

Belt and Road Dispute Resolution: New Development Trends

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I Introduction

A *Background of the Belt and Road Initiative*

The Belt and Road Initiative (BRI) was first proposed by President Xi Jinping in 2013 with a view to promoting regional economic and infrastructural cooperation in Asia, Europe and the Middle East.¹ The BRI is a two-faceted cross-border economic strategy, consisting of the “Silk Road Economic Belt” and the “21st Century Maritime Silk Road.”² It engages the joint effort and participation of six-five countries in the world.

As outlined by China’s National Development and Reform Commission (NDRC) in its report dated March 28, 2015, the BRI has five major goals: enhancing policy coordination, facilitating connectivity, removing trade barriers, facilitating financial integration, and building people-to-people bonds.³

With the dual boost to land and maritime trade and business within the Belt and Road Nations, the BRI fosters market integration in the Asian region and forges new economic ties between China and the global economy.

B *Belt and Road Initiative and Dispute Resolution*

With increasingly robust cross-border trade, commercial disputes would inevitably arise. A solid legal framework is required for resolving increasingly sophisticated commercial disputes. A well-functioning dispute resolution mechanism serves two purposes: First, it is crucial to have an effective and reliable legal framework for ensuring investors’ confidence. Second, in the context of the geographically wide-spanning proposal, a legal framework which is compatible across the Belt and Road countries is of paramount importance to enhance certainty and coherence of the application of laws.

This report aims to discuss the impacts of the BRI on dispute resolution, namely (1) arbitration and; (2) the courts. In Part II, it is argued that the BRI provides a unique opportunity to harmonize the private international laws in Asia and in particular, to reconcile the notoriously indeterminate “public policy exception” to arbitral enforcement. Part III introduces the China International Commercial Courts (CICC), and explores its features and challenges.

1 Ministry of Foreign Affairs (PRC), President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries, Sep. 7, 2013, <http://www.fmprc.gov.cn/mfa_eng//topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml>.

2 Nat’l Development & Reform Comm’n (PRC), Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road, Mar. 28, 2015, <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.htm>. ■ author: URL is not working, please check!

3 Id.

II BRI and Harmonization of International Arbitration Laws in Asia

A *Arbitration as a Primary Forum for International Disputes*

Arbitration is generally regarded as a preferred forum for resolving international commercial disputes. Formal court proceedings have a number of setbacks in the eyes of foreign investors. Foreign investors tend to have reservations towards court litigation for fear of local protectionism and the lack of judicial independence. In this respect, the China International Economic and Trade Arbitration Commission (CIETAC), the oldest and largest scale international arbitration institution in China, is well-regarded.⁴ The CIETAC is an independent arbitration institution which is less susceptible to local protectionism and political influence.

On the other hand, international commercial arbitration has three major advantages.⁵ Firstly, arbitration offers confidentiality.⁶ Courts traditionally adopt the “open court, open judgments” principle. The insistence on transparent proceedings may not be desirable for investors and corporations as it implies that some confidential trade information has to be disclosed in the course of litigation. Secondly, arbitral proceedings are generally more efficient and cost-effective in resolving disputes because of the simpler procedures. Thirdly, flexibility is allowed in the selection of the applicable law and judges.⁷ For example, parties have the autonomy to appoint an arbitrator with the requisite expertise in the particular areas such as construction, finance and law.

It is against this backdrop that this report advocates a harmonized international arbitral law, and in particular, a harmonized and coherent “public policy exception” to the enforcement of arbitral award in the BRI Asian region.

B *Harmonization of International Arbitral Laws in Asia*

The ideal level is harmonization of laws. It refers to the synchronization of laws across jurisdictions.⁸ Harmonization means a high level of consistency and coherence of the application of laws, as opposed to allowing individual states to develop them of their own accord.

4 Faegre Baker Daniels, *Using International Arbitration to Resolve Disputes in China*, Sep. 16, 2005, <<https://www.faegrebd.com/using-international-arbitration-to-resolve-disputes-in-china>>.

5 Geoffrey Ma, *Arbitration in Hong Kong: A Practical Guide* (4th ed. 2017).

6 *Id.* at 6.026.

7 *Id.* at 6.003.

8 Roderick A. Macdonald, “Three Metaphors of Norm Migration in International Context”, 34 *Brook. J. Int’l L.* 603, 612 (2009).

Notably, the availability of the New York Convention and the Model Law of the United Nations Commission on International Trade Law (the “UNCITRAL Model Law” or “the Model Law”) provides a model framework for countries to achieve “transplantation” or even “harmonization” in the area of commercial arbitration. The New York Convention and the Model Law are widely adopted in BRI nations. Statistics show that out of the 30 Asian countries participating in the BRI, 28 have adopted the New York Convention and 20 have imported the Model Law as their domestic arbitration laws.⁹

With such a foundation in place, the BRI further provides a catalyst for synchronizing arbitral laws and norms in the course of resolving cross-border disputes.

C *Taming the “Public Policy Exception” to Arbitral Enforcement in Asia*

The spirit of the New York Convention and the UNCITRAL Model is to encourage the recognition and enforcement of foreign arbitral awards among contracting states. However, the enforcement of arbitral awards is not absolute. They are subject to a number of exceptions.

