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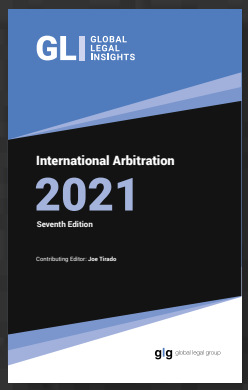

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FROM THE EDITOR

Welcome to the first edition of *Essential Intelligence: The Belt and Road Initiative.*

As the world slowly emerges from the COVID-19 pandemic, the last 18 months has created a renewed appreciation for the transport infrastructure which supports travel and trade. Likewise, the importance of supply chains in restarting the global economy has been brought into sharp relief.

Construction has long been a significant driver of the global dispute resolution market, and the Belt and Road Initiative is the biggest infrastructure project of our, or possibly any, era. As such, it promises to be a major source of dispute resolution work for years to come.

This book sets out to provide useful reference and discussion points for these disputes, in project finance, investment and construction across a range of regions, particularly Europe, the Middle East, and Central, East and South East Asia. These conversations will continue and develop over many years to come.

Thank you to Dr Colin Ong QC, Walter Chen SC of Grandall Law Firm and Stephen Jagusch QC of Quinn Emanuel Urquhart & Sullivan for their invaluable support and assistance in developing this title, and to all of our contributors for their insights.

Please visit iclg.com/cdr for day-to-day analysis of the international dispute resolution scene, including Belt and Road matters.

Andrew Mizner
Editor
Commercial Dispute Resolution

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59 Tanner Street
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EDITOR
Andrew Mizner
andrew.mizner@glgroup.co.uk

PUBLISHER
George Archer
george.archer@glgroup.co.uk

PRODUCTION EDITOR
Oliver Chang
oliver.chang@glgroup.co.uk

MARKETING DIRECTOR
Rachel Williams
rachel.williams@glgroup.co.uk

DISTRIBUTION MANAGER
Mark Carroll
mark.carroll@glgroup.co.uk

CHIEF MEDIA OFFICER
Fraser Allan
fraser.allan@glgroup.co.uk

CHIEF EXECUTIVE OFFICER
Jason Byles
jason.byles@glgroup.co.uk

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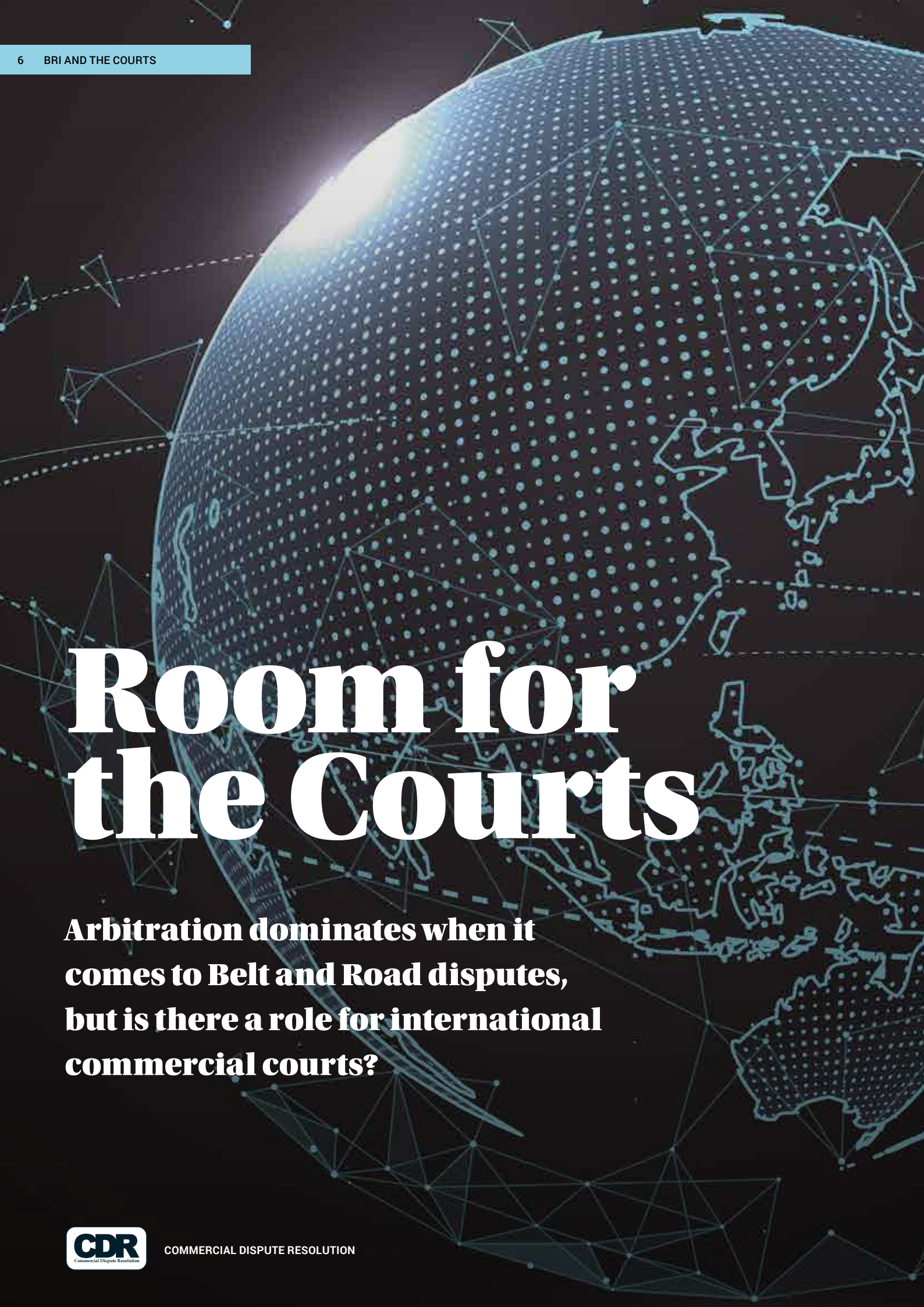


Room for the Courts

Arbitration dominates when it comes to Belt and Road disputes, but is there a role for international commercial courts?

Andrew Mizner
Commercial Dispute Resolution

Arbitral institutions continue to jostle for position in the Belt and Road Initiative (BRI) disputes market. There is an obvious appeal to appointing specialist commercial and infrastructure arbitrators under client-friendly rules, but a small number of international courts are hoping they can get in on the act.

While there has been little BRI litigation to date, there are corners of the market where the courts might be the better option.

"In general, international commercial arbitration is regarded as the preferred mode of international commercial dispute resolution due to its advantages in enforceability, fairness, efficiency, expeditiousness, promptness, finality, professionalism, economy, as well as its characteristics of being *ad hoc*, neutral, consensus-based, private and confidential," says **Walter Chen** of **Grandall Law Firm** in China.

"However, in practice, nowadays arbitration is becoming costly and time-lagging. The international commercial court, which absorbs the speedy and convenient characteristics of arbitration, can work as a companion to, and not as a substitute of, international arbitration and make great progress in the harmonisation of commercial laws and practices," he adds. The creation of these courts is targeting users who prefer litigation's transparency and accountability, but the more tailored approach of international arbitration.

Corresponding jointly via email, **Gilad Katz** and **Tal Sticker** of **S. Horowitz & Co.** in Israel argue that "disputes that are specific and under relatively smaller scope with 'known' boundaries, are better suited to be tried in court than in arbitration", due to lower costs.

"However, complex cases and/or [those] under larger scope are preferred to be held under arbitration, since the arbitrator is far more available to the parties and, in most cases, isn't restricted to the civil procedure and hence can give his ruling quicker and more efficiently."

Katz and Sticker have seen BRI-related litigation in Israel, "such as claims regarding subcontractors, delays, tenders", and expect to see more in future.

Perhaps perversely, the lack of choice in litigation can be a selling point. The inability to choose a judge eliminates the repeat appointments and potential conflicts caused by using the same arbitrators over and over again. "To me, one of the most important aspects of international commercial courts is not just that it reduces, but it removes the likelihood of conflict of interest," says **Colin Ong QC** of **Dr Colin Ong Legal Services** in Brunei.

Similarly, **Chris Osborne**, managing director of expert witness provider **Osborne Partners**, theorises that parties have a good idea of prominent arbitrators' opinions "and there is definitely a phenomenon in which arbitrators signal that they are generally favourable to one side or another". If the newer commercial courts can build a reputation for independence, it would appeal to parties concerned about a perceived lack of arbitrator impartiality.

Osborne continues: "Anybody who felt that a different forum had a more reliable process for neutrality on the part of the person rendering the decision, that is potentially attractive. But it would take a while to establish a reputation for neutrality in the decision maker."

Litigation could also appeal in cases which require a quick claim and enforcement. Courts also offer joinder, the ability to add parties to a case, which is particularly useful when many sub-contractors are involved.

Players old and new

The Commercial Court in London is perhaps the most prominent for international litigation and Ong believes that it will remain popular with European parties for BRI matters: "In terms of commercial courts, London is in the lead for the caucuses, all the way up to the European borders, because these jurisdictions, especially the former Soviet states, including Russia, have a lot of experience and familiarity of litigating in London."

One concern for London will be the sanctions placed by China on **Essex Court Chambers**, which although impacting only one chambers, has raised alarm about similar actions in future.

Singapore, a well-established international legal hub, has been promoting its own option. The Singapore International Commercial Court (SICC) was established in 2015, challenging arbitration on cost, the right of appeal and joinder. The court has more recently targeted

BRI disputes by introducing greater flexibility and tackling time and cost, disclosure, evidence and delaying tactics, as well as doing more to encourage settlement.

SICC "offers a very different option to the Chinese equivalent, because it was started by Singapore judges and international judges. Proceedings are conducted in English, you can use international lawyers, provided they are registered with the court", says **Roger Milburn**, an investment manager with third-party funder **Litigation Capital Management** (LCM) in Singapore. "I just wonder how much parties are wondering about this when they are drawing up their contracts."

To date, most SICC cases are transfers from the High Court of Singapore, so its success is hard to gauge, but Ong says Singapore will be popular in certain regions: "The Singapore courts would have the advantage in drawing African, Indian and other South-Asian work because many of their cases are already being sent to Singapore to both the **ICC International Court of Arbitration** and the **Singapore International Arbitration Centre**, so they are familiar with its highly regarded judiciary and pre-eminent legal system. Singapore's shared common law tradition is also going to be another major attraction. Familiarity with the legal system is the most important thing."

As of June this year, third-party funding is permitted at SICC, which might encourage more claims, but at the moment contracts with SICC clauses appear to be few and far between.

There is also competition from the Middle East. In 2018, the courts of the Dubai International Finance Centre (DIFC) agreed to an exchange of information with Oxford University on what it called, in a statement: "The legal certainty, protection and contract enforcement needed for Chinese and international investors to secure participation in China's five trillion-dollar Belt and Road Initiative."

At the time, **Michael Hwang SC**, chief justice of the DIFC Courts, promoted the value of international litigation: "As goods and services travel across the world along the BRI, they will seamlessly cross borders – so we shall need a seamless legal platform, based on legal convergence, that can start to do the same. This aim can partly be fulfilled by the near-universality of the New York Convention for recognition and enforcement of international arbitral awards, but the ideal legal platform should also include a robust regime of enforceable court judgments outside the boundaries of the issuing court."

However, DIFC currently appears to be on the outside when it comes to the BRI. Geographically it is well-positioned for Africa-related disputes, but the establishment of the **China-Africa Joint Arbitration Centre** (CAJAC) and availability to Chinese parties of the China International Commercial Court (CICC) or the **Hong Kong International Arbitration Centre**, threatens to limit its role.

Until recently, many regarded Hong Kong as a good location for BRI disputes, given its geographical and cultural proximity to China, and the independence of its multinational judiciary. The introduction of the special administrative region's National Security Law in mid-2020 however, has brought wariness among the international community, although the degree to which it has impacted the Hong Kong commercial legal sector overall is still to be seen.

China enters the ring

China, befitting the home of the BRI, established the CICC in 2018, a branch of the Supreme People's Court with sites in Shenzhen and Xi'an, to handle cases worth at last CNY 300 million (GBP 33 million). The court allows evidence in English and dissenting opinions, and its early cases have been primarily in shareholder and product liability disputes.

CICC judges are drawn entirely from the senior ranks of the Chinese People's Courts and foreign lawyers have no rights of audience, unlike in Singapore and Dubai where foreigners can appear and join the judiciary.

Nor does CICC allow appeals, although application can be made to the Supreme People's Court for a retrial, whereas SICC cases can be appealed to the Singapore Court of Appeal. The new court's reach is also limited, as it does not have jurisdiction over cases with no connection to China.

Opinion is divided on how popular CICC will be. Chinese companies with a strong negotiating position will be able to insist on its use, but where there is a more even footing, international parties are likely to prefer Singapore, London or an arbitration centre.

To ease the international understanding of the court, the International Commercial Expert Committee (ICEC) was established at the same time, made up of more than 50 members, from China and countries including Mexico, Uganda, Nigeria, Egypt, Singapore and Kazakhstan. Members were appointed for four-year terms

in two batches in 2018 and 2020, and advise on judicial interpretation, the application of foreign legislation and international treaties, and act as mediators.

CICC had accepted 13 international cases by the end of 2019, with parties from Asia, Europe and the Caribbean, reportedly on product liability, commission, surplus distribution, shareholder matters, damage liabilities and a range of similar matters. There have not been more cases yet, notes Ong, an ICEC member, because the CNY 300 million (USD 46 million) threshold "is quite high". "Most BRI disputes would probably be in the USD 20 million region, and not in the CNY 300 million range. So such smaller disputes will not end up before the CICC unless it hits that amount."

"When it comes down to dispute resolution between Chinese and BRI parties from the Association of Southeast Asian Nations and Maritime Silk Road, before international commercial courts, it is going to be down to the CICC and the SICC," adds Ong.

Enforcement is the key

When it comes to beating the competition, enforceability is the most important factor.

China's signature of the Hague Convention on the Recognition and Enforcement of Foreign Judgments is a positive step, but to date very few other countries have joined it, and China itself has not ratified the treaty.

The country does have bilateral judicial treaties with 39 other states, while Hong Kong has a handful of its own reciprocal agreements, but there is a long way to go before there is guaranteed enforcement of CICC judgments abroad.

It is not just China – practitioners report difficulties enforcing foreign judgments around the entire Asia-Pacific region due to a lack of treaty infrastructure.

The Chinese court could make itself more appealing to international users by adopting English law, leaning on the ICEC, and making its judgments more enforceable.

Singapore, on the other hand, has worked hard to increase the international enforceability of its judgments, signing and ratifying the Hague Convention and a non-binding enforcement memorandum with DIFC, while its use of English law gives it a more established place in the international judicial landscape.

Future choices

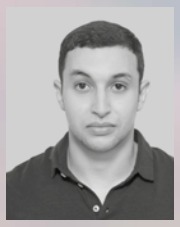
As Osborne points out, international dispute resolution "needs to be governed by consent and you are only going to get consent to have your dispute adjudicated by a body that both parties can have confidence in". That confidence cannot be earned overnight, "so there is a long period of time before any new body can establish itself as a forum".

Ultimately, for more BRI matters to end up in court, it will depend on the terms of the commercial agreements. "The contracts that have already been written will have decided the forum in which they will be heard," says Milburn. "It will come down to the circumstances of the parties and their bargaining position when they are tendering these jobs and getting the contracts written up and a lot will depend on the bargaining power of the Chinese financing parties."

"The English-speaking courts offer a different option for parties that are not comfortable going into China, but the parties who are not comfortable going into China may well not get the deals," he concludes.

BRI Project Disputes at HKIAC: The Story So Far

Joe Liu
Hong Kong International Arbitration Centre



Othmane Benlafkih
GBS Disputes

THE BRI generates significant investment in large-scale projects across multiple sectors in numerous countries. However, these projects are exposed to a spectrum of political, financial and legal risks during the project life cycle. It is inevitable that disputes will arise from some of the BRI projects and such disputes should be managed properly with the choice of effective dispute resolution mechanisms. Recent years have seen some BRI disputes submitted to international arbitral institutions and courts. The Hong Kong International Arbitration Centre (HKIAC), for example, has handled numerous such disputes which arise typically from a Chinese-funded project in a BRI country between a Chinese enterprise and its local counterparty.

The first part of this chapter provides an overview of the BRI and some of its notable projects. In the second part, we present statistics to identify the types of BRI disputes that have been submitted to HKIAC, followed by case studies to look into some of those disputes in more detail. We conclude by outlining the common features of HKIAC's cases with BRI elements and highlighting the importance of selecting suitable dispute resolution mechanisms for BRI projects.

BRI and its notable projects

The BRI refers to the "Silk Road Economic Belt" and the "21st Century Maritime Silk Road" – two trade routes to connect Asia, Europe and Africa.

The BRI contemplates the establishment of six economic corridors to build a transportation and infrastructure network overland and a network of maritime trade routes connecting major seaports.

Since its introduction in 2013, the BRI has created a framework of economic cooperation covering more than 140 countries. The transcontinental scale of the BRI requires significant investment. According to the World Bank, BRI projects in all sectors that are already executed or planned are estimated to require investment of US$575 billion. The Asian Development Bank estimates that, between 2016 and 2030, the required investment in the infrastructure needs for Asia alone would amount to US$26 trillion. Chinese investment has been the primary source of funding for BRI projects. According to the statistics published by the Chinese Ministry of Commerce, the total non-financial direct investment made by Chinese enterprises in BRI countries from January 2020 to May 2021 was US$23.4 billion. During the same period, Chinese enterprises concluded 6,631 contracts in respect of projects in BRI countries with a total contractual value of US$160.9 billion.

At present, most BRI projects are led by large Chinese state-owned enterprises ("**Chinese**

SoEs") that invest primarily in the energy, transportation, telecommunications and infrastructure sectors. Such investment may receive funding from the Silk Road Fund – a state-owned investment fund established by the Chinese government in December 2014 to invest mainly in infrastructure and resources, as well as in industrial and financial cooperation related to BRI projects. Chinese outbound investment may also receive financial support from two China-led multilateral development banks, namely, the New Development Bank and the Asia Infrastructure Investment Bank, as well as China's policy banks.

