



The Belt and Road Initiative and Arbitration

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Abstract

The Belt and Road created in 2013, became in English an “initiative” (BRI) in 2017. This article concerns Chinese Courts; there are few arbitral institutions in China. This has a great significance and demonstrates the opening-up trend for foreign legal service in the People’s Republic of China. This paper aims at understanding the importance of arbitration, what is the main objective of arbitration? The research methodology uses surveys, interviews and observation. China, a global country along the BRI, has great international legal arbitrators and has, it seems, to think seriously to develop arbitration to be internationally credible.

Subject Areas

Law

Keywords

Arbitration, Belt and Road Initiative, Greater Bay Area, International Commercial Court, International Relations

1. Introduction

The research aims to prove that with arbitration the Belt and Road Initiative (BRI), launched in 2017 by President Xi Jinping, can be more successful. Research method includes the presentation of papers at the UNCITRAL Conferences of the Law Faculty of Macau University on 1 December 2018 and 11 December 2019. It concerns also surveys, interviews and observation during the Shenzhen Court of International Arbitration (SCIA) during the Arbitration Training Course in 2018, followed later by the visit of certain lawyers in their firms in Shenzhen; these lawyers had attended the important training at the SCIA.

The SCIA was initiated in 2013 just during the same year when the BRI was initiated by President Xi Jinping.

Multiple interviews were also done by the author at the HKIAC Hong Kong International Arbitration Center located in Central in 2018-2019.

Along the Belt and Road Initiative, we always have to think globally. The BRI provides needed capital for global infrastructure projects in both developing and developed economies. To secure these huge investments—China who has great international legal arbitrators—has to think seriously to develop arbitration to be internationally credible.

In particular, arbitration is very important for the development and internationalization of the BRI and for China's global development. The International Court of Arbitration (ICC), founded in 1983, conducts arbitration under the rules of the American Arbitration Association, London Court of Arbitration, International Chamber of Commerce, and UNCITRAL.

2. The Value of Arbitration in General and along the GBA as a Method of Settling Disputes That May Arise in the Context of International Relations

Arbitration is an Alternative Dispute Resolution (ADR) done outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, and binding arbitration.

Mediation as a viable mode of resolving commercial disputes will not vanish so long as culture and tradition continue to strongly influence Chinese society and its commercial practices [1].

Confidentiality is perceived as encouraging efficient and dispassionate dispute resolution, reducing damaging disclosure of commercially sensitive information to competitors and others and facilitating settlement by minimizing the role of public posturing. For a long time, investment arbitration followed confidentiality rules and kept all the information and documents used in an arbitration [2].

Confidentiality and transparency are squarely conflicting principles serving competing interests. Especially for China, acting both as a big source and recipient country of Foreign Direct Investment, which has developed a long-term friendly relationship with South Africa and other African countries and economies. It is not appropriate to simply say that China shall or shall not advocate more transparency in Sino-Africa investment treaty arbitration [2].

In history, international arbitration was promoted to solve a conflict between France and Britain; following successful international arbitration the Suez Canal was officially open on 17 November 1869 [3]. The French construction team in the 1880s and the United States commenced building a canal across the Panama isthmus in 1904 thanks to harmonious international cooperation. Opened in 1914, the world-famous Panama Canal was transferred to Panama in 1999.

There are international rules in arbitration and China, in the period post-2015 and in particular after the year 2018 the PRC seems to be more ready to promote international arbitration. The Hong Kong International Arbitration Center (HKIAC), founded in 1985, provides alternative dispute resolution ser-

vices from administered and ad hoc international arbitration to mediation, adjudication and domain name dispute resolution. Nearby, the Shenzhen Court of International Arbitration (SCIA) since April 2018 is closer to the HKIAC's progresses and works in that direction. Every step forward in mediation and arbitration will be useful to promote the BRI.

