Harmonising the Public Policy Exception for International Commercial Arbitration along the Belt and Road

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I. INTRODUCTION

Officially referred to as the Belt and Road Initiative ("BRI") *(一带一路, yidai yilu)* by the Chinese Government, the anecdotal "Belt and Road" presently spans and traverses 65 countries in Asia, Europe and the Middle East. On March 27, 2015, China's National Development and Reform Commission particularized mechanisms and initiatives for regional cooperation under the BRI.[1] Such activities include the establishment of unified mechanisms for infrastructure building; standardizing and ensuring compatibility of transport rules; establishment of free trade areas; multilateral information exchange and inspection in trade cooperation; bolstering financial regulation cooperation; and promoting cultural exchange and friendship between the Belt and Road nations and their peoples.[2] In a nutshell, the BRI seeks not only to stimulate development, open up markets and expand trade volume within the economies under its reach, but crucially, to promote and facilitate economic integration amongst the nations of the anecdotal Belt and Road roadmap.

The formation of a de facto economic bloc, exhibiting among its features the establishment and operation of cooperation zones, designated funds for infrastructural project financing and investment, as well as a gradual dismantling of trade barriers among the Belt and Road nations, has already yielded substantial increases in regional trade volume. In 2015, China's trade within the Belt and Road region reportedly surpassed US$1 trillion, accounting for approximately a quarter of China's trade value

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1 *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road,* National Development and Reform Commission (NDRC) People's Republic of China (March 28, 2015), http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html

2 *Id*.

that year.[3] The resulting potential for expanding cross-border commercial collaboration, trade and investment, thus yields as between all the Belt and Road nations a common economic interest – that is, to capitalise on the manifold and multitudinous opportunities produced and stimulated by China's BRI. The strengthening of systems for regional economic cooperation among Belt and Road states and their investors thus promises collateral benefits for people and markets across all of the Belt and Road economies.

It is within this context of a steadily increasing volume of cross-border transactions and joint commercial enterprises that a robust legal framework is required to support and facilitate regional economic integration. A well-functioning dispute resolution system further yields a secondary benefit of increasing transactional efficiency and reducing transactional costs for investors of and state parties to BRI infrastructural projects.

In consideration of the traditional distrust and reluctance of investors to utilise foreign courts - with which they may not be familiar - to resolve commercial disputes, and due to its potential for offering commercially flexible solutions and particular suitability for mitigating conflicts between different legal systems, it is expected that international commercial arbitration ("ICA") will under market forces form a preferred, indeed optimal, primary vehicle for commercial dispute resolution under the BRI.[4] The prominent level of harmonization already existing among the ICA laws of many BRI countries render arbitration the ideal mechanism of dispute resolution. Moreover, arbitration as part of a harmonized legal framework is necessary to fulfil the collateral dispute-resolution needs of increased commercial trade and investment collaboration, and to further the goal of economic integration. It is against this backdrop that the author contends that the BRI provides a unique opportunity to contemplate the real possibility of a "geo-legal" harmonization of the public policy exception to arbitral enforcement within Belt and Road nations.

The public policy exception, which expresses fundamental policy considerations for non-enforcement of awards within and by national courts, is an exception to the generally harmonized system of arbitration laws. Frequently characterized as an "unruly horse" due to the indeterminacy of its ambit, it yields corresponding negative implications for commercial certainty, business efficacy and investor confidence in light of the BRI. While this shortcoming may be regarded as de facto addressed by jurisdictions' pro-enforcement judicial approach encompassing narrow interpretation and application of the

3 Tian Shaohui (ed.), *China's trade with Belt and Road countries surpasses 1 trillion USD in 2015*, Xinhua News, June 22, 2016, http://news.xinhuanet.com/english/2016-06/22/c_135458107.htm

4 Hong Kong's former Secretary for Justice Rimsky Yuen envisioned that opportunities for outward expansion of the local legal and arbitration sectors lay in providing services to alleviating the "legal uncertainties" along "One Belt, One Road" countries. See *Secretary for Justice promotes Hong Kong's legal and dispute resolution service in Beijing (with photos)*, Department of Justice, http://www.doj.gov.hk/mobile/eng/public/pr/20150818_pr.html.

public policy, the high-stake commercial and investment concerns of the BRI, particularly within China herself, are expected to demand greater delineation and definition of concerns proscribed by the exception to enforcement.

Apart from the public policy exception, there are two recurring themes under the BRI. First, the role of BRI in China's rule-making for resolving investment disputes should not be overlooked. In this respect, rule-making can further subcategorized into (i) 'soft-law' – namely harmonization and capacity-building; and (ii) 'hard-law' – which includes investor-state dispute settlement (ISDS) treaties. For harmonization of arbitral regime across the BRI region, the author argues that the main challenge lies in the public policy exception. It is envisaged that China has the potential for rule-making along the BRI region given that the current public policy exception remains uncertain and such uncertainty calls for a "transnational" standard. On the hard-law perspective, China is also exploring to diversify its dispute resolution dynamics by establishing the China International Commercial Court (CICC) in Shenzhen and Xi'an in 2018.[5] As things currently stand, it can be said that China's ambition in engaging with rule-making in the adjudication market is evident, but is not yet achieving the rule maker in the field.

Second, China is a keen player in the ICA market. A number of arbitral institutions, including the China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC) and Shenzhen Court of International Arbitration (SCIA), have attained visibility in the regional and international market.[6] The 2006 Interpretation Concerning the Implementation of the Arbitration Law by the Supreme People's Court in China can be regarded as the symbol of the attempt by the top judiciary in China to bring about substantial reform to liberalize the arbitral framework.[7] For instance, drafting defects with ambiguous and multiple arbitration commissions is no long fatal for establishing the validity of arbitration agreements.[8] Looking forward, China has the potential to become a key player in the Asian ICA market. However, the lack of official legislation benchmarked against the 2006 Model Law standards remains a concern for its arbitral regime in the long term.[9]

Following this Introduction, in subsequent sections, ICA – and in particular, the public policy exception – are identified as prime initial targets for harmonization efforts. This chapter then considers the practical mechanics of harmonizing the public policy

[5] Vivienne Bath and Luke Nottage, "*International Investment Agreements an Investor-State Arbitration in Asia",* The University of Sydney Law School Legal Studies Research Paper Series, available at SSRN: at: http://ssrn.com/abstract=3544458, 24; Weixia Gu, 'The Dynamics Of International Dispute Resolution Business In The Belt And Road', ASIL Proceedings (2019), Vol. 113, 370-374.