Given their large scale and nature, many BRI projects are long-term, cross-border, high-value, high-public interest, multi-party and multi-contract transactions. They typically involve entities from countries at different stages of development with varying legal, political and economic systems. Some recent BRI projects bearing those features are listed below:

- The Addis Ababa–Djibouti Railway, a Chinese-built 756-kilometre electric rail connecting Ethiopia to the Gulf of Aden, began operations on 1 January 2018, becoming Africa's first electrified trans-boundary line and opening new trade markets for Djibouti and Ethiopia.
- The overland route from Kashgar in Xinjiang to Pakistan's Gwadar Port, a key piece of China's biggest BRI project to date – the China-Pakistan Economic Corridor – is now partially operational.
- In the second half of 2019, Russia began construction of its portion of the China-Western Europe transport corridor, a highway that will allow trucks to travel between China and Europe in just 11 days.
- In December 2019, Kenya launched cargo operations on the new 120-kilometre section of the Standard Gauge Railway between Nairobi and Naivasha, which cost US$1.5 billion and was funded by the Export-Import Bank of China.

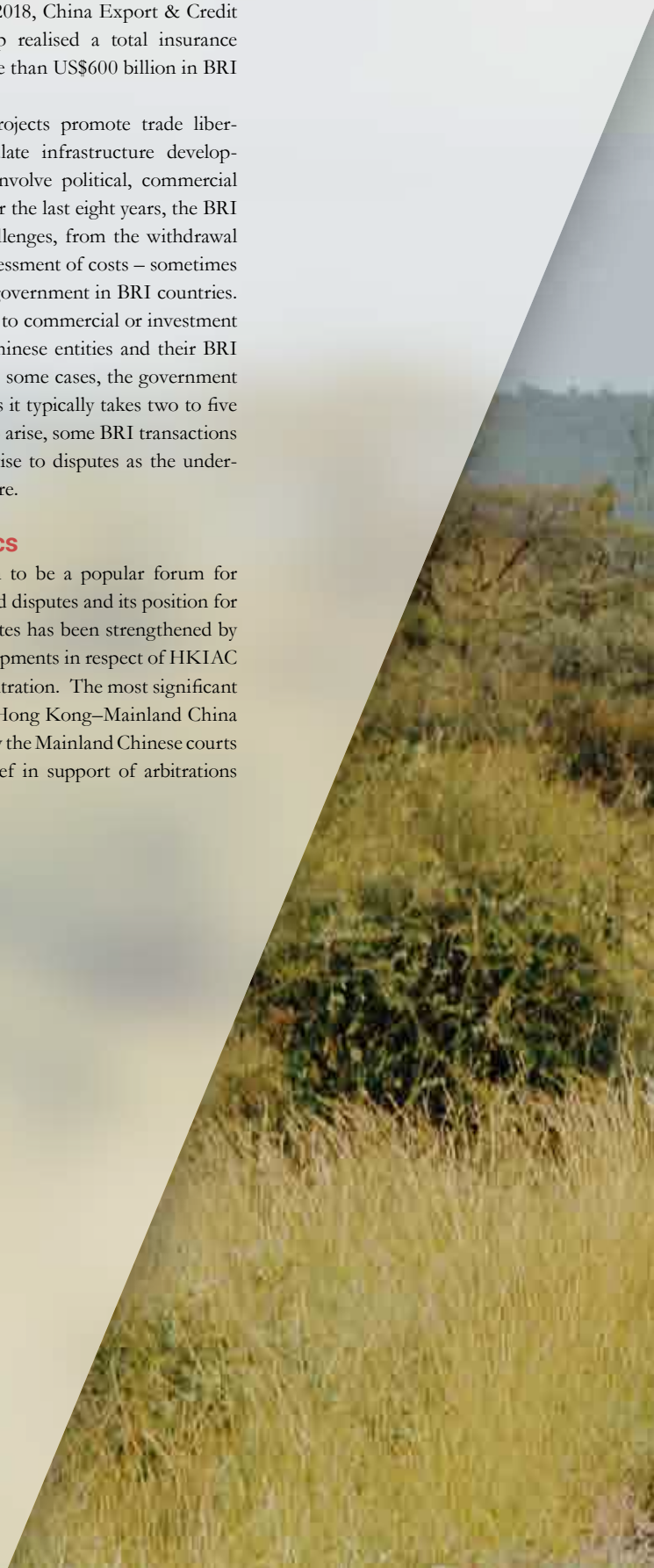
The World Bank predicts that BRI projects have the potential to substantially improve trade, foreign investment and living conditions for citizens in BRI countries. While quantifying the impact of the BRI is challenging, its financial and social impact on the participating economies is supported by the following statistics as reported by *China Daily*:

- The trade volume between China and other BRI countries surpassed US$6 trillion from 2013 to 2018, with an average annual growth rate of 4%.
- The total value of foreign contracts signed between China and other BRI countries has surpassed US$600 billion, with an average annual growth rate of 11.9%.
- The overseas economic and trade cooperation zones which Chinese companies have built in BRI countries have created approximately 300,000 local jobs, with a total investment of more than US$30 billion.
- By the end of 2018, China Export & Credit Insurance Corp realised a total insurance amount of more than US$600 billion in BRI countries.

Although BRI projects promote trade liberalisation and stimulate infrastructure developments, they often involve political, commercial and legal risks. Over the last eight years, the BRI has faced some challenges, from the withdrawal of contracts to reassessment of costs – sometimes due to a change of government in BRI countries. These risks can lead to commercial or investment disputes between Chinese entities and their BRI counterparties or, in some cases, the government of the host state. As it typically takes two to five years for a dispute to arise, some BRI transactions have already given rise to disputes as the underlying contracts mature.

HKIAC statistics

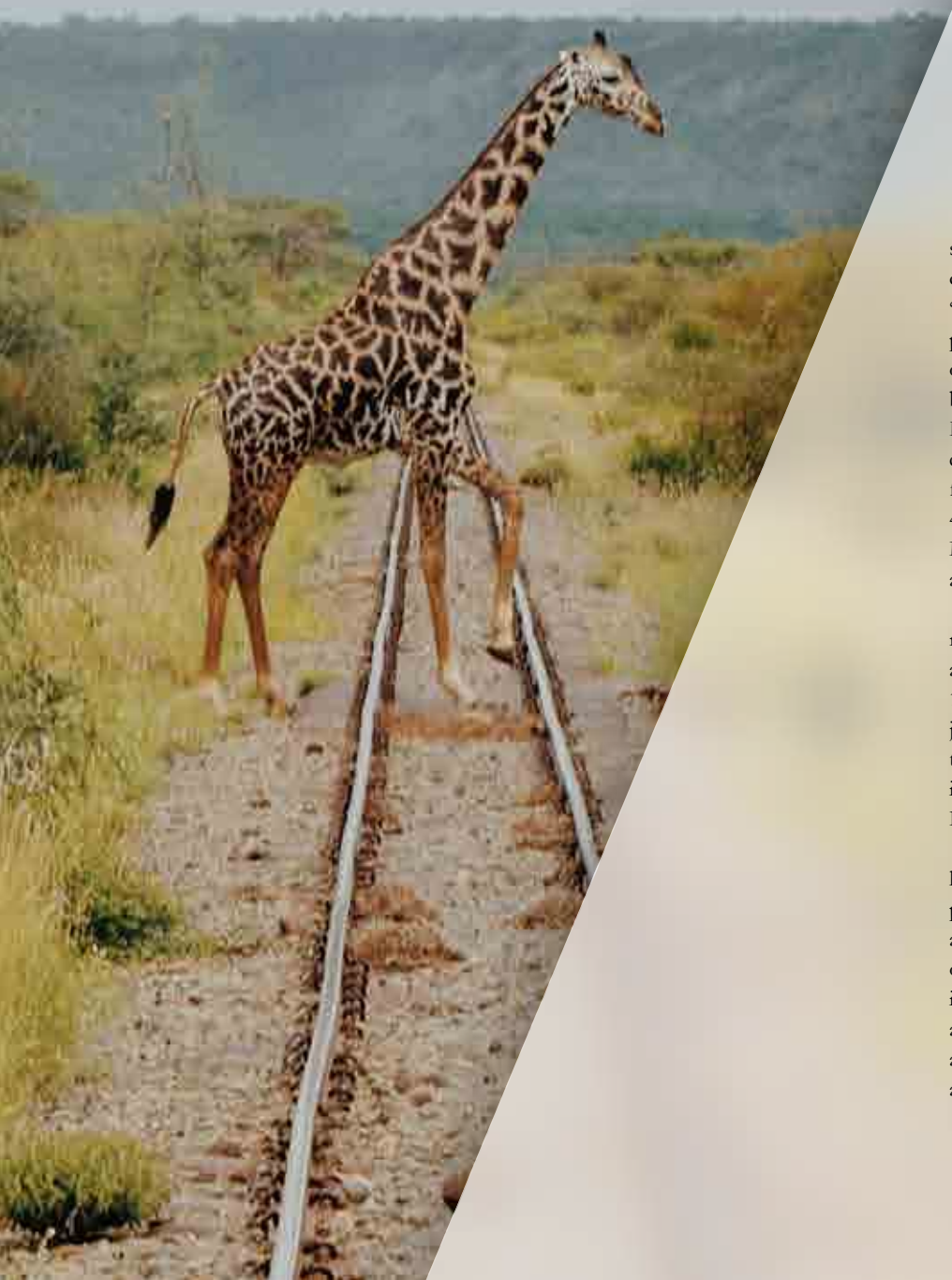
HKIAC has proven to be a popular forum for resolving BRI-related disputes and its position for handling such disputes has been strengthened by several recent developments in respect of HKIAC and Hong Kong arbitration. The most significant development is the Hong Kong–Mainland China arrangement to allow the Mainland Chinese courts to issue interim relief in support of arbitrations



Applicable Rules	
2013 HKIAC Administered Arbitration Rules	52 (48%)
2018 HKIAC Administered Arbitration Rules	39 (36%)
UNCITRAL Arbitration Rules	18 (16%)

Governing Law	
Hong Kong	49 (45%)
Mainland China	26 (24%)
England & Wales	23 (21%)
Laos	1 (1%)
Republic of Korea	1 (1%)
State of California	1 (1%)
State of New York	1 (1%)
Unspecified	7 (6%)

Language	
English	81 (74%)
Chinese	19 (18%)
English & Chinese	9 (8%)



seated in Hong Kong and administered by a qualified arbitral institution such as HKIAC (the "**Arrangement**"). The Arrangement allows parties to eligible arbitrations to seek interim orders to preserve assets, evidence or conduct by the Mainland Chinese courts thereby placing Hong Kong in a unique position to resolve BRI disputes. Since the Arrangement came into force on 1 October 2019, HKIAC has processed 49 applications and received 31 orders from the Mainland Chinese courts preserving assets worth a total of approximately US$1.7 billion.

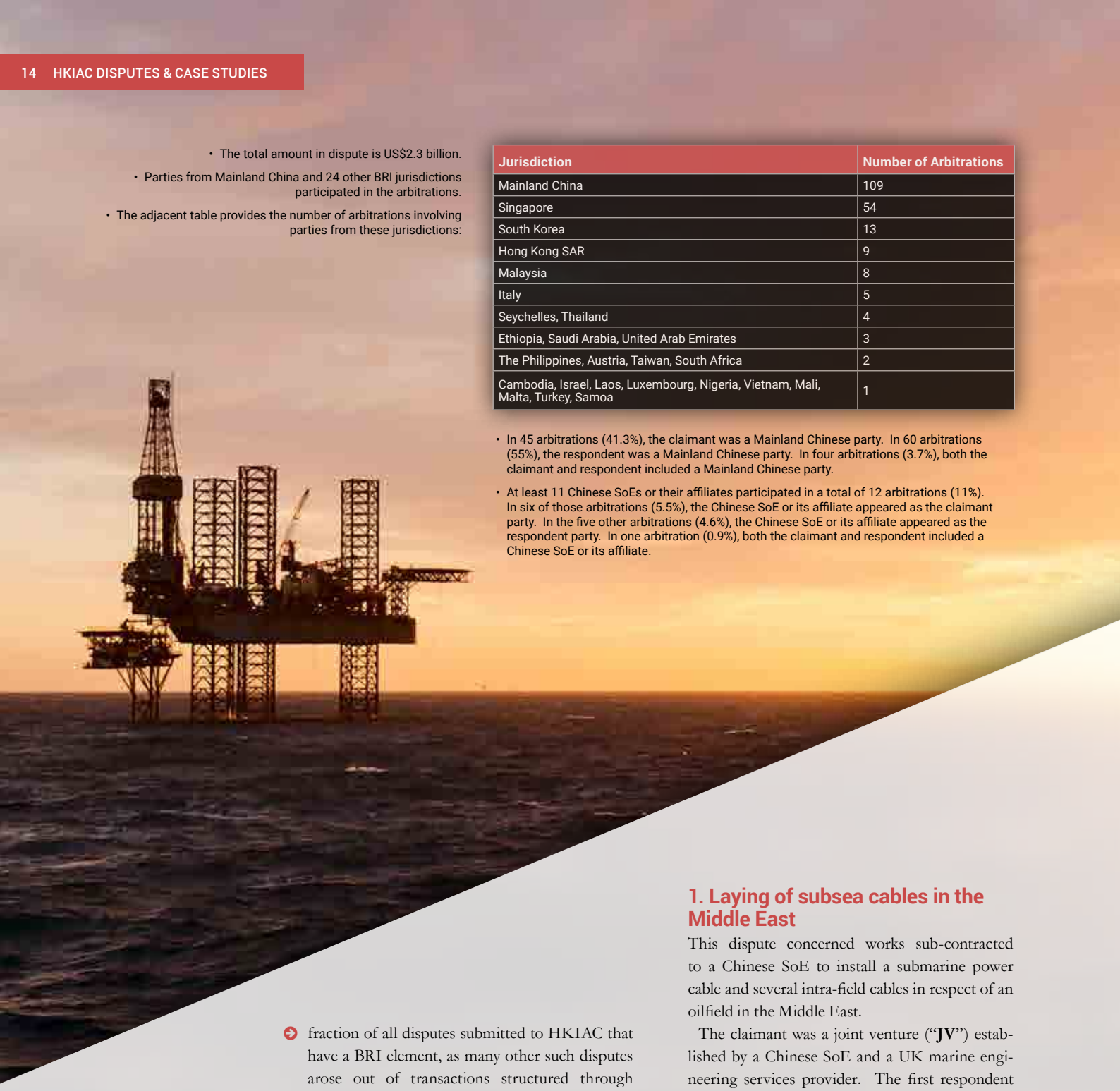
From 1 January 2016 to 31 May 2021, HKIAC registered a total of 1,248 arbitrations involving at least one party from a BRI jurisdiction. These 1,248 cases featured 2,587 parties and 45 BRI jurisdictions. For the purposes of HKIAC's statistics, BRI jurisdictions are the 146 jurisdictions identified by the Chinese government's Belt and Road Portal (yidaiyilu.gov.cn).

Given the undefined scope of the BRI and limited data on the number, size and terms of BRI projects, identifying disputes from BRI projects is a challenging task. Accordingly, for the purposes of this chapter, we have identified 109 arbitrations involving at least one party from Mainland China and one party from another BRI country that were administered by HKIAC between 1 January 2016 and 31 May 2021. These cases represent only a

- The total amount in dispute is US$2.3 billion.
- Parties from Mainland China and 24 other BRI jurisdictions participated in the arbitrations.
- The adjacent table provides the number of arbitrations involving parties from these jurisdictions:

Jurisdiction	Number of Arbitrations
Mainland China	109
Singapore	54
South Korea	13
Hong Kong SAR	9
Malaysia	8
Italy	5
Seychelles, Thailand	4
Ethiopia, Saudi Arabia, United Arab Emirates	3
The Philippines, Austria, Taiwan, South Africa	2
Cambodia, Israel, Laos, Luxembourg, Nigeria, Vietnam, Mali, Malta, Turkey, Samoa	1

- In 45 arbitrations (41.3%), the claimant was a Mainland Chinese party. In 60 arbitrations (55%), the respondent was a Mainland Chinese party. In four arbitrations (3.7%), both the claimant and respondent included a Mainland Chinese party.
- At least 11 Chinese SoEs or their affiliates participated in a total of 12 arbitrations (11%). In six of those arbitrations (5.5%), the Chinese SoE or its affiliate appeared as the claimant party. In the five other arbitrations (4.6%), the Chinese SoE or its affiliate appeared as the respondent party. In one arbitration (0.9%), both the claimant and respondent included a Chinese SoE or its affiliate.



fraction of all disputes submitted to HKIAC that have a BRI element, as many other such disputes arose out of transactions structured through offshore entities controlled by Chinese investors.

In respect of the 109 arbitrations identified, 69 arbitral tribunals were constituted, and all were seated in Hong Kong. Further details are provided in the table above.

Case studies

In this section, we present four case studies in respect of disputes administered by HKIAC that have a BRI connection. Each case involves a dispute concerning a transaction connected to a BRI country between a Mainland Chinese party or a party affiliated with a Mainland Chinese entity on the one hand and its counterparty in the BRI country on the other hand. All identifying and confidential information has been removed.

1. Laying of subsea cables in the Middle East

This dispute concerned works sub-contracted to a Chinese SoE to install a submarine power cable and several intra-field cables in respect of an oilfield in the Middle East.

The claimant was a joint venture ("**JV**") established by a Chinese SoE and a UK marine engineering services provider. The first respondent was a listed company controlled by another Chinese SoE. The second respondent was a wholly owned subsidiary of the first respondent in Saudi Arabia.

Pursuant to two sub-contracts entered into by the parties, a certain part of the project work was to be undertaken by the claimant. The dispute concerned primarily the alleged failure by the respondents to lay an electricity cable at the level required by the sub-contracts and the alleged breach of contract by the claimant with respect to alleged defects in its trenching and seabed cable laying work.

Each sub-contract included an arbitration clause providing that all disputes be resolved under the "*Rules of Hong Kong International Arbitration Centre*

Types of Disputes	
International trade	36 (33%)
Maritime	28 (26%)
Corporate	16 (15%)
Professional services	10 (9%)
Finance	8 (7%)
Intellectual property	6 (5%)
Construction	5 (5%)

(HKIAC)" and designated Hong Kong as the seat of arbitration. The governing law of both sub-contracts was Hong Kong law.

The claimant initially commenced one arbitration against each respondent under the 2013 HKIAC Administered Arbitration Rules (the "**2013 HKIAC Rules**"). Both arbitrations were subsequently consolidated based on all parties' agreement.

The claimant requested the arbitral tribunal, among other things, to declare that its works under the sub-contracts were completed and to update the contract price as a result of a series of "change orders". The respondents contested the updated contract price contended by the claimant and counterclaimed damages for the alleged delay of the claimant's works.

The parties designated jointly a sole arbitrator to determine the dispute. HKIAC confirmed the arbitrator pursuant to the 2013 HKIAC Rules.