A notoriously indeterminate exception is the public policy exception, which provides that an arbitral award may be refused if it would be contrary to the public policy of the state. (Art 36(1)(b)(ii) Model Law; Art V (2)(b) New York Convention) As Cole argued, the public policy exception potentially creates an “escape clause” which may ultimately undermine the intention of the Model Law.¹⁰

In interpreting “public policy,” the Model Law did not limit the scope to an international standard. As pointed out by Fry, the notion of public policy applied by states is not necessarily “supranational” or “international.”¹¹ It follows that the scope of public policy can extend to the domestic and regional standards. In the context of BRI nations, cultural and legal systems are vastly different, ranging from common law, civil law, to Islamic law. Given the wide range of geo-legal considerations, the “public policy exception” can be a source of indeterminacy if a broad interpretation is given.

9 New York Arbitration Convention, Contracting States, <<http://www.newyorkconvention.org/countries/>> (last visited Apr. 25, 2019); UN Comm’n on Int’l Trade Law (UNCITRAL), Status: UNCITRAL Model Law on International Commercial Arbitration (1985); with Amendments as Adopted in 2006, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (last visited Apr. 25, 2019).

10 Richard A. Cole, “The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards”, 1 *Ohio St. J. on Disp. Resol.* 365, 374 (1986).

11 James D. Fry, “Desordre Public International under the New York Convention: Wither Truly International Public Policy”, 8 *Chin. J. Int’l.* 81, 82 (2009).

Furthermore, the substantive content of public policy may not be as straightforward as it seems. A divergence exists among different jurisdictions. As Gill and Baker suggests, the meaning of “public policy” in civil law systems tends to refer to “the very fundamentals of public and economic life.”¹² This echoes with the equally authentic French text of the UNCITRAL Model Law that stipulates an “*ordre public* exception,” which arguably has a wider coverage.¹³ On the other hand, the meaning of “public policy exception” in common law jurisdictions tends to include more specific core values, such as justice and fairness.¹⁴

The International Bar Association (IBA) issued a report on public policy exception in 2015. As the IBA report observed, there are two dimensions of public policy – procedural and substantive.¹⁵ On procedural public policy, it aims to promote formal justice between parties. At the heart of procedural public policy lies the value of fair hearing and due process. The most universal and non-contentious examples include fraud, falsification of documents and corruption of arbitrators. In addition to these uncontroversial examples, there are some more contentious examples, such as the violation of *lis pendens*, which is only adopted in a minority of jurisdictions.¹⁶ Be that as it may, procedural public policy exceptions are generally less contentious than their substantive counterpart. As a matter of fact, Art V(1) of the New York Convention has spelled out a number of procedural grounds for refusal of recognition and enforcement. For example, Art V(1)(b) stipulates that an arbitral award can be refused if the party against whom the award is invoked was not given proper notice.

Substantive public policy concerns the subject matter of the arbitration. For example, the refusal of enforcement due to the illegality of activities is a substantive public policy. However, the substantive content of public policy is non-exhaustive and is usually dependent upon the underlying social and

12 Judith Gill QC & David Baker, “The Public Policy Exception Under Article V.2(b) of the New York Convention: Lessons from Around the World”, 2 *Asian Disp. Rev.* 74, 75 (2006).

13 UNCITRAL, Status: UNCITRAL Model Law on International Commercial Arbitration (1985); with Amendments as Adopted in 2006, <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> (last visited Apr. 25, 2019); UNCITRAL, Loi type de la CNUDCI sur l'arbitrage commercial international 1985 avec les amendements adoptés en 2006, <http://www.uncitral.org/pdf/french/texts/arbitration/ml-arb/07-86999_Ebook.pdf> (last visited Apr. 25, 2019).

14 Gill & Baker, *supra* note 9, at 75.

15 Int'l Bar Ass'n, “Report on the Public Policy Exception in the New York Convention”, at 12 (Oct. 2015), available at <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E>>.

16 Gill & Baker, *supra* note 12, at 78.

cultural values, as well as the governing policies of the individual jurisdictions.¹⁷ Inconsistencies would arise as each jurisdiction has its unique set of standards. In the context of the wide geographical landscape covered by the BRI region, there are huge variations in legal systems, cultural characteristics and political framework. For instance, under Islamic law, the practice of charging interests for loans (*riba*) is illegal.¹⁸ This is based on the Islamic principle that money is purely a medium of exchange and it is unjust to allow a person to receive payment without being exposed to business risks (i.e., no reward without risk-bearing).¹⁹ Hence, any contract providing for the provision of interest for a loan would be illegal and unenforceable under the Islamic law.²⁰ This is to be contrasted to the Western position that the charging of interest is lawful insofar as it does not amount to usury. Modern economic theories justify the payment of interest by the loss of value in inflation.²¹ Hence, charging interest for loan agreements would be legal in many jurisdictions unless the interest rate exceeds a certain threshold and constitutes usury. As illustrated above, it is envisaged that there would be inconsistencies arising from the application of substantive public policy between countries based on Islamic law (e.g., Saudi Arabia, the United Arab Emirates) and other civil or common law jurisdictions.

Coherence of laws among BRI nations is of utmost importance in promoting investment and encouraging financial integration. Hence, the following discussion will be devoted to considering a harmonization of substantive public policy in the BRI region.

It is submitted that the EU model on international arbitration can shed light on the creation of a coherent international framework on public policy in the context of the BRI Asian region.