[6] Anselmo Reyes and Weixia Gu (Ed.) *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific*, 280.

[7] supranote 6, 25

[8] supranote 6, 25

[9] supranote 6, 38

exception, proposing designation of the Asian Infrastructure Investment Bank ("AIIB") as a coordinating authority for the drawing up of common standards and normative regulations. The possible substantive contents of a public policy exception, utilizing a "negative list" approach, are considered, with reference to similar harmonization efforts of the European Union ("EU") and the Organization for the Harmonization of African Business Law ("OHADA") evaluated as comparative case studies. The far-reaching implications of China's BRI upon a steadily evolving global landscape will also be considered.

II. CHINA'S BELT AND ROAD INITIATIVE AND AN ECONOMICALLY INTEGRATED ASIA

The BRI as aided by the AIIB and the Silk Road Fund is envisaged to play an indispensable role in connecting markets and addressing infrastructural needs across Central Asia and Southeast Asia, in light of existing infrastructural deficits and untapped development potential across the region.[10] Infrastructural development has been confirmed by the literature to hold positive causal relationships with economic growth and poverty reduction.[11] The Asian Development Bank has recently estimated that developing Asia will require investments of US$26 trillion from 2016 to 2030, or US$1.7 trillion per annum in order to eradicate poverty, continue growth momentum, and to counter the effects of climate change.[12] In this regard, infrastructural investment holds the potential to bolster sustainable, long-term regional economic growth, productivity and increases regional competitiveness by generating commercial activity and creating employment opportunities, which themselves lift communities out of poverty.[13]

The infrastructural projects generated by virtue of the BRI development is expected to widely increase commercial collaboration among states and their investors. By way of facilitation, market liberalization and reduction of trade barriers under the BRI is further expected to stimulate an abundance of commercial and trade opportunities within a region of increasing economic integration. Economic integration itself yields, broadly, a multitude of benefits, including boosting cross-border trade, the movement goods and services at lower costs, homogenization of national trade and fiscal policies, and the

10 Gilberto M. Llanto et al. *Infrastructure Financing, Public-Private Partnerships and Development in the Asia-Pacific Region,* 22 ASIA-PACIFIC DEVELOPMENT JOURNAL 27 (2015).

11 *Id*. For an in-depth discussion of the causal link between infrastructure development and economic output growth in the context of China, see: Pravakar Sahoo et al., *Infrastructure Development and Economic Growth in China (IDE Discussion Paper No. 261),* Institute of Developing Economies (October 2010), www.ide.go.jp/English/Publish/Download/Dp/pdf/261.pdf.

12 Asian Development Bank, MEETING ASIA'S INFRASTRUCTURE NEEDS, xi (2017), https://www.adb.org/publications/asia-infrastructure-needs .

13 Pravakar Sahoo et al., supra note 31.

creation of employment opportunities. In economic literature, differing forms and degrees of economic integration are frequently categorised by reference to a spectrum characterised by increasing integration.[14] Such forms edging towards integration occurring over the spectrum include free trade areas, customs unions, common markets, economic unions, to complete economic integration.[15]

The degree of economic integration to be facilitated by China's BRI development will naturally hinge upon the economic cooperation and national policies of governments in the Asia region. In any event, such integration is anticipated to mature and develop over time as the BRI becomes a cornerstone of regional economic relations and cross-border commercial transactions. The potential development of a de facto zone of economic integration under the BRI, similar to the common market created by the European Economic Community ("EEC"), will further allow participant countries access to substantial markets to build export capacities and to strengthen national economic institutions, by creating much-needed trade opportunities within Belt and Road nations in Asia and beyond. In addition, regional economic harmonization reduces transaction and commercial costs, yielding benefits for all parties involved.

The proper and efficient functioning of such a system, regardless of the level of economic integration envisaged, requires an analogous level of legal harmonization. By way of analogy, one may consider the Uniform Commercial Code, which was published in the United States in 1952 and aimed at harmonizing the law governing commercial transactions and sales among all American states and territories. The Uniform Commercial Code was, like the present case with the BRI, conceived in the light of increasingly large volumes of inter-state commercial transactions and need to harmonize and modernize contract laws. While the end of forging consistency between legal and regulatory norms among China and the Belt and Road nations is aimed at harmonization rather than creating uniformity, from a general perspective, such practices bolster the efficiency of trade and commercial transactions, in addition to providing a region-compatible framework for effective dispute resolution. Such an analysis may be summarised as targeting a "cost-savings" motivation of the harmonization of standards.[16]

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14 Bela Balassa (1998), *The Theory of Economic Integration: An Introduction*, in THE EUROPEAN UNION, 174 (Brent F. Nelson & Alexander C.G. Stubb eds., 1998)

15 *Id*.

16 Jonathan M. Miller identified four "types" of international legal norm transplants, based upon the motivation for their adoption. These are summarised in Souichirou Kozuka & Luke Nottage's *Independent Directors in Asia: Theoretical Lessons and Practical Implications,* in Dan W. Puchniak, Harald Baum, Luke Nottage (eds), *Independent Directors in Asia: A Historical, Contextual and Comparative Approach* (Cambridge University Press, 2017) as being (a) externally dictated, i.e. those brought about by external forces ; (b) cost-savings, i.e. those geared at promoting economic efficiency; (c) entrepreneurial, i.e. those transplants motivated by expectation of advantage, whether material or political, to those who propose them; and (d) legitimacy-generating, i.e. those geared at

III. ARBITRATION AS A PRIMARY VEHICLE OF INTERNATIONAL DISPUTE RESOLUTION

Regardless of the private/public nature of the Belt and Road investment, however, it is contended that the determinative considerations underlying the selection of dispute resolution mechanisms, when such disputes arise, are applicable to each class of dispute. Investors, whether in the capacity of private corporations or state governments, tend to harbour the propensity to distrust dispute resolution mechanisms offered by unfamiliar legal institutions. This is logical as a matter of course from an investor's perspective – lack of experience or familiarity with the logistics of a foreign judicial system may place a party at a strategic disadvantage, whether real or imagined, vis-à-vis the local "other" party to the dispute. Such concerns may be exacerbated by an investor's lack of confidence in the judicial independence of certain jurisdictions, or that the system will not otherwise "favour" a local party.