The arbitrator issued two partial awards. The first partial award decided, among other things, that the claimant was liable for any failure to achieve the required depth below the seabed of the excavated trench into which an electricity cable was to be laid. The second partial award determined the remaining issues in the arbitration including certain milestone payments and quantum issues.

2. Financing of exploration of oilfields in Africa

This case related to the repayment of a loan arising out of an investment made by a Chinese SoE in three deep water oil blocks A, B and C located offshore an African state pursuant to a loan agreement and a shareholder loan agreement.

The claimant, a Cayman entity of the Chinese SoE, was the lender under each of the agreements and acquired a 50% stake in the JV for each block. It commenced two separate arbitrations, i.e., one against the borrowers and guarantor under each agreement, pursuant to the 1976 UNCITRAL Arbitration Rules and the 2005 HKIAC Procedures for the Administration of International Arbitration.

The borrowers under the loan agreement were (1) the national oil and gas company of the African state (the "**African SoE**"), and (2) a Hong Kong company that formed a JV with the African SoE with respect to various oil and gas interests in the African state. The guarantor was a Cayman vehicle established by the claimant, African SoE and Hong Kong company.

Under the shareholder loan agreement, the borrowers were the JVs for the three blocks and the guarantor was the same Cayman vehicle under the loan agreement.

Each of the agreements provided for arbitration before a sole arbitrator under the UNCITRAL Arbitration Rules "*as at present in force*" with HKIAC as the appointing authority and administering institution and Hong Kong as the seat of arbitration. Each agreement was governed by Hong Kong law.

The loan provided by the claimant was part of a series of transactions by which the claimant bought into a JV between the African SoE and the Hong Kong company in relation to the three blocks. This transaction was structured so that the loan would be repaid from revenues from the blocks.

The claimant alleged that, while block A was a moderate commercial success, no economically viable discoveries were found at blocks B and C. The claimant asserted that block B was subsequently returned to the state government and block C was sitting idle. In the circumstances, the claimant considered that the commercial failure of

blocks B and C and the return of block B to the state government were events that had a material adverse effect on the ability of the borrowers and guarantor under each agreement to repay the loan. The claimant therefore asserted that an event of default had occurred under each agreement and requested repayment of approximately US$820 million under the loan agreement and approximately US$615 million under the shareholder loan agreement. Neither the borrowers nor the guarantor paid these amounts.

HKIAC appointed the same sole arbitrator in each arbitration pursuant to the list-procedure under the UNCITRAL Arbitration Rules. The claimant then sought consolidation of both arbitrations to which the respondents objected. The claimant subsequently withdrew its request for consolidation and its claims against the respondents under the shareholder loan agreement. The other arbitration under the loan agreement proceeded.

In that other arbitration, the borrowers denied that their obligations to repay the loan had been triggered. The borrowers' case was that the alleged exploration failures of blocks B and C could not constitute an event of default, because the geological conditions, commercial viability and exploration risks of the two blocks were foreseeable before the loan was advanced, the return of block B to the state government was foreseen and consented to by the claimant, and block C was in fact expected to come into production. The borrowers argued that an event of default could not arise in respect of conditions that were within the contemplation of the parties at the time of the contract and the matters relied upon by the claimant could not materially adversely affect the borrowers' performance of the loan agreement.

The parties subsequently agreed to terminate the arbitration as regards the African SoE and the guarantor under the loan agreement. The claimant's remaining claim against the Hong Kong company was suspended due to settlement discussions.

3. Payment of drilling services in Turkey

This case concerned a Chinese SoE's well-drilling operations in Turkey and the alleged failure of a Turkish JV to pay the Chinese SoE's invoices in full.

The claimant was a Turkish entity established by a Chinese SoE to provide drilling services related to the exploration and development of oil and natural gas in Turkey. The respondent was an energy JV incorporated under Turkish law. The dispute arose out of a drilling agreement (the "**DA**") concluded in May 2017 under which the claimant was contracted to conduct well-drilling operation works for the respondent in respect of a geothermal power project in Turkey.

The claimant issued 12 invoices to the respondent for works completed under the DA. While the respondent settled some of the invoices, it failed to pay the remaining balance of approximately US$4.7 million. According to the claimant, the respondent did not dispute the outstanding payment but alleged that it had been trying to obtain funding to pay the outstanding amount through a transfer of the project to third parties.

The claimant commenced an arbitration under the 2018 HKIAC Administered Arbitration Rules (the "**2018 HKIAC Rules**") requesting the arbitral tribunal to order the respondent to pay the outstanding amount of approximately US$4.7 million and liquidated damages specified in the DA, plus interest and costs.

The arbitration clause contained in the DA provided that, in the event of any dispute, "*either party may propose such case to Hong Kong International Arbitration Centre for arbitration, and the arbitration will take place in Hong Kong*". The DA was governed by Chinese law.

In the arbitration, the claimant also applied to HKIAC to conduct the arbitration in accordance with the expedited procedure under the 2018 HKIAC Rules on the grounds of "*exceptional urgency*". The claimant alleged exceptional urgency based on the respondent's alleged attempts to transfer the project to third parties and the alleged financial difficulty faced by the respondent including the possibility of the respondent's entry into bankruptcy at any time. The claimant asserted that it would suffer irreparable harm and its ability to fully recover its claims would diminish significantly if those activities eventually occurred.

The respondent did not respond to the claimant's substantive claims but objected to the

applicability of the expedited procedure. The respondent contended that it was a reputable JV company established by two large energy companies with a good financial standing in Turkey. The respondent also pointed out that it owned several licences and wells in Turkey worth over US$10 million and it had no intention to sell its assets or licences to any third parties.

Having considered each party's position, HKIAC rejected the claimant's application for an expedited procedure on the basis that the claimant did not demonstrate exceptional urgency in support of its application.

The parties eventually settled the case and, upon the parties' request, the arbitral tribunal issued an award on agreed terms.

4. Acquisition of interest in an infrastructure project in a Specific Economic Zone of a developing South-East Asian state

This case concerned the transfer of shares in a JV from the claimant to the respondent under a shareholders cooperation agreement (the "**SCA**"). The JV was the owner of a project to build and develop infrastructure in a Specific Economic Zone of a developing South-East Asian state. The zone was established by the government to open up the economy and had attracted significant investment from Chinese companies over the years. Due to the nature of the project, the Ministry of Commerce of the host state held a stake in the JV.

The claimant was a Malaysian company and the majority shareholder of the JV. The respondent was a Mainland Chinese public company that engaged primarily in engineering and medical investment in China and abroad. The respondent held itself out as a top contractor for foreign contracts in China and a leading private enterprise for the BRI.

The claimant contended that both parties entered into the SCA in January 2018 pursuant to which the respondent acquired 30% of the claimant's equity in the JV in consideration for US$30 million. The parties agreed to adopt Chinese standards and use Chinese technology, material and equipment to design and implement the project. The claimant alleged that the respondent was responsible for monitoring and supervising the construction work of the project but failed to fulfil its various obligations under the SCA causing delays in the construction work, breaches of the conditions for a bank to finance the project, as well as losses and damages to the claimant and the JV.

The SCA included an arbitration clause providing for arbitration under "*the rules of conciliation and arbitration of Hong Kong International Arbitration Center (HKIAC)*" with Hong Kong as the seat of arbitration. The SCA was governed by the laws of the host state.

The claimant commenced an arbitration against the respondent pursuant to the 2018 HKIAC Rules seeking, among other things, termination of the SCA, return of the 30% equity from the respondent, and compensation of losses and damages of approximately US$65 million.

The respondent contested the claimant's claims on both jurisdiction and merits. The respondent averred that the version of the SCA relied upon by the claimant had been terminated and replaced by a subsequent version and that the claimant's

Nationality of Arbitrator	Number of Appointments or Confirmations
United Kingdom	31
Hong Kong, China	18
Hong Kong, China and United Kingdom	10
Mainland China; Australia	9
Malaysia	8
Canada; Singapore	5
France; New Zealand	4
Austria; United States	3
Australia and United Kingdom; Germany; South Korea	2
Austria and Switzerland; Canada and Hong Kong, China; France and Iran; Greece and South Africa; Switzerland; Sweden; The Netherlands	1

claims should be governed by the subsequent version including the arbitration clause therein. On the merits, the respondent disputed various aspects of the claimant's case including the overall structure of the transaction, the respondent's role in the project and the scope of its obligations under the subsequent version of the SCA. The respondent further alleged that the claimant had failed to perform its various obligations under the SCA and therefore counterclaimed damages against the claimant.

At the time of writing, the arbitral tribunal has issued a procedural timetable for the submission of pleadings and other documents with the substantive hearing to be held at HKIAC.

Conclusion

The BRI brings investment opportunities but also risks requiring careful management. It is imperative for all parties to a BRI project to be aware of possible legal risks and disputes that may arise out of the project and formulate a strategy to avoid and manage those risks and disputes during the negotiation and performance of the relevant contracts.

As shown in HKIAC's cases, disputes with BRI elements may involve a multiplicity of parties, contracts and legal systems. They may feature the direct or indirect involvement of a Chinese SoE as investor or contractor. Such disputes can be complex, technical and capital intensive. Some of them may also involve national interest and political sensitivity.

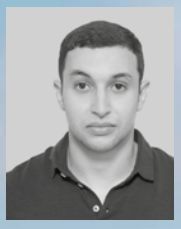
The four case studies presented above show that transactions can go wrong at any stage of the project. The primary claims raised in the case studies are contractual debt claims in respect of services provided or money invested as well as damages for breach of contract. The common defences include jurisdictional challenges, the invalidity of the underlying contract, breaches of representations and warranties, defects and delays in the services provided, and wrongful construction of contractual terms. Notably, the parties to some of these cases sought to invoke various procedural mechanisms under the HKIAC Rules to streamline the arbitral process, such as the expedited procedure and consolidation. Where applicable, these mechanisms can bring significant benefits to the procedural management of the case in terms of time and cost efficiency.

A central aspect to the management of legal risks and disputes is the choice of appropriate and effective dispute resolution mechanisms. This is to ensure that disputes are resolved under a neutral, fair and efficient framework with decisions rendered by professionals with relevant expertise that are enforceable in relevant BRI jurisdictions. Given that arbitral awards are enforceable in 73% of the BRI jurisdictions under the New York Convention 1958, international arbitration is considered as a preferred method of dispute resolution for BRI projects.

In recent years, multiple fora have been established or promoted for BRI disputes. Hong Kong and HKIAC stand out as an attractive option for such disputes given their proven record and experience of handling cross-border disputes involving Chinese parties and strong record of enforcement of arbitral awards in Mainland China and elsewhere. The Arrangement has further strengthened the position of Hong Kong and HKIAC as a preferred forum for BRI disputes. Parties should be aware of the benefits and risks of all alternative dispute resolution fora and select the most suitable option as part of their overall risk management strategy for BRI projects.

Joe Liu is Deputy Secretary-General of HKIAC. He oversees dispute resolution proceedings under HKIAC's auspices, develops HKIAC's rules and procedures, and promotes HKIAC's services worldwide. He has acted as secretary to multiple arbitral tribunals in HKIAC-administered matters. Joe was a member of the HKIAC Rules Revision Committees which oversaw the drafting of both the 2013 and 2018 HKIAC Administered Arbitration Rules. He is a key contributor to Moser & Bao, *A Guide to the HKIAC Arbitration Rules* – a detailed commentary to the 2013 HKIAC Rules published by Oxford University Press. Joe is a frequent speaker and writer on issues of international dispute settlement.

joe@hkiac.org



Othmane Benlafkih is a Trainee at GBS Disputes and former Counsel and Team Supervisor in HKIAC's arbitration team. In his role as Counsel at HKIAC, he was responsible for the administration of arbitrations under HKIAC's auspices. He also served as tribunal secretary under the UNCITRAL and HKIAC Rules. Prior to joining HKIAC, Othmane gained work experience in cross-border disputes at leading international law firms and barristers' chambers in Hong Kong. He is a graduate of the University of Hong Kong and speaks English, French, Arabic and intermediate level Mandarin.

othmaneb@connect.hku.hk

The **Hong Kong International Arbitration Centre** (HKIAC) is a company limited by guarantee and a non-profit organisation established under Hong Kong law. It is one of the world's leading dispute resolution organisations, specialising in arbitration, mediation, adjudication and domain name dispute resolution. HKIAC also offers state-of-the-art hearing facilities, which have been ranked first worldwide for location, value for money, IT services and helpfulness of staff.

According to the Queen Mary, University of London and White & Case *2021 International Arbitration Survey,* HKIAC is the third most preferred arbitral institution worldwide. Having received multiple awards from Global Arbitration Review, HKIAC is constantly at the forefront of innovative arbitration practice.

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THE BELT AND ROAD INITIATIVE 2021

Drafting Effective Arbitration Clauses for the Belt and Road Initiative

Stephen Jagusch QC
Quinn Emanuel Urquhart & Sullivan, LLP

Michael Greenop
Quinn Emanuel Urquhart & Sullivan, LLP

THE Belt and Road Initiative (**BRI**), proposed by the People's Republic of China (**PRC** or **China**) in 2013 is an extensive outbound investment strategy intended to stimulate economic development along the Silk Road Economic Belt and the 21st Century Maritime Silk Road, and create a trade and infrastructure network connecting Asia with Europe and Africa.

BRI projects bind together Chinese investors (often as project financers) and public and private entities of host States or other third-country participants including multinational corporations. Many projects are complex, high-value, long-term, capital intensive, multi-party, multi-contract, cross-border transactions, often involving at least one Chinese party (M Gearing and J Liu, 'The Contributions of the Hong Kong International Arbitration Centre to Effective International Dispute Resolution' in P

Quayle and X Gao, *International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019* (Vol 2, Brill 2019) 41, at 53). They will involve entities from countries at different stages of development and with widely variant legal, political and economic systems – some highly sophisticated and some largely undeveloped. The BRI involves countries making up 65% of the world's population and more than 65 countries. Many of the host States rank high for operational risk and credit risk. Indeed, several countries along the BRI are developing countries in Asia, Africa and Latin America experiencing an economic transition or regime change (Jian Huang, "China and One Belt and One Road Countries Project Docking Risk and Response Strategy" (2017) 6 Journal of Beijing Technology and Business University (Social Sciences)).

It follows that BRI projects are exposed to a large spectrum of risks during their project life-cycle (as to the risks relating to BRI projects, see generally Permanent Forum of China Construction Law, *The Belt and Road Initiative: Legal Risks and Opportunities Facing Chinese Engineering Contractors Operating Overseas* (Kluwer Law International 2019). The disruption caused by the ongoing COVID-19 pandemic may also serve to exacerbate the risks. The players involved will have to enter into a mosaic of contracts to allocate such risks, which may include separate contracts with the financiers, designers, suppliers, insurance providers, contractors and operators.

The potential for disputes relating to these projects is significant. With this in mind, it is important that parties to BRI projects consider how they might wish any potential disputes be resolved and ensure that they are negotiating their agreements with counterparties on an informed basis.

Dispute resolution mechanisms

Within the realm of BRI disputes, three forms of disputes will typically arise: (i) State-State disputes; (ii) investor-State disputes; and (iii) investor-investor/commercial disputes. This chapter will focus primarily on the latter category and, in particular, international commercial arbitration disputes.

Historically, Chinese parties have expressed a reluctance to be involved in formal dispute resolution proceedings as they were unaccustomed to the idea of Western-style litigation or arbitration (https://www.kwm.com/en/knowledge/insights/rise-of-chinese-investors-as-claimants-likely-impacts-on-international-arbitration-20180412). China's preferred method of friendly consultation, deeply rooted in both its culture and international legal instruments, may remain a barrier for non-Chinese counterparts to bring Chinese parties before an arbitral tribunal. However, with the increase in China's foreign investment, Chinese claimants are now far more familiar with such dispute resolution mechanisms (https://www.financierworldwide.com/arbitration-processes-in-asia#.YRWqoehKjD4). Accordingly, Chinese parties are more open to using international dispute resolution procedures to their advantage and have adopted a more liberal attitude towards international arbitration. As a result, it is becoming common for cross-border agreements with Chinese parties to provide for disputes to be referred to arbitration, especially in relation to the construction, infrastructure and maritime sectors. These sectors are the principal focus of the BRI.

Arbitration will play a central role in the resolution of BRI disputes due to its ability to offer parties a neutral venue to accommodate cultural differences, control over the procedure (including the selection of decision makers) and (depending on the choice of laws) confidentiality. It is also favoured for its ability to give rise to final and enforceable awards (explored further below).

Court litigation in national courts is often more formal, perceived to be a less neutral forum in cross-border disputes and much less confidential. In the context of the BRI, it may take some time for investors to build confidence in the domestic legal systems of States along the BRI routes. The BRI also creates significant risks for investors because many projects are negotiated and executed separately on a country-by-country basis, meaning that investors may have to fight in different fora with different States simultaneously.

While arbitration is expected to be the default mechanism for such cross-border BRI disputes, other mechanisms are also gaining traction. For example, specialised international commercial courts have risen in prominence in recent years.

Chinese International Commercial Court (CICC)

On 23 January 2018, a joint committee of the Chinese Communist Party and the State Council issued an Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions which led to the establishment of the CICC. The two existing CICC courts serve as permanent bodies within China's Supreme People's Court (**SPC**).

The CICC is likely to be the most commonly used by Chinese parties to BRI contracts. The CICC aims to protect the legitimate rights and interests of Chinese and foreign parties equally (CICC Procedure Rules, Article 3). Judges are selected from senior judges familiar with international laws and norms and proficient in both English and Chinese.

Reflecting its aim of "internationalisation", the CICC is pioneering a system of international commercial expert committee composed of legal experts from all over the world who specialise in international law and their own domestic laws.

In terms of jurisdiction, the CICC is essentially limited to parties having a substantial connection to China, which is not the case with the other international commercial courts.

Reflecting the Chinese experience, the CICC embodies a hybrid mechanism where mediation and arbitration are interwoven into the dispute resolution process. Under this process, parties may refer their dispute to Chinese arbitration institutions. The CICC is authorised to assist these arbitration institutions by issuing judicial orders for the preservation of property, evidence or conduct before or after an arbitration proceeding.

If a Chinese party insists on the jurisdiction of the Chinese courts, the CICC provides a compromise position for international parties, given its use of technology and rules on evidence. One benefit of the CICC is that it provides parties with convenience and multiple choices which lower costs, and provides a direct route to the SPC, bypassing traditional territorial and court-level jurisdictional limits, avoiding potential local protectionism issues. In turn, this maintains the quality and consistency of international commercial dispute resolution.