Firstly, it is noted that EU member states are allowed to determine their own substantive considerations of public policy against arbitral enforcement.²² This approach is to pay due regard to the sovereignty of individual states. In addition to domestic concerns, courts in member states are required to

17 *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Int'l Petroleum Co. Ltd.* (Ct. of Appeal, Mar. 24, 1987) (*quoted in* Maxi Scherer, "England", at 6 (2014), <<https://www.ibanet.org/Document/Default.aspx?DocumentUid=DB68248A-6EC4-45A7-8324-EF6266C699EE>>) (last visited Apr. 25, 2019).

18 Inst. of Islamic Banking & Insurance, Islamic Banking, <<http://www.islamic-banking.com/explore/islamic-finance/islamic-banking>> (last visited Apr. 25, 2019).

19 *Id.*

20 *Id.*

21 David Birch, "Predicting the Future of Money", *The Economist*, July 1, 2017, <<https://www.economist.com/books-and-arts/2017/07/01/predicting-the-future-of-money>>.

22 George A. Bermann, "Reconciling European Union Law Demands with the Demands of International Arbitration", 34 *Fordham Int'l L.J.* 1193, 1201 (2011).

recognize the violation of “EU public policy” as an effective and valid ground of challenge. As demonstrated by a number of cases in the Court of Justice of the European Union (CJEU), the European Parliament has recognized the existence of “EU public policy.”²³ Hence, a balance is struck between sovereignty principle and a harmonized legal framework. It is a valuable precedent demonstrating that a “regional” compatible standard of public policy can co-exist with the free determination of sovereign states.

Nevertheless, there is uncertainty as to the substantive content of “EU public policy.” The notion of regional public policy remains vague. No effort was made to clarify the substantive content of the collective EU public policy. One has to resort to case precedents to have a clearer picture.

Drawing experience from the EU model, it is argued that harmonization can be achieved in BRI nations in various ways:

To begin with, it is emphasized that harmonization does not necessarily mean absolute uniformity. The focus is on consistency and coherence across jurisdictions.

The first step towards harmonization is to introduce the notion of a regional public policy which is compatible across various jurisdictions. In the context of EU law, there is a set of fundamental norms and common interests shared among EU member states. For example, the restriction on competition of trade between member states was held by the CJEU to be contrary to the regional public policy. As fair competition and free trade are core values of the EU, they were considered part of the EU’s public policy.²⁴ The EU model clearly demonstrates that there are core values which fall within the commonalities of member states. In addition, there are other substantive norms which are largely non-contentious, for example, the protection of diplomatic relations.

With the EU framework in mind, it is submitted that some of the key features are of high referential value to the BRI context. As enunciated by the NDRC Report 2015, removing trade barriers and fair trade are among the key goals of the BRI.²⁵ These considerations are within the common interests of BRI nations, and can thus be incorporated into the regional public policy of

23 Tony Cole et al., “Legal Instruments and Practice of Arbitration in the EU: Annex”, at 15 (Nov. 14, 2014), *available at* <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988\(ANN01\)_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988(ANN01)_EN.pdf)>.

24 It is the EU’s mission to ensure the free mobility of people, goods, services and capital within the Union (“four freedoms”). Free trade is one of the founding principles of EU. See European Parliament, Values, <<https://europarlamentti.info/en/values-and-objectives/values/>> (last visited Apr. 25, 2019).

25 Nat’l Development & Reform Comm’n, *supra* note 2.

the BRI. Other substantive grounds such as illegal and immoral activities are also rather non-contentious.

It is suggested that China, the advocate of the BRI's activities and grand vision, should take a leading role in coordinating the harmonization of laws. For example, holding a Ministerial Conference between the Ministers of Justice in the BRI region is one possible option. In this regard, the Association of Southeast Asian Nations (ASEAN) and the Hague Conference on Private International Law (Hague Conference) are helpful references.²⁶ The ASEAN Law Ministers Meeting (ALAWMM), which started in 1986, is held every 36 months. It is a ministerial-level meeting aimed at promoting cooperation and integration in the areas such as the international commercial law within the ASEAN region.²⁷ On the other hand, the Hague Conference is an inter-governmental organization which holds regular meetings between member states to the Hague Conventions to promote the harmonization of laws.²⁸ It is proposed that, based on the models of the ALAWMM and the Hague Conference, a Ministerial Conference can be held between the Ministers of Justice in the BRI region in coordinating the harmonization of arbitral laws. Secondly, the Asian Infrastructure Investment Bank (AIIB), though its main function is to coordinate finance, could take a proactive step in the harmonization of laws. The AIIB can even take a step further by issuing a clear set of guidance on the substantive public policy.

Admittedly, the harmonization of laws may face two major challenges. The first challenge is the vast differences of legal systems and culture among BRI nations. The BRI sets out an ambitious plan which forges a new economic belt with a wide geographical span. Islamic law, common law, and civil law systems are covered. Even if a uniformed framework is transplanted, how the law should be interpreted by local courts would also be crucial in the harmonization efforts. Despite the foregoing, it is argued that nations do share a great proportion of common interests and similar considerations in public policy, e.g. policy against market fraud and policy to ensure a fair and due process.

The second challenge is the notion of "regional public policy." At the time of drafting, the New York Convention was intended to give effect to individual states and allow them to adopt their own domestic public policy.²⁹ However,

26 Anselmo Reyes, "ASEAN and The Hague Conventions", 21 *Asia Pac. L. Rev.* 10, 25-44 (2016).

27 Ass'n of Southeast Asian Nations, ASEAN Law Ministers Meeting (ALAWMM), <<http://asean.org/asean-political-security-community/asean-law-ministers-meeting-alawmm/>> (last visited Apr. 25, 2019).