International commercial arbitration, as opposed to court litigation, is thus envisioned to act as a primary vehicle of cross-border dispute resolution in relation to disputes arising out of the Belt and Road transactions (defined broadly as all trade, provision of services and investments under or in furtherance of the BRI development). As stated above, increased trade, investment and commercial opportunities arising from the BRI is expected to harbour proportional increases in commercial disputes as among states and investors. Due to the transnational nature of commercial dealings promoted under the Belt and Road, such disputes among states and investors may be further classified into one of two classes. These are, respectively, disputes arising (i) within China; and (ii) outside China, which may be further subcategorised depending on the involvement, or lack thereof, of Chinese parties. International commercial arbitration is expected to be a favoured means of dispute resolution with respect to each of the two scenarios, for general reasons as given above and elaborated below.

IV. CONTEMPLATING REGIONAL HARMONIZATION OF THE PUBLIC POLICY EXCEPTION IN ASIA TO ARBITRAL ENFORCEMENT UNDER THE BELT AND ROAD INITIATIVE

A. The Case for Harmonizing Arbitration Laws in the Asia Region

It is contended that harmonization of arbitration laws yields greatest benefits in terms of commercial certainty, especially in the light of cross-border economic activity in an

reaping the perceived prestige of adopting foreign norms. While Miller discusses transplantation of norms rather than harmonization, it is contended that the same motivations apply here.

increasingly globalized world. The next section therefore seeks to make the case that harmonization of arbitration laws in the Asia region has largely been realized, such that a case may be made for pursuing the next step of harmonizing the public policy exception to arbitral enforcement under Article V(2)(b) of the New York Convention.

The author pre-emptively recognises that the nations touched by the BRI are not limited to Asian nations, but include approximately 65 economies in Asia, Europe and the Middle East. In light of the vast differences in geo-economics, legal systems, cultural values and traditions across these three regions, the contemplation of geo-legal harmonization of international arbitral enforcement and the public policy exception will initially be limited in the present article to the Belt and Road nations in the Asian region. Specifically, the noted geo-legal harmonization efforts broadly include the economies making up China, Russia[17], Southeast Asia, South Asia and Central and Western Asia; but geographically excluding economies in Central Europe, Eastern Europe and the Middle East.[18] Table 2 illustrates the Belt and Road nations by region.

Table 1: The Belt and Road Nations Categorised by Region

Region	**Belt and Road nations**	**Number**
China	China	1
Southeast Asia	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, Vietnam	11
South Asia	Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka	7
Central and Western Asia	Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan, Uzbekistan	11
Total the Belt and Road nations in Asia:		*30*
Middle East and Africa	Bahrain, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates, Yemen	15
Central and Eastern Europe	Albania, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Ukraine	20
Total the Belt and Road nations outside of Asia:		*35*
Total:		***65***

As noted previously, arbitration laws within the Asian region have largely reached

17 While Russia is categorised as being in Central and Eastern Europe rather than in Asia, Russia is included in this analysis as being an "Asian" Belt and Road nation due to its geographical spread over both European and Asian continents.

18 *Country Profile,* Belt and Road, http://beltandroad.hktdc.com/en/country-profiles/country-profiles.aspx.

harmonization due to the adoption of the New York Convention and the Model Law by most Asian nations along the Belt and Road. As of April 2018, 159 and 109 jurisdictions worldwide have acceded to the New York Convention and the Model Law respectively.[19] Tables 3 and 4 set out the Belt and Road nations that have acceded to the New York Convention and the Model Law respectively. Table 3 shows that, 28 out of 30 Belt and Road nations in Asia are New York Convention member states. Table 4 shows that, 20 out of 30 Belt and Road nations in Asia have adopted the Model Law.

Table 2: Adoption of the New York Convention by Belt and Road nations

Region	**Belt and Road Nations Adopting New York Convention**	**Number**
China/Russia	China, Russia	2
Southeast Asia	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam	10
South Asia	Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka	6
Central and Western Asia	Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Uzbekistan	10
Total Belt and Road Nations:		*28*

Table 3: Adoption of the Model Law by Belt and Road nations

Region	**Belt and Road Nations Adopting the Model Law**	**Number**
China/Russia	Russia	1
Southeast Asia	Brunei, Cambodia, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste.	8
South Asia	Bangladesh, Bhutan, India, Maldives, Sri Lanka	5
Central and Western Asia	Armenia, Azerbaijan, Georgia, Iran, Mongolia, Turkmenistan.	6
Total Belt and Road Nations:		*20*

The widespread adoption of common international commercial arbitration norms represents at least a positive starting point for further harmonization efforts of arbitral enforcement norms among the Belt and Road countries. In particular, the ratification of both the New York Convention and the Model Law by the Russian Federation, make it conceivable that Central Asian economies, particularly those previously of the Soviet Union, will readily follow any further harmonization efforts.[20] As such, a foundation

[19] Member jurisdictions of the New York Convention and Model Law are available at, respectively, http://www.newyorkconvention.org/countries and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

20 These "post-Soviet" Belt and Road nations located in Asia, in addition to the Russian Federation, may include Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

already exists upon which harmonization of the public policy exception to arbitral enforcement under Article V2(b) of the New York Convention may be contemplated.

B. The Public Policy Exception under Article V2(b) of the New York Convention

Under Article V2(b) of the New York Convention, recognition or enforcement of a foreign arbitral award may be declined, where such recognition or enforcement is considered by a court of the member state to the Convention to contravene her public policy.[21] As the peripheries of "public policy" are neither restricted nor defined under the Convention, member states are essentially free to determine the substantive contents and limits of their nation-specific, albeit "international" rather than "domestic", conception of public policy.[22] In this regard, Fry contends that such notion of public policy to be applied by states ought not to be obligatorily "supranational" or "truly international" in the sense that the public policy applied refers to those values considered "quasi-universal" amongst states rather than those of the states themselves, but those values determined by the state itself – which may legitimately reflect regional or international norms and concerns at its discretion.[23]

The controversy of the "free-for-all" public policy exception in the private international law jurisprudence is rooted in the fact that it bestows upon national judicial systems' ultimate control over recognition and enforcement of perhaps otherwise valid foreign arbitral awards, with all the potentials of unpredictability and irregularity in its application. It has been noted that the power of refusal to recognize or enforce arbitral awards goes "to the heart" of the Convention.[24] The significance lies in that the primary objective of the New York Convention was to advance collective legislative standards for the enhanced recognition and enforcement of cross-border arbitral awards. A broad interpretation of the public policy exception would thus frustrate the functioning and effectiveness of the Convention, and by extension, efficient operation of the international arbitration system.[25] Even within national boundaries, the vagueness of Article V2(b)'s exception is encapsulated in the general dearth of statutory definitions for public policy.[26]

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21 New York Convention, art. V2(b), June 10, 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046.

