

## THE CHINA INTERNATIONAL COMMERCIAL COURT: A SUPPORTIVE FORUM FOR INTERNATIONAL COMMERCIAL ARBITRATION

As the China International Commercial Court (**CICC**) approaches its third anniversary, this briefing gives some insight into its operation based on our recent experience acting as international counsel for the prevailing parties. Such insight is valuable, as the CICC is still relatively unfamiliar to many, having published under 15 judgments. In this case, the CICC was asked to set aside two China-seated CIETAC arbitral awards made in our client's favour. The CICC declined to set aside the awards and demonstrated an approach consistent with other well-developed, arbitration-friendly jurisdictions.

### THE CICC

The Supreme People's Court (**SPC**) established the CICC in June 2018 to deal with the increasingly international nature of business disputes and to enhance the legal framework supporting the Belt and Road Initiative. The Provisions of the SPC on Several Issues Regarding the Establishment of the CICC (**the SPC Provisions**) state in its recitals that the purpose is to protect the lawful rights of Chinese and foreign parties *equally*, and provide services and protection for Belt and Road construction. The CICC is a permanent adjudication organ of the SPC and consists of two courts: the First International Commercial Court is located in Shenzhen, and the Second International Commercial Court is located in Xi'an.

In line with its focus on international commercial disputes, various features of the CICC distinguish it from the pre-existing court structure. These include:

- **Enhanced finality:** judgments of the CICC are final and binding, and not subject to appeal, albeit may be revoked for retrial.
- **Specialist judges:** cases are heard by a panel of three or more judges. Decisions are by majority, but minority opinions may be specified in the judgment to increase transparency. The SPC has designated senior judges with qualifications including the ability to work in both Chinese and English, and familiarity with international conventions, treaties and practices.
- **Foreign law determination:** the International Commercial Expert Committee was constituted to assist judges sitting on CICC cases to determine points of foreign law, and consists of both Chinese and foreign legal experts. This complements a 'foreign law ascertainment platform' launched in late 2019.
- **"One-stop" dispute resolution:** the SPC has issued a Notification on the International Commercial Arbitration and Mediation Institutions Included in the "One-stop-shop" International Commercial ADR Mechanism to facilitate arbitration

### Key points

- The CICC was established in June 2018 by the Supreme People's Court to support resolution of disputes arising from the Belt and Road Initiative.
- The purpose of the CICC is to hear international commercial cases, including certain applications relating to international commercial arbitration proceedings and awards.
- For arbitral awards issued by certain institutions including CIETAC, parties may apply to the CICC for setting aside.
- In our recent experience, the CICC upheld two arbitral awards in favour of our client and adopted an approach in line with our experiences in other well-established supervisory jurisdictions.

and mediation. The institutions included comprise CIETAC, Beijing Arbitration Commission, Shanghai International Economic and Trade Arbitration Commission, Shenzhen Court of International Arbitration, China Maritime Arbitration Commission, Mediation Centre of China Council for the Promotion of International Trade, and Shanghai Commercial Mediation Centre. Parties may agree to use such an institution for mediation, or alternatively, a member of the International Commercial Expert Committee or an international mediation institution.

The jurisdiction of the CICC also includes various matters that are relevant to parties engaged in international arbitration proceedings. For example, parties to arbitrations administered by the above specified institutions may apply to the CICC for interim relief in support of the arbitration. This is subject to the general threshold that cases must concern an amount in dispute in excess of RMB300 million or have a 'nationwide significant impact'.

Relevant to our case, parties to arbitral awards issued by specified institutions may apply to the CICC for setting aside of the award, again subject to the value or impact requirement. In addition, parties may apply to the CICC for enforcement of arbitral awards.

Other than use in international arbitration, the CICC may handle international commercial cases:

- in the first instance, in which the parties have chosen by way of written agreement the jurisdiction of the SPC, the First International Commercial Court or the Second International Commercial Court with the amount in dispute being at least RMB300 million whereby the dispute has a connection with China;
- in the first instance, subject to the jurisdiction of the Higher People's Courts, which consider that the cases should be tried by the SPC and the SPC has given approval;
- the SPC considers appropriate.

However, despite it now being near its third anniversary, the CICC has published less than 15 judgments which means that many are still unfamiliar with it and its operations.

## **THE AWARDS AND SET ASIDE APPLICATIONS**

The underlying dispute arises from a private equity investment made by the Claimants into a Chinese restaurant business. It was found, by way of two CIETAC arbitral awards issued in April 2019, that the Claimants were induced into the acquisitions by misrepresentations made or endorsed by the three Respondents.

The Respondents filed petitions with the CICC in July 2019 seeking to set aside the awards. The Respondents' complaints hinged on whether Article 27(3) of the CIETAC Arbitration Rules (2012) (the **CIETAC Rules**), which provides for the Chairman of CIETAC to appoint all three members of the tribunal and designate a presiding arbitrator where either side has failed to nominate an arbitrator in a multi-party arbitration context, should apply to the proceedings or whether it was excluded by the parties' arbitration agreement. The arbitration clause provided, in summary, for each side to nominate one arbitrator and for a list procedure to appoint the presiding

arbitrator. The Respondents claimed that they had been unable to agree and jointly nominate an arbitrator, and that CIETAC should have appointed all three members of the tribunal in accordance with Article 27(3).

During the arbitration proceedings, CIETAC in fact notified the parties of its view that the arbitration clause amended the CIETAC Rules regarding constitution of the tribunal, and that the Chairman of CIETAC would appoint an arbitrator for the Respondents if they failed to do so. The Respondents agreed to jointly nominate an arbitrator, but reserved their rights to challenge the jurisdiction of the tribunal at a later stage.

In their set-aside petitions, the Respondents argued, among other things, that CIETAC's actions to constitute the tribunal violated the principle of equal treatment, were prejudicial to procedural fairness and violated social and public interests. The Respondents relied on the well-known French case in which the Cour de Cassation set aside the ICC award in *Siemens AG & BKMI Industrienlagen GmbH v. Dutco Constr. Co.* (the **Dutco case**) on the basis that public policy requires parties to be afforded equal rights to choose an arbitrator.

## CICC'S DECISIONS

The CICC conducted a virtual hearing in March 2020 and the judgments were **published** in early March 2021.

The CICC dismissed the petitions, with costs. The CICC's key findings included that:

- The parties' specifically-agreed procedure for constitution of the tribunal was neither inoperative nor in conflict with mandatory provisions of applicable procedural law, and so should be respected;
- As a matter of interpretation of the arbitration clause, the agreed procedure was clear including insofar as it referred to the rights of the 'Claimant(s)' and 'Respondent(s)' to collectively nominate an arbitrator;
- CIETAC had allowed each side sufficient time and opportunity to express their views and took such views into account. CIETAC had also explained the basis for its decisions and gave the Respondents ample time to nominate an arbitrator (with extensions spanning 16 months); and
- In agreement with our client's position, the Dutco case did not provide any binding precedent and was distinguishable on its facts.

Notably, the CICC considered the relevance of the Respondents having reserved their rights to object to the constitution of the tribunal, and commented that such "*opportunistic*" actions "*shall not be encouraged*".

## CONCLUSION

The case highlights the importance of a clear procedure for the constitution of the arbitral tribunal in the arbitration agreement. It also highlights the need to consider any potential inconsistencies with the applicable rules of the arbitral institution

It is as yet unclear whether the CICC will become increasingly active in the coming years, but based on this recent experience, it adopted a strongly pro- arbitration approach.

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