

CHINA'S BELT AND ROAD INITIATIVE: REFORMING PRACTICES IN INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

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Introduction

The Belt and Road [**BRI**] is an international infrastructure development initiative launched by the People's Republic of China in 2013. Rooted in the history of Silk Roads, it is an ambitious project which consists of a land-based belt and a maritime road stretching from China to the Middle East and Europe. It is one of the world's largest ever infrastructure plans and involves more than seventy sovereign states in addition to independent investors, contractors and developers. Given the magnitude and complexity of the project, disputes will inevitably arise, and lawyers practicing dispute resolution will play a significant role. Three kinds of disputes are most likely to occur under the BRI:¹

- Disputes between commercial entities in relation to provision of ancillary services like financing, foreign exchange, and customs clearance.
- Investor-state disputes commonly resolved through the mechanism of Investor State Dispute Settlement in accordance with multilateral & bilateral investment instruments and treaties.
- State to State trade disputes normally resolved under the framework of the World Trade Organization.

Projects under the BRI are capital intensive, involve various contractual agreements, and are spread across jurisdictions. Therefore, it is reasonable for parties to prefer alternative modes of dispute resolution over the local court system which involve concerns regarding impartiality of local judges, applicability of local law, and international enforcement of local judgments. International arbitral institutions are conscious of the increasing demand for arbitration due to BRI, and competition is rising among many of them to exploit this opportunity. Therefore, many of them have made amendments to their rules, focusing particularly on the BRI, in order to maintain competitiveness. In 2018, China itself developed its own commercial court – The China International Commercial Court [**CICC**] for arbitration and mediation of disputes under the

¹ Jue Jun Lu, 'Dispute Resolution along the Belt and Road: what does the future hold?' (*Thomson Reuters Practice Law Arbitration Blog*, 2 August 2018) <<http://arbitrationblog.practicallaw.com/dispute-resolution-along-the-belt-and-road-what-does-the-future-hold/>> accessed 10 March 2021.

BRI.² This paper attempts to discuss and analyze some developments taking place in the field of dispute resolution, in view of this initiative.

The Unique Legal Challenges of BRI

The BRI, owing to its cross-border nature and its involvement of a vast number of parties, poses some unique challenges in dispute resolution. Contingent on the circumstances of the host state, BRI projects run the risk of political instability, are clouded with concerns over security and local protectionism, and face regulatory and legal hurdles. Some unique challenges which ought to be addressed with respect to dispute resolution under the BRI are:

Mitigating Differences

Ever since its announcement in 2013, China has asserted that one of BRI's primary goals would be to guarantee and advance certain internationally recognized standards in the rule of law.³ Such a goal has been set, keeping in mind the fact that cross-border projects under the BRI are spread across a variety of political and legal systems, which makes enforcement by a single forum difficult.⁴ There are over forty civil law, eleven common law, and four Islamic law countries within the BRI, besides nine others with a mixed legal system.⁵ Disparities in legal systems, jurisprudences and expectations from the law complicate the manner in which disputes ought to be resolved in the event of a default or breach.⁶ Therefore, BRI's smooth operation depends on the development of a system which can mitigate the differences between existing legal systems of participating nations.⁷ Legal practitioners and mediators are of the opinion that BRI's goal of a seamless international economy can be realized only if countries are willing to revise their legal systems and bring a degree of uniformity in their domestic laws.⁸ The introduction of CICC is itself seen as one of the attempts

² 'China has established International Commercial Court for commercial disputes under BRI' (*Roedl & Partner*, 25 September 2018) <<https://www.roedl.com/insights/china-international-commercial-court-commercial-disputes-bri>> accessed 28 May 2021.

³ 'Building the Judicial Guarantee of International Commercial Court "Belt and Road" Construction An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People's Court, PRC' (*China International Commercial Court*, 19 March 2018) <<http://cicc.court.gov.cn/html/1/219/208/209/774.html>> accessed 28 May 2021.