Arbitration is a mandatory and binding method of settling disputes that may arise in the context of international relations. There is a wide use of arbitration for the settlement of treaty-based investor-State disputes. Arbitration concerning the BRI is the referral of an international dispute to an impartial arbitrator chosen by the parties, meaning that they agree in advance to be bound by this arbitrator's decision after hearing in which both parties have an opportunity to be heard. This consensual arbitration is the best solution to win an award which binds the parties involved.

Litigation is also possible and means going to court for settling the dispute between parties. It is a legal proceeding, a lawsuit. Arbitration is less formal and constitutes the best solution in case of litigation between China/Chinese enterprises and European Union and European enterprises and companies. Litigation is the Court method of resolving a dispute where a judge decides the case. Arbitration and mediation are both forms of Alternative Dispute Resolution (ADR), arbitration has the advantage to be binding the parties involved in a dispute.

In reality and practically, arbitration exists along the Greater Bay Area (GBA) along the BRI. The GBA explains how the global Belt and Road works thanks to huge and modern cities like Guangzhou and Hong Kong. The GBA is a huge and densely populated geographic space including Guangzhou and Guangdong Province's nine cities, two Special Administrative Regions (SARs) and two Special Economic Zones (SEZs). When more Foreign Direct Investment (FDIs) will come from many origins (including Taiwan) the new space named "Greater Bay" will be compared to New York's Bay according to enthusiastic Chinese scholars. In total GBA includes nine cities of mainland China: Dongguan, Foshan, Guangzhou, Huizhou, Jiangmen, Shenzhen, Zhaoqing, Zhongshan and Zhuhai. Hong Kong and Macau SAR which are essential to attract FDIs from the global world and the Lusophone World. Hong Kong SAR and Shenzhen are becoming closer, only legally separated by different legal systems until 2047. GBA unites them as part of a new social and economic relationship. On 1 July 2017, President Xi Jinping attended the signing ceremony of the framework agreement on the development of the Guangdong-Hong Kong-Macau mega-bridge [4]. The main project started in 2009 in the Pearl River Delta of China's biggest South province and was completed in February 2018 by one of the world's longest bridge Hong Kong-Zhuhai-Macau. It is a symbolic accomplishment following the reforms launched in 1992 in Guangdong Province by Deng Xiaoping. This mega-bridge was inaugurated on 23 October 2018 by Xi Jinping, Carrie Lam, Fernando Chui Sai-on and Tung Chee-hwa.

GBA is at present an essential element of the BRI starting in China as the cor-

ridor beginning in Kazakhstan, Urumqi-Almaty-Tehran-Istanbul-Rotterdam. Under the Greater Bay Area, great progress has already been made in connecting the flows of people, goods and capital within the area.

Where people and goods flows are concerned, the determination of various local governments in propelling the development of the GBA is reflected by their continuous efforts, inputs in infrastructure construction and huge economic development. Another successful accomplishment, the Guangzhou-Shenzhen-Hong Kong High Speed Rail, Nansha Bridge and Shenzhen-Zhongshan Bridge are all large-scale strategic infrastructure projects. These projects play a significant role in connecting the entire GBA (HKTDC) (Research, 2020). China's BRI brings new investment opportunities but also an increased need for careful risk management. Prior to entering into any investment, it is important for contracting parties to consider their dispute resolution options and to ensure these are properly reflected in the contracts (HK Arbitration 2017). Arbitration in the coming years is indisputable even in China, at the beginning of the BRI.

3. Successful Examples of Arbitration along the BRI

Chinese courts may examine foreign arbitral awards (also in Hong Kong, Macau or Taiwan) under Article V of the New York Convention, but also as subject to the public policy exceptions in China's Civil Procedure Law, articles 237 and 274 [5].