22 While national courts do not always draw a clear distinction between "domestic" and "international" concepts of public policy, a wider-ranging "international" public policy was endorsed by the International Law Association (ILA) in 2003. See Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 19 ARBITRATION INTERNATIONAL 249, 251 (2003).

23 James D. Fry, Desordre Public International under the New York Convention: Wither Truly International Public Policy, 8 Chinese J. Int'l L. 81, 82 (2009).

24 Richard A. Cole, supra note 38, 372.

25 *Id*, 366.

26 A recent report of the IBA Subcommittee on Recognition and Enforcement of Arbitration found that of over 40 jurisdictions surveyed, just two jurisdictions (Australia and the United Arab Emirates) had developed explicit statutory definitions for the concept of "public policy". See: IBA

In this regard, Fry astutely argues that a uniform approach of enforcing arbitral awards may compromise the strength of the system in attractive negative implications for ease of enforcement (for instance, where refusal was based on a procedural defect applicable not only to one, but suddenly all states) and the ability of states to regulate events and transactions within their jurisdiction (as a marker of their sovereignty).[27]

In this regard, in 2015, the International Bar Association ("IBA")[28], following a survey of country reports on the public policy exception, recently observed that while different jurisdictions differ in their formulations of international public policy, three subcategories of norms are generally included.[29] These are first, fundamental principles relating to justice and morality; second, rules serving fundamental political, social and economic interests of the nation; and third, international obligations of nations towards other nations or international organisations.[30] As such, the "minimum" content of a state party's public policy would lie in the fundamental principles or values underscoring its legal order and social fabric – whatever these normative standards and values are determined to be. It is thus clear that judicial systems do not generally allow the "public policy" exception to be trotted out as a mere excuse, where all other lines of attack fail – as suggested cynically in *Richardson v Mellish*, in which it was commented that "[public policy] is never argued at all but when other points fail" but whose issue must at least reach a minimum standard of fundamentality.[31]

However, in this respect, Gill and Baker, in referring to the IBA report to identify common themes belying public policy decisions in national courts, note that even beyond an unspoken consensus that public policy issues must be sufficiently fundamental to a nation's normative values, there exists a divergence as among different legal systems and cultures in such expression of the degree of violation of "public policy" required to mandate intervention.[32] For instance, whereas civil law systems couch public policy considerations in terms of "the basic principles or basic ideas of the *legal system* of our country" and going to "the very fundamentals of *public and economic life*" (with emphasis), common law systems tend to refer to specific core values such as considerations going to the "fundamental norms of *justice and fairness*" (with

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Subcommittee on Recognition and Enforcement of Arbitral Awards, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION" 2 (October 2015).

27 James D. Fry, supra 78, 124.

28 Not to be confused with the International Law Association ("ILA"), references to which reports will be made in subsequent paragraphs. As both reports of the IBA and ILA engage in comparative research as to the application of the public policy exception among different jurisdiction, the merits of the conclusions of both will be used as appropriate in this article.

29 Pierre Mayer & Audley Sheppard, supra note 77, 255.

30 *Id*.

31 Judith Gill QC & David Baker, The Public Policy Exception Under Article V.2(b) of the New York Convention: Lessons from Around the World, Asian Dispute Review 74, 75 (April 2006).

32 *Id.*

emphasis).[33] While Gill and Baker categorise such definitions as simply creating the "overall impression that the values concerned have to be 'fundamental' to the particular State",[34] it is worth noting the discrepancies between the example formulations of common law and civil law jurisdictions – with possibilities for further alternative formulations under different legal systems themselves pose a source of indeterminacy as to the definition of "public policy".

C. Grounds for Successful Invocation of the Public Policy Exception

The IBA recommends that indeterminacy of the definition of "public policy" can be mitigated by dividing it into two dimensions: the procedural, and the substantive.

"Procedural" public policy is concerned with upholding formal justice between two arbitrating parties – for instance, relating to the right of due process, or refusing the enforcement of awards obtained by fraud or falsification.[35] In this regard, Gill and Baker note that the content of procedural violations engaging the public policy exception to arbitral enforcement may range from virtually universally accepted grounds (such as fraud or falsification of documents) to grounds adopted by the "majority" of jurisdictions (such as contravention of the *res judicata* norm), to grounds accepted only by a "minority" of states (such as contravention of the common law *lis pendens* doctrine).[36] In any event, it is noted by the IBA report that "procedural" public policy grounds are more likely to succeed as compared to "substantive grounds".

In contrast, "substantive" public policy involves value-laden norms, which inform the interests of public policy.[37] In this regard, the IBA report separates substantive public policy into five main categories: (a) antitrust and competition law; (b) *pacta sunt servanda*; (c) equality of creditors in insolvency situations; (d) state immunity, prohibition of punitive damages; and (e) prohibition of excessive interest.[38] Gill and Baker further note that in relation to the "substantive" categories, however they be defined, public policy may be judicially influenced by constitutional and political issues, as well as by legal system.[39] It may be observed that there is a greater divergence between states as to agreed grounds of "substantive" public policy.

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33 *Id.* In addition, Gill QC and Baker further identify a third combined approach enunciated by the Supreme Court of India, which stipulated that enforcement of a foreign arbitral award may be refused on public policy grounds where it was inconsistent with the "fundamental policy" of Indian law, Indian national interests (civil law concept) or "justice or morality" (a common law concept).

34 *Id.* 76.

35 IBA Subcommittee, supra 81, 15.

36 Gill QC and Baker, supra 86, 78.

37 IBA Subcommittee, supra 81, 17.

38 Gill QC and Baker, supra 86, 78.

39 Id, 79. In particular, Gill QC and Baker note that the principles of Muslim Sharia Law impact upon such jurisdictions' view of public policy.

It is noted by some authors that "public policy" under Article V2(b) would in practice not necessarily encapsulate all procedural public policy concerns, most already specifically accounted for in Article V1.[40] It is however noted that the stipulated bars to arbitral enforcement in Article V1 cover far from all possible procedural defects in arbitral procedure, such that Article V2(b) may be considered a "catch-all" for other procedural considerations, in addition to substantive norms.[41]

In any event, as will be discussed later, "procedural" public policy based on securing fair procedure is often viewed as less contentious as compared to "substantive" public policy, which is concerned with certain norms based on state-specific priorities or other value judgments.

