
A ROAD TO ARBITRATION IN CHINA'S BELT AND ROAD INITIATIVE PROJECTS: THE INSTITUTIONAL PERSPECTIVE

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I. Introduction

The project of the 21st century as it is called or the dragon widening its wings to take a flight over the world, it is China's most highly ambitious flagship project introduced in the year 2013 by the Chinese President Xi Jinping with a blanket name of Belt and Road Initiative (“BRI”) or One Belt One Road (“OBOR”)¹. The main aim of this flagship project is to revive the ancient silk route of China like it used to trade in ancient times across Asia, South East Asia, Central Asia, the Middle East, Europe, and Russia.

Our forefathers opened the Silk Road, a transcontinental path connecting Asia, Europe, and Africa, over 2,000 years ago, by journeying across immense steppes and deserts. Our forefathers, braving treacherous waters, constructed the maritime Silk Road, which connected the East with the West. These historic silk routes opened doors to peaceful cooperation across nations, adding a glorious chapter to the annals of human civilization.

The historic silk routes, which span thousands of miles and years, exemplify the spirit of peace and collaboration, openness and inclusion, reciprocal learning, and mutual profit. The Silk Road spirit has become a significant human civilization's inheritance. Silk Road travellers have constructed a bridge for peace and East-West collaboration generation after generation. Our best teacher is history. The old silk routes' splendour demonstrates that geographical distance is not insurmountable. We can embark on a path leading to friendship, mutual development, peace, harmony, and a better future if we take the first bold step towards one other.

This project under the BRI consists of various projects related to infrastructure development, transportation, energy, mining, information technology and communications, the creation of

¹ Belt and Road Initiative, European Bank for reconstruction and development *available at:* <https://www.ebrd.com/what-we-do/belt-and-road/overview.html> (last visited on January 30, 2021)

special economic zones, tourism, and urban development.

As of January 2021, the number of countries that have joined the BRI by signing a memorandum of understanding with the Republic of China is 140.² All the four major continents in the world i.e., Asia, Europe, Russia and Africa are connected under this BRI. The idea behind this project is to connect the main four continents through a single Road on land as a belt and through a single Maritime Road covering the Indian Ocean and connecting all the major ports for international trade.

This Crown Jewel project is estimated approximately between US\$1 trillion to US\$8 trillion.³ So, one can imagine that how unrealistic it could be if looking at the huge costs involved in this great sized project but China always does unrealistic things. China had pledged to invest US\$100 billion to initiate this project formally in the year 2015 and China through its soft policy is convincing the other super economies of these four continents to join the project of the millennium through bilateral investment treaties (“BIT”) and China through its great diplomacy, is already a part of 128 such treaties including many with BRI countries.⁴

With as many as 140 countries have involved and become part of China, disputes are bound to happen in this massive international project. With the involvement of countries with different cultures, languages and laws and countries ranging from the First World to the Third world, the conflict resolution needs to be robust with single approach management to handle this cross-cultural massive trade affair on a global platform.

To mitigate the risks involved in the Belt and Road Initiative projects with a humongous pool of participants the rule of law needs to be at the topmost priority so that the participating countries can feel the trust, confidence and security in entering these projects with the People’s Republic of China.

II. Arbitration as dispute resolution in belt and Road initiative

² Nedopil, Christoph, “Countries of the Belt and Road Initiative”; Beijing, IIGF Green BRI Center, 2021 *available at: <https://green-bri.org/countries-of-the-belt-and-road-initiative-bri/?cookie-state-change=1612697642780>* (last visited on January 30, 2021)

³ Jonathan E. Hillman, “How Big is China’s Belt and Road?”, *Centre for strategic & international studies*, April 3, 2018, *available at: <https://www.csis.org/analysis/how-big-chinas-belt-and-road>* (last visited on January 30, 2021)

⁴ Database for Bilateral Investment Treaties, International Centre for settlement of investment treaties, World Bank Group, *available at: <https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties>* (last visited on February 2, 2021)