⁴ Jingzhou Tao and Mariana Zhong, 'The Changing Rules Of International Dispute Resolution in China's Belt And Road Initiative' in Wenxian Zhang, Ilan Alon and Christopher Lattemann (eds), *China's Belt and Road Initiative: Changing the Rules of Globalization* (Palgrave 2018) 305.

⁵ *ibid* 308.

⁶ *ibid*.

⁷ Poomintr Sooksripaisarnkit, 'Harmonisation of Choice of Law Rules in Commercial Contracts in the One Belt One Road Countries: Will the Hague Principles on Choice of Law in International Commercial Contracts Serve as a Good Model?' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).

⁸ *ibid*.

to create an international business environment that is stable, transparent, and committed to appropriate rule of law.⁹ However, the institution shall be faced with its own legal challenges due to inconsistencies in the legal culture of China and questions raised against the past role of courts in the country. Some of these include partiality of judges, involvement of the government in adjudication, and opaqueness of laws and regulations. They shall be discussed in greater detail in the third chapter of the paper.

Enforcement of Awards

In cross-border disputes, enforcement of judicial pronouncements or arbitral awards is a pressing question. Enforcement is an extremely relevant factor considered by parties who enter into an arbitration agreement or any other contract which ensues the risk of potential international litigation. In negotiating and drafting clauses relating to the choice of forum and choice of law, they carefully consider the impact of such clauses on the disputes that may arise. The complex and high-cost nature of BRI projects imply that the stakes are very high for negotiating parties, more particularly when it comes to arbitration, termination, or clauses of breach. Scholars have opined that enforcement of foreign decisions in China is currently the most important topic in private international law with respect to BRI.¹⁰ In the absence of sound enforcement capability, contracting parties may arbitrate their disputes and receive an award in their favor, only to realize that it is not enforceable and thus useless in effect. Historically, the international business and legal community has viewed China with a lens of caution when it comes to reciprocity and enforcement of foreign judgments.¹¹ The launch of BRI has induced China to move towards a system that guarantees reciprocity as an important principle.¹² The country has entered into over thirty bilateral treaties for legal assistance, and the mutual recognition and enforcement of civil and commercial judgments.¹³ It is also actively participating in the negotiation on recognition and enforcement of judgments in civil and commercial matters at the Hague Conference on Private International Law, and exploring the possibility of ratifying the convention.¹⁴

⁹ 'A Brief Introduction of China International Commercial Court' (*China International Commercial Court*, 28 June 2018) <<http://cicc.court.gov.cn/html/1/219/193/195/index.html>> accessed 11 March 2021.

¹⁰ King Fung Tsang, 'The role of Hong Kong in the dispute resolutions of One Belt One Road' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018) 201.

¹¹ *ibid* 205.

¹² Interview with Gao Xiaoli (n 3).

¹³ *ibid*.

¹⁴ *ibid*.

Choice of Dispute Resolution Forum

Primarily concerned with international construction of infrastructure, projects under the BRI involve a large number of companies, both Chinese and non-Chinese, besides the Chinese government and other sovereign states. These parties have a range of competing options available to them for dispute resolution ranging from domestic courts and arbitral institutions to international arbitral institutions, mediation institutions and ad hoc options. This part discusses various factors which should be considered by parties in deciding the appropriate forum to resolve their disputes under BRI.

Difference in Arbitral Institutions

International arbitration, with its numerous advantages, has been the most preferred mode of dispute resolution for parties involved in BRI. Due to rising demand, tough competition is arising among arbitral institutions to maintain parity in their rules and secure a competitive position in the market.¹⁵ However, noteworthy differences continue to exist and parties to the BRI ought to take them into account while deciding the appropriate forum for themselves:¹⁶