Another benefit is that certain procedural requirements for foreign-related disputes under Chinese civil procedure rules have been relaxed for CICC proceedings. Accordingly, evidence created outside the PRC may be admissible for examination, even if it is not notarised or certified according to legalisation procedures. A document in English without a certified Chinese translation copy can also be directly submitted to the CICC if the other party so agrees.

However, two important limitations that are likely to impact its use are that the CICC does not admit foreign counsel to appear or hear cases in English.

Singapore International Commercial Court (SICC)

An alternative is the SICC which continues to grow in popularity and is perceived to be an increasingly important alternative to ICC arbitration in Singapore. In particular, it is a good option for parties that want to preserve the ability to appeal. The SICC also eases foreign attorney's registration requirements and affords them greater authority to appear and plead in any relevant proceedings once registered.

Disputes in the SICC are adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore together with international judges.

The SICC has jurisdiction over an international commercial claim so long as the parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement (much like arbitration agreements).

Other specialist courts

The Astana International Financial Centre Court, led by the Rt. Hon. Lord Mance, offers a common law system within the Central Asian region. It has exclusive jurisdiction over disputes arising out of the Astana International Financial Centre and where parties have agreed to give it jurisdiction, with the aim of fostering growth opportunities from the Eurasian Economic Union, Central Eurasia and the BRI.

Summary

It remains to be seen whether major players would choose these institutions over more established arbitration Seats. This may depend on whether end-users will have confidence in the trust, transparency or judicial experience of

these new institutions. They may also perceive that there are potential difficulties for parties seeking to enforce their judgments/awards, when compared to arbitral awards that may be enforced through the popular New York Convention mechanism (*discussed further below*).

Further, a valid choice of court agreement is the prerequisite for the chosen court to exercise jurisdiction, and it is also an important factor for the judgment to be recognised and enforced elsewhere. The question becomes which law will be applied to determine the validity of the agreement. According to China's current judicial practice, the Chinese courts will consider the choice of court agreement as a procedural matter which should be governed by the *lex fori* (i.e. Chinese law) to determine its validity.

However, on 12 September 2017, China signed the Hague Convention on Choice of Court Agreements which seeks to provide certainty in cross-border litigation by allowing parties to choose the exclusive court in which any disputes arising under a commercial agreement will be resolved. Courts of member States must accordingly respect exclusive jurisdiction clauses in such agreements by staying proceedings in favour of the courts of other member States. They must also recognise and enforce judgments of the courts of other member States subject to certain limited exceptions. Under Articles 5(1), 6(a) and 9(a) of the Hague Convention on the Choice of Court Agreements, the Chinese courts would be bound to apply the law of the State of the chosen court when considering the choice of court agreement. However, China is yet to formally ratify the Convention (a precondition to it becoming a member State bound by the terms of the Convention) (see http://arbitrationblog.kluwerarbitration.com/2021/06/17/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-ii).

Investor-State dispute settlement

Investment treaties often contain dispute resolution clauses referring investor-State disputes to arbitration. Although it is beyond the scope of the present chapter, the Chinese bilateral investment treaties (**BITs**) may also provide an avenue for investor-State dispute settlement under the BRI framework. Chinese investors may increasingly choose to take advantage of protection measures under these treaties for their outbound investments. Many of these BITs have unique "*Chinese characteristics*" including the emphasis on consultation and mediation, as well as carve-outs for investment protections. Within the Central Asian region, China has BITs with Kazakhstan, Uzbekistan, Kyrgystan, Turkmenistan, Tajikistan, but not Afghanistan. China also has BITs with the following Caspian region countries: Russia; Turkey; Iran; Azerbaijan; Armenia; Georgia; and Mongolia.

Existing forums, such as ICSID, should be considered since some of the main BRI participants, such as Kazakhstan, China, Pakistan and Netherlands, are signatories to the ICSID Convention. However, the Chinese Government has made the reservation that it would only submit disputes over compensation resulting from expropriation and nationalisation to ICSID (http://arbitrationblog.kluwerarbitration.com/2019/07/05/isds-as-a-means-of-addressing-challenges-for-the-bri-in-central-asia).

Recognising the potential for BRI disputes between investors and States (including claims under BITs), some institutions have worked on their investment arbitration credentials.

On 1 October 2017, the new International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission (**CIETAC**) came into force. These rules are designed to regulate both investment treaty arbitrations and investor-State arbitrations as the contractually agreed dispute resolution mechanism. While it is unclear whether States will re-negotiate their BITs with China to include CIETAC investment arbitration as their dispute resolution mechanism, there is potential for parties to select CIETAC investment arbitration in contracts between investors and foreign States, governmental organisations or entities whose conduct is attributable to a State. Depending on the wording of each individual BIT, there is also scope for the parties to agree to submit their investment disputes to CIETAC if the BIT enables the parties to do so. For example, the China-Uzbekistan BIT 2011 permits claims to be commenced in a competent domestic court, or to be submitted to ICSID arbitration, *ad hoc* arbitration under the UNCITRAL Rules or to "*any*

- *other arbitration institutions or ad hoc arbitral tribunals agreed by the disputing parties*". CIETAC has more recently released its Panel of International Investment Arbitrators in September 2018, with a total of 79 arbitrators. Among them, 15 arbitrators are from 12 major countries along the Belt and Road.

The Singapore International Arbitration Centre (**SIAC**) also released its own investment arbitration rules on 1 January 2017, the Investment Arbitration Rules of the Singapore International Arbitration Centre. These rules can be applied by agreement in disputes involving a State, State-controlled entity or intergovernmental organisation, whether arising out of a contract, treaty, statute or other instrument. SIAC has also administered investment disputes under the SIAC Rules and served as the appointing authority in investment disputes under the UNCITRAL Arbitration Rules.

Selection of laws in international commercial arbitration

Party autonomy is a key feature of arbitration. An arbitral tribunal must conduct the arbitration in accordance with the procedure agreed by the parties. If it does not do so, the resulting award may be subsequently set aside. A failure by the tribunal to comply with the procedure agreed by the parties may provide a ground to refuse recognition and enforcement of the award under Article V(1)(d) of the New York Convention.

Those familiar with arbitration understand the significance of the agreement to arbitrate and there is already plenty of guidance available to assist parties and their lawyers to draft effective arbitration clauses generally.

This chapter considers issues relating to the selection of laws in arbitration agreements in the context of BRI projects. Businesses and States alike will be looking for effective dispute resolution clauses that will enable their disputes to be resolved fairly, efficiently and effectively.

An arbitration clause need not be complex in order to be effective, but it is prudent to think strategically about the parties' likely posture in any dispute and how that should be translated into an arbitration clause which will maximise the prospect of a successful and effective resolution.

There is no single arbitration clause that would suit in every case. Drafting an effective clause requires consideration of the nature of the contract, the parties, the type of disputes that might be expected to arise and the jurisdictions likely to be involved when it comes to enforcement. Drafting an appropriate clause also requires an understanding of any circumstances that may call for special provisions relating to interim relief, confidentiality, joinder or consolidation.

Procedural framework

The procedural rules applying to any arbitration will often be taken from a number of sources. The starting point is to have regard to the parties' agreement (including any specific points of agreement on the procedure). The parties often express their agreement on the procedural rules in the arbitration agreement, though they can agree on the procedure at any time.

The parties' agreement on procedural matters takes primacy over any other rule of the agreed institutional rules or the laws of the Seat (see further below) except any mandatory rules which may not be derogated from (Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) at [3.63]-[3.64]).

Mandatory rules typically comprise minimum procedural safeguards. Although their content depends on the law of the legal place and any selected institutional rules, some basic safeguards are common to many national laws and institutional rules and may arguably represent the consensus of the international community (Lew JDM and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at [5.68]-[5.69]), even if expressed in different ways. These typically include rules such as the opportunity to put a party's case (see, for example: ICC Rules, Article 22(4); HKIAC Rules, Article 13.1; or UNCITRAL Arbitration Rules, Article 17.1); or equal treatment of the parties (see, for example, HKIAC Rules 2018, Article 13.1; or UNCITRAL Arbitration Rules, Article 17.1). The English Arbitration Act 1996 (UK) helpfully sets out exhaustively in Schedule 1 a list of mandatory rules. The division between mandatory and non-mandatory provisions is expressed less clearly in other instruments.

If the procedure to be followed is not capable

of determination by reference to the parties' specific points of agreement on the procedural rules and any mandatory rules, the tribunal will supplement it with the non-mandatory institutional rules agreed by the parties. In the unlikely event that these rules do not fill in the remaining gaps, the tribunal will typically apply the laws of the Seat.

The Seat of the arbitration

One of the primary laws governing the arbitral procedure is the law of the legal place of the arbitration – the "*lex arbitri*" (**the Seat**). The Seat is a legal construct representing the juridical place of the arbitration and serves as the territorial link between the arbitration and the location in which the arbitration is legally seated (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 1537; Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) at [3.56]). The Seat is distinguishable from the location or venue of the actual arbitral hearings, which may be different for reasons of convenience of the tribunal, parties or witnesses. In international arbitration, the law of the Seat will often also differ from the proper law governing the substantive dispute, as parties typically select the Seat for reasons such as convenience or neutrality, even though that place may have little or even no connection to either party or their contract.

The Seat can be of critical importance to an international arbitration in many respects. It sets the framework for the law governing the arbitration procedure (providing the default rules in the absence of the parties' agreement on rules to govern a particular procedural matter) and more importantly, the process and rights relating to the enforcement of the arbitral award (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2207-2208). The Seat of the arbitration provides the link between the arbitration and a judicial forum, and it is the law of the Seat which gives legal effect to the powers conferred by the parties on the tribunal under their arbitration agreement. Some Seats have local requirements which if not respected may jeopardise the integrity and enforceability of the award. These mandatory procedural rules cannot be overcome by agreement of the parties or by rulings of the arbitrators (see G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2326-2334).

While the law of the Seat has an important role, other laws governing procedural matters will also be relevant. For example, the parties may select to apply certain institutional rules or *ad hoc* rules (explored further below). In addition, any hearing taking place in a venue outside of the Seat will be subject to any applicable mandatory laws in the relevant jurisdiction. Further, a national court outside of the Seat of the arbitration may be asked to order the taking of measures to make the tribunal's work more effective. The matter would be before the court because the court would have, under its own procedural rules, the power to assert a personal jurisdiction over the parties and to order measures against them, even without any other connection to the arbitral agreement and process. If enforcement of an award is sought in a jurisdiction which is different from the place of arbitration, then the enforcement jurisdiction's laws will apply to determine the enforceability of the award in that jurisdiction.

Selection of a Seat

The wise selection of the Seat is essential in order for an international arbitration to proceed efficiently, effectively and in accordance with the parties' objectives (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2208). It is therefore highly advisable for arbitration agreements to designate the Seat.

Factors to consider in agreeing a Seat

In 2015, the Chartered Institute of Arbitrators published the "*CIArb London Centenary Principles*", which aim to help parties to identify "*an effective, efficient and 'safe' Seat for the conduct of International Arbitration*" (see https://www.ciarb.org/media/1263/london-centenary-principles.pdf). The principles comprise 10 elements:

1. an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency;
2. an independent, competent and efficient judiciary;
3. an independent, competent legal profession with expertise in international arbitration;

4. a sound legal education system; the right to choose one's legal representative, local or foreign;
5. ready access to the country for witnesses and counsel and a safe environment for participants and their documents;
6. good logistical support, including transcription, hearing rooms, document handling, and translation;
7. professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel;
8. well-functioning venues for hearings and other meetings;
9. adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements; and
10. immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

One of the most important considerations is that the Seat should have both national arbitration legislation and courts that are supportive of international arbitration (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2211). Choosing a Seat where the national legislation supports and facilitates the arbitral process, rather than obstructing or invalidating it, is essential. Many modern national arbitration laws are based on the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on International Commercial Arbitration 1985 (**the Model Law**), which ensures some degree of uniformity. The Model Law addresses at a relatively high level the minimum procedural requirements and the relationship between arbitrating parties and the courts. This includes issues such as the rules on tribunal and court-ordered interim measures, minimum requirements for the appointment of tribunal members, the making of the award, and the courts' powers to assist and supervise an arbitration, both during and after proceedings. However, it is important to distinguish between the formal legislation applicable in a particular jurisdiction and the actual practice by national courts and other competent authorities within the jurisdiction (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2212).

National courts in the Seat have the possibility of significantly affecting the arbitral proceedings when they are commenced or as they proceed (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2212). When selecting a Seat, parties should consider identifying a Seat which limits the opportunity for unnecessary or disruptive judicial intervention in arbitration proceedings. Judicial involvement can affect selection of the tribunal members, interlocutory judicial decisions regarding jurisdictional disputes or judicial prescription or supervision of the procedural rules for the arbitration. Local courts must also be experienced in complex commercial matters, particularly relating to arbitration, and must be independent and objective. These qualities can be difficult to find in many jurisdictions.

Another central consideration is the enforceability of the award. The Seat chosen should be within a State party to the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (**New York Convention**) in order to ensure enforceability in other States that are parties to the Convention (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2210-2211). If you obtain an award from an arbitration tribunal seated in a New York Convention contracting State which you intend to enforce in another New York Convention State, it will significantly minimise the risks relating to enforcement, and will assist in avoiding local law issues relevant to enforcement. In this regard, 92% of BRI jurisdictions have ratified the New York Convention making arbitration the most viable dispute resolution tool for cross border transactions under the BRI. The only countries that have not ratified the New York Convention are Iraq, Maldives, Timor-Leste, Turkmenistan and Yemen. Enforcing arbitration awards in these jurisdictions will depend on local laws and court procedures, and may be less straightforward. Parties to transactions involving any non-New York Convention territory should take specialist advice to ensure their dispute resolution provisions are suitable. Parties should think twice about selecting these jurisdictions as their Seat if they wish to enforce their awards in jurisdictions in which the New York Convention applies. If parties intend to enforce an award against a counterparty in any of these non-New York Convention jurisdictions, the fact that

the chosen Seat is a party to the New York Convention will become much less relevant.

The New York Convention also has relevance before the enforcement stage, as it contains provisions requiring the courts of contracting States to refer matters to arbitration where they are the subject of a valid arbitration agreement.

The law of the Seat should permit maximum party autonomy in determining the procedure. To this end, parties may wish to choose a Seat which imposes less mandatory procedure rules on arbitrations located in the Seat. This will enable the parties to have the maximum flexibility to design a suitable procedure.

Confidentiality in arbitration is often seen as a key reason why parties choose it over other mechanisms to resolve disputes (IM Smeureanu, *Confidentiality in International Commercial Arbitration* (Kluwer Law International 2011) at xv and xvi). However, it is important for parties to bear in mind that there remains no consensus internationally on confidentiality and the Model Law is silent on the issue. Courts in some jurisdictions have accepted that the duty of confidentiality applies in arbitration, such as Singapore (see *Myanma Yaung Chi Oo Co v Win Win Nu* [2003] SLR 547 (HC Singapore)), but others have chosen not to recognise such an implied obligation of confidentiality (e.g. United States and Sweden). Some jurisdictions have enacted statutory rules to provide for a rule of arbitral confidentiality, such as Hong Kong (see s 18 of the Hong Kong Arbitration Ordinance (Cap 609)).

A further consideration is whether the Seat imposes any restrictions on the parties' freedom to choose counsel or arbitrators. The influence of the Seat can be either direct (through statutory requirements) or indirect (resulting from practical considerations). For example, some jurisdictions may impose restrictions such as nationality requirements. The immigration regime and professional regulations for the country could also raise barriers to entry or participation by foreigners as counsel, arbitrators, party representatives or witnesses. Other logistical considerations should be geographical convenience and whether the Seat would have available an adequate pool of local practitioners who can support possible ancillary litigation. As a practical matter, in choosing a sole or presiding arbitrator, many appointing authorities will be inclined to select an individual qualified to practise law in the Seat and resident in the Seat (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2213).

Many BRI projects are predominantly built by Chinese investors and backed by Chinese State financiers such as the China Development Bank, the Silk Road Fund and the China EXIM Bank. On the other side, many projects are directly backed or guaranteed by the BRI-targeted countries (and, in particular, Central Asian States). As Chinese parties are likely to have greater leverage in BRI negotiations, it is expected that this may lead to more Chinese-centric or, at the very least, Asia-centric choices of the arbitration institution and Seat in BRI disputes. Parties should therefore anticipate that their counterpart may well propose that the Seat of the arbitration be located in China. Indeed, one issue for parties in China-related disputes is whether they are able to choose their Seat freely at all. Broadly speaking, Chinese law only permits foreign-seated arbitration in respect of contracts that are "foreign-related". A contract is foreign related if: (i) it involves a party which is either foreign or has its habitual residence outside the territory of Mainland China; (ii) the subject matter of the dispute is outside the territory of Mainland China; (iii) the facts that lead to the establishment, alteration or termination of the civil relationship occurred outside the territory of the Mainland; or (iv) there exists circumstances that may be deemed foreign-related. Foreign ownership of a Chinese entity may not be sufficient to qualify as "foreign-related", but Chinese courts have shown a greater willingness to recognise that the involvement of a party that is a wholly-foreign owned enterprise registered in one of the designated free trade zones creates a foreign element in the dispute.

Outside of China, Hong Kong and Singapore are the most likely options for BRI-related disputes given their well-established pro-arbitration legal regimes, excellent logistical facilities and Chinese language capacity. These potential Seats can be compared with some of the Central Asian options which tend to feature an inexperienced judiciary, international doubts with regard to the integrity of the local judicial system and unfamiliarity on the part of foreign investors with the material law of the jurisdiction (WE Butler, 'International Commercial

Arbitration in Central Asia' (2014) 6 Y.B. Arb. & Mediation 255 at 268). These factors will discourage foreign investors from selecting these options as the Seat.

Hong Kong

Hong Kong is in a unique position in the BRI being a part of China under the "*one country two systems*" arrangement, while simultaneously maintaining separate and independent legal system based on common law.

As the Secretary General at the Hong Kong International Arbitration Centre (**HKIAC**) noted (see https://www.kwm.com/en/knowledge/insights/belt-and-road-conversation-cietac-hkiac-20170522):

> Hong Kong's independent legal system and judiciary, extensive network of professional services in finance, accounting, construction and law, bilingualism, and geographical proximity to China are particularly important. A large proportion of the initiative's investment will be channelled through Hong Kong, particularly through Hong Kong incorporated vehicles. As a result, Hong Kong is a critical centre for Belt and Road projects.

Hong Kong upholds the rule of law, which is overseen by an independent judiciary (ranked first in Asia for judicial independence by the World Economic Forum's Global Competitiveness Report for the past 24 years), with a proven pro-arbitration stance. The Hong Kong courts take a "hands-off" approach to arbitration and the arbitration-related cases are heard at first instance by specialist judges.