D. Harmonizing the "Public Policy Exception" under Article V2(b) of the New York Convention

It is noted in the IBA's report that fears over the "indeterminacy" of the public policy exception under Article V2(b) may be more academic than factually-based. Due to the narrow construction given to the public policy exception by the courts of most member states, coupled with a pro-enforcement approach of many jurisdictions, even where the exception is raised, it is far more often rejected than not.[42] This trend of practice is in line with the International Law Association's ("ILA") 2003 general recommendation that "international commercial arbitration should be respected save in exceptional circumstances"[43] as contained in the ILA's Interim and Final Reports on Public Policy as a Bar to Enforcement of International Arbitral Awards, which are increasingly considered guidelines of best international practice.[44] As of 2017, Bermann's most recent wide-ranging survey of the interpretation and application of the New York Convention by the courts of 44 jurisdictions likewise identifies the trend of violations of public policy being construed narrowly, much being limited to the violations of the "most fundamental notions of morality and justice".[45]

Still, from the commercial perspective, the potential of enforcement uncertainties which arise with respect to public policy cases are sufficient to compromise commercial certainty and investor confidence, with adverse effects on the commission of commercial transactions and business in foreign jurisdictions. It is noted that a pro-enforcement

40 James D. Fry, supra 78, 92-93.

41 *Id*.

42 IBA Subcommittee, supra 81, 12.

43 Pierre Mayer & Audley Sheppard, supra note 77.

44 International Council for Commercial Arbitration ("ICCA"), *Chapter III – Request for the Recognition and Enforcement of an Arbitral Award*, ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES, 107 (2011).

45 George A. Bermann (ed.), RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS, 60 (2017).

approach to arbitral enforcement, as aforementioned, appears to be the judicial practice in China, in which from the timeframe spanning from 2000 to 2012, of twelve cases concerning or including public policy issues, just one succeeded on the basis of contravention of public policy under Article V2(b) of the New York Convention.[46] As the anticipated primary economic force driving the BRI development, China's partiality approach towards facilitating commercial endeavors except in cases involving elements significantly affecting fundamental national concerns, is expected to set the tone for any harmonization of the public policy exception.

In this regard, it is interesting to note Friedman's conclusions in relation to the public policy defence in the context of American contract law. He analysed a sample of public policy defence cases which show that public policy cases invoking a specific statute or regulation (48% of the cases sampled) have a 59% success rate, in contrast to public policy cases which either (i) refer to case law (15%) or (ii) make a "broad, general appeal" to public policy as a defence (33%) – which succeed just 31% of the time.[47] The takeaway from this appears to be that specificity of public policy concerns, i.e. those which are clearly defined or based in precedent, have a higher rate of success in public policy defence than those that refer to a vaguer notion of public policy. This would be illustrative of an appropriate balance of judicial oversight over arbitral enforcement in the context of public policy – to be applied where clearly defined so as to give reassurance to legislative and commercial certainty.

In light of international commercial arbitration being utilized as the primary mode of commercial dispute resolution for the Belt and Road transactions, and an existing high level of harmonization of international arbitration norms among the Belt and Road nations in Asia, coupled with the commercial cost-reducing interest in plugging any real or imagined uncertainties relating to the public policy exception, the conditions are ripe for taming the "unruly horse" of public policy.

V. DETAILS OF HARMONIZING THE PUBLIC POLICY EXCEPTION UNDER THE BELT AND ROAD INITIATIVE

A. Drawing from the Experiences of EU and OHADA

[46] This evidences a "pro-enforcement" approach generally taken by the Chinese judiciary. *See* He Qisheng., *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China,* 43 HONG KONG LAW JOURNAL 1037 (2013).

[47] David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLORIDA STATE UNIVERSITY LAW REVIEW 563, 567 (2012).

It is noted that the countries under the BRI are not yet economically integrated, although it cherishes the good wishes of being so connected. As such, the EU and OHADA are not for these purposes perfect comparators. The EU, despite its useful enunciation of a "regional public policy", unlike OHADA and the Belt and Road region, exists not solely for the purpose of trade, but acts further as a political bloc dealing with matters as diverse as human rights and regional security. It is, however, considered that the lengthy experience of the EU in matters of economic integration are unparalleled by any other strategic international alliance in the world. In the same vein, whereas the approach of OHADA of absolute uniformity of business laws – and by extension, public policy – as opposed to harmonization across a host of countries with different national laws and economic considerations is not identical to the Belt and Road region, their single focus on economic integration – as under the BRI – makes them an eligible comparator.

1. "EU Public Policy" of EU Member States

A key implication of sovereignty, accounted for under Article V2(b) of the Convention, is that EU member states are judicially free to determine the substantive considerations constituting their jurisdiction's "[international][48] public policy".[49] However, due to the supranational nature of EU laws and directives vis-à-vis EU member states, individual member states are further required to take EU law into consideration when determining the substantive content of public policy.[50] Notably, in *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECRI 3055, the Court of Justice of the European Union ("CJEU") specifically ruled that where an EU member state's refusal to recognise and/or enforce an arbitral award occurs on public policy grounds, violation of "EU public policy" must also be treated as a valid ground for annulment.[51] The European Parliament itself affirms the existence of an "EU public policy" as considered in a number of cases by the CJEU.[52]

The EU's experience indicates that the adoption and inclusion of "regional" public policy considerations by member states is compatible with the free determination of sovereign states of the contents of their jurisdiction-specific conception of public policy. It is thus conceivable that an "Asian public policy" similarly encapsulating core Asian interests may be agreed and adopted as part of the national conception of public policy by individual nations within the Belt and Road network. Conceivably, a distinction may be made on the basis that the relationship of member states to the EU is akin to a politically-

48 Discussion as follows.

49 George A. Bermann, *Reconciling European Union Law Demands with the Demands of International Arbitration,* 34 FORDHAM INTERNATIONAL LAW JOURNAL 1193, 1201 (2011).

50 *Id*.

51 *Eco Swiss China Time Ltd v Benetton International NV*, Case C-126/97, [1999] ECRI 3055 at 37.

52 Tony Cole et al., *The Law and Practice of Arbitration in the EU*, LEGAL INSTRUMENTS AND PRACTICE OF ARBITRATION IN THE EU, 15 (2014).

integrated federal union.[53] In contrast, there is no political affiliation among the Belt and Road nations notwithstanding their geographical proximity and shared economic goals. Nonetheless, political integration ought not to constitute a prerequisite for inclusion of a regional public policy; the presence of common goals or interests should be sufficient.

The substantive contents of "EU public policy" remain indeterminate. While the CJEU has indicated that individual EU laws and regulations may constitute "EU public policy" in the specific case, it has yet to enunciate exactly which provisions, or which classes of provisions, are likely to form part of regional public policy.[54] It is noted that while the EU promotes incorporation of an "EU public policy" into "national" public policy, a regionally "harmonized" public policy is not advanced. The rationale behind the approach of the CJEU is to ensure that civil claims based upon EU laws in individual member states would be treated no less favourably as compared to claims based upon domestic laws.[55] As such, there is no implication that the substantive contents of public policy considerations of individual EU nations must be consistent among the common market.