The first step in reducing the risk of (1) resolving disputes in potentially less favourable local courts on the BRI and/or (2) being unable to enforce an award or judgement once obtained is to carefully draught the law and arbitration clause in a contract, ensuring that it provides for disputes to be resolved by an arbitration institution under their administered arbitration rules or even on an ad hoc basis. To ensure confidence, trust and security in the participating country, the Dragon country needs to serve a great dispute resolution mechanism. And to serve that sense of security to the participating country, the dragon country needs to have a great rule of law at their own home country but the question arises that why would a participating foreign country in the BRI project shall believe in another country's legal regime, that is, China, when that home country's laws are itself muddled up with political interference, long delays and corruption.⁵ In the mind of the participating foreign country, the doubt shall always prevail that at the time of the dispute, the Chinese court shall always favor the Chinese entity due to its natural ground favoritism.

The language barrier is also an area where the participating country would have an issue dealing with the Chinese government.⁶ Even engaging a language interpreter would put another cost onto a participating country, so there the need arises that common language should be used in dealing with the disputes. Why would any participating country pay the extra cost of a language interpreter in a foreign land to understand the nuances of the law and technological terminologies?

The yuan, commonly known as the renminbi ("RMB"), was traditionally not freely convertible, although that is changing as China internationalizes the RMB. Contracts under the BRI favour Chinese developers, contractors, and suppliers, and payment is frequently made in RMB. China developed its foreign development institutions to fund the BRI projects, notably a new Asian Infrastructure Investment Bank ("AIIB"). In 2013, the United Kingdom became the first western nation to issue a sovereign renminbi bond. "As China begins to play a larger role in the global economy," the Financial Times adds, "the UK has been keen to promote the City of London as a platform for overseas commerce in the Chinese currency."⁷ While American

⁵ Tanner Greer, "One Belt, One Road, One Big Mistake", *Foreign Policy*, December 6, 2018, available at: <https://foreignpolicy.com/2018/12/06/bri-china-belt-road-initiative-blunder/> (last visited on February 21, 2021)

⁶ Yang Gao, "How the Belt and Road Initiative Informs Language Planning Policies in China and among the Countries along the Road." *12 Sustainability* 14:5506 (2020) available at: <https://doi.org/10.3390/su12145506> (last visited on February 24, 2021)

⁷ "US attacks UK's constant accommodation with China", *Financial Times*, March 12, 2015, available at: <https://www.ft.com/content/31c4880a-c8d2-11e4-bc64-00144feab7de> (last visited on January 12, 2021)

Express has been granted permission to operate in China, Visa and Mastercard are still barred from doing so. China will digitize the RMB shortly, effectively leapfrogging the West's credit card payment systems. The entire concept of money is rapidly evolving.⁸

Similarly, the participating foreign country from the other side of the global map would never choose a venue of arbitration in China to administer their dispute, so the need for venue arises, as no participating country will ever choose to travel to China to resolve its dispute, let's say e.g., Greece will never come to China to get a dispute resolved in a China's Court of Law or before a Chinese Arbitrator with a Chinese company on the Chinese land.

Keeping all these parameters in the mind, it is best to resolve the dispute through arbitration as all these insecurities related to party autonomy, venue and procedural aspects between the parties would be covered with alternative dispute resolution because litigation in today's time is not the preferred mode of settling disputes as it leads to an enormous number of multiple litigations. International arbitration is an excellent option for resolving disputes resulting from BRI projects. Through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitration also provides a neutral forum, internationalized procedures and rules, confidentiality, and international enforceability of final and binding arbitral awards (New York Convention).

Arbitration adds convenience and efficiency to the process for both parties. When parties and members of arbitral tribunals are located in different locations, virtual hearings may be used instead of in-person hearings, and procedures such as just clock arbitrations or hot-tubbing of expert Witnesses may be used to tailor the process to the specific needs of the dispute at hand. For example, bodies may choose to limit document production by applying the IBA standards on The Taking of Evidence to documents that are relevant and material to the case's resolution. When parties and members of the arbitral tribunal are located in separate locations, virtual hearings may be used instead of in-person hearings, and methods such as chess-clock arbitrations or 'hot-tubbing' of expert witnesses may be used.