According to the 2021 Queen Mary University of London and White & Case International Arbitration Survey, Hong Kong is the third most preferred Seat in the world (Queen Mary University of London and White & Case, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (2021) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 7 August 2021).

If parties select Hong Kong as the seat, they are free to choose lawyers and arbitrators from anywhere in the world without restriction. Hong Kong has expressly provided in its Arbitration Ordinance that restrictions on who can serve as counsel in court proceedings do not also apply to arbitration.

As the first Asian arbitration statute to be based on the 2006 UNCITRAL Model Law, the Arbitration Ordinance (introduced on 1 June 2011) cements Hong Kong's status as a user-friendly Model Law jurisdiction. Among other things, key features include the express provisions permitting courts to enforce urgent relief ordered by emergency arbitrators in or outside Hong Kong together with the explicit assurance of confidentiality of arbitral proceedings, awards, related court proceedings and judgments.

Hong Kong is an attractive options for Chinese parties who seek geographical proximity and cultural familiarity, and for non-Chinese parties who seek independence, neutrality and international best practice. Hong Kong's role as a centre for international dispute resolution for the BRI has also been recognised and endorsed by the PRC government.

Chinese parties to BRI contracts are likely to feel more comfortable with institutions that are familiar with Chinese business practices and are accustomed to conducting proceedings in the Chinese language. Hong Kong may be the go-to jurisdiction for parties looking to meet their Chinese counterparties half-way.

In June 2017, Hong Kong amended its Arbitration Ordinance to allow third-party funding for international arbitration and related court proceedings.

Hong Kong is a party to the New York Convention (by virtue of ratification by the PRC), meaning that awards made in Hong Kong are enforceable in more than 168 jurisdictions.

Hong Kong is also advantageous for parties intending to enforce arbitral awards against assets, or requiring evidence, located in Mainland China. Hong Kong has its advantages due to the reciprocal arrangements with China for enforcement of arbitration awards and interim measures (Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong SAR). Further, on 30 December 2009, the SPC issued a notice confirming that both *ad hoc* and institutional arbitration awards made in Hong Kong are enforceable in Mainland China. Since the Arrangement Concerning Mutual

Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR came into force in October 2019, applicants have obtained orders from Mainland Chinese courts preserving assets amounting to more than US$ 1.3 billion. The arrangements extends to arbitrations seated in Hong Kong before six arbitral institutions (including HKIAC, CIETAC and ICC).

Singapore

In the latest 2021 Queen Mary University of London and White & Case International Arbitration Survey, Singapore was ranked jointly with London as the most popular Seat in the world, and the most preferred Seat in the Asia-Pacific region (Queen Mary University of London and White & Case, '2021 International Arbitration Survey: Adapting arbitration to a changing world' (2021) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 7 August 2021).

Singapore is perceived as a neutral and independent third-country venue and is ranked as the top Asian country in the 2020 Rule of Law Index and 2020 Corruption Perceptions Index.

The Model Law is the cornerstone of Singapore's legislation on international commercial arbitration which is regularly updated to incorporate accepted codes and rules of arbitration. The early adoption of the Model Law allowed Singapore to advance itself rapidly by promoting its role as an important centre for international legal services and arbitrations.

Just like Hong Kong, Singapore is a party to the New York Convention, meaning that its arbitration awards are enforceable in over 160 countries worldwide.

Its courts offer maximum judicial support and minimum judicial intervention in international arbitration proceedings, having developed an "*unequivocal judicial policy of facilitating and promoting arbitration*" (see *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]). The Singapore courts are even empowered to make interim orders in aid of arbitration seated outside of Singapore.

Parties also have complete freedom to choose counsel in arbitration proceedings with no restrictions on foreign law firms doing arbitration work in Singapore. Non-resident lawyers and arbitrators do not require work permits to carry out arbitration services in Singapore. Foreign counsel may even conduct arbitrations where the substantive governing law is Singapore law (see the Singapore Legal Profession Act).

It also has lower costs than almost any other major centre of arbitration. It also permits the use of third-party funding for international arbitration and related litigation (see the Civil Law (Amendment) Act 2017).

The SICC (described further above) is empowered to hear proceedings under the Singapore International Arbitration Act, including applications to set aside awards, jurisdictional challenges and enforcement applications.

China

On the advantages of China as a Seat, see generally Fei Ning and others, 'Annual Review on Commercial Arbitration in China', in *Commercial Dispute Resolution in China: An Annual Review and Preview (2020)* (Kluwer Law International 2020).

It is important to note that the PRC Arbitration Law diverges from the Model Law in several respects (see L Song, 'National Report for China (2020 through 2021)' in L Boseman (ed), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International 2020)). For example, an arbitration agreement featuring China as the Seat must designate an arbitration commission (i.e. administering institution), meaning that there is no room for *ad hoc* arbitration (except for arbitrations seated in free trade zones). In other words, arbitration agreements for *ad hoc* arbitration seated in Mainland China are generally unenforceable.

Mainland China also does not fully recognise the principle that arbitral tribunals may decide on their own jurisdiction (i.e. the "'Kompetenz-Kompetenz" principle). Instead, arbitration commissions are generally empowered to make a ruling on the issue.

One further consideration is that discovery (i.e. document disclosure) is likely to be limited in arbitrations seated in Mainland China.

However, on 30 July 2021, the Ministry of Justice of the PRC published a consultation draft of revisions to the current PRC Arbitration Law. If implemented, these would considerably

liberalise China's legislative arbitration infrastructure. For example, the proposed revisions may open the door to foreign arbitration institutions accepting and administering China-seated cases and would expressly permit *ad hoc* arbitration in certain instances. The revisions would also involve instating the principle of Kompetenz-Kompetenz.

Under the current Chinese legal framework, courts in Mainland China have the exclusive power to grant interim relief for arbitration both before and during arbitral proceedings. In other words, interim relief in support of arbitration in Mainland China is not available from the arbitral tribunal. Such restrictions will also be lifted if the revisions to the PRC Arbitration Law are implemented.

Selection of an institution and/or its rules

Another key decision to make when drafting an arbitration agreement is whether to opt for institutional or *ad hoc* arbitration.

Institutional arbitrations are administered and overseen by an arbitration institution/commission in accordance with its own arbitration rules which govern many procedural aspects. The institution provides administrative assistance with running the arbitration in exchange for a fee.

Institutions offer the procedural "*safety net*" of tried-and-tested rules, periodically refined over many years (Gerbay R, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) at 36-37; Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) at 45). While adopting such rules may be said to limit flexibility, it can save time, costs and the potential dissatisfaction of a situation in which parties' disagreement over the arbitral procedure (or any material ambiguity or inconsistency in their personalised arbitration agreement concerning the same) requires such matters to be left to the determination of the arbitral tribunal (if constituted) or domestic courts (Gerbay R, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) at 36-37). It can also be more cost effective than negotiating a detailed *ad hoc* arbitration clause which is capable of providing as much detail as the comprehensive rules offered by institutions (Gerbay R, *The Functions of Arbitral Institutions* (Kluwer Law International 2016) at 37). The efficiency of such an approach relies on the cooperation of the parties and the complexity of the disputes. For completeness, while parties may adapt institutional rules for use in an *ad hoc* arbitration, these rules typically weave-in references to institutions which may be unlikely to work effectively without their support (Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) at 43. However, parties may elect to conduct an *ad hoc* arbitration according to established rules such as the UNCITRAL Arbitration Rules (Blackaby N and others, *Redfern and Hunter on International Arbitration* (6th ed, OUP 2015) at 42)).

Most arbitral institutions rules typically make provision for (see G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2366):

a. filing and service of the request for arbitration;
b. filing and service of the answer and counterclaim(s);
c. the appointment of arbitrators, challenges and other matters concerning the constitution of the arbitral tribunal;
d. selection of the arbitral seat and language of the arbitration;
e. disposition of jurisdictional challenges, including the arbitrators' competence-competence and the separability of the arbitration agreement;
f. written submissions;
g. taking of evidence and holding of hearings;
h. provisional measures;
i. choice of substantive law;
j. timetable for an award;
k. formalities of and procedures for making awards; and
l. allocation and quantum of costs.

In more recent years, some institutional rules have also added provisions for, among other things: emergency arbitral relief before the arbitral tribunal has been constituted; powers for the tribunal to summarily dispose of issues or claims; and expedited or fast-track arbitral procedures.

Ad hoc arbitrations are arranged solely between the arbitrators and the parties themselves. Reflecting a more bespoke approach, the parties must envisage and advance the arbitration procedure themselves under the supervision

of the tribunal. Parties often choose to adopt a ready-made set of arbitration rules (such as the UNCITRAL Rules of Arbitration) or, alternatively, draw up a bespoke set of procedural rules for the particular case. Parties tend to opt for *ad hoc* arbitration where they are more experienced in international arbitration. The disadvantage of *ad hoc* arbitrations is that you would not have an administrative authority to assist with issues such as the appointment or challenge of arbitrators. If parties opt for *ad hoc* arbitration, the 2010 UNCITRAL Rules provide a set of rules which include procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism for arbitration costs, as well as additional provisions dealing with multi-party arbitration, joinder, and interim measures.

One consideration to factor into the decision as to whether to opt for institutional arbitration is whether the user is likely to be the claimant or the respondent in any arbitration. This may be relevant given that certain rules provide for fee arrangements that require the claimant to bear more of the up-front costs. There is also the possibility that the respondent may refuse to participate in the arbitration. Certain institutional or *ad hoc* rules address this situation and enable the arbitration to proceed in the absence of a party (e.g. the ICC Rules, SIAC Rules, HKIAC Rules and UNCITRAL Rules). If the arbitration clause or rules do not allow the arbitration to proceed in the absence of a party, it may require lengthy and costly court proceedings to compel arbitration.

Another consideration is whether there are any jurisdiction-specific constraints. For example, China's arbitration law may not recognise *ad hoc* arbitrations seated in Mainland China generally, unless the parties in dispute are both registered in free trade zones and certain other conditions are satisfied.

It is noted that, if the parties adopt institutional or *ad hoc* arbitration rules, they must abide by any mandatory rules of those institutions.

Selecting an institution

An institutions' approach to confidentiality illustrates the differences which arise. For example, the ICC Rules do not contain any express confidentiality provisions, but the tribunal may make orders concerning the confidentiality of proceedings. By contrast, HKIAC and SIAC both provide for confidentiality as the default rule, subject to certain exceptions.

Similarly, the institutions' approach to the publication of awards (in a redacted form) may be an important consideration. In this regard, HKIAC provides that publication of redacted awards is permitted unless a party specifically objects. By contrast, the SIAC Rules provide that publication requires the prior written consent of all parties and the tribunal. The ICC Rules are silent on the issue, but the ICC routinely publishes redacted awards/decisions.

An institution's approach to the time limit for issuing a final award may also be a relevant factor. The ICC Rules provide that the final award should be issued within six months of the date of the terms of reference (unless extended by the ICC). The SIAC Rules provide that an award shall be issued within 45 days of the date of closure of the proceedings. The ICC Rules remain silent on the time limit.

The extent to which awards are scrutinised also varies significantly. Awards made by ICC arbitrators are scrutinised and approved by the ICC court to maintain consistency and a high standard of award-writing. Certain other institutions, e.g. CIETAC, also scrutinise awards. By contrast, HKIAC and the SIAC do not scrutinise awards.

The disputes that emanate from the BRI projects will often involve multiple contracts as well as multiple parties both from within and without the BRI jurisdictions. With this in mind, parties should be minded to consider institutional rules which are designed to deal with multi-party and multi-contract scenarios and have favourable rules for consolidation, joinder or commencement of a single arbitration under multiple contracts.

The HKIAC and SIAC Rules are also the most expansive when it comes to joinder of third parties. In any case, if parties wish to provide for joinder in circumstances other than those allowed by their selected rules (if any), they should include in their arbitration agreement wording that expressly provides for it.

Many of the leading institutional rules provide a framework for consolidation. The ICC, SIAC and HKIAC Rules all permit consolidation at the request of any party to any dispute, even in the absence of consent from all other parties,

with some distinctions. For example, under the ICC Rules, consolidation is allowed where: the claims arise under the same agreement; or the arbitrations are between the same parties, they relate to claims that arise in connection with the same legal relationship and the arbitration agreements are compatible. The SIAC Rules are similar expect that they need not be between the same parties. The HKIAC Rules are also similar except that claims made under different arbitration agreements must have a common question of law or fact and the rights to relief claimed must be in respect of, or arise out of, the same transaction or series of transactions.

Many institutional rules grant tribunals the authority to prescribe the procedure for obtaining and submitting evidence. Exercising this power, tribunals often have regard to the IBA Rules on the Taking of Evidence in International Arbitration 2010 which are designed to fill the void left in the Model Law between the submission of initial pleadings and the issuance of an award (see WW Park, "Arbitration in Autumn" (2011) 2 JIDS 287 at 290). The rules present a method for conducting an arbitration, which blends common law and civil law procedures, balancing fairness and efficiency in order to render efficient and economical the taking of evidence in international arbitrations. They present internationally recognised standards, which most parties should find acceptable. For these reasons, parties may wish to spell out expressly in their arbitration agreement that they would like to apply the rules (or include certain provisions of the rules and not others).

Popular institutions for BRI disputes

Although the advantages of a number of arbitration institutions are dealt with elsewhere in this publication, the section that follows provides an introduction to some of the key points relating to the most popular institutions to be used for BRI disputes.

Preferred venues would likely continue to be HKIAC and SIAC, where BRI-oriented programmes and rules are well-established. These institutions are world-class and are well-placed to resolve such disputes.

Other regional institutions, including Malaysia's KLRCA and Seoul's KCAB, are also positioning themselves to attract BRI disputes.

HKIAC

HKIAC is generally considered to be the leading international arbitration centre in the Asia-Pacific region in terms of attracting end-users from the Asia-Pacific. It is perceived to be the most neutral arbitration institution for parties coming from both civil and common law jurisdictions.

HKIAC even has specific BRI-related arbitration clauses and administered arbitration rules to deal with BRI disputes. HKIAC also has extensive experience administering arbitrations involving parties from jurisdictions along the BRI. Since the introduction of its 2013 Administered Arbitration Rules, it has handled 362 cases involving a party from a BRI jurisdiction, and one-third of the cases it handled in 2017 involved a Mainland Chinese party and a party from a BRI jurisdiction. Indeed, HKIAC has administered more disputes involving Chinese parties than any other non-Mainland arbitral institution (M Gearing and J Liu, 'The Contributions of the Hong Kong International Arbitration Centre to Effective International Dispute Resolution' in P Quayle and X Gao, *International Organizations and the Promotion of Effective Dispute Resolution: AIIB Yearbook of International Law 2019* (Vol 2, Brill 2019) 41, at 53).

HKIAC awards have a strong track record of enforcement in BRI countries and, according to HKIAC, an "unrivalled record" of enforcement in Mainland China (https://www.hkiac.org/arbitration/why-choose-hkiac).

HKIAC Rules allow multiple arbitrations to be consolidated, additional parties to be joined to arbitrations, and single arbitrations to be commenced under multiple contracts.

HKIAC Rules can be strategically used to control costs and increase efficiency in multi-party multi-contract disputes, of the kind that typically arise in construction, joint venture and finance disputes.

Unlike the other leading institutional rules, a selection of the HKIAC Rules will result in Hong Kong being the default Seat of the arbitration unless the parties have selected a Seat or the tribunal determines that another place is more appropriate.

HKIAC has formed an industry-focused BRI Advisory Committee to support parties embarking on BRI projects. The committee

comprises independent experts from the finance, infrastructure, insurance, construction and maritime sectors.

SIAC

SIAC is a popular, experienced regional arbitral institution. Experienced parties and lawyers from common law countries such as Australia, India and the United States tend to favour SIAC, which is known to favour appointing arbitrators from a common law background, particularly from England, the United States and Australia. In contrast to HKIAC which is very much Asia-centric, SIAC targets end-users and arbitrators from outside Asia including the United Kingdom and the United States.

It is not necessary for the parties to have any connection with Singapore in order to refer a case to SIAC for administration. Indeed, approximately half of the cases filed with SIAC have no connection with Singapore. For completeness, SIAC is able to administer arbitrations even where the Seat of arbitration is not Singapore.

Under the SIAC Rules, parties may agree on a Seat of arbitration (*see above*) and failing such agreement, the tribunal shall determine the Seat. However, Singapore will serve as the default Seat for emergency arbitration proceedings unless the parties have agreed otherwise.

SIAC has fluency in English as well as Bahasa Indonesia, Chinese, French, Hindi, Korean, Lithuanian, Malay, Russian and Tagalog. If the arbitration agreement so requires (i.e. if the parties agree), SIAC is generally able to administer the case in languages other than English.

Subject to the parties agreement to the contrary or other circumstances, hearings do not need to be held in Singapore. It is also possible for parties to agree on a documents-only arbitration.

SIAC maintains a panel of arbitrators comprised of experienced, qualified and well-known arbitrators from over 40 jurisdictions. However, parties to an arbitration are free to nominate arbitrators of their choice (even if they are not on the SIAC Panel of Arbitrators).

There are no restrictions on foreign law firms or foreign counsel acting in arbitrations in Singapore. However, if the dispute involves issues of Singapore law, parties may wish to engage Singapore counsel to advise on such issues.

SIAC also offers an expedited "fast-track" procedure available to parties on application to SIAC. The final award will be typically issued within six months of the constitution of the tribunal. To qualify for the expedited procedure, the amount in dispute should not exceed SGD 6,000,000. Alternatively, the case must be one of exceptional urgency or the parties must agree on the expedited procedure.

The Emergency Arbitrator procedure is a special procedure whereby an Emergency Arbitrator is appointed to hear applications for urgent interim relief prior to the constitution of the tribunal. SIAC was the first Asian arbitration institution to offer this procedure and has received more than 50 applications for the appointment of an Emergency Arbitrator since 1 July 2010.

In addition to the Expedited Procedure, the SIAC Rules 2016 were the first to offer a procedure for the early dismissal of claims and defences. A party may make an application to the tribunal for the early dismissal of a claim or defence on the basis that:

(a) a claim or defence is manifestly without legal merit; or

(b) a claim or defence is manifestly outside the jurisdiction of the tribunal.

ICC

The ICC Rules are familiar to many parties worldwide. In comparison to other commonly used rules, the ICC Rules provide for substantially more administrative involvement at various stages of the proceeding, including scrutiny of draft awards. The ICC Rules continue to be revised and updated as part of the ICC efforts to improve efficiency and transparency.

As the world's leading arbitral institution, the ICC is adept at handling complex cases, including high-value, multi-party and multi-contract disputes (https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution). Approximately half of all cases filed with the ICC involve three or more parties.