In 2008, Ningbo Intermediate Court ruled on a controversial case concerning the enforcement of an ICC award rendered in Beijing, granting enforcement by regarding the disputed award as "non-domestic" award as prescribed in the last sentence of the Article 1(1) of New York Convention, under which the member states may extend the effect of Convention to certain type of award which is made inside its territory while is not considered as domestic for various reasons. It shall be noted that the method used by Ningbo Court is problematic and have given rise to heavy criticisms, because China had filed the reservation set out in Article 1(3) of New York Convention confirming that it will apply the Convention to the "recognition and enforcement of awards made only in the territory of another Contracting State". In other words, said non-domestic award approach shouldn't be use by Chinese courts. With this respect, the approach employed in Brentwood seems less controversial because it does not concern a vague and debatable concept not included in current law. Moreover, by deciding the nationality of award based on the seat of arbitration instead of the base of institution, the Guangzhou Court is actually promoting the reconciliation of Chinese law with New York Convention [6].

Elsewhere, in 2019, an offshore Arbitration Institutions was located in the New Lingang Area of the Pilot Free Trade Zone of China (Shanghai). This Free Trade Zone more or less follows the model of the Tanger Free Zone (TFZ) created in 1999. On 8 November 2019, the Shanghai Municipal Bureau of Justice announced the administrative measures for Business Offices Established by Over-

seas Arbitration Institutions in Lingang Special Area of China (Shanghai) Pilot Free Trade Zone, on 21 October 2019, at the Shanghai International Arbitration Summit, as one of the events in the 2019 China International Import Expo. The administrative measures contain no restrictions on the parties who submit their disputes to arbitration by the foreign arbitration institution in the Lingang FTZ. In particular, there is no requirement that one or more parties have to be companies registered in the Lingang [7].

Elsewhere, on 6 August 2020, Guangzhou People's Intermediate Court handed down a ruling on a rare case concerning the enforcement of an award rendered by International Commercial Court of Arbitration in China. Non-domestic award under New York Convention was not applicable to the PRC because it had declared reservation on this matter; the arbitration clause was invalid because the ICC Court was not an arbitration institutions formed in accordance with Article 10 of the PRC Arbitration Law (revised in 2017); there are substantive errors in the Final Award; the arbitrator exceeded its power in the Final Award. The Guangzhou Court ruled that the arbitration clause was valid and its validity had been confirmed in previous case by the same court. As for the nationality and enforceability of the Final Award, the court opined that it shall be regarded as a domestic award which can be enforced in accordance to Article 273 of Civil Procedural Law in 2012, and stipulated that the awards by foreign related arbitration institutions in China were enforceable before competent intermediated courts. Based on the above reasoning, the court stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that the case shall be closed without enforcing the Final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis.

Foreign arbitral awards in China have seen rising success rates in recent years. Between 2011 and 2015, over 86 percent of foreign arbitral awards were upheld upon application for recognition and enforcement. In late 2017, the Statistical process control is a method of quality control which employs statistical methods to monitor and control a process which provides clarity on the grounds for judicial review and expanded the Prior Reporting System so that intermediate courts could refer any matters where they intended to refuse recognition or enforcement of an arbitral award for judicial review.

Another arbitration: Timor-Leste's recent Maritime Boundary Treaty with Australia signed on 6 March 2018 in New York, is an interesting example of successful international arbitration along the Belt and Road Initiative.

Related to this, the Supreme Court of the People's Republic of China or Supreme People's Court (SPC) appears to be expanding the CICC's mandate to conduct judicial review of arbitration cases. On September 18, 2019, the CICC released its first jurisdictional ruling in the three interrelated Luck Treat Co., Ltd. matters against Zhongyuan Cheng Commercial Investment Holdings Co., Ltd. which the SPC were referred from the Shenzhen Intermediate Court. The

CICC confirmed that the contract's arbitration clause was valid, independent of whether the parties actually entered into the contract.

4. Risks in Globalization

China and other BRI countries need to address several important challenges in order to implement globalization with success, and realize these benefits [8]. This statement has to include the importance of arbitration.