As discussed above, the enunciation of a "harmonized" public policy exception within the Asia region serves a different purpose in light of the BRI. Mitigating the indeterminacy of jurisdiction-specific public policies through harmonization of their substantive contents promotes the certainty needed to allow the BRI to flourish.

2. A "Uniform" Public Policy Under OHADA

Next considered is the analogous experience of OHADA, which has taken a different approach from the EU in instituting a "uniform" public policy as part of their regional implementation of uniform business laws. It should be noted at the outset that the application of uniform public policy under OHADA regime is unrelated to Article V2(b) of the Convention.[56]

Formed under the 1993 OHADA Treaty, OHADA is an alliance of seventeen West and Central African countries, which aims to implement a modernised cross-border regime of uniform business laws and institutions across the participation countries.[57] As the vast majority of OHADA nations are connected as historical French colonies, the OHADA laws similarly derive from French law. [58] Akin to the infrastructural and economic development motives belying the BRI, the purpose of the unified OHADA laws is to

53 Sergio Fabbrini, *Comparing Democratic Models*, WHICH EUROPEAN UNION?, 187(2015).
54 Tony Cole et al., supra note 52.
55 George A. Bermann , supra note 49.
56 Article V2(b) will only apply to those OHADA member states that have ratified the New York Convention.
57 Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune,* 44 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 17, 19 (2005).
58 *Id.*, 21.

bolster much-needed economic development via the greater attraction of foreign investment in the sub-Saharan African region.[59] Unification of regional commercial laws, supported by OHADA's supranational court,[60] strengthens regional rule of law and is geared at increasing investor confidence by cultivating certainty and bolstering easy accessibility to OHADA's shared business environment.

OHADA's 1999 Uniform Act on Arbitration ("Uniform Act") provided an updated, unified set of arbitration laws for the seventeen OHADA nations.[61] Articles 26 and 31 deal respectively with "international public policy" as one of the six grounds for invalidity of, and the sole ground for refusal to recognise and/or enforce an arbitral award.[62] As "public policy" refers to OHADA's "collective" public policy of the member states as a unit, and the Uniform Act applies to all OHADA jurisdictions, the substantive contents of public policy is not simply harmonized, but actually identical in the seventeen OHADA nations.[63] The significance of Articles 26 and 31 of the Uniform Act is that as long as an award rendered in an OHADA seat jurisdiction is not void due to contravention of OHADA's public policy,[64] it is recognized and enforceable in any other OHADA jurisdiction.[65]

OHADA's uniform regime under the Uniform Act is aimed at maximising efficiency and commercial certainty for the rendering and enforcement of arbitral awards in the region.[66] However, as with the EU public policy, little legislative guidance is provided as to the substantive content of OHADA public policy and is decided on a case-by-case basis. To further the ends of uniformity, enforcement courts will generally have to accept the conclusions on validity and subsequent order for recognition in the seat jurisdiction, with appeals to OHADA's supranational court, the Common Court of Justice and Arbitration.[67]

It must be emphasised that OHADA's uniform "international public policy" implies identical considerations amongst all OHADA member states. A "uniform" public policy is more stringent than a "harmonised" public policy in that while the former demands

59 *Id.*, 19-20.

60 The OHADA laws are judicially enforced and interpreted by the supranational *Cour Commune de Justice et d'Arbitrage* (CCJA).

61 Francis Ulrigh Ndinga, *The features of the arbitration proceedings under the OHADA Uniform Act on arbitration law,* 1 GLOBAL SCHOLARS JOURNAL OF LAW AND CONFLICT RESOLUTION 1, 1-2 (2014).

62 Uniform Act on Arbitration, arts. 26 and 31, OHBLA (1999).

63 Emilia Onyema, *Enforcement of Arbitral Awards in Sub-Sahara Africa,* 26 ARBITRATION INTERNATIONAL 115, 121 (2010).

64 I.e. under art. 26 of the Uniform Act.

65 I.e. under art. 31 of the Uniform Act. Indeed, an order of recognition and enforcement granted by the court of an OHADA member state only has to be registered with the courts of the second OHADA member state in which enforcement is sought. See Emilia Onyema, supra note 107.

66 See Emilia Onyema, supra note 133, 121.

67 *Id*.

complete uniformity in substantive content, the latter requires only that they be mutually consistent. A "harmonised" public policy allows individual nations leeway to tailor their public policy to the particular jurisdictional circumstances, provided that its application does not conflict with the nation-specific public policy of other jurisdictions. OHADA's uniform "public policy" regime is facilitated, aside from a common interest in regional economic development, by their shared historical experience and French law-based legal systems of many OHADA nations.[68] However, a lack of similar homogeneity among the Belt and Road nations would create virtually insurmountable difficulties in establishing a unified conception of public policy. As such, a "harmonised" rather than a "uniform" approach in Asian public policy may be more appropriate as a starting point.

B. Substantive Contents of a Harmonized Public Policy

As noted in the IBA report, there are certain violations of public policy that appear common to most nations, regardless of variation in legal culture, political framework and level of economic development.[69] For instance, procedural irregularities in the arbitral process amounting to the violation of the right of a party to be heard or to present the case are virtually universally considered contrary to agreed standards of fairness, and thus, public policy.[70] Some substantive matters, such as corruption and fraud, are similarly regarded by most nations to contravene public policy.[71] By way of illustration, the discussion below sets out common examples of procedural and substantive matters suggested by the ILA to contravene public policy, which may be incorporated into a shared Asian public policy framework in international arbitration.