Members of arbitral tribunals are located in different locations and use procedures such as chess clock arbitration coming for Expert Witnesses. Parties can select arbitrators based on specific

⁸ "China's central bank delays market entry for Visa and Mastercard", *Financial Times*, January 13, 2019, available at: <https://www.ft.com/content/8dee4b22-13ef-11e9-a581-4ff78404524e> (last visited on January 14, 2021)

factors such as the technical expertise required or cultural or language concentrations.

The covid-19 outbreak highlighted the importance of adaptability, as organizations such as SIAC and ICC, as well as users, practitioners, and tribunals, quickly utilized technology to keep arbitrations running smoothly while imposing travel limits and lockdowns throughout the world. The pandemic brought new challenges which the arbitration professionals faced, and came out of it by introducing new technology-driven mechanisms.

III. Institutional Perspective on Belt & Road Initiative

Although China's arbitration law exists but a lot of gaps have been identified in China's arbitration legislation. The procedural aspects of arbitration are modelled on the litigation style which is a great hindrance in attracting foreign parties to choose arbitration in China with Chinese institutions. So, to fill that gap, China has made amendments in the year 2017 and introduced institutions like China International Economic and Trade Arbitration Commission – Silk Road Arbitration Centre⁹ (“CIETAC”), which can deal with matters involving foreign countries and at a global level in BRI. CIETAC is considered to be the most preferred arbitration institution in China due to its impartiality and independently resolving the economic and trade disputes by way of arbitration since its inception in the year 1956 under the name of China Council for the Promotion of International Trade.¹⁰ But still, if we look at the size of participating countries involved in the BRI projects, CIETAC – Silk Road Arbitration Centre at such an infant stage is not that cross-culturally competent to handle the arbitration with several foreign participating countries exceeding 140.

Though CIETAC has opened its satellite office in Hong Kong¹¹ for foreign parties who wish to engage themselves in arbitration outside China that has not gained that popularity as other arbitration institutions have till date on the global map like Hong Kong International Arbitration Centre¹² (“HKIAC”), Singapore International Arbitration Centre¹³ (“SIAC”) and

⁹ Historical Data, CIETAC Silk Road Arbitration Center Established, China International Economic and Trade Arbitration Commission, available at: <http://www.cietac.org/index.php?m=Article&a=show&id=15830&l=en> (last visited on March 15, 2021)

¹⁰ *Ibid*

¹¹ China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center, available at: http://www.cietachk.org/portal/showIndexPage.do?pagePath=%5Cen_US%5Cindex&userLocale=en_US (last visited on March 29, 2021)

¹² Hong Kong International Arbitration Centre, available at: <https://www.hkiac.org/> (last visited on April 19, 2021)

¹³ Singapore International Arbitration Centre, available at: <https://www.siac.org.sg/> (last visited on April 19, 2021)

International Chamber of Commerce¹⁴ (“ICC”).

Unlike China where laws are not even based on the common-law system¹⁵, the foreign party will always prefer the country with a common law system. Considering this as the most important factor, there have been neighbouring countries in Asia where the rule of law and laws are based on the common law system such as Hong Kong and Singapore. Both countries have an impeccable record of maintaining the rule of law and the law practised in these countries are common law which again is favourable for the foreign parties involved in Belt and Road Initiative projects. Also, in Asia, these two countries have become the preferred Institutions of arbitration due to their International styled arbitration approach and how the arbitration is conducted through the international pool of arbitrators.

HKIAC¹⁶ is considered to be the top-notch arbitration centre due to its great history and track record of dealing with arbitration matters since its inception in 1986 with disputes involving both Chinese and Non – Chinese parties.

Due to the number of diversified projects involved in the Belt and Road Initiative, Hong Kong International Arbitration Centre has made a separate division in the institution to look after the disputes arising out of these projects.¹⁷ It takes Belt and Road Initiative projects as an opportunity to explore the legal nuances of arbitration like party autonomy, the conduct of arbitration, language of arbitration and enforceability of awards involving several countries and bringing cross-culture to this Centre of excellence.

