICC has not yet published any judgements, awards or mediation decisions which could be found through a search of the official publication channels. However, according to the news from the Supreme People's Court, the first CICC has accepted the following cases: a) unjust enrichment disputes between Asia optical Co., Ltd., Dongguan Sintai Optical Co., Ltd. and Japan Fuji Photo Film Co., Ltd., Fujifilm (China) Investment Co., Ltd., Shenzhen branch of Fujifilm (China) Investment Co., Ltd., and Fujifilm Opt-Electronics (Shenzhen) Co., Ltd.; b) product liability disputes between Guangdong Herbal Pharmacy Co., Ltd. and Italy Bruschetti S.R.L.; c) confirmation of the validity of an arbitration agreement in a dispute between British Virgin Islands Yunyu Co., Ltd. and Shenzhen Zhongyuancheng Commercial Investment Holdings Co., Ltd.; d) confirmation of the validity of an arbitration agreement in a dispute between Beijing HK CTS International Hotel Management Co., Ltd., Shenzhen Weijing Jinghua Hotel Co., Ltd. and Shenzhen Zhongyuancheng Commercial Investment Holdings Co., Ltd.; and e) confirmation of the validity of an arbitration agreement in a dispute between British Virgin Islands Xinjin Co., Ltd. and Shenzhen Zhongyuancheng Commercial Investment Holdings Co., Ltd. The second CICC has accepted the following cases: a) a dispute regarding the distribution of company profits between Yingte Biopharmacy Holdings Co., Ltd. and Red Bull Vitamin Drink Co., Ltd.; b) a dispute regarding the confirmation of a qualification as shareholder between Thailand Reignwood International (Group) Co., Ltd. and Red Bull Vitamin Drink Co., Ltd., Red Bull Vitamin Drink (Thailand) Co., Ltd.; c) disputes regarding the responsibility for damaging the company's interests between Global Market Holdings Co., Ltd. and Xu Xinxiong, Red Bull Vitamin Drink Co., Ltd.; and d) disputes regarding the responsibility for damaging the company's interests between Yingte Biopharmacy Holdings Co., Ltd. and Yan Bin, Red Bull Vitamin Drink Co., Ltd. These four cases accepted by the second CICC were initially accepted by the Beijing Higher People's Court. The Supreme People's Court considered that these four cases were first-instance international commercial cases that shall be heard by the CICC because of their significant impact, their model character, their complexity, the high interests at stake and the great concerns they pose for society. In addition, the Supreme People's Court decided that these four cases shall be jointly heard by the second CICC due to their relevancy. From this reasoning by the Supreme People's Court, we can infer that these four cases were accepted by the second CICC based on the jurisdiction stipulated in article 2.3 and article 2.5 of the Several Provisions.

## **Conclusion**



In conclusion, the establishment of CICC provides parties to an international commercial case with a high amount in dispute with a new way of dispute resolution, which may provide for a more efficient protection of the parties' rights. However, as a new feature in the judicial framework of Mainland China, the operation of CICC and related supporting regulations will be subject to further review and amendment. The questions and interpretations raised in this article are formulated from the perspective of jurisdiction, with the expectation that the CICC System will develop into an increasingly mature system in the future. In light of the new developments in the field of dispute resolution, we regard it as our duty as attorneys to assist clients during the negotiation of international commercial contracts involving a high transaction amount. In order to protect the best interests of our clients, we shall assist them in 1) making a rational choice of a dispute resolution institution, 2) selecting favorable procedures, as well as 3) drafting the relevant clauses. We will closely monitor the implementation of the CICC System and look forward to seeing it mature in the future.