Gao Shangquan is a member of the Committee for Development Policy and a former vice-minister of State Commission for Restructuring the Economic System (SCRES) in China. He thinks that economic globalization, is an irreversible trend which refers to the increasing interdependence of world economies. The fast globalization of the world's economies in recent years is largely based on the rapid development of science and technologies, has resulted from the environment in which market economic system has been fast spreading throughout the world, and has developed on the basis of increasing cross-border division of labor that has been penetrating down to the level of production chains within enterprises of different countries [9]. International economic and financial organizations are under the control of the United States and other western countries. They have been using these advantages to promote and dominate the development of globalization. At the same time, with China partly they are the largest beneficiaries of economic globalization.

Geopolitical and macroeconomic risks are currently faced by political instability, covid risks and changes concerning for example the global power balance such as USA-China relations and trade wars in recent times.

The One Belt, One Road Initiative offers sometimes potential in several economic, political, cultural, and strategic realms. There are sometimes risks in globalization in particular when investments concern rather poor countries.

High-speed rail (HSR) in China is the world's longest high speed railway network and most extensively used—with a total length of 37,900 km by the end of 2020. For example the Lao People's Democratic Republic (LPDR) section Kunming-Vientiane of the Kunming-Singapore Railway has an estimated cost of US \$6 billion—nearly 40 percent of the GDP of Laos in 2016. The project will be delayed, but the consequences for the Lao People's Democratic Republic are not fully studied yet. The LPDR is part of the BRI, but also a country very close to Vietnam, so the Lao Republic will find a way to delay the payment of its cost of the HSR to Singapore, but some African countries will not be able to find a way to delay the investment they have to pay to China for its improvement in infrastructure.

In Laos also the question of energy, between modernity and sustainability, deals with the Belt and Road. Modernization and “energy questions go straight to the heart of how we govern and practice our daily life, institutions, countries and regions” [10].

An example is given by mining—in particular in Africa—which is by its very

nature extremely vulnerable to political and regulatory risk. According to a McKinsey August 2020 survey of mining executives, covid-19 has had a significant impact on mining operations, with 75 percent reporting moderate disruption and 65 percent expecting fundamental changes to their operational models. On average the pandemic COVID has triggered a 42 percent decrease in production, attributable to reduction in demand and impacts on workforce availability [11].

South-East Asia is essential in Asia on the BRI. China's BRI is not seen as threatening *per se* and, as the Malaysian case demonstrates, when an authoritarian state lacking transparency in financing mega projects engages China, then multiple risks can accrue. The alacrity in which Malaysian Prime Minister Mahathir visited China and mixed deals sends a strong message to China, namely the limits as to some of the hubris surrounding the BRI. Moreover, both Indonesia and Malaysia can also deal with Japan and/or Korea when it comes to entering into economic partnerships or in sourcing high end technology whether or not for civilian or military use, and with India another card play when it comes to security as demonstrated by a recent warming between Jakarta and New Delhi [12]. Independently globalization has also opportunities.

5. BRI's Opportunities

China's globalization provides needed capital for global infrastructure projects in both developing and developed economies and need arbitration [13].

Investments have a long history in China. Standard Chartered is a British international banking group established in London. The company entered the Chinese market over 160 years ago and is one of the longest-established foreign companies in China. The bank opened its first Chinese branch in Shanghai in 1858 and started business in Hong Kong in 1859. In 2020, the Chinese market was restricted, but now the European Union wants to take advantage of the BRI. During a video call hosted on 30 December 2020 by Chinese President Xi Jinping, European Commission President Ursula von der Leyen, Council President Charles Michel, German Chancellor Angela Merkel and French President Emmanuel Macron concluded their negotiations for "a landmark investment pact". This excellent China-European Union international cooperation will help and facilitate the importance of international arbitration.

The promotion and construction of China's BRI, the creation and establishment of the CICC by the SPC to hear international commercial disputes is undoubtedly a milestone achievement that will eventually upgrade and integrate China's dispute resolution mechanisms for international commercial disputes.