HKIAC, in 2018 formed an industry-focused Belt and Road Initiative Advisory Committee and launched an online resource platform dedicated to Belt and Road Initiative projects.¹⁸ This division of HKIAC updates the publications on the Belt and Road Initiative. The reports which show the facts related to Belt and Road Initiative projects can be easily accessed through this e-portal. For the general public at large, who are interested in studying the past and present events related to BRI, this online resource platform informs all the relevant information to

¹⁴ International Chamber of Commerce, *available at*: <https://iccwbo.org/> (last visited on May 1, 2021)

¹⁵ CJO Staff Contributors Team, “Does China have Common Law system?”, *China Justice Observer*, November 9, 2020 *available at*: <https://www.chinajusticeobserver.com/a/does-china-have-common-law#:~:text=China%20has%20no%20common%20law,and%20the%20judiciary%20are%20laws>. (last visited on May 21, 2021)

¹⁶ *Supra* note 15, on 5.

¹⁷ Overview of the Belt and Road Initiative, Hong Kong International Arbitration Centre, *available at*: <https://www.hkiac.org/Belt-and-Road/overview-belt-and-road-initiative> (last visited on June 11, 2021)

¹⁸ HKIAC Belt and Road Advisory Committee, Hong Kong International Arbitration Centre, *available at*: <https://www.hkiac.org/Belt-and-Road/belt-and-road-advisory-committee> (last visited on June 18, 2021)

them.

The main effort of HKIAC in dealing with the BRI is to cater for the needs of participating foreign countries to give them the comfort of a global legal atmosphere and to give the sense of security in dealing with the entities of Mainland China out of China. After the announcement of BRI in 2013, HKIAC already has dealt with 362 cases involving parties from BRI jurisdictions.¹⁹ It can be selected for resolving disputes because of the enforceability as 92% of BRI jurisdiction countries have ratified New York Convention,²⁰ making it the most viable option for arbitration.

Another reason for choosing HKIAC, is the affordability which it offers through two options i.e., hourly basis or online fees calculator. HKIAC is famous for its efficiency as it can appoint arbitrators at the time of emergency, where urgent relief is required. Due to its unique position being part of China under the “one country two systems” doctrine, this country enjoys an independent legal system.

Another country that is as good as Hong Kong and its arbitration institution like HKIAC is Singapore and its Singapore International Arbitration Centre also known as SIAC.

SIAC also, if not exactly like HKIAC offers the somewhat attractions to foreign parties involved in the BRI projects. Singapore also has an added advantage in that its laws are based on a common law system²¹ which is preferred amongst the global players for dispute resolution in BRI. It is also preferred because of the proximity to many countries involved in BRI. Singapore expertise lies in its experience and development in the professional service domains like technology, infrastructure, law and finance, making SIAC a premier arbitration institution.

SIAC being Singapore-based is a party to the New York Convention which sets out a mechanism for reciprocal recognition and enforcement of arbitration awards between countries. Due to the high costs involved in arbitrations in BRI, Singapore recognizes third-party funding in their domain of financing arbitration.

When SIAC appoints an arbitrator, the president of the SIAC Court is the one who makes the

¹⁹ Holman Fenwick Willan LLP, “The Belt And Road Initiative: Dispute Resolution along with Belt and Road” <https://www.hfw.com/The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road> (last visited on July 13, 2021)

²⁰ Supra note 19, on 6.

²¹ *Ibid*

appointment. SIAC's expert knowledge of an arbitrator's expertise, experience, and track record is used to make appointments. SIAC looks to its panel of arbitrators first when determining appointments, which consists of over 500 arbitrators from over 40 nations. The SIAC Panel has over 100 arbitrators from 25 countries with experience in the energy, engineering procurement, and construction sectors, which account for the majority of BRI projects and investments. Admission to the SIAC panel is subject to stringent requirements. Applicants must have at least 10 years of experience, among other requirements. Experience as an arbitrator in five or more cases and completion of at least two commercial arbitration awards are all required qualifications.