28 Reyes, *supra* note 26.

29 Pierre Mayer & Audley Sheppard, "Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", 19 *Arbitration Int'l* 251 (2003).

the concept of a “regional public policy” is not inconsistent with the nation-specific nature of public policy. The regional public policy notion is brought into play only when there are inconsistencies with the domestic public policies. As indicated, the focus of harmonization is on the coherence of laws. The concept of a collective public policy among BRI nations would not limit the nation’s own capacity to rule by its domestic policy if a sound justification is provided.

III Impact of Belt and Road Initiative on Arbitration Institutions in Asia

Another major impact of the BRI is on Asian arbitration institutions. The BRI has largely reshaped the landscape of arbitration institutions in Asia. The leading Asian arbitration institutions each have their own strategies to support BRI-related dispute resolution.

A *Chinese Arbitration Institutions*

The leading arbitration institutions in China are the CIETAC, the Beijing Arbitration Commission (BAC), and the Shenzhen Court of International Arbitration (SCIA). Each of them has its own policies to develop BRI dispute resolution services.

The CIETAC, the predominant arbitration institution in China, issued the Investment Arbitration Rules (CIETAC Rules) on October 1, 2017 for facilitating international arbitrations along the BRI region and established a CIETAC Investment Dispute Resolution Centre (CIETAC IDRC).³⁰ The CIETAC Rules were designed to regulate both investment treaty arbitrations and investor-state arbitrations, which were referred to CIETAC by contract or other instruments. (Art 2).³¹ The CIETAC Rules provide for Arb-Med procedures (Art 43) and recognize third party funding (Art 27).³² With the increasing number of outbound Chinese investment along the BRI region, the CIETAC Investment Arbitration Rules can meet the demand for the upward trend of China-related investor-state disputes and investment treaty arbitrations in the future. The promulgation of the CIETAC Rules marks China’s first attempt to settle international investment disputes by a domestic arbitral institution. In addition,

³⁰ China Int’l Econ. & Trade Arbitration Comm’n (CIETAC), “International Investment Arbitration Rules (For Trial Implementation)”, Sept. 12, 2017, available at <<http://www.cietac.org/index.php?m=Article&a=show&id=15199&l=en> (English)>.

³¹ Id.

³² Id.

the CIETAC established the Silk Road Arbitration Centre in Xi'an in September 2017.³³ The opening of a new arbitration centre by the CIETAC in Xi'an, which is historically the starting point of Silk Road, demonstrates its ambition to support BRI-related dispute resolution.³⁴ The Centre also serves to handle disputes within the Shaanxi Pilot Free Trade Zone.³⁵

In March 2017, the BAC and the Nairobi Centre for International Arbitration (NCIA) together set up the China-Africa Joint Arbitration Centre (CAJAC) Beijing and Nairobi branches. The two branches are new additions to the CAJAC, following the establishment of the Shanghai and Johannesburg CAJAC Centres in 2015.³⁶ BAC and NCIA will work closely on building the CAJAC into an efficient and professional arbitration centre catered for the disputes arising from Sino-African trade and investment.³⁷ Furthermore, the BAC has launched the "One Belt One Road Arbitration Initiative" by collaborating with the Kuala Lumpur Regional Centre for Arbitration (now known as the Asian International Arbitration Centre) and the Cairo Regional Centre for International Commercial Arbitration in May 2017.³⁸ The collaboration promotes multilateral resource exchanges and fosters the bond between the three arbitration institutions.³⁹ Its vision is to establish a set of uniform arbitration rules and ultimately to set up an independent and uniform dispute resolution platform.⁴⁰

The current SCIA is a product of the combination between the Shenzhen Arbitration Commission and the previous SCIA. The SCIA promulgated a new set of Arbitration Rules in 2016, which were heavily based on the UNCITRAL

33 CIETAC, CIETAC Silk Road Arbitration Center Established, <<http://www.cietac.org/index.php?m=Article&a=show&id=14442&l=en>> (last visited Apr. 25, 2019).

34 Id.

35 Id.

36 China-Africa Joint Arbitration Centre (CAJAC) Shanghai, The Opening Ceremony of CAJAC Shanghai Successfully Held, <http://www.shiac.org/CAJAC/news_detail_E.aspx?page=12015&id=599> (last visited Apr. 25, 2019); Arbitration Foundation for Southern Africa, Announcement of the China-Africa Joint Arbitration Centre Johannesburg (CAJAC), Aug. 17, 2015, <<http://www.arbitration.co.za/pages/cajac.aspx>>.

37 Beijing Arbitration Comm'n / Beijing Int'l Arbitration Cent. (BAC), Inaugural Conference of China-Africa Joint Arbitration Centre—Beijing and Nairobi & Symposium on Dispute Resolution of Sino-African Infrastructure Construction Project Successfully Hosted, Mar. 31, 2017, <<http://www.bjac.org.cn/english/news/view?id=2934>>.

38 Lin Zhiwei, "Belt and Road a turning point for arbitration in China?", *China Bus. L. J.*, Oct. 16 2017, <<https://www.vantageasia.com/belt-road-turning-point-arbitration-china/>>; Ouya Chu, In-depth Exploration of Cooperation between Arbitration Institutions, Joint Promotion of Belt and Road Arbitration—Signing Ceremony of Belt and Road Arbitration Initiative & Legal Issues on Investment Climate and Dispute Resolution in Malaysia and Egypt, May 24, 2017, <<http://www.bjac.org.cn/english/news/view?id=2974>>.