"Whether to introduce international judges and allow English as an optional language for hearing along the BRI? Also, similar to the approach taken by the Singapore International Commercial Court (SICC), whether to consider signing more bilateral memorandum of judicial cooperation with other jurisdictions for the bilateral/multilateral recognition and enforcement [6]. Also, similar to the

approach taken by the SICC Court, whether to consider signing more bilateral memorandum of judicial cooperation with other jurisdictions for the bilateral or multilateral recognition and enforcement of court judgments and decisions before China's final approval of the Hague Convention on Choice of Court Agreements. The answers to such questions await decision of court judgments and decisions before China's final approval of the Hague Convention on Choice of Court Agreements. The answers to such questions await decision.

6. Research Findings

Despite the lack of publicity in general, arbitration is much more important than expected in China because at present China has taken the initiative to promote its position as an arbitration-friendly destination, which should encourage foreign entities facing Chinese counterparties for example in mining-related disputes to consider choosing the numerous institutions available in China or Hong Kong as their arbitral seat.

The strict limitations on the content of arbitration agreement remain unchanged. Concerning arbitration, very important for the BRI's future agreements, providing ad hoc proceeding is still invalid by virtue of the law. Moreover referring dispute without foreign-related factor to foreign institutions is also in principal unacceptable under current judicial policy in China, even for exclusively foreign-owned enterprises. These limitations have been heavily criticized by legal practitioners and researchers over the years. But in Guangzhou the court (ICC) stated that Brentwood had invoked the wrong legal basis, and it refused to amend its claim after the court asked clarification multiple times. Hence, the court concluded that a case shall be closed without enforcing the final Award, while Brentwood had the right to file a new enforcement proceeding with correct legal basis [14].

There are positive changes in Chinese arbitration policy. Parties seeking to recognize or enforce foreign arbitral awards in China have seen rising success rates in recent years. Between 2011 and 2015, over 86 per cent of foreign arbitral awards were upheld upon application for recognition and enforcement. In late 2017, the Supreme People's Court (SPC) provided clarity on the grounds for judicial review and expanded the Prior Reporting System so that intermediate courts could refer any matters where they intended to refuse recognition or enforcement of an arbitral award for judicial review. The right of higher courts to retry cases based on illegal Policy Documents is now possible, it was impossible before 2015. It increases the chances of political liberalization [15].

7. Epilogue

The Belt and Road is a reflection of China's ascendance in global arena, economically, politically, and strategically [16]. International arbitration is certainly essential. We believe that the Belt and Road Initiative is going to be a success story of globalization. Negotiation, mediation and international arbitration are

an essential condition for the future of the Belt and Road.

Following the research of Gao Shangquan and Wei Cui, it seems that the Supreme Court of the People's Republic of China will interpret new sets out and will be may be more favorable in accepting the international value of arbitration. Judicial independence is interesting because it increases the chances of political liberalization and accelerates the development of the Belt and Road Initiative.

In 2013, 2015 and later with the 2018 SPC interpretations, China is aiming to accept more than before arbitration—a binding legal act—following judgements given by Shanghai International Arbitration Center (SIAC), Shenzhen Court of International Arbitration (SCIA), Hong Kong International Arbitration Center (HKIAC) and other courts.