Similarly, Paris based International Chamber of Commerce has opened its chapter offices along with BRI route countries that have the same mechanism to resolve disputes through arbitration like HKIAC and SIAC²². Due to its rich experience since 1919 and specifically International Court of arbitration, western countries will in no doubt choose ICC from a lot of international institutions available for arbitration due to its expert's international arbitrators and the great repute this organization has developed after World War – I in handling the international trade disputes.

On the other hand, in Central Asia, Tashkent International Arbitration Centre (“TIAC”) has emerged as a new arbitration Institution of a great international repute located in Uzbekistan which is also a country on the route of China's belt.²³ These young institutions like TIAC which has been established in the year 2018, have been specifically set up for the Belt and Road Initiative projects to deal with the disputes arising out of these projects, these arbitration institutions offer the same international practice and procedure to handle disputes of the frontrunner BRI projects which are eventually turning into reality like China Pakistan Economic Corridor (“CPEC”) and others in the line.²⁴

But according to another analysis, eight BRI countries have a particularly significant danger of default, including Tajikistan, Kyrgyzstan, Laos, Pakistan, and Mongolia.²⁵ For example, under the BRI project, a Chinese business developed the Hambantota International Port in Sri Lanka,

²² Supra note 19, at 6.

²³ “Tashkent International Arbitration Centre”, Chamber of Commerce and Industry of Uzbekistan, *available at*: <https://chamber.uz/en/news/4886> (last visited on August 12, 2021)

²⁴ CPEC, Belt and Road Initiative *available at*: <https://www.beltroad-initiative.com/tag/cpec/> (last visited on September 9, 2021)

²⁵ Priyanka Kher & Trang Tran, Investment Protection Along the Belt and Road, 12 MTI GLOBAL PRAC. 28, (Jan. 2019).

but Sri Lanka failed to repay the Chinese loans used to construct the port.²⁶ Although the media frequently highlighted the Sri Lanka port as an example of how the Chinese government deliberately places countries in debt to dominate them, Chinese investors also suffered as a result of the loan default.²⁷ Chinese investors lose not only money, but also bargaining leverage, and may be forced to renegotiate terms for projects that have already begun.²⁸ Malaysia, for example, recently postponed a rail project under the BRI and renegotiated the cost to one-third of the original loan amount.²⁹

IV. Conclusion

The Institutions as old as Paris based International Chamber of Commerce, or Asia based Hong Kong International Arbitration Centre or Singapore International arbitration centre and as a young institution as Central Asia based Tashkent International arbitration centre, all have been geared up to administer the arbitration in Belt and Road Initiative projects as these high net worth projects are a platform for these institutions to showcase the world of their expertise in handling complex, interrelated disputes related to bilateral investment treaties, cross - jurisdictions and foreign direct investments with Chinese and Non - Chinese parties based on institution's independence, neutrality, efficiency, enforceability and hospitality to the foreign participating countries getting involved with dragon country's flagship project of Belt and Road Initiative. Contracts should include a clear and enforceable law and arbitration or court jurisdiction clause providing for a place of arbitration in a jurisdiction that is a party to the New York Convention or in a jurisdiction with a reciprocal enforcement arrangement if litigation is preferred to manage disputes and minimise litigation associated with infrastructure, maritime, or logistics projects along the Belt and Road. However, there isn't yet any formal clarity concerning the mechanism of rules to be applied and used by the international commercial courts and arbitration centres as a selection of institutions will be based on the geographical proximity and institutional credibility. The world is therefore looking forward to witnessing how arbitration in China and other countries evolves in line with the BRI leaving aside geopolitical goals.

²⁶ Barry Sautman & Yan Hairong, The Truth About Sri Lanka's Hambantota Port, Chinese "Debt Traps" and "Asset Seizures," South China Morning Post (May 6, 2019), <https://www.scmp.com/comment/insightopinion/article/3008799/truth-about-sri-lankas-hambantota-port-chinese-debt-traps>

²⁷ Yasheng Huang, Can the Belt and Road Become a Trap for China?, NIKKEI ASIAN REV. (May 23, 2019), <https://asia.nikkei.com/Opinion/Can-the-Belt-and-Road-become-a-trap-for-China>

²⁸ *Ibid*

²⁹ *Supra* note 27, on 8.