39 Id.

40 Id.

Arbitration Rules. This made the SCIA the first Chinese arbitral institution to align with the international standards in arbitration rules. These Rules also extended the jurisdiction of SCIA to include investment disputes between states and nationals of other states (Art 2 of the SCIA Arbitration Rules).⁴¹ The inclusion of investor-state disputes echoes the growing trend of settling investment disputes by domestic arbitration centres in the context of BRI.

B *Hong Kong International Arbitration Centre (HKIAC)*

As announced on April 26, 2018, in response to the BRI, the HKIAC has formed a “Belt and Road Advisory Committee” and launched an online resource platform for promoting the BRI to the public.⁴²

The Belt and Road Advisory Committee consists of members from a wide range of BRI industries, such as finance, infrastructure, construction, maritime and law.⁴³ They would act as independent advisers for HKIAC on Belt and Road issues.

Moreover, the Secretary for Justice of Hong Kong, Ms Theresa Cheng SC, revealed that Hong Kong is establishing an online dispute resolution platform, eBRAM.hk (which stands for Belt and Road Arbitration and Mediation) for resolving BRI disputes.⁴⁴ As Ms Theresa Cheng added, the Department of Justice in Hong Kong will also establish a dispute resolution centre for the BRI. The centre aims to serve state-owned enterprises and small and medium-sized enterprises from various countries.⁴⁵

C *Singapore International Arbitration Centre and Singapore International Mediation Centre*

In light of the increasing amount of investment disputes in the BRI region, the Singapore International Arbitration Centre (SIAC) released the SIAC Investment Arbitration Rules (SIAC Rules) which came into force on January 1, 2017. It is a specialized set of rules tailor-made for resolving investment treaty arbitrations. The SIAC Rules are applicable by agreement to disputes involving a State, State-controlled entity or intergovernmental organisation, arising out of

41 Shenzhen Court of Int'l Arbitration, SCIA Arbitration Rules 2016, Dec. 1, 2016, *available at* <http://www.sccietac.org/web/doc/view_rules/861.html>.

42 Hong Kong Int'l Arbitration Cent. (HKIAC), HKIAC Announces Belt and Road Programme, Apr. 6, 2018, <<http://www.hkiac.org/news/hkiac-announces-belt-and-road-programme>>.

43 HKIAC, HKIAC Belt and Road Advisory Committee, <<http://hkiac.org/Belt-and-Road/belt-and-road-advisory-committee>> (last visited Apr. 25, 2019).

44 Teresa Cheng Outlines Key Trends, May 16, 2018, <https://www.news.gov.hk/eng/2018/05/20180516/20180516_184054_283.html>.

45 Id.

a contract, treaty or other instruments.⁴⁶ This move meets the demand for investment arbitrations along the BRI region.

The mediation in Singapore has also made efforts to catch up with the BRI trend. The Singapore International Mediation Centre (SIMC) and the China Council for the Promotion of International Trade/China Chamber of International Commerce (CCOIC) Mediation Centre have signed an agreement in September 2017 to assist the mediations of businesses arising from BRI projects. They will jointly assist Chinese businesses with investments in Singapore (33% of its investment in BRI countries), Singapore businesses with investments in China (85% of the total inbound investment in BRI countries) and companies with investments in other BRI markets.⁴⁷

D *Malaysian Arbitration Institutions*

Malaysia enjoys a geographical advantage as it is situated in the middle of the BRI region. The leading Malaysian institution, the Asian International Arbitration Centre (AIAC), formerly known as the Kuala Lumpur Regional Centre for Arbitration), is ambitious to become a forefront alternate dispute resolution (ADR) hub for the BRI.⁴⁸ As mentioned above, AIAC and the BAC jointly launched the “Belt and Road Arbitration Initiative” in May 2017. The Initiative will see both arbitration institutions working closely on the harmonization of arbitral laws by composing a set of uniform arbitration rules.⁴⁹

In response to the growing business cooperation between Malaysia and China under the BRI, the AIAC co-hosted the “Cross Border Investments and Its Legal Consequences: ADR in Belt and Road” with the China-ASEAN Legal Cooperation Centre in December 2017.⁵⁰ Over 100 delegates from various BRI

46 SIAC, SIAC Investment Arbitration Rules 2017, Jan. 1, 2017, available at <<http://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf>>.

47 Ministry of Law (Sing.), Singapore and China Mediation Centres Work Together to Help Businesses Resolve Disputes along Belt and Road, Sept. 19, 2017, <<https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-and-china-mediation-centres-work-together-to-help-busi.html>>; Herbert Smith Freehills, The Role of Mediation in the Resolution of Belt and Road Disputes, Oct. 11, 2017, <<https://hsfnotes.com/asiadisputes/2017/10/11/the-role-of-mediation-in-the-resolution-of-belt-and-road-disputes/>>.

48 Rajvinder Singh, “Malaysia Plans to Play a Major Role as an Arbitration Centre under the Belt Road Initiative, *The Sun Daily*, May 15, 2017, <<http://www.thesundaily.my/news/2017/05/15/malaysia-plans-play-major-role-arbitration-centre-under-belt-road-initiative>>.

