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Challenges and criticisms of international commercial courts: evaluation of their effectiveness, legitimacy and accessibility

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Introduction

In the last decade, the extraordinary phenomenon of international commercial courts (ICCs) has gained popularity and somewhat changed the landscape of international commercial dispute resolution.

The geography and organisational structure of ICCs vary widely. For instance, in the Gulf countries and Kazakhstan, ICCs are established in special economic zones and operate as separate bodies from the rest of the judicial system. Examples include:

- Dubai International Financial Centre (DIFC) Courts;
- Qatar International Financial Court and Dispute Resolution Centre (QICDRC);
- Abu Dhabi Global Market Courts (ADGM); and
- Astana International Financial Centre Court (AIFCC).

While another type of ICC serves as a chamber or division of a national court:

- Singapore International Commercial Court (SICC);
- Netherlands Commercial Court (NCC); and
- China International Commercial Court (CICC).

The idea behind ICCs is to absorb the best qualities of international commercial arbitration (international character, procedural flexibility, high quality of adjudicators, foreign lawyer participation) and domestic court litigation (publicity and possibility of appeal). The

ICCs themselves confirm this statement. In particular, the SICC website declares that it is an ‘arbitration in litigation’.

Nevertheless, ICCs have not revolutionised the landscape of international commercial dispute resolution; international commercial arbitration remains the dominant and preferred method of dispute resolution for some transnational enterprises.

In this context, it is essential to examine what obstacles ICCs have encountered, what has prevented them from shifting the paradigm in the dispute resolution sphere, and the criticism ICCs have faced during their development.

Roadblocks and concerns

The main driver behind the success of international commercial arbitration is the mechanism of recognition and enforcement of arbitral awards set out in the New York Convention, which has been ratified and enforced by approximately 170 contracting states. International surveys such as the Evolution of International Arbitration Survey also confirm the paramount importance of the ‘enforceability’ of arbitral awards, as this aspect ranks first in the category of ‘most valuable characteristic’ of international commercial arbitration.[1]

The first major roadblock to the broad success of ICCs is the absence of a similar consensus around the recognition of choice of court agreements and the recognition and enforcement of foreign judgments in civil and commercial matters. The Hague Convention on Choice of Court Agreements (HCCCA) is unlikely to be seen as having any prospect of large-scale ratification at this stage. It is possible to express restrained optimism about the Hague Conference

on Private International Law (HCCH) 2019 Judgments Convention in light of recent news about its ratification in the UK. However, the number of states that have ratified the HCCH 2019 Judgments Convention is still disproportionate to the number of contracting states to the New York Convention.

Consequently, the lack of a unified regime for the recognition of choice of court agreements and foreign judgments is an explicit constraint on the popularity of ICCs, as parties cannot be certain whether courts in other countries will recognise their choice of court agreement and, if a judgment is rendered, the problems they may experience in different jurisdictions at the recognition and enforcement phase. Considering that international commercial arbitration has advanced significantly over the past 50 years in resolving problems of enforcement, parties may prefer the tried-and-true dispute resolution tracks.

The second issue that arises regarding ICCs is their legitimacy. The term ‘legitimacy’ can be interpreted in a myriad of ways – and it is unlikely that the ICCs established by a state, regardless of their organisational form, will suffer from a lack of legitimacy – but certain aspects, such as the independence and biases of judges, may cause concern. One unique feature of some ICCs is the ability to appoint a foreign judge. This feature is particularly popular amongst ICCs in the Gulf countries and Kazakhstan, where judges from common law countries are appointed. Likewise, the SICC allows the appointment of foreign judges, for example, from civil law countries. In these cases, the word ‘international’, which defines the essence of the ICCs, does apply at least to the roster of judges, and the question of any bias is less relevant. The circumstances are different in the context of ICCs, where the roster of judges, despite the court’s international character, consists solely of nationals of the jurisdictior in which the ICCs is established. In that regard, a reasonable

question may arise as to what extent ICCs without foreign judges are truly 'international' and free from protectionist intentions in favour of local parties to the dispute.