This study shows that at present in China many new legal procedures and awards already exist. So, there are positive changes concerning Chinese arbitration policy.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

- [1] De Vera, C. (2004) Arbitrating Harmony: “MED-ARB” and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China. *Columbia Journal of Asian Law*, **18**, 149-194.
- [2] Li, K. (2020) A Chinese-African Cross Cultural Perspective Dispute Settlement and the BRI Challenges and Risks Facing Chinese Investors. In: Berlie, J.A., Ed., *China's Globalization and the Belt and Road Initiative*, Palgrave Macmillan, New York, 193-194.
- [3] Beatty, C. (1956) De Lesseps of Suez the Man and His Times. Harpers & Brothers, New York, 225-245.
- [4] Berlie Jean, A. (2020) China's Globalization and the Belt and Road Initiative. Palgrave Macmillan, New York, 78-79.
- [5] Norton Rose Fulbright (2020) The Rise of China: Impacts for Mining Arbitration. <https://www.nortonrosefulbright.com/en-fr/knowledge/publications/665e5d36/the-rise-of-china>
- [6] Chen, Z. (2020) Chinese Court Holds Arbitral Award by Foreign Arbitration Institutions in China Enforceable. University of Macau, Macau. <https://conflictoflaws.net/2020/chinese-court-holds-arbitral-award-by-foreign-arbitration-institutions-in-china-enforceable/?print=pdf>
- [7] Tang, H. and Hu, S. (2019) China's Lin-Gang Free Trade Zone in Shanghai Opens to Foreign Arbitration Institutions from 2020. <https://hsfnotes.com/arbitration/2019/11/12/chinas-lin-gang-free-trade-zone-in-shanghai-opens-to-foreign-arbitration-institutions-from-2020/>
- [8] Fan, Z. (2018) China's Belt and Road Initiative: A Preliminary Quantitative Assessment. *Journal of Asian Economics*, **55**, 84-92.
- [9] Gao, S. (2000) Economic Globalization: Trends, Risks and Risk Prevention. Economic and Social Affairs. United Nations CDP Background Paper No. 1, United Na-

- tions, New York.
- [10] Ruta, M. (2018) Three Opportunities and Three Risks of the Belt and Road Initiative. <https://blogs.worldbank.org/trade/three-opportunities-and-three-risks-belt-and-road-initiative>
 - [11] IA (2018) International Arbitration Survey: The Evolution of International Arbitration. Queen Mary University, London.
 - [12] Geoffrey, G. Berlie *ibid.* China's BRI Project: The Case of Indonesia and Malaysia. New York/Cham, 123-138.
 - [13] McKinsey (2017) China's Role in the Next Phase of Globalization. McKinsey Global Institute, New York.
 - [14] Tao, J. and Zhong, M. (2019) Resolving Disputes in China: New and Sometimes Unpredictable Developments. In: Quayle, P. and Gao, X., Eds., *International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law* 2019, Vol. 2, Brill, Leiden, Boston, 56-74.
 - [15] Wei, C., Cheng, J. and Wiesner, D. (2019) Judicial Review of Government Actions in China. *China Perspectives*, **2019-1**, 42-43. <https://doi.org/10.4000/chinaperspectives.8703>
 - [16] Hong, Y. (2017). Motivation behind China's "One Belt, One Road" Initiatives and Establishment of the Asian Infrastructure Investment Bank. *Journal of Contemporary China*, **26**, 353-368. <https://doi.org/10.1080/10670564.2016.1245894>

Abbreviations

ADR: Alternative Dispute Resolution refers to any means of settling disputes outside of the courtroom

BRI: Belt and Road Initiative

CICC: China International Commercial Court

CIETAC: China International Economic and Trade Arbitration Commission

FDI: Foreign Direct Investment

FTZ: Free Trade Zone; Shanghai Free Trade Zone

GBA: Greater Bay Area

HKIAC: Hong Kong International Arbitration Center

HKTDC: Hong Kong Trade Development Council

ICC: International Court of Arbitration

IISD: International Institute for Sustainable Development

PCA: Permanent Court of Arbitration

PRC: People's Republic of China

SCIA: Shenzhen Court of International Arbitration

SIAC: Shanghai International Arbitration Center

SICC: Singapore International Commercial Court

SPC: Supreme People's Court or SCPRC Supreme Court of the People's Republic of China

TFZ: Tanger Free Zone

UNCITRAL: United Nations Commission on International Trade Law