49 Lin, *supra* note 38.

50 Kuala Lumpur Regional Cent. for Arbitration, Digital Newsletter 2017, Dec. 26, 2017, <<https://www.aiac.world/wp-content/newsletter/2017/December.html>>.

nations participated in the event to discuss the key issues and challenges of ADR under the BRI.⁵¹

E *The International Court of Arbitration of the International Chamber of Commerce*

In October 2017, the International Court of Arbitration of the International Chamber of Commerce based in Paris (ICC Arbitration) signed a Memorandum of Understanding with the SCIA on arrangements for facilitating the use of SCIA facilities in the BRI context. Mr. Alexis Mourre, President of the ICC Arbitration, described the arrangement as an important step to “better serve the needs of parties using arbitration and mediation, in particular in the context of the BRI.”⁵²

The ICC Arbitration has also established the Belt and Road Commission in January 2018 to promote ICC Arbitration’s existing services to support dispute resolution along the BRI.⁵³ The Chairman of the Commission, Mr. Justin D’Agostino, stated that they aim to raise awareness of the ICC Arbitration as the “go-to” institution for BRI disputes.⁵⁴ The Commission consists of experienced members and ambassadors who will play a pivotal role in promoting ICC’s existing services to support dispute resolution in BRI region. The Commission is planning a series of events to be held along the BRI region, such as China, Kazakhstan, Nigeria and Southeast Asia, to highlight the institution’s capabilities in handling BRI-related arbitrations and mediations.⁵⁵

IV The China International Commercial Court

The BRI follows a global trend of economic integration. Apart from cross-border arbitration, cross-border litigation also increases. This part of the report introduces the development and features of the newly established China

⁵¹ Id.

⁵² Int’l Chamber of Commerce (ICC), ICC MoU with Shenzhen Court of International Arbitration Extends Facilities to Arbitration Users, Oct. 19 2017, <<https://iccwbo.org/media-wall/news-speeches/icc-mou-with-shenzhen-court-of-international-arbitration-extends-facilities-to-arbitration-users/>>.

⁵³ ICC, Belt and Road Commission, <<https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/>> (last visited Apr. 25, 2019).

⁵⁴ Id.

⁵⁵ ICC, ICC Court Launches Belt and Road Initiative Commission, Mar. 5, 2018, <<https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/>>.

International Commercial Courts (CICC), an institution established in response to cross-border litigation arising out of the BRI context.

A *ICCs around the World*

The first international commercial court (ICC) was the United Kingdom's Commercial Court (UKCC) established in 1895. Today, the UKCC continues to be important to the UK's economy. In 2016, 70% of the 1100 claims issued in the UK's Admiralty and Commercial Court involved at least 1 foreign party, while 45% of the claims involved purely international parties.⁵⁶

As the demand for international dispute resolution increases, countries around the world plan to set up their own ICCs. In Europe, Britain's departure from the European Union has prompted several countries to establish their own ICCs. For instance, the International Chambers of the Paris Commercial Court and the Paris Court of Appeal were inaugurated in February 12, 2018,⁵⁷ while, at the time of writing, the Netherlands Commercial Court is expected to begin operation in 2018.⁵⁸ In the Middle East, the Dubai International Financial Court was set up in 2004, the Qatar International Court in 2009, and the Abu Dhabi Global Markets Court in 2015. In Asia, the Singapore International Commercial Court (SICC) was established in 2015 in response to the growth of "cross border investment and trade into Asia and between Asian economies."⁵⁹ Meanwhile, the Astana International Financial Centre Court in the Republic of Kazakhstan was established in January 2018.⁶⁰

⁵⁶ TheCityUK, "Legal Excellence, International Renowned: UK Legal Services 2017", at 6 (Nov. 2017), available at <<https://www.thecityuk.com/assets/2017/Reports-PDF/39ccc4245b/Legal-excellence-internationally-renowned-Legal-services-2017.pdf>> (last visited Apr. 25, 2019).

⁵⁷ Emmanuel Gaillard, Yas Banifatemi & Chloe Vialard, "The International Chambers of the Paris Courts and Their Innovative Rules of Procedure", *Shearman & Sterling Perspectives*, Apr. 23, 2018, <<https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure>>.

⁵⁸ Netherlands Commercial Court, "Planning of the Netherlands Commercial Court", <<https://netherlands-commercial-court.com>> (last visited July 24, 2018).

⁵⁹ Singapore Int'l Commercial Court Comm., "Report of the Singapore International Commercial Court Committee" (Nov. 2013), available at <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603.pdf>.

⁶⁰ Embassy of the Republic of Kazakhstan in the United Kingdom of Great Britain and Northern Ireland, Chairman and Judges to Astana International Financial Centre Court Take Oath, Dec. 7, 2017, <<http://www.mfa.gov.kz/en/london/content-view/chairman-and-judges-to-astana-international-financial-centre-court-take-oath>>.

B *Development of the China International Commercial Court (CICC)*

The development of the CICC began on June 16, 2015, when China's Supreme People's Court (SPC) published "Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts." As the first document on BRI-related dispute resolution, the publication pointed out the need for the SPC to provide cross-border adjudication services to facilitate a good rule-of-law development for the BRI.