This problem might be relevant for the CICC, where only Chinese nationals can be judges, and may explain the low number of cases handled since the CICC was established in 2018. The potential solution of the problem could be implementation of codes of conduct for judges, that would establish general principles on which ICC judges should orient themselves, such as independence, impartiality, equality, etc. Unfortunately, codes of conduct have not been adopted in many ICCs, but the SICC Judicial Code of Conduct is a positive example.[2]

A further obstacle to the development of ICCs is the confidentiality of disputes and the publicity of judgments. According to the previously mentioned Evolution of International Arbitration Survey, confidentiality is a crucial advantage of international commercial arbitration. Regarding complex transnational disputes with significant sums and projects at stake, disputing parties tend to avoid publicity and resolve the matter in arbitration behind closed doors. ICCs cannot offer a similar scenario to the parties because, despite their unique nature and differences from classical national courts, ICCs are still part of states' judicial systems, which tend to require public hearings and publication of judgments.

Nevertheless, some ICCs make exceptions and depart from the general rule of publicity of proceedings and judgments. According to the SICC Rules, Order 16, rule 9(1) the SICC may, on the application of a party, make an order that the case be heard in private or an order that no person must reveal or publish any information or document relating to the case. In deciding to make this order, the Court may have regard to whether the case is an 'offshore case' (ie,

does not have a substantial connection to Singapore) and any agreement between the parties on the making of such an order. Thus, it can be concluded that ICCs cannot offer total confidentiality of proceedings to the parties as in international commercial arbitration, but can still be flexible in this aspect and allow partial derogation from the general rule of publicity in some cases, as realised, for instance, in the SICC Rules.

An additional barrier that may inhibit the rapid development of ICCs is the cost of proceedings. The fees are generally higher than in ordinary domestic court litigation in the same jurisdictions and not substantially lower than the costs of resolving a dispute in arbitration. In particular, in the DIFC Court of First Instance, if the claim is worth up to $500,000, the fee will be $25,000, and the fee for the Appellant's Notice will bet $5,000.[3] Another example worth a mention is the NCC, which has a fixed rate for proceedings in the NCC District Court of €18,961 per party and in the NCC Court of Appeal of €5,282 per party.[4]

However, it is necessary to note the positive experience of DIFC courts, which allows for hearing disputes for a small amount in the special Small Claims Tribunal (SCT). According to the DIFC Annual Report for 2023, the SCT heard a higher number of cases than any other category of disputes.

Conclusion

While the new generation of ICCs have not revolutionised the field of international commercial dispute resolution, it has certainly changed it by providing parties with another option for dispute resolution that

combines some of the strengths of international commercial arbitration and national courts litigation.

Notwithstanding, problems such as the absence of a uniform regime for the recognition and enforcement of choice of court agreements and foreign judgments in civil and commercial matters, lack of confidentiality, the cost of proceedings, and concerns about the bias and neutrality of judges have prevented ICCs from being a true breakthrough in the resolution of international commercial disputes. However, it is already apparent that in time such courts will carve out a niche for themselves and will attract some demand from transnational corporations.

Ressources

1. For a more detailed assessment of the evolvement of international arbitration see International Arbitration Survey: The Evolution of International Arbitration (Queen Mary University of London and White & Case, 2018), see www.qmul.ac.uk/arbitration/research/2018/, accessed 27 March 2025.
2. 'SICC Judicial Code of Conduct' (SICC), see www.judiciary.gov.sg/singapore-international-commercial-court/sicc-judicial-code-of-conduct, accessed 27 March 2025.
3. 'Fees' (DIFC Courts), see www.difccourts.ae/about/fees, accessed 27 March 2025.
4. 'Costs Netherlands Commercial Court' (NCC), see www.rechtspraak.nl/English/NCC/Pages/costs.aspx, accessed 27 March 2025.

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