- Confidentiality: Maintenance of confidentiality is a very important factor in choice of arbitral institutions by concerned parties. Significant disparities exist in the approaches taken by different arbitral institutions on this issue. For example, International Chamber of Commerce [“ICC”] Rules don’t contain any clear provision on confidentiality whereas rules of the International Centre for Dispute Resolution expressly prohibit the disclosure of any confidential matter in relation to the proceeding or the arbitral award.¹⁷ Similarly, London Court of Arbitration Rules [“LCIA”] provides that all information relating to the arbitral proceeding and award should be confidential.¹⁸
- Scrutiny: The degree to which arbitral awards are scrutinized is also different for different arbitral institutions. When it comes to the ICC, awards given by the arbitrator are subject to scrutiny and approval of the institution in order to ensure consistency and a good standard in writing awards.¹⁹ On the other hand, institutions like the Singapore International Arbitration

¹⁵ James Rogers, Alfred Wu and Anita Fong, ‘Belt and Road Initiative disputes – Bumps in the road?’ (*Norton Rose Fulbright*, October 2018 <<https://www.nortonrosefulbright.com/en-fr/knowledge/publications/7b9bd0cc/belt-and-road-initiative-disputes--bumps-in-the-road>> accessed 11 March 2021.

¹⁶ *ibid.*

¹⁷ International Centre for Dispute Resolution, International Arbitration Rules, art 37.

¹⁸ London Court of Arbitration, LCIA Arbitration Rules, art 30.

¹⁹ International Chamber of Commerce, Arbitration Rules, art 34.

Centre [“SIAC”] and the Hong Kong International Arbitration Centre [“HKIAC”] do not undertake scrutiny of arbitral awards.

- Fees: Fee structures are also different for different arbitral institutions. Some of them charge on the basis of a fixed hourly rate of service while others base it on the amount of dispute. Parties need to be informed of these differences so that they can select that institution which suits their concern.

Responses of Arbitral Institutions

The UN Convention on Recognition and Enforcement of Foreign Tribunal Awards, forms the legal basis for international commercial arbitration, and signatories to the convention have an obligation to enforce arbitral awards given in their jurisdiction. Of more than seventy countries involved in BRI projects, it is important to note that only five are not signatories to this convention.²⁰ This implies that enforcement of arbitral awards shall be relatively convenient for signatory states. Most prominent arbitral institutions are therefore improvising on their mechanisms to capitalize on this opportunity. The ICC, in March 2018, proposed the establishment of a dedicated commission to take up the resolution of BRI disputes and published a statement that it would make concerted efforts to promote mediation, followed by arbitration in such cases.²¹ Soon thereafter, HKIAC also announced a “Belt and Road Programme” which will consist of a road advisory committee, an industry focused belt and an online resolution platform dedicated especially to BRI disputes.²² HKIAC amended its rules in the year 2018 to bring in many new features such as an online repository of documents, alternative modes of resolution such as Arbitration-Mediation-Arbitration [“Arb-Med-Arb”], funding by third parties, and multilingual procedures.²³ It is seen by many commentators as one of the most preferred forums for arbitration due to its proximity with China, a stable legal system based on common law, long positive experience of arbitration, and its familiarity with Chinese companies and foreign investors. The latest SIAC rules brought in 2016 contain provisions for multiple contract arbitration, joinder of new parties, and quick dismissal of defenses and claims.²⁴ Since 2014, it already had a protocol in

²⁰ Rogers (n 15).

²¹ ‘ICC Court Launches Belt and Road Initiative Commission’ (*International Chamber of Commerce*, 5 March 2018) <<https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/#:~:text=The%20International%20Court%20of%20Arbitration,China's%20Belt%20and%20Road%20Initiative>> accessed 11 March 2021.

²² ‘HKIAC announces Belt and Road Programme’ (*Hong Kong International Arbitration Centre*, 26 April 2018) <<https://www.hkiac.org/news/hkiac-announces-belt-and-road-programme>> accessed 11 March 2021.

²³ 2018 Administered Arbitration Rules, Hong Kong International Arbitration Centre.