ICC arbitration is a neutral and globally trusted way to effectively resolve disputes and deliver enforceable awards in virtually all Belt and Road countries, including China. Parties to ICC arbitration seated in Hong Kong can also seek interim relief from the Chinese courts, under the aforementioned arrangement

- between Mainland China and Hong Kong. This is a significant advantage in Belt and Road deals.

As opposed to other institutions that have a propensity to appoint arbitrators from outside the Asia-Pacific region, the ICC is generally known for its diversity-conscious position and tends to appoint arbitrators from within the region and to allocate appropriate civil or common law arbitrators.

In March 2018, the ICC announced that it had established a commission to review dispute resolution in relation to the BRI (https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission). The commission shall help the ICC to develop its existing dispute resolution procedures and infrastructure to support BRI disputes. Through its BRI Commission, the ICC could also see an increased caseload based on disputes coming out of the Central Asian region.

CIETAC

CIETAC is the most representative international arbitration institution in China with the longest history.

It is often selected by non-PRC parties as the arbitration institution for arbitrations in Mainland China. Other Chinese institutions such as the Beijing Arbitration Commission/International Arbitration Center (**BAC**) have also been steadily increasing their reputation for professionalism and internationalisation in recent years. In 2013, CIETAC's sub-commissions in Shanghai and Shenzhen declared their independence from CIETAC.

All three maintain practices consistent with international standards of neutrality and have allowed for the inclusion of foreign arbitration specialists as well as leading foreign arbitration specialists in China on their respective panels of arbitrators. They also allow for foreign lawyers to participate in hearing processes and for foreign and international law to be pleaded as the governing law.

To date, CIETAC has already handled many BRI-related cases and adopted measures to play an active role in furthering the initiative. From January 2013 to June 2019, CIETAC has accepted 557 Belt and Road related cases, involving a total dispute amount of RMB 24.357 billion and involving 43 Belt and Road countries.

It has also stepped up its efforts to enhance the quality of its arbitration services. CIETAC has selected and engaged arbitrators in consideration of the advantages of BRI countries. Having accomplished the renewal of its arbitrators in 2017, CIETAC has now engaged more arbitrators form the BRI countries, with the number of arbitrators increased from 51 to 78, and the nationalities from 17 to 32, further enhancing the perceived credibility and influence of CEITAC's arbitral awards.

Since the implementation of the BRI, CIETAC has organised and carried out a number of research projects on the international arbitration systems of the Belt and Road countries and has finished research on the commercial arbitration systems in 25 countries such as India, Indonesia, Vietnam, Turkey and Pakistan. Based on this research, CIETAC has provided enterprises with specific information concerning the arbitration systems and institutions of the relevant countries, to help them avoid legal risks and conduct comprehensive assessments of their economic and trade activities in the Belt and Road countries.

Law governing the substance of the dispute

Most national, transnational and international legal systems afford parties to an arbitration agreement considerable autonomy in selecting the substantive rules of law applicable to their disputes, leaving it to the arbitral tribunal to determine the proper law in the absence of a party choice (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2877-2880).

Arbitrators identify the applicable substantive law by relying on the will of the parties, as expressed in their arbitration agreement. Indeed, the great majority of national and international choice of law rules privilege party autonomy, so that if parties have expressly or implicitly selected the substantive law(s) to apply to their dispute, that choice will be respected. Notably, Article 28(1) of the Model Law treats the parties' designation of the law of a State as a choice to adopt the substantive law of the State rather than just its law of conflict of laws.

In making a choice as to the substantive law(s) to apply, parties should bear in mind that, even where they have chosen a proper law of the contract, it does not automatically follow

that all aspects of their dispute will be governed by that chosen law. Where, for example, the parties have chosen a foreign law to govern the contract, matters such as liability in tort, the quantification of damages and limitation may still be governed by the law of the Seat. Ultimately, the arbitral tribunal will have to ask itself both what is the proper law of the contract and what is the proper law of the non-contractual dimension of the dispute.

Although foreign laws such as English law are often used as the applicable law for international engineering contracts, the host country's laws may still provide for the mandatory application of the host country's laws in certain areas for reasons such as protection of public interest (*The Belt and Road Initiative: Legal Risks and Opportunities Facing Chinese Engineering Contractors Operating Overseas* (Permanent Forum of China Construction Law 2019) at 58). For example, some host countries make mandatory provisions that the project agreement for some of the country's infrastructure projects must apply the local laws of the host country, or at least require that the guarantee document that provides the guarantee with the assets of the host country apply the local law of the host country. For example, in Russia, if the construction project involves a "foreign element", foreign law can be chosen as the applicable law, but even so, in certain circumstances, according to the "super mandatory clause" in Russian law, the selected applicable law will also be excluded in favour of Russian law.

Where the agreement is silent on the substantive law(s) that should apply, the Model Law provides that the arbitral tribunal should apply the law determined by the conflict of laws rules which it considers applicable (see ILA "International Commercial Arbitration Committee's 2010 Report and Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration" (2010) 26 Arb Int'l 193 at 195). In determining which conflict laws to apply, the parties' choice of a Seat will not necessarily indicate a choice to submit to the conflicts rules of the Seat. Different approaches are taken. Those approaches are beyond the scope of the present chapter.

Which law to select?

Parties are afforded great flexibility in selecting the substantive law to govern their dispute. Indeed, they need not be limited to selecting a single national law to govern. For example, they could choose a set of specific rules crafted for purpose, transnational rules such as *lex mercatoria* (i.e. the autonomous set of rules developed from the practice of merchants and from international codifications which can be applied directly by arbitrators) or even the 1994 UNIDROIT Principles of International Commercial Contracts. A wide array of non-national alternatives are encountered.

The simplest, safest and most common choice-of-law agreement specifies the law of a single State. However, it may even be suitable in some circumstances for the parties to select a set of combined laws to apply in respect of their particular contractual context, and may even help to resolve a deadlock during negotiations over the choice of law. However, parties should exercise some caution in selecting a combination of laws, as this may give rise to complex issues where there are inconsistencies between the selected laws that are difficult to resolve (and may prolong the resolution of disputes) (see G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2961-2966).

Note that, where parties agree that "trade usages" are to be taken into account in deciding the dispute, this is likely to be understood as providing for the consideration by the tribunal of the practices, expectations and economic context of particular types of business transactions which will inform how the applicable substantive rules should be applied to a particular dispute, as opposed to a selection of a non-national legal system (see G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 2666-2667 and 2983-2987).

A variety of considerations affect the choice of the substantive law governing the parties' contract. These considerations typically guide commercial parties in similar directions towards a mutually-acceptable, neutral and objective legal system.

Law governing the arbitration agreement

The law of the arbitration clause potentially governs matters including the formation, existence, scope, validity, legality, interpretation,

- termination, effects and enforceability of the arbitration clause and the identities of the parties to the arbitration clause.

Although the parties' consent is essential for an agreement to arbitrate, the ultimate efficacy of an agreement depends in large part upon its validity and enforceability in national courts (G Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 256). Only if national courts are prepared to recognise and enforce an agreement to arbitrate can the parties' will be effective.

Issues involving questions of contractual formation, validity, scope and interpretation are determined by the law governing the arbitration agreement. These issues are important because, in order for an arbitral tribunal to have jurisdiction to decide a dispute, the dispute must fall within the scope of a valid arbitration agreement and be capable of being determined by arbitration. If the resulting award deals with matters outside of the scope of the arbitration agreement, the award may be set aside or refused recognition and enforcement.

The law governing a contract may not necessarily also be the law governing the arbitration agreement itself (see, generally, Lew JDM and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at [6-1]-[6-69]). Most national and international laws of arbitration treat the arbitration agreement as a distinct agreement from the rest of the contract which may be subject to its own governing law (a principle known as the "separability of the arbitration agreement") (Lew JDM and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at [6-9]). This enables parties to select a different or neutral law to govern their arbitration agreement, if they so choose.

In the absence of an express choice, the main alternatives for a default or implied choice are the law of the Seat or the proper law of the principal contract. There is a lack of uniformity between jurisdictions as to which of them is the preferred option (for the latest position in the United Kingdom, see *Enka v Chubb* [2020] UKSC 38).

Conclusion

In conclusion, recognising the significant potential for disputes in relation to BRI projects, parties should approach the drafting of their arbitration agreements with counterparties in a careful and considered way to ensure that their disputes can be resolved fairly, efficiently and effectively. Among other things, parties should factor into their thinking the nature of the contract, the parties, the type of disputes that might be expected to arise and the jurisdictions likely to be involved when it comes to enforcement. Drafting an appropriate clause also requires an understanding of any circumstances that may call for special provisions relating to interim relief, confidentiality, joinder or consolidation.

As already mentioned, an arbitration clause need not be complex in order to be effective, but it is prudent to think strategically about the parties' likely posture in any dispute and how that should be translated into an arbitration clause which will maximise the prospect of a successful and effective resolution.

Stephen Jagusch QC is Global Chair of Quinn Emanuel's International Arbitration Practice. He specialises in international commercial and investment treaty arbitration, having acted as adviser and advocate in dozens of *ad hoc* and institutional international arbitrations, conducted in many countries around the world, and subject to a wide variety of governing substantive and procedural laws. A great many of Stephen's cases have been for or against sovereign States or substantial multinational organisations, and he has been lead counsel in many of the world's leading investment treaty cases.

Stephen is recognised as a leading expert in the field of international arbitration and disputes arising under contracts and bilateral or multilateral investment treaties, and is highly ranked by all international and domestic legal publications in international arbitration and public international law. Leading directories recognise Stephen as a leader in his field and have recently described Stephen as "one of the most impressive advocates around", "a masterful cross-examiner", a "tenacious fighter", the "maestro of strategy", "one of the gurus in the field", "one of the pre-eminent ICSID arbitration experts in the world", and praise his "finely honed instincts for strategy in advocacy".

stephenjagusch@quinnemanuel.com

Michael Greenop is an associate in Quinn Emanuel's London office. His practice focuses on international commercial and investment treaty arbitration, public international law and business and human rights litigation. Prior to joining the firm, Michael practiced as an employed barrister at one of New Zealand's leading sets where he assisted Sir David A R Williams KNZM QC in connection with some of the world's leading international arbitration cases. He has also appeared as counsel in commercial cases in the New Zealand High Court, arbitrations and specialist courts. Michael has represented New Zealand at the Philip C Jessup International Law Moot and the ICC International Commercial Mediation Competition, ranking second place globally in both and receiving individual recognition as the third best speaker in the former. He has also competed internationally at the Willem C Vis International Commercial Arbitration Moot, receiving an honourable mention for best individual speaker. Michael assisted in the preparation of the second edition of New Zealand's leading text on arbitration and co-founded its preeminent group for young arbitration practitioners. In October 2019, he became the youngest Fellow of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) and was admitted in 2020 as a Fellow of the Chartered Institute of Arbitrators (CIArb).

michaelgreenop@quinnemanuel.com

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Proposed Dispute Settlement Mechanism for BRI Disputes along the Maritime Silk Road

Dr Colin Ong QC
Dr Colin Ong
Legal Services

This chapter seeks to explore the possibility of setting up a dispute settlement mechanism (DSM) for Belt and Road Initiative (BRI) disputes which may take place along the BRI's Maritime Silk Road. It focuses upon contractual disputes that may take place between a Chinese party and an Association of South-East Asian Nations (ASEAN) party, but may be subsequently extended to the rest of the countries along the Maritime Road and potentially across the BRI's Land Belt.

The BRI consists of two different strands. The first strand is a land-based Silk Road Belt and the second strand is the Maritime Silk Road (MSR). The priority of the MSR is to connect China with BRI partner countries that are situated along two main economic passages. The first and most important one being the China-Indian Ocean-Africa-Mediterranean Sea followed by the China-Oceania-South Pacific.

The most important sub-group of the MSR is ASEAN. The reasons for this being the most important part of the MSR is because the combined population and market between China and ASEAN comprises more than 2 billion consumers and is one of the largest markets in the world in terms of trade volume. In addition, there has been a historical close commercial connection between China and the ASEAN countries dating back millennia, achieving its peak during the Chinese Song dynasty (960–1279).

It is clear that appropriate financing arrangements are an essential element for each BRI project initiated by Chinese state owned entities (SOE). Most of these can be expected to come from Chinese banks and financial institutions, including the Asian Infrastructure

Investment Bank, the Silk Road Fund and the New Development Bank (https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1669177.shtml (see also https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf)). Given the diversity of BRI countries and legal systems, it is inevitable that both Chinese and BRI parties will encounter complex legal issues involving cross-border laws. There are challenges in navigating different legal and regulatory systems. There are a range of common law jurisdictions (Brunei, Malaysia and Singapore amongst the ASEAN and South Asian countries that have adopted the British common law heritage), civil law jurisdictions (the rest of the Asian countries and Central Asian countries have adopted a civil law heritage), and Islamic law jurisdictions (the countries of the Middle East and some African countries have adopted an Islamic Syariah law heritage) that Chinese investors and contractors will encounter. It is inevitable that disputes and conflicts will arise out of misunderstandings between contracting parties or a misunderstanding of the different laws and legal systems at play.

It is therefore critical that all countries along the BRI, including China, come up with a solid legal foundation and a respected DSM for the healthy success of BRI projects. Clarity of the law and legal certainty will be crucial components for BRI projects to promote both the continued flow of international capital to fund projects as well as to operate completed projects. It is in the interests of all parties, particularly Chinese SOEs who will often bear the initial financial burden, to find a way to resolve legal disputes with BRI/ASEAN countries in an efficient and fair manner. While there are popular choice-of-law clauses that contracting parties tend to agree to use as the governing law of their contracts (as Chinese parties will be entering into contracts with BRI countries, it is likely that the choice of English law will be a popular neutral choice of governing law), it is clear that there is no single agreed "international standard" of laws. Any uncertain legal risk will ultimately translate into an increase in the cost of doing business.

The role of mediation in resolving BRI disputes

Mediation has steadily gained acceptance over the years because it is seen to be a much cheaper way of settling disputes and has the perceived advantages of speed and flexibility over both litigation and arbitration. Mediation works best in such situations where it is necessary to try to get the litigant parties to speak to each other and to understand the other side's views as to what went wrong. Mediation between culturally diverse contracting parties can often avoid a pointless blame game taking place in court and it can help to bridge differences and get the disputing parties to focus on finding "win-win" solutions rather than spending time analysing problems or how they got to the point of a legal dispute. However, there are limits to what the mediation process can do in resolving large quantum disputes which may involve multiple players and the need for political transparency. While the Singapore Convention (the Singapore Convention on Mediation, formally the United Nations Convention on International Settlement Agreements Resulting from Mediation, was signed on the 7 August 2019 and became effective on the 12 September 2020) will lay to rest the traditional complaints that settlement agreements arising from mediation are non-binding, the main commercial players – including contractors, financiers, insurers, Chinese SOEs and host states – would need to be assured of a finality to disputes. Unless parties agree to mediate in good faith and reach settlement agreements, there is no end to any dispute. Some proponents have also come up with the untested idea that the Singapore Convention may be misused for other untoward purposes. Justice Hamid Sultan, in his article, *Singapore Mediation Convention: Is the Rule of Law Intact?* (CIArb, 5 September 2019) suggests the possible risk of the Singapore Convention being hijacked for money laundering activities (https://www.ciarb.org/resources/features/singapore-mediation-convention-is-the-rule-of-law-intact). While mediation will continue to be an important dispute settlement tool, it will need

- to be used alongside more permanent DSMs including litigation and commercial arbitration.

The rise of the international commercial courts

There has been a proliferation of international commercial courts across the world over the last decade. One of the advantages of international commercial courts is that they reduce the likelihood of conflict of interests, as compared with international arbitrations, where a party has the right to select its own arbitrator in an arbitration which is to be presided over by a three-member tribunal. One cannot shop for one's judge and unlike a domestic arbitrator, the national court judge is not dependent on any law firms or parties for cases. Another advantage that courts have over arbitration is the ability to join non-parties and the ability to provide experienced judges with their own expertise in commercial dispute resolution. (Sir William Blair, "The New Litigation Landscape: International Commercial Courts and Procedural Innovations" (2019) The International Journal of Procedural Law 2019 no. 2; https://sifocc.org/app/uploads/2020/04/The-New-Litigation-Landscape-International-Commercial-Courts-and-Procedural-Innovations-1.pdf.)

The London Commercial Court remains the oldest and still most-active court for international commercial disputes (other new players include: the Astana International Financial Centre (AIFC) court in Kazakhstan; the Dubai International Financial Centre (DIFC); and the Qatar International Court and Dispute Resolution Centre (QICDRC)). However, the Singapore International Commercial Court (SICC), which was set up in 2015, and the China International Commercial Court (CICC), which was set up in 2018, are likely contenders for BRI projects. The judges appointed to the CICC are restricted to judges of the Chinese Courts who are Chinese nationals with experience in international commerce, together with the ability to work in both English and Mandarin Chinese. The CICC has constituted an International Commercial Expert Committee (ICEC) consisting of foreign legal experts from other jurisdictions who are renowned legal jurists. These foreign legal experts will provide advice and assist CICC judges in ascertaining the content of foreign laws and also preside over mediation. The SICC has the advantage of being part of the Singapore Court, which is considered one of the world's leading judiciaries, whose judges are often considered to be on a par with London and Hong Kong. In addition to judges of the Singapore Supreme Court, there is a group of eminent international jurists from both common and civil law jurisdictions sitting in the SICC.

The CICC has the advantage as host countries and players from financially weaker countries may be forced to agree to accept CICC dispute resolution clauses. However, there is likely to be push-back because contracting parties often do their best to avoid litigating before the national courts of their business partners. However, while litigants to SICC proceedings may engage registered foreign lawyers to make submissions on foreign law in offshore cases with no substantial connection to Singapore, litigants to CICC proceedings may only be represented by Chinese law-qualified lawyers. Non-Chinese lawyers are not entitled to have a right of audience in Chinese Courts. This is the single greatest unattractive feature of the CICC as it means that non-Chinese parties are not only forced to litigate in China, but they would also need to expend more money to engage two sets of lawyers – one who may be representing them on the dispute, and another set of Chinese lawyers to formally represent them before the CICC. It is also strategically disadvantageous for the foreign party as their Chinese lawyers will be reliant on their international lawyers for both the background and preparation of evidence and witnesses. While the CICC acts neutrally, one can see the apprehension if an ASEAN/MSR party were to litigate a case before a Chinese SOC before the CICC. This would be the exactly same for a Chinese party who is expected to litigate a case between "X" ASEAN SOE party before the courts of "X". Parties look for absolute neutrality in settlement of disputes. Justice must not only be carried out, but Justice must also be seen to be done.