More specifically, China's intention to establish its own ICC was first revealed by Judge Liu Guixiang, member of the SPC's judicial committee, during his speech on September 26, 2017.⁶¹ This was confirmed on January 23, 2018, when the "Opinion regarding the establishment of 'Belt and Road' dispute resolution mechanism and organization" was passed during the second meeting of China's Central Leading Group for Deepening Overall Reform.⁶²

More information about the CICC was given by Judge Gao Xiaoli, Deputy Chief Judge of the Fourth Civil Division of the SPC, during an interview on March 10, 2018. In particular, Judge Gao referred to various ICCs around the world to highlight the advantages of ICCs. She also pointed out challenges that might be faced by the CICC, such as the use of English and participation of foreign lawyers.⁶³

Details of the CICC were published on June 29, 2018 when the SPC issued the "Provisions on Several Issues Concerning the Creation of International Commercial Courts" (Provisions), which became effective from July 1, 2018.

C *Features of the CICC*

The CICC is established by the SPC to adjudicate international commercial cases. Its objective is "to try international commercial cases fairly and timely in accordance with the law, protect the lawful rights and interests of the Chinese and foreign parties equally, [and] create a stable, fair, transparent and convenient rule of law international business environment."⁶⁴

61 Li Yang, China to Set up Belt and Road Commercial Court, Sept. 28, 2017, <<https://eng.yidaiyilu.gov.cn/home/rolling/29381.htm>>.

62 Song Yan, Xi Jinping zhuchi zhaokai zhongyang quanmian shenhua gaige lingdao xiaozou di er ci huiyi [Xi Jinping Presides over the Second Meeting of the Leading Group for Deepening Overall Reform], Jan. 23, 2018, <http://www.gov.cn/xinwen/2018-01/23/content_5259818.htm>.

63 He Jingjing & Geng Zhenshan, "Dazao guoji shangshi fating sifa baozhang 'yidai yilu' jianshe [Build International Commercial Court, Judicial Protection of 'One Belt One Road' Development]", *Renmin Fazhi*, Feb. 2018, at 37-39.

64 China Int'l Commercial Court (CICC), About China International Commercial Court, <<http://cicc.court.gov.cn/html/1/219/193/195/index.html>> (last visited Apr. 25, 2019).

Two CICC courts are set up in Shenzhen, Guangdong Province and Xi'an, Shaanxi Province respectively. As explained by Judge Gao Xiaoli, the Shenzhen court focuses on the Maritime Silk Road, while the Xi'an court focuses on the land-based Silk Road Economic Belt.⁶⁵ Meanwhile, the Fourth Civil Division of the SPC in Beijing, which specializes in trials of international commercial disputes in China, is responsible for coordinating and guiding the Shenzhen and Xi'an courts.⁶⁶

The features of the CICC are discussed below.

1 Jurisdiction

Under Article 1 of the Provisions, the CICC is a permanent adjudication tribunal under the SPC. Its jurisdiction covers circumstances specified in Article 2 of the Provisions, which includes first instance international commercial cases with an amount in dispute of at least RMB300,000,000 and cases involving applications for preservation measures in arbitration, as well as for setting aside or enforcement of international commercial arbitration awards according to Article 14 of these Provisions. Furthermore, the SPC has the power to transfer cases to the CICC, while the higher people's courts may also seek the SPC's permission to transfer cases to the CICC.

The meaning of "international commercial cases" is defined in Article 3. It includes situations in which either or both parties' nationality or habitual residence is non-Chinese, or circumstances in which the object in dispute or the legal facts regarding the parties' relationship arise outside China.

With regards to procedures, Article 5 states that CICC cases should be heard by a collegiate panel of three or more judges. However, it is unclear whether the CICC has the power or obligation to refer certain cases to other institutions, such as the SPC judicial committee. Parties have no right to appeal in CICC disputes. Instead, parties who disagree with the CICC's decision may apply for a retrial to the main body of the SPC, which will be heard by another collegiate panel according to Article 16.

2 Judges

Article 4 states that judges of the CICC should be senior SPC judges who are experienced in trial work, familiar with international treaties, usages, trade and investment practices, and capable of using Chinese and English proficiently as working languages. On June 28, 2018, eight judges have been appointed to the CICC:

⁶⁵ He & d Geng, *supra* note 63.

⁶⁶ CICC, *supra* note 64.

- Judge Zhang Yongjian (Chief Judge of the First, Second and Fourth Civil Division of the SPC, Member of the Adjudication Committee of the Fourth Civil Division of the SPC, Vice President of the First Circuit Court of the SPC, National Adjudication Expert)
- Judge Wang Chuang (Deputy Chief Judge of the Third Civil Division of the SPC)
- Judge Gao Xiaoli (Deputy Chief Judge of the Fourth Civil Division of the SPC, Presiding Judge of the First Circuit Court of the SPC)
- Judge Xi Xiangyang (Presiding Judge of the First Circuit Court of the SPC)
- Judge Sun Xiangzhuang (Presiding Judge of the First Circuit Court of the SPC, National Adjudication Expert)
- Judge Shen Hongyu (Judge of the SPC)
- Judge Zhu Li (Judge of the Third Civil Division of the SPC)
- Judge Du Jun (Judge of the SPC)

Notably, all eight CICC judges have been SPC judges before the appointment. All of them are Chinese. Unlike other ICCs, the SICC does not have prominent judges from different countries and different legal traditions. Also, it is unclear whether any selection, appointment or dismissal mechanism exists for CICC judges.

3 Applicable Law

Article 7 provides that parties may choose the applicable law by agreement in accordance with the Law of the People's Republic of China on Choice of the Laws Applicable to Foreign-related Civil Relations. Otherwise, the CICC may determine the applicable law. When doing so, the CICC may be guided by parties, legal experts from China or abroad, institutions rendering law finding services, members of the International Commercial Expert Committee (ICE Committee), the central authority of the other contracting party that has entered into a judicial assistance treaty with China, the Chinese Embassy or Consulate in the relevant country, or the Embassy of the relevant country in China.