²⁴ Eric Lai, ‘SIAC 2016 Rules: The Key Changes’ (*Singapore International Arbitration Blog*, July 11 2016) <<https://singaporeinternationalarbitration.com/2016/07/11/siac-2016-rules-the-key-changes/>> accessed 11 March 2021.

association with the Singapore International Mediation Centre [“**SIMC**”] to enable Arb-Med-Arb between the involved parties.²⁵ In another major development, the China International Economic and Trade Arbitration Commission [“**CIETAC**”] adopted a special set of rules for investment arbitration aimed at timely resolution of investment claims in relation to BRI.²⁶ Considering these changes and their impact on time and cost of resolution, parties should carefully weigh the pros and cons before selecting the suitable institution.

Prospects of Mediation

In the last few years, a global trend towards combining different modes of alternative dispute resolution is becoming popular, most particularly because of BRI. Led by China, experts are of the view that participating countries will reflect Asian values and take a more consensus-based approach to dispute resolution, promoting mediation in the way.²⁷ End-users, academics and reforms undertaken by Chinese courts themselves highlight the important role that mediation is likely to play in disputes under BRI.²⁸ Some of the most important advantages of mediation of BRI disputes are:²⁹

- Flexible and informal: Mediation normally follows a broad standard process, but its procedures are quite flexible and informal, and can be changed easily to suit the needs of the mediating parties.
- Confidentiality: Normally, all documents used in the mediation process are kept confidential and cannot be relied upon for the purpose of any subsequent arbitration or litigation proceeding in the future.
- Saves time and cost: Mediation is set up in very quick time upon agreement and appointment of a mediator. Little cost is involved in organization, and most mediation proceedings hardly last for a day.

Three important BRI jurisdictions – China, Hong Kong, and Singapore have taken notable steps to promote mediation for resolution of BRI disputes. In 2019, a memorandum of understanding was signed between the China Council for the Promotion of International Trade [“**CCPIT**”] and the Singapore International Mediation Centre [“**SIMC**”], to establish a panel of skilled dispute

²⁵ SIAC-SIMC Arb-Med-Arb Protocol 2014.

²⁶ China International Economic and Trade Arbitration Commission, International Investment Arbitration Rules, 2017.

²⁷ ‘Mixed-Mode Dispute Resolution: China’s Belt and Road is Driving Change’ (*Herbert Smith Freehills: ADR Notes*, 26 March 2019) <<https://hsfnotes.com/adr/tag/belt-and-road-initiative/>> accessed 11 March 2021.

²⁸ *ibid.*

²⁹ ‘The Role of Mediation in the Resolution of Belt and Road Disputes’ (*Herbert Smith Freehills*, 11 October 2017) <<https://hsfnotes.com/asiadisputes/2017/10/11/the-role-of-mediation-in-the-resolution-of-belt-and-road-disputes/>> accessed 11 March 2021.

resolution professionals for ensuring “a high settlement rate and a high level of user satisfaction”.³⁰ Rules, enforcement procedures, and case management protocols shall also be established under this MoU.³¹ Recently, the ICC also published a special guidance document on mediation of BRI disputes, which promotes mediation either as a standalone method or a mixed-mode process along with arbitration.³² The chair of ICC Court’s Belt and Road Commission also commented that with the Belt and Road nexus, a mixed-mode combining both mediation and arbitration can be quite efficient in resolving disputes.³³

China’s Plans on Dispute Resolution

International businesses partnering in BRI projects include in clear terms in their contracts to establish a forum for resolution in the event of dispute, be it mediation, arbitration, or some mixed method. Spearheading most of its projects, China has made the most significant efforts to develop mechanisms which can expeditiously resolve BRI disputes. The China International Commercial Court constituted by the Supreme People’s Court of China [“**SPC**”] is emerging as an important development in this respect. A brief comparison of the CICC with existing forums in Singapore and Hong Kong can help us understand the international perception, benefits and potential questions that may arise in respect of CICC and China’s overall plan of emerging as a global dispute resolution hub:

- Hong Kong: Hong Kong’s dispute resolution forums for both arbitration and mediation, are recognized as quite reliable and transparent.³⁴ Therefore, parties with a greater concern for judicial impartiality and experience are more likely to opt for a mechanism in Hong Kong over China. However, China does not recognize judgments from Hong Kong as Chinese judgments, subjecting the parties to domestic civil procedures.³⁵ Moreover, there are complicated issues of reciprocity accompanying enforcement of arbitral awards in China as has been discussed before.³⁶ In recent years however, there has been a considerable change in the approach of

³⁰ ‘SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes’ (*Singapore International Mediation Centre*, 25 January 2019, <<http://simc.com.sg/blog/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/>> accessed 11 March 2021.