1. Procedural Contraventions of Public Policy

Procedural public policy contraventions involve defects in the arbitral procedure which adversely impact on the availability of due process. Non-contentious matters constituting such contravention may include: evidence of fraud or corruption in the arbitral process;[72] as well as violations, generally, of due process.[73] Subject to agreement amongst the Belt and Road nations, other grounds of procedural contravention of public policy may include, for example, specific procedural issues such as: evidence of arbitrator

68 Claire Moore Dickerson, supra note 127, 15.
69 IBA Subcommittee, "Report on the Public Policy Exception" (n 12), pp 14-17.
70 *Id*, p 15.
71 *Id*, p 16.
72 Audley Sheppard, "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" (2003) 19 *Arbitration International* 217, p 238.
73 *Id*, p 239.

partiality;[74] irrational dissonance between the facts and award;[75] or decisions made in the absence of reasons.[76]

It is noted here that Article V(1) of the New York Convention already deals with the refusal of recognition and enforcement of arbitral awards on a number of due process and procedural grounds; inter alia, notice of arbitral proceedings and compliance of arbitral process with pre-existing arbitral agreement or laws of the seat jurisdiction. In the same vein as public policy harmonization, it should be possible to develop standards of due process and consistency in the way procedural issues are approached in Belt and Road jurisdictions, as there is already significant overlap in those categories of procedural irregularities considered under individual judicial systems to constitute public policy contraventions.[77]

2. Substantive Contraventions of Public Policy

Substantive public policy contraventions concern the subject matter of the arbitration, protection of which may be considered contrary to public policy. Such "proscribed" matters frequently differ amongst different jurisdictions without common ground, due to variations in policy concerns underlying societal values.[78] The general exception concerns awards which allow the commission of activities universally considered to be illegal or morally objectionable,[79] such as those relating to drug trafficking, corruption or fraud.[80]

However, as discussed in the context of "EU public policy", while substantive prohibitions may vary depending on the governance policies of individual states, it is submitted that fundamental norms, values and interests shared over an alliance of nations may form part of an individual jurisdiction's public policy. For instance, Article 81 of the Treaty Establishing the European Community, which prohibits practices restricting competition between member states, was ruled by the CJEU contrary to regional "EU public policy".[81] As fair competition laws are integral to the facilitation of trade and the proper functioning of the free markets, their protection is considered a matter of EU public policy.[82] Such a consideration protects both the economic interests of individual EU member states, as well the European Community as a regional entity.

74 *Id*, p 240.
75 *Id*.
76 *Id*.
77 IBA Subcommittee, supra note 81, 14.
78 *Id*, 16.
79 *Id*.
80 *Id*.
81 Pierre Mayer & Audley Sheppard, supra note 77, 233.
82 *Id*.

It is ventured that similar norms and considerations may be applied to the Asian region in regard of the promotion of the economic goals of the BRI. The fundamental interest of the BRI, aside from the development of regional infrastructure, are the bolstering of cross-border commercial and trade cooperation amongst the Belt and Road nations. Regional prosperity, envisaged as an interest of all jurisdictions in the Belt and Road Asian region, may be facilitated through the application of harmonized public policy. Such substantive norms in the harmonized public policy may include, for example, relatively non-contentious rules such as those against anti-competition agreements, the formation of de facto regional monopolies, and corruption. Other substantive norms, relating to the protection of diplomatic relations amongst nations, may similarly be part of an Asian public policy, considering the objectives of the BRI to increase transnational cooperation. The general approach to be taken as a first step, from a practical perspective, could be to draft a negative list including some of the matters above, such as anti-competition provisions or procedural impropriety, under which awards are likely to be turned down.

Harmonization of the public policy exception requires not absolute uniformity, but consistency among the Belt and Road nations. This would imply that while this geo-legal public policy forms just one part of the nation-specific public policy under Article V2(b) of the New York Convention, remaining nation-specific public policy must be congruent with "Asian public policy". It is noted, as above, that judicial custom emphasises the narrow construction of Article V2(b) of the New York Convention.[83] This pro-enforcement approach works in tandem with harmonization efforts to tame the "unruly horse" of public policy.

While there is no existing institution dealing with the coordination of cross-border arbitral enforcement rules per se, it is suggested that in the interim, the AIIB could take a proactive role in coordinating the harmonization of national laws, whether in the specific context of public policy harmonization or more broadly with regard to trade- and investment-related regulations, which forms an integral part of the broad goal of trade facilitation under the BRI. Although the AIIB's primary function is currently to provide loans for infrastructural projects under the BRI development, the semi-governmental constitution of the AIIB's corporate governance would readily allow adaptation or creation of a new office or sub-organization to discuss harmonization of legal norms and regulations, in which all the Belt and Road nations would have a stake, necessary to the efficient functioning of trade and commerce. Whereas in the EU, the public policy exception has largely been defined at the highest level of the CJEU where CJEU is competent only to make judgments of issues being litigated. Such an approach is not recommended. Since there is no supranational court under the BRI so far (pretty much because the BRI aims to create an economically, rather than a politically integrated zone).

83 IBA Subcommittee, supra note 81, 6.

Whereas courts may pronounce what public policy "is" or "is not" constituted in a particular case, queries as to its concrete and substantive contents are left unanswered in the lack of guidelines defined. From the perspective of efficiency, and to ensure participation of all the Belt and Road nations in determining certain shared matters under the BRI that are against a "regional" public policy, it would be more desirable to designate a coordination institution such as the AIIB for this purpose.

C. Challenges and Other Aspects of Public Policy Harmonization

1. Compatibility of Legal Systems and National Cultures along the Belt and Road

As the Belt and Road's metaphorical "silk road" moves the wide geographical spread of the East Asia, South Asia, and Central Asian regions, it simultaneously navigates common law, civil law, Islamic law systems; as well as a wealth of nations divided along social, cultural, ethnic and religious lines.

First, the definition and span of the public policy concept itself falls to different interpretations as amongst legal systems. The civil law conception of public policy, or *order public*, is frequently viewed as being wider in application as compared to the traditionally restrictive interpretations to public policy under common law systems.[84] This is compounded by the interaction of jurisdiction-specific social and cultural features. Such social characteristics belie the integral values and interests of a nation, which goes to the root of national conceptions of public policy. For instance, the Islamic concept of public policy revolves around the spirit of Sharia law and its sources.[85] The wide divergences in culture amongst legal systems and values suggest an inherent difficulty in achieving harmonization of the public policy exception, of which contents are informed by the same. This concern may be met with reiteration of the extent of Asian harmonization applicable by the BRI. A universal prescription of public policy considerations applicable wholesale to the entire Asia region is not the goal of harmonization. A proposed "Asian public policy" includes defined categories of matters which contravene public policy. This does not preclude nations from retaining other nation-specific public policy considerations provided that they do not come into conflict with the "regional" policy. Further, given that the substantive grounds of the "Asian public policy" proposed largely revolve around the facilitation of economic growth and commercial interactions amongst the Belt and Road nations, there is less likely a wide room for contradiction.