It should be emphasized that a significant international element has been introduced in this respect. While foreign judges and lawyers are not permitted under Chinese law,⁶⁷ the CICC is able to accept advice of international legal experts on matters involving different legal traditions. Similarly, international dispute-resolution institutions may give such advice if they are members of the ICE Committee. Meanwhile, since parties may choose the applicable law,

⁶⁷ See Judges Law of the People's Republic of China, art. 9(1) (Order No.76, Issued Jan. 9, 2017) (stating that a judge must "be of the nationality of the People's Republic of China.")

the CICC is able to operate with non-Chinese legal principles, such as the common law system.

4 Mediation and the ICE Committee

The SPC will set up an ICE Committee in accordance to Article 11. This Committee should include international commercial courts, mediation and arbitration institutions. According to Article 12, within the first seven days of the CICC's acceptance of a case, parties may agree to mediate at any international commercial mediation centers. If such mediation is facilitated by a member institution of the ICE Committee, the CICC may issue a settlement agreement or judgement under Article 13.

The ICE Committee is another significant step towards internationalization of the CICC. Like foreign legal experts, international institutions specializing in dispute-resolution may give advice on the applicable law for a particular dispute. Moreover, the CICC's power to enforce ICE Committee members' mediation not only encourages expeditious resolution of disputes, but also boosts the CICC's international recognition.

D *Potential Challenges faced by the CICC*

Despite the breakthroughs achieved by the CICC in developing China's legal system, there remain several defects in the CICC's structure. These defects could undermine the CICC's attractiveness in attracting cases, especially when it faces fierce competition from ICCs around the world.

1 Lack of Legal Tradition

The success of the UK's Commercial Court is due to its flexible procedures and competent legal professionals,⁶⁸ as well as "the use of English; a reputation for fairness; the centuries of precedent that lend predictability."⁶⁹ These are advantages of the common law tradition which the SICC can borrow from. However, China's legal system is still developing, and its legal tradition could not match that of the UK and Singapore. In the World Justice Project Rule of Law Index 2017-2018, China ranks 75 out of 113 countries.⁷⁰ The lack of a predictable judicial behaviour is reflected in the CICC. For instance, it is unclear how CICC judges or members of the ICE Committee are selected.

68 Richard Southwell, "A Specialist Commercial Court in Singapore", 2 *Sing. Academy L.J.* 274 (1990).

69 "Foreign Jurisdictions Try to Lure Legal Business from London," *The Economist*, Aug. 31, 2017.

70 World Justice Project, Rule of Law Index 2017-2018, available at <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf>.

2 Lack of International Elements

Given that the CICC intends to cover cases of different countries, “the diversified legal systems in the OBOR countries will make it difficult for the parties or the judges to prove the foreign law ... China may push to establish a multilateral system among the OBOR countries, so as to create a favorable legal environment for the parties from these countries.”⁷¹ One way to establish a multilateral system is to increase participation of foreign legal experts in CICC proceedings. While this may be achieved by seeking advice from international legal experts or ICE Committee members, it remains to be seen how effective such measures can be. It is probable that the CICC will still lack behind ICCs around the world which have prominent international judges.

The lack of international judges is, among others, a challenge which Judge Gao acknowledged and pointed to the need for legislative support.⁷² As remarked by Susan Finder:

those drafting the structure of the CICC were constrained by Chinese law, the nature of the Chinese court system and related regulatory systems ... the language of the court could not be English, the procedural law had to be Chinese civil procedure law, and the judges had to be judges so qualified under current Chinese law.⁷³

V Conclusion

The BRI has been a game-changer in the field of courts and alternative dispute resolution since its launch in 2013. As observed, the impact of BRI on courts and arbitration has been substantial and will continue to reshape the landscape of international commercial disputes in the future.

For arbitration, the BRI is a strong impetus in enhancing the harmonization of international arbitral laws across the BRI Asian region. A coherent and uniform legal framework for dispute resolution is the backbone to the realization of BRI infrastructural and business projects. On this premise, a harmonization of international arbitral laws is called for. In particular, a harmonized notion of

71 Jędrzej Górski, Julien Chaissee, Manjiao Chi, Ahmad Manzoor & Teresa Cheng, “One Belt One Road Initiative (“OBOR”): Editorial,” *Transnat'l Dispute Mgmt.*, Oct. 12, 2017, <<https://www.transnational-dispute-management.com/article.asp?key=2469>>.

72 He & Geng, *supra* note 63.

73 Susan Finder, “Comments on China’s International Commercial Courts,” *Supreme People’s Court Monitor*, July 9, 2018, <<https://supremepeoplescourtmonitor.com/2018/07/09/comments-on-chinas-international-commercial-courts/>>.

the substantive public policy exception to the enforcement of arbitral awards should be established due to the wide-ranging cultural and legal considerations.

Regarding the impact of the BRI on the Chinese courts, the establishment of the CICC signifies China's attempt to participate in the trend of cross-border dispute-resolution, with a particular focus on the BRI region. The CICC introduces features that are innovative to the current Chinese legal system. For instance, its law-finding mechanism and ICE Committee allows for foreign legal advice to be presented and adopted in CICC proceedings. While it remains to be seen how effective such measures are, these measures already stand as remarkable improvements on the Chinese legal system.

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