Unlike most international commercial courts including the SICC, which use the English language, Chinese procedural law mandates that the language of court proceedings must only be in the Chinese language. While this may be inconvenient to many non-Chinese lawyers, it is not as significant as the fact that non-Chinese lawyers are completely forbidden to represent their clients before the CICC.

Ultimately, the most important aspect of any DSM is the ability and ease of enforcing the judgment or arbitral award. While the Convention

on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) and the Hague Convention on Choice of Court Agreements (2005) have gone a long way to assist in the enforceability of court judgments, both Conventions will only be a true game changer if ratification takes places relatively quickly and if ratification is sufficiently widespread. Sixteen years after the Hague Convention on Choice of Court Agreements was concluded, there have only been 10 signatory states and only Denmark, the EU, Mexico, Montenegro, Singapore and the United Kingdom have ratified it. It will therefore take a long time before international commercial courts can be considered to be a replacement to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), with its 168 contracting states. This also means that it is going to be very difficult to enforce CICC or SICC or indeed any other court judgments within China and the MSR countries.

What are the most appropriate arbitration seats to serve China-BRI projects?

There is a plethora of arbitral institutions that are capable of serving China-BRI projects. These institutions stretch across the entire range of both the MSR and the Land Belt segment of the BRI. Contracting parties who negotiate a choice-of-jurisdiction clause in a BRI contract are most likely to opt for a better-known arbitral institution and seat of arbitration. According to the 2021 Queen Mary University of London International Arbitration Survey (QM Survey), the five most-preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva – with London and Singapore leading the pack followed closely behind by Hong Kong. 90% of survey respondents indicated that their preferred forum for resolving cross-border disputes is international arbitration. The absolute neutrality of the world-class judiciaries of both Hong Kong and Singapore would make these two seats of arbitrations amongst the natural contenders as neutral seats of arbitration for China-ASEAN party BRI contracts.

Due to its close proximity, Hong Kong has historically been the preferred seat for Mainland China parties who have to select choice of arbitration venues outside Mainland China. The special arrangement between China and Hong Kong for enforcement of awards (*Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong*), coupled with the HKIAC and ICC's unrivalled experience among non-Mainland arbitration institutions in handling disputes involving Chinese and foreign parties, gives Hong Kong the edge over all other non-PRC/Mainland jurisdictions. Hong Kong is the first and only jurisdiction outside the PRC where, as a seat of arbitration, parties to arbitral proceedings administered by its arbitral institutions would be able to apply to the Mainland Chinese Courts for interim measures under the *2019 Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings*.

However, reports of end-users panicking over the continued independence of the Hong Kong judiciary as caused by some provisions in the new National Security Law implemented by Mainland China on 30 June 2020 appears to have benefitted Singapore's position as a neutral seat of arbitration (https://www.bloomberg.com/news/articles/2020-07-22/hong-kong-is-losing-to-singapore-as-a-venue-for-arbitration). As BRI projects are driven by Chinese parties and as Chinese parties will be part of BRI projects, it is naturally likely for non-Chinese parties to prefer to opt for Singapore rather than Hong Kong as the seat of arbitration. It all comes down to the bargaining position of the contracting parties.

In the long run, it is likely that Singapore will have the edge over Hong Kong as the leading seat for ASEAN-China and MSR-China disputes simply because it is a sovereign nation that is completely independent from China. In terms of geographical proximity, one cannot discount London as an attractive seat of arbitration to the countries along the Land Silk Road Belt. Geography and history are often important considerations as they can affect the convenience of the end-users and counsel. Many of the Central Asian countries on the Belt and Eastern European countries including Russia have traditionally referred their disputes to London for both commercial court litigation as well as arbitration. Familiarity with London as the seat of arbitration or London courts is another important factor that one needs to consider.

As the majority of major international arbitration centres across the world tend to invite the same group of 200 arbitrators from both civil law

and common law backgrounds to be on their arbitrator panels so as to improve the prestige of their own institution, it is now no longer a good indicator to just look at the panel of arbitrators. One needs to look deeper into the statistics of each arbitral institution to understand who from those panel of arbitrators are actually appointed by each institution. The statistics will also show whether there is diversity in the type of court members and representatives who are appointed or tasked to represent the arbitral institution.

The focal regions of different leading arbitration institutions

The International Chamber of Commerce (ICC) has been consistently identified as being the world's most-preferred arbitral institution for decades. In Asia, the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) were both ranked as the most-preferred arbitration seats on the Asian continent.

Leaving aside the ICC and HKIAC, which are perfectly balanced in their choice of appointment of a default arbitrator, many arbitration institutions have a track record of appointing a great majority of arbitrators from either a civil law or a common law background. Parties need to understand how each arbitral institution will be likely to act in the event of a default situation, and whether it is likely to appoint an arbitrator who will be familiar with and uphold the principles of the governing law of the contract that has been agreed by the parties. One can envisage that Chinese SOEs and Chinese parties may prefer to advocate for the selection of PRC law as the governing law of the BRI contract. Counterparties tend to be more concerned about the selection of a neutral seat of arbitration and about selecting a well-known and reliable arbitral institution. However, parties also know that the arbitration is only as good as the arbitrator. The arbitrator or presiding arbitrator must, however, be experienced in the governing law of the contract as there would otherwise be injustice caused by a failure to understand or to apply the governing law of the contract.

Experienced counsel, advisors and parties will understand this issue really well. As an example, if one has an arbitration governed by civil law, such as PRC law, and counsel believes that he or she has a weak case under the PRC law concept of good faith, then counsel is likely to appoint a senior English or common law arbitrator but retain the right to accept or reject the appointment of the presiding arbitrator. The opposing side may appoint a Chinese arbitrator or PRC law expert and may then try to seek agreement for a presiding arbitrator who understands PRC law or civil law. Opposing counsel may have a case strategy of deliberately not allowing his or her own party-appointed arbitrator to appoint the chairperson and to force the appointment process to fall onto the appointing authority (Colin Ong, "*Case Strategy and Preparation for Effective Advocacy*" (2020), GAR Guide to Advocacy; https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/case-strategy-and-preparation-effective-advocacy) if this is perceived to be advantageous. If it is an authority such as SIAC, then based on its own statistics, it is much more likely for the authority to appoint an English or non-civil law arbitrator in a default situation where the parties are unable to agree upon a sole arbitrator or presiding arbitrator. This will increase the likelihood of the two common law arbitrators being on the same wavelength regarding common law principles. Conversely, where an arbitration is seated in a civil law jurisdiction such as Indonesia but is subject to common law (such as English law), the same tactical consideration may come into play when black letter law does not favour a party. The party that does not want someone who understands English law would object to all proposed names so that the Indonesian National Board of Arbitration (BANI) would then appoint the default arbitrator or presiding arbitrator. This appointee would in all likelihood be an Indonesian or civil law experienced arbitrator without the requisite experience in English law.

It is important for end-users to carefully go through the statistics of the arbitral institution and then decide whether that institution has a preference of appointing a common law or civil law experienced arbitrator who truly understands the governing law. According to the latest SIAC Annual Report 2020, three countries – namely India, US and China – topped the foreign user rankings in 2020 (https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf). The actual number of new cases at SIAC in 2020 was far less than was initially reported by the institution. Within the new caseload, there

were two sets of related cases, 261 cases in one set and 145 in another. The true number of cases at SIAC in 2020 was closer to 670. There were 195 cases submitted which involved Chinese end-users. However, there were only three cases where Chinese nationals had been appointed as arbitrators of all SIAC cases in 2020. However, this does not necessarily mean that there were a total of three different Chinese nationals appointed to all SIAC cases in 2020. As an example, the statistics indicate that there were four cases in 2020 where a Brunei national was appointed but a single Brunei national was appointed to all four cases. SIAC made 109 appointments of non-Singapore arbitrators. The UK did not feature among the top 10 nationalities of end-users who sent their cases to SIAC. There was a total of 64 UK nationals appointed to SIAC cases in 2020. The next largest group of foreign nationalities who were appointed as arbitrators were from the US (27) and then Australia (24). Other common law nationals appointed to SIAC cases in 2020 included 102 Singaporean, 23 Malaysian, 14 Canadian and six Irish nationals. There were significantly far fewer appointments of arbitrators from civil law countries. There were five French, four Vietnamese, three German, three Dutch, three Thai, two Austrian, two South Korean, one Indonesian and one Russian national appointed as arbitrator from the civil law countries. The statistics show that SIAC is the perfect arbitral institution for common law end-users who have adopted choice of common law as the governing law of the contract. The default appointments by SIAC indicate a great preference for the appointment of common law lawyers as sole or presiding arbitrator. SIAC has extremely experienced common law lawyers heading the institution. The president and both of the vice presidents of SIAC have always been common law lawyers and are true experts in the US and Singapore common law systems and laws. The current president of SIAC is an eminent US lawyer based in London. One of the more active vice presidents who makes the majority of the appointments is a US lawyer based in New York, while the other vice president is one of the most eminent Singapore senior counsel. All major events held by SIAC each year are spearheaded by speakers who are either favoured English silks or common law lawyers. The majority of the SIAC Court is comprised of common law arbitrators. The SIAC statistics certainly makes it very attractive for end-users from common law jurisdictions. End-users can be almost assured to be entrusted with an experienced common law experienced arbitrator in a default situation. SIAC statistics consistently indicate that the overwhelming majority of default arbitral appointments by the institution are common law arbitrators. This is very helpful for counsel who are trained or accustomed to dealing with English law or other common law systems such as the US and India.

However, this does not necessarily make it attractive for Chinese SOEs or other Chinese end-users to stipulate SIAC arbitration rules in any BRI contracts that are governed under PRC law or under civil law. They too would understand that in any default arbitral appointment, the statistics suggest that it will be very much more likely for SIAC to end up appointing an English or US or Australian or common law experienced arbitrator to hear their cases. This will increase the likelihood of the two common law arbitrators being on the same wavelength regarding common law principles but perhaps with not as much experience on PRC law. This may reduce the importance of the application of PRC law as the governing law of the BRI contract and may reduce the importance of the application of the concepts of fairness and good faith.

As with other well-known arbitration centres in Asia, including BAC, CIETAC, HKIAC, KCAB, SIAC has many of the same renowned arbitrators from outside the ASEAN region. This is perfectly logical for SIAC as its focus is to maintain its status as a truly global arbitration centre. However, unlike ICC Singapore or HKIAC, which have their panel of arbitrators from virtually all countries in Asia, the SIAC website reveals that many Asian countries are not on its radar, including those of some ASEAN countries (https://www.siac.org.sg/our-arbitrators/siac-panel (accessed on 4 August 2021)). From ASEAN, three countries (Brunei, Cambodia and Laos) are missing from the SIAC panel of arbitrators. There are only five Indonesian nationals from the largest ASEAN country/economy and only one Thai national from the second-largest economy in ASEAN. Conversely there are: 31 Australian nationals; 75 UK nationals; and 43 US nationals on the SIAC panel. This is another good indication as to which countries form the target clientele of SIAC. This is not conclusive, but it does indicate that it is a more important priority for SIAC to invite non-Asian-based common law experienced arbitrators rather than Asian/ASEAN-based civil law

- experienced arbitrators to swell the ranks of its panel of arbitrators for their long-term strategy, and goals, whatever that may be.

There are many excellent arbitration institutions in China and the top ones that lead the pack in terms of having the most international arbitrations, involving a foreign party, are: the Beijing Arbitration Commission/Beijing International Arbitration Center (BAC); the China International Economic and Trade Arbitration Commission (CIETAC); and the Shanghai International Economic and Trade Arbitration Commission (SHIAC). BAC and CIETAC are both located in the capital Beijing, while SHIAC is located in Shanghai, the second-largest Chinese city and banking hub. All three arbitration centres maintain practices consistent with international standards of neutrality and all three have allowed for the inclusion of foreign arbitration specialists, as well as leading arbitration specialists in China, on their respective panels of arbitrators. They also allow for foreign lawyers to participate in their hearing processes and, where it has been agreed between the parties, allow proceedings to be conducted in the English language. CIETAC established the CIETAC Silk Road Arbitration Center in Xi'an to act as a hub to provide commercial arbitration service for countries along the land-based Silk Road Belt. As Chinese arbitration commissions would tend to naturally appoint experienced Chinese national arbitrators in default situations, there is much less possibility of such arbitrators failing to understand or apply PRC law, where PRC law has been designated, as the governing law of the contract.

However, one of the most important factors in selecting a seat of arbitration is absolute neutrality. The ability to select a neutral seat that is not in either party's "home jurisdiction" is one of the key issues which parties consider when selecting arbitration as a DSM. It is quite likely that the non-Chinese counterpart will insist on an absolutely neutral seat of arbitration such Singapore. This will in itself end up excluding the participation of the Chinese arbitration commissions.

ICC arbitration seated in Singapore as the likely default choice for China-ASEAN/MSR parties

Since 2020, Singapore has the edge over Hong Kong as a seat of arbitration. Singapore is likely to not just maintain but also to widen its lead over Hong Kong until such time as international parties are assured that the legal and political situation in Hong Kong has not changed much.

As stated earlier, the Singapore Courts are the most respected courts in the Asia-Pacific region to enforce both arbitration agreements and awards. Singapore regularly updates its international arbitration laws, which are themselves based on the UNCITRAL Model Law, to ensure that best practices in arbitration are always adopted. Geographically, Singapore is located in the hearts of both ASEAN and Asia itself. It has the best hearing facilities globally at Maxwell Chambers. Most importantly, Singapore as an independent sovereign nation is seen to be an absolute neutral seat *vis-à-vis* China and is not subject to authorities in China.

It is much more likely for both PRC contracting parties and ASEAN/MSR parties to reach agreement to elect for choice of ICC Arbitration Rules with the arbitration seated in Singapore. The ICC has a great advantage over other institutions as it has a very diverse team at both its Secretariat as well as at its Court of Arbitration. These ICC organs work hard to ensure that the right qualified and appropriate civil law/common law experienced arbitrators are appointed in each case. As compared to other institutions that have a propensity to appoint arbitrators from outside the Asia-Pacific region, the ICC is generally known for its diversity and cost-conscious position. It tends to appoint arbitrators from within the region and to allocate the appropriate civil or common law arbitrators for the arbitration. The ICC takes into account the time zones of the parties when considering the appointment of arbitrators in default situations, as virtual arbitrations can be disruptive in situations where witnesses have to give evidence at night. Even if the seat of arbitration was to be Singapore, if the arbitration centre has a propensity to appoint arbitrators from a distant time zone to Asia, such an appointment will also inevitably tilt the balance of convenience, disruption and fatigue against Chinese parties in a

virtual arbitration. Assuming that a party is from Germany and the other party is from China, in the event that the arbitration centre appoints a default arbitrator from say New York or a European city, this could have an impact on the sitting times in a virtual arbitration setting. Instead of beginning the hearing at 1.30pm Beijing time corresponding to 7.30am Berlin time, the parties may have to begin at 6pm Beijing time corresponding to 12 noon Berlin time. Even if there is only a five-hour hearing day, the Chinese parties will have to end their day at 11pm, putting their witnesses at a disadvantage despite the seat of arbitration being in Singapore. Fortunately, this is less likely to happen if the parties select the ICC Rules of Arbitration.

The ICC Secretariat and Court looks carefully at the issue of diversity of the arbitrators appointed by the ICC in default situations. The ICC published its annual *Dispute Resolution Statistics Report for 2020*, which laid out details of the record numbers of cases administered by the ICC International Court of Arbitration. It recorded a total of 946 new arbitration cases in 2020, of which a record 929 were requested under the ICC Rules of Arbitration. The ICC has increased its attention to ensure that arbitrators who are qualified or have significant experience in the designated governing law of the contract (civil or common law) are being appointed in default situations. In addition, unlike other arbitration centres, the ICC has the great advantage of its intense scrutiny of all draft awards. Each draft award is first scrutinised by both the ICC Secretariat and then by members of the ICC Court of Arbitration. The comments and suggested amendments made by the Court and the Secretariat are then often acted on as a guide by the arbitrators who then send back the improved draft award for scrutiny and final approval before it is handed down to the parties. As the Singapore Courts are the leading courts in Asia for dealing with arbitration matters and they have a strong pro-arbitration attitude, parties can often go away with a sense of satisfaction that justice has been carried out, even if they have not been successful in ICC Singapore-seated arbitrations.

As the ICC Secretariat is situated in both Singapore as well as Hong Kong, one can also expect some spillover of CHINA-ASEAN/MSR cases to flow into ICC with seat in Hong Kong. HKIAC will continue to be a credible challenger to ICC Hong Kong as HKIAC also has a trusted reputation for appointing the appropriate arbitrator according to the circumstances of the case and whether the case is governed by civil law or common law. The 2019 *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings* may well attract certain non-Chinese parties to adopt HKIAC clauses because they believe that they may need to have additional security of being able to rely upon interim measures for the BRI projects that they have committed themselves to with Chinese parties. End-users with civil law backgrounds, who have been disillusioned by other arbitration centres, which have a tendency to appoint arbitrators from common law backgrounds with no real experience of civil law, may also consider stipulating HKIAC as a cheaper alternative to ICC arbitration. HKIAC also takes into account the time zone of the parties and witnesses when considering the appointment of arbitrators in default situations. As explained earlier, virtual arbitrations can be disruptive in situations where witnesses have to give evidence at night to cater to arbitrators who are located outside East Asian/ASEAN time zones.

In a similar vein, the Singapore Chamber of Maritime Arbitration (SCMA), which is also cognisant of the need to appoint arbitrators from the same time zone as the parties and counsel, is also likely to become more attractive to end-users in the maritime industry. SCMA is also advantaged as being the only specialist maritime arbitration centre in the ASEAN region.

Possible alternative DSM for BRI disputes along the Maritime Silk Road?

While the ICC will be likely to be the most dominant neutral arbitration institution for BRI contracts and disputes for years to come, one would ask if there can be an additional new DSM system that can work alongside the ICC. To be sure, there are and will continue to be many BRI disputes which will need to be handled by many arbitration institutions and not just a handful of institutions.

As the BRI project is the brainchild of the Chinese Government, it may yet be able to come up with another proposal to its BRI neighbours in South-East Asia, through ASEAN, for the possibility of a new DSM by way of a multilateral treaty.

Twenty years ago, China and ASEAN had already begun entering into a series of multilateral treaties to settle commercial disputes.

The Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China (CAFTA DSM) was signed on 5 November 2002 (the framework comprises three agreements to date: Trade In Goods, Trade In Services and Investment, which were concluded in November 2004, January 2007 and August 2009, respectively). At the 16th ASEAN-China Summit on 9 October 2013 in Brunei, the Leaders agreed to upgrade CAFTA. The scope and coverage of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China was expanded. Additional features of arbitration were introduced into the 2009 Framework Agreement while Article 13 provides that: "*The provisions of the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China signed in Vientiane, Lao PDR on the 29th day of November 2004 shall apply to the settlement of disputes between or amongst the Parties under this Agreement*". (The official name of the Agreement is the "*Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the People's Republic of China, Vientiane, Lao PDR*", and was signed on 29 November 2004.)

It is to be noted that the CAFTA DSM applies WTO-style DSM procedures and applies between any ASEAN member state and the PRC. It does not, however, cover person-to-person arbitration. The CAFTA DSM is much more basic (Annex 1 Rules of CAFTA DSM contains eight Articles in total) in scope to the 2010 ASEAN Protocol (the 2010 Protocol applies to disputes concerning interpretation or application of the ASEAN Charter and ASEAN instruments that expressly provide that the 2010 Protocol is to apply. It also applies to other ASEAN instruments unless other means of settling such disputes have already been provided for to those instruments). It certainly does not give much guidance on any applicable arbitration procedures. It is in the interests of both China and the ASEAN host countries for BRI projects to consider the possibility of setting up a dedicated arbitration DSM that would allow non-state contracting parties within both China and ASEAN a chance to settle any BRI contract disputes through such a DSM. It is in the interests of both the ASEAN countries and China to offer fair and neutral protection to their respective nationals and business entities. Such a DSM can follow the general skeletal framework of the CAFTA DSM but be fine-tuned to deal with private commercial interests of companies and individuals from ASEAN and China.

It is possible to adopt and adapt the 2010 UNCITRAL Rules and to build special rules into the same to deal with specific industries (for example, the protection of construction projects, IP secrets, IT & life sciences, finance, etc.) common to BRI projects. It would also present an opportunity to devise and add in separate rules that could apply for any state-to-state BRI contracts or where Chinese SOE and ASEAN SOE companies are involved. This would allow a framework to deal with both investment and commercial arbitration at the same time by way of a treaty. It would create a lot of legal and commercial certainty for all parties if there were to be a permanent seat of arbitration for BRI contracts signed between parties from China and ASEAN. It would provide an opportunity to lower the costs of arbitration and therefore the costs of doing business on BRI contracts. The NYC is well-respected and applied by all countries from ASEAN and China and is the most appropriate treaty for disputes arising out of commercial activities.

In the long term, it would be advantageous to have a dedicated ASEAN-China arbitration centre. A permanent arbitration centre for CAFTA BRI contracts would allow for the establishment of jurisprudence emanating from sanitised awards arising from such a dedicated arbitration centre. As Chinese and ASEAN people have the same basic fundamental values, expectations, cultural understanding and legal cultural understanding, it is possible to train up experienced arbitrators emanating from China and ASEAN countries to deal with all sorts of specialised arbitration matters that are likely to perennially arise from disputes arising out of BRI contracts. This would also silence municipal-minded lawyers and general counsel who often complain that the presiding arbitrator, who was appointed by the arbitration centre in a default situation, had no understanding at all of their business culture, legal culture and laws.

A dedicated China-ASEAN arbitration centre which would have a large panel of arbitrators including the leading regional arbitrators from all 11 countries would also mean that Chinese-ASEAN parties would be judged by peers with similar cultural and legal cultural backgrounds. Such a

centre could also serve as a repository of sanitised commercial arbitration awards and perhaps even a separate training institution for both lawyers and aspiring arbitrators who are interested in BRI dispute resolution. In addition, both China and the ASEAN country concerned when faced with the default situation of requiring the arbitration centre to appoint the presiding arbitrator or sole arbitrator, as the case may be, can also be assured that there is no possibility of having a sanctioned individual appointed as arbitrator in a default situation (http://www.aprag.org/wp-content/uploads/2021/05/9-Thoughts-on-the-impact-of-international-sanctions-on-international-arbitration-proceedings-involving-sanctioned-practitioners.pdf).

China and ASEAN could adopt similar wording to Article 11(2) of the ASEAN Charter and modify it to have additional clauses with wording along the following lines:

All arbitrators shall:

*(a) have expertise in law, experience in the common law or civil law system of law selected by the parties and prior experience as arbitrator in the subject matter of the dispute;**

(b) be chosen strictly on the basis of objectivity, reliability, and sound judgment;

(c) be independent to any party to the dispute;

(d) not have dealt with the matter in any capacity;

(e) disclose information which may give rise to justifiable doubts as to independence or impartiality;

(f) have experience in Conflict of Laws or Comparative Laws; and

(g) provide evidence of eight sanitised international awards dealing with commercial cases.

(*The original wording of Article 11(2) of the ASEAN Charter states as follows: "*have expertise in law, other matters covered by ASEAN Charter or relevant ASEAN instrument, or resolution of disputes arising under international agreements*".)

The country where any such China-ASEAN arbitration centre is to be situated must allow visa waiver applications to PRC and ASEAN nationals to enter the country to deal with arbitration cases in their capacity as party, arbitrator, counsel, witness or expert witness. Currently, apart from Singapore, which allows all such participants to enter the country for attending arbitration proceedings, no other ASEAN country makes it as easy for this to happen. Arbitrators in China and ASEAN countries have to undergo the rigmarole of obtaining a work visa when they are sitting in countries outside Singapore, Brunei and Malaysia. Those who are attending in other capacities in arbitration proceedings must in all other countries obtain valid work visas. Singapore would seem to be the most ideal country to site any new China-ASEAN arbitration centre. It is also amongst the most interconnected global cities. It would be desirable to have a dedicated building to house such a new centre on the lines of the Peace Palace in The Hague, where the Permanent Court of Arbitration and the International Court of Justice are housed.

It would be ideal if Singapore, were it to be the designated country, to provide plot of land to allow the respective governments of China and ASEAN countries to build and own a new dedicated BRI arbitration centre. China and ASEAN could split the costs of construction as well as the annual costs of maintenance and running the centre equally on a 50:50 basis.

Conclusion

In conclusion, as the BRI projects are projects concluded by Chinese parties with non-Chinese parties along the two BRI Roads, it will certainly mean that there is a certain need to resolve cross-border disputes both within as well as outside Mainland China. In the last few years, many arbitration centres and international commercial courts have been set up or been promoted to resolve BRI disputes. Both Hong Kong and Singapore stand out as very safe and attractive seats to deal with BRI projects. It is likely that many non-Chinese parties to BRI projects will prefer to push for ICC arbitration seated in Singapore while their Chinese counterparts may prefer to stipulate HKIAC or ICC arbitration seated in Hong Kong. As Singapore is an independent sovereign neutral seat, it will likely continue to gain ground as the choice default seat. It will also be possible for China and the ASEAN countries to consider developing an additional new China-ASEAN arbitration centre that is dedicated to resolving BRI disputes as well as acting as a specialist centre for the dissemination of knowledge and for the training of lawyers and aspiring arbitrators who are interested in BRI disputes. There is more than enough BRI disputes to be shared by all arbitration centres in Asia and outside Asia. At the end of the day, end-users will scrutinise all key statistics of institutions to decide which would be the most neutral, fairest and appropriate institution to deal with their BRI disputes.

Dr Colin Ong QC is senior partner at Dr Colin Ong Legal Services (Brunei), counsel at Eldan Law LLP (Singapore) and Queen's Counsel at 36 Stone (London). Chartered Arbitrator and Arbitration Fellow at various institutions (including FCIArb, FMIArb and FSIArb). President of Arbitration Association Brunei Darussalam; Advisor to the Indonesian National Board of Arbitration (BANI); Chairman of the International Advisory Board, Thailand Arbitration Center (THAC); Appointing Committee member of the Chinese European Arbitration Centre (Germany); Chair, Advisory Board (JIIART, Japan); Co-Chair, IBA APAG; Vice-President, APRAG; and Advisory Committee Member of the China-ASEAN Legal Research Centre. Dr Ong was previously Council member of the Cambodian NCAC and former Chairman, Regional Arbitral Institutes Forum. He has extensive Court experience with important reported judgments pertaining to arbitration matters. He is regularly instructed as counsel or arbitrator on major commercial and construction arbitrations within Brunei, England, China, Hong Kong, India, Japan, Qatar, Indonesia, Malaysia, Singapore, South Asia, Thailand, and the UAE. He is a visiting professor of Civil Law as well as Common Law jurisdictions and has handled cases under many different governing laws including Brunei, Canadian, English, Hong Kong, Indian, Indonesian, Japanese, Korean, Malaysian, Mongolian, New York, Philippine, PRC, Singaporean, Thai, Swiss and Vietnamese law. He is the first English silk appointed by China's Chief Justice to sit on the International Commercial Expert Committee of the Chinese International Commercial Court. He was identified a 45 under 45 by *Global Arbitration Review*. He has acted as arbitrator or as counsel/lead counsel in over 370 international arbitrations under most major arbitration rules, including AAA, BANI, CIETAC, HKIAC, ICC, LCIA, LMAA, MNAC, KCAB, KLRCA, OIC, SCMA, SIAC, TAI, UNCITRAL and WIPO. He is the first ASEAN national lawyer appointed English Queen's Counsel and elected Master of the Bench of the Inner Temple (2010). *Who's Who Legal Arbitration* 2021 says: "*His mastery of civil law gives him an immeasurable strategic advantage…His breadth of experience in arbitration is truly impressive.*"

contacts@onglegal.com

Dr Colin Ong Legal Services is an internationally recognised leading commercial and dispute resolution law firm in Brunei Darussalam, acting for a broad spectrum of clients. It is one of the very few commercially focused law firms in Brunei and has been consistently listed as a leading banking, arbitration and commercial law firm by independent legal publications such as: *Who's Who Legal*; *IFLR1000*; and *AsiaLaw Leading Lawyers*. The firm and its lawyers are to date the only Brunei lawyers to have been listed in Euromoney's *International Who's Who Legal Series* in five categories and also in *Expert Guides* in Commercial Arbitration, Commercial Litigation and Best of the Best categories.

In addition to international commercial arbitration and litigation services, other main areas of practice include: banking law and the setting up and marketing of funds; aviation; energy disputes; coal mining and supply disputes; company law; oil and gas; intellectual property; joint ventures; production sharing contracts; project finance; shipping matters; technology transfer; and foreign investments. The firm is often instructed to act for and against multinationals and also for and against quasi-government companies within the ASEAN region and for several major global banks, and has regularly acted for and against many of the leading international and regional law firms in the world. Some members of the firm are also visiting academics and contributing authors for various leading loose-leaf works in the fields of banking, arbitration and litigation, for several international legal journals in Asia, the UK and the US, including: APRAG e-journal; *Arbitration* (CIArb); *Badan Arbitrase Nasional Indonesia (BANI) Arbitration Journal*; *Butterworth's Journal of International Banking & Financial Law*; *China-ASEAN Law Review*; and *Maritime Risk International*.

Dr Colin Ong Legal Services

The Use of Litigation Finance in Disputes along China's Belt and Road

Nick Rowles-Davies
LCM

Roger Milburn
LCM

William Panlilio
LCM

Joe Durkin
LCM

China's Belt and Road Initiative (the "BRI") is one of the largest and most historic initiatives of its kind in the world today. The BRI seeks to rebuild and expand China's ancient Silk Road through a modern day, global network of large-scale infrastructure projects across international borders. It involves a multitude of stakeholders – countries from across the globe, financial institutions, multilateral organisations and private companies drawn from sectors such as infrastructure, energy and transportation, among others.

In any initiative of this magnitude, disputes are inevitable; and for the BRI, *international disputes* are inevitable. For these types of cross-border and multiple stakeholder disputes, international arbitration is arguably the most suitable and efficient means of dispute resolution. Innovations in international dispute resolution such as litigation or disputes finance are becoming critical elements in international arbitration. Indeed, among other advantages, litigation finance enables access to justice and makes possible the prosecution of meritorious claims by parties who might otherwise not have the resources to secure their rights through formal proceedings. Parties involved in BRI-related disputes should therefore consider litigation

finance as an additional tool not only in their dispute resolution arsenal, but also as an important element of their risk mitigation and corporate management strategies – all of which are vital considerations in complex projects arising out of the BRI.

What is the BRI?

In 2013, Chinese President Xi Jinping – in a speech drawing heavily upon over 2,000 years of history that saw China build and grow old trade routes between East and West Asia with Europe – announced the BRI, envisioned as the most ambitious infrastructure programme in history. President Xi himself best summarised the aspirations behind the initiative: "*China will actively promote international co-operation through the [BRI]. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international co-operation to create new drivers of shared development.*"

As a modern-day equivalent of China's Silk Road, an ancient network of trade arteries through which commerce flowed, the BRI is composed of the land-based "Silk Road Economic Belt", linking China, Central Asia, Russia, and Europe; China with the Persian Gulf and the Mediterranean Sea; and China with Southeast Asia, South Asia, and the Indian Ocean. Complementing that Belt is the "21st Century Maritime Silk Road", which will stretch from China's East Coast to Europe. The BRI aims to develop six economic corridors from China to Eurasia; and seeks to link China's maritime domain with Western China and the Eurasian heartland.

Together, the modern Chinese Belt and Road aim not only to re-establish and fortify China's ties with its ancient trading partners but also to develop new markets for outbound Chinese investment. The BRI's reach now includes projects in the Middle East, Africa, and even South America. Indeed, the BRI has been extended beyond the original reaches of the ancient Silk Road and reflects China's aim to project its economic and political prowess even further than ever.

The BRI is sweeping in geographic scope and monumental in the enormity of its ambitions. BRI-participating economies contribute more than one-third of global GDP and represent over 62% of the world's population. Governments as well as other members of the international community have taken notice. According to China's top economic planning agency, the National Development and Reform Commission, by the end of 2020, China had signed BRI cooperation deals with 138 countries and 30 international organisations addressing a wide range of areas, including transportation infrastructure development, joint set-up of industrial parks, establishment of sister-city networks, trade and investment promotion, financial cooperation and joint collaboration in regional programmes.

When built, the BRI will consist of an unparalleled transcontinental network of bridges, highways, airports, ports, roads, railroads, pipelines, hydropower projects, airports and various other infrastructure that will cross 70 or more international borders. Examples of these include landmark projects such as the USD 5.29 billion Jakarta Bandung high-speed railway in Indonesia (75% funded by the China Development Bank), the 22.5-kilometre second Penang Bridge in Malaysia, the longest cross-sea bridge in Southeast Asia (funded through a USD 800 million loan from China Exim Bank), and the 720MW Karot Hydropower Project of Pakistan (in part financed by the Chinese sovereign State fund, the Silk Road Fund).

The Oxford Business Group estimated that, as of January 2020, over 2,900 BRI-linked projects at a cost of USD 3.87 trillion were planned or under way. It is estimated that USD 5 trillion will be invested in BRI projects, consisting mostly of these types of large-scale infrastructure projects.

Implementing an initiative of this magnitude requires equally tremendous amounts of financing. With this in mind, China established the USD 40 billion Silk Road Fund in December 2014 and the Asian Infrastructure Development Bank (a China-led multilateral financial institution) which, together with China's three government policy banks, as well as other State-owned banks are and will be providing the backbone of financing for BRI projects.

The BRI is ripe ground for cross-border disputes

Because of the mammoth scale of the initiative, the BRI will require the involvement of a complex patchwork of stakeholders, including national governments (as well as their agencies, instrumentalities, and regulators), foreign investors, shareholders and joint venture partners, EPC contractors, project companies and even off-takers. Many, if not most, of these parties will be Chinese, specifically State-owned enterprises, and Chinese financial institutions, as well as the Asian Infrastructure Investment Bank.

However, if it is to succeed, China cannot embark on this initiative alone, and it will have to rely on the participation of corporations and partners from many other countries along the

Belt and Road, and even beyond.

Due to the cross-border nature of BRI projects, these projects are particularly vulnerable to political risk, or the possibility that political forces or events, whether occurring in a host country or resulting from changes in the international environment, will disrupt an entity's operations. Political risk can come in many incarnations, including, for example, the global spread of a pandemic, and in most instances precipitate contractual breaches and ultimately, disputes. This is more apparent where a BRI project is in a frontier market beset by government instability, weak (or non-existent) regulation, undeveloped laws or legal systems, or poor security. It is estimated that China has pledged USD 690 billion in investments and construction contracts for 44 countries that are either not rated or do not have investment-grade ratings from Fitch Ratings, Moody's, or Standard & Poor's. This makes BRI projects susceptible to disputes fostered by political risk.

BRI projects are not just susceptible to political risk, but like the rest of the world, they are subject to international events beyond any State's control. From 2020 and thereafter, the world was ravaged by the COVID-19 pandemic and BRI projects were not immune. According to China's Foreign Ministry, by mid-2020, approximately 20% of all BRI projects were "*seriously affected*", with 40% "*adversely affected*", and 30–40% "*somewhat affected*". From the litany of ways in which projects have been impacted, the pandemic has disrupted supply lines, negatively affected manpower and called into question financial models and economic bargains that form the basis of many contracts, to name a few examples. Without a doubt, BRI-related disputes have arisen, and will continue to arise, from this global pandemic.

But even setting aside this economic and public health crisis of a lifetime, the nature of the infrastructure projects which form the backbone of the BRI also make them ripe ground for disputes. These projects are, on the whole, gigantic infrastructure projects which typically require not just one, but several contractors, resulting in a constellation of separate but related contracts, each with a different set of counterparties, including EPC contractors, financiers, joint venture partners, designers, insurance providers and operators. An additional facet of the congested team sheet is that such participants will frequently come from different jurisdictions. Thus, BRI-related disputes are likely to be multi-party disputes involving the laws of multiple jurisdictions under potentially multiple, but related contracts. These types of disputes are complex and involve challenging choice of law and choice of forum questions, including, among others, questions on foreign law.

As an example of these complex disputes, in early 2021, Jordan and its State-owned National Electric Power Company commenced an international arbitration against Attarat, a company awarded a USD 2.1 billion contract to build a power station and mine as part of the BRI. State-owned Sinosure of China extended a USD 1.6 billion debt facility for the project as part of the BRI, while China's Guangdong Yudean Group also owns a 45% stake in Attarat. The central dispute arose out of the power purchase agreement for the project.

Looking further back to August 2019, an ICC tribunal issued an award in favour of the Roads Committee of the Kazakh Ministry of Industry against an Italian-Kazakh joint venture in a USD 32 million dispute arising out of delays in the construction of the "Western Europe–Western China International Transit Corridor", a 193-kilometre motorway between Almaty in Kazakhstan and Khorgos