Second, there are diverging standards of due process amongst legal systems. Common law jurisdictions may hold parties to arbitration to different standards of procedural

84 Pierre Mayer & Audley Sheppard, supra note 77, 223-224.
85 *Id.*, 219.

fairness, as compared to civil law systems, based on the idea that due process is connected to natural justice.[86] For instance, while the concept of "fraud" is well established under common law, there may be definitional variation when the same term is applied in non-common law legal systems.[87] This creates issues insofar as even where a substantive ground for invoking the public policy exception is regionally harmonized, enforcement courts may still be applying diverging standards in determining its application. While it may be theoretically possible to apply a "universal" standard with respect to specific public policy grounds, to do so would be problematic in that inconsistencies would be created with respect to judicial standards between international arbitral enforcement and the remainder of the legal system. Such a concern is more difficult to resolve. However, it is ventured that as a matter of a judicial preference for upholding enforcement, enforcement would be denied only on clear grounds of breach of public policy considerations.

2. Creation of a "Transnational" Public Policy

A conceptual concern of a proposed harmonized "Asian public policy" is the creation of a "transnational" public policy. A "transnational" public policy has been defined by the ILA to refer to a "truly international public policy…of universal application, comprising fundamental rules of national law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'."[88] An "Asian public policy" would appear to fit into the category of a transnational public policy in that it contains considerations that straddle borders and apply to a region of states. This is problematic in that the public policy exception under Article V2(b) of the New York Convention intends public policy considerations to be nation-specific, albeit "international" rather than "domestic" in nature.[89] Further, this is the understanding recommended by the ILA, although such an issue has yet to be conclusively litigated by national courts.[90] In other words, when drafted, Article V2(b) of the New York Convention intended that enforcing states applied their own respective notions of public policy. Nonetheless, as reiterated, the conception of a "regional public

86 *Id.,* 233.

87 Such is the case of fraud as a ground of refusing reciprocal enforcement of judgments between Hong Kong, a common law jurisdiction, and China, whose system is based upon civil law. See Jie Huang, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS (2014).

88 Pierre Mayer & Audley Sheppard, supra note 77, 220.

89 In other words, a national conception of "international public policy", rather than "domestic public policy". The expression "international public policy" has been defined by the ILA not to refer to a public policy shared by a number of states, but the part of a public policy belonging to a state, the contravention of which would prevent a party from enforcing a foreign award. See Pierre Mayer & Audley Sheppard, supra note 77, 251.

90 Bermann notes that while some jurisdictions, for instance, France and Switzerland, make a distinction between domestic and international conceptions of public policy, the position of most national courts is uncertain. See George A. Bermann (ed.), supra note 76, 100.

policy" adopted by a group of nations is not inconsistent with nation-specific nature of public policy envisioned under Article V2(b) of the New York Convention. As stated above, the application of an "Asian public policy" operates such that it constitutes just one category of public policy considerations – itself, as explored above, a negative list, applied by a jurisdiction. The existence of this region-specific public policy impacts national public policy considerations only insofar as there are inconsistencies, which would in any case need to be resolved to ensure the cooperation of the nations with the region. As such, harmonization does not limit the ability of a country to define their own public policy. It simply aims to bring harmony to the application of the public policy exception.

An additional practical concern may arise with respect to the receptiveness of Belt and Road countries in adopting aspects of a "regional" or "transnational" public policy as part of their nation-specific public policy. In particular, it revisits the willingness of the Chinese judiciary – and by necessary extension, the Chinese government – to broaden the existing narrow definition of its nation-specific "public policy", which is largely limited to fundamental principles such as the safeguarding of China's national sovereignty, public security, and the integrity of the legal system.[91] To include commercial concerns encapsulated and mandated by an "Asian public policy" under the BRI, it is necessary to ensure the success of the endeavour of China as the proposer and leader of the BRI. While there has yet to be any governmental inclination in this proposal, it is contended that the tangible commercial benefits associated with harmonization, and the illustrations of the EU and OHADA experiences, may lessen the scepticism of adopting a wider take on public policy than currently prevails.

VI. CONCLUSION

In the light of China's continued economic rise, the BRI provides a unique opportunity for increased economic cooperation and integration through the cross-border development of infrastructural projects in the Asian region.[92] Against the backdrop, international commercial arbitration, due to its advantages, has been identified as primary vehicle in international dispute resolution within the Belt and Road Asia.

In looking forward, this Article has sought to demonstrate the distinct advantages and benefits of increased harmonization of arbitration regulatory landscape in the Asia region as a means to bolster and further the multitudinous goals of strengthening cross-border

[91] Qisheng He, *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People's Court of China,* 43 HONG KONG LAW JOURNAL 1037, 1043 (2013).

[92] Vivienne Bath and Luke Nottage, "*International Investment Agreements an Investor-State Arbitration in Asia",* supranote 5, 22.

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relationships, both commercial and as a matter of geopolitics. The fundamental issue at stake in this context is how to harmonize cross-border arbitral enforcement so as to ensure the requisite legal and commercial certainty necessary to secure investor confidence. In order to forge such confidence, a strong and well-established dispute resolution system is integral. This reduces commercial transactional costs and will be critical in evaluating the success of China's Belt and Road development policy and economic diplomacy strategy.

The BRI provides a golden opportunity for China to take the lead in considering the possibility of harmonizing the public policy exception in international commercial arbitration within the Asian Belt and Road nations. There is a bright future in light of the existing status of harmonization efforts of arbitration enforcement norms through the substantial adoption of the New York Convention and the Model Law by the Asian economies. The remaining "unruly horse" of the public policy may create issues of incompatibility in arbitral enforcement which is against the BRI's goal of economic integration and commercial certainty. As the above analysis reveals, the reconciliation of national public policies within the Asian region of the BRI, promises to yield significant benefits not only for harmonizing international arbitration norms as a significant mode of dispute resolution development, but also for strengthening the recognition of common economic interests under the BRI development. Over time, this consolidates and makes inroads towards the goal of enhanced economic integration in the Belt and Road Asian region, and gradually, extend to all the 65 countries involved in the BRI.

With these principles in mind, and drawing upon experiences of the EU and OHADA, this Article suggests that public policy in context of arbitral enforcement in the Belt and Road Asian region could be introduced at the approach of a "negative list". It is further advocated that the creation of a "transnational" public policy, as framed around the common economic interests of the BRI and drawing on existing procedural and substantive common grounds among the Belt and Road nations in Asia, may not be compatible with the requirement of "national" public policy considerations under Article V(2)(b) of the New York Convention. However, as discussed, the practical implementation of this suggestion depends much on the receptivity of the Chinese government in widening the current narrow understanding of her nation-specific public policy. As "true harmonization" of the international arbitral system is the ideal goal in an increasingly interdependent and globalized world, the opportunities brought by China's Belt and Road development realizing it within the Asian context is truly exciting.