³¹ *ibid.*

³² International Chamber of Commerce, *Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration*.

³³ ‘Mixed-Mode Dispute Resolution: China’s Belt and Road is Driving Change’ (n 27).

³⁴ Catherine Smith, ‘The Belt and Road Initiative: Dispute Resolution along the Belt and Road’ (*HFW Briefing*, August 2018) <<https://www.hfw.com/The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road>> accessed 12 March 2020.

³⁵ Tsang (n 10).

³⁶ Alyssa V M Wall, ‘Designing a New Normal: Dispute Resolution Developments along the Belt and Road’ (2019) 52 *N Y U Journal of International Law and Politics* 279, 311.

Chinese Courts. The most notable of them was the decision of SPC to enforce the Singaporean judgment of Kolmar AG Group. In its decision, the court noted that treaties signed by China for mutual recognition and enforcement of commercial and civil cases ought to be respected, and doing so was in accordance with Article 282 of China's Civil Procedure Law.³⁷ This has been seen as a significant step in the direction of observing reciprocity of international judgments by Chinese courts. However, much more needs to be done to build confidence among private parties and states that international judgments shall be enforced as per these treaties.

- Singapore: For now, SIMC has partnered with CCPIT to develop rules and procedures for examination of conflicts and assistance of dispute resolution between parties involved in BRI.³⁸ Soon however, the two of them may turn into potential competitors, considering the continued zest with which CICC is pushing to strengthen its services in both mediation and arbitration. Like Hong Kong, Singapore has also earned a reputation among international businesses and practitioners for its well-developed commercial courts and a strong judiciary. Insofar as the CICC is concerned, there are widespread apprehensions amongst investors, that arbitral awards, especially the ones which are against the Chinese government or Chinese corporations, will not be enforced in time.

The SPC is cognizant of these problems with the CICC and has in fact constituted an international commercial expert committee to address them. The committee's functions include: (i) presiding over mediations; (ii) providing advisory opinions on special legal issues; (iii) providing suggestions and advice on the development of CICC; and (iv) consider other matters entrusted by the CICC among others.³⁹

Conclusion

The success of Belt and Road Initiative is contingent upon the ability of parties to resolve their disputes in an amicable and timely manner. Given their sheer magnitude and cross-border nature, BRI projects encounter some unique difficulties in enforcing awards and mitigating the legal differences which exist between different jurisdictions. It is important that parties, especially China, take concrete steps keeping these considerations in mind. In so far as the investors are concerned,

³⁷ Alison Lu Xu, 'Belt and Road Typical Case 13: Towards a Liberal Interpretation of the Reciprocity Principle for Recognition and Enforcement of Foreign Judgments' (*Stanford Law School China: Guiding Cases Project*, 15 June 2018) <<https://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-3-alison-xu/>> accessed March 12, 2020.

³⁸ 'SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes' (n 26).

³⁹ 'Working Rules of the International Commercial Expert Committee of the Supreme People's Court' (China International Commercial Court, 5 December 2018) <<http://cicc.court.gov.cn/html/1/219/208/210/1146.html>> accessed March 12, 2021.

choice of dispute resolution forum is the most important question, and intense competition is emerging among various international institutions to make their rules for both arbitration and mediation attractive and simple. Besides procedural rules, parties are considering other factors like the experience of arbitrators and flexibility of the institution to provide for mediation and mixed modes of resolution such as arb-med-arb. Therefore, these institutions will have to take important steps, not only to improve their quality of service but also to specialize in newly emerging trends in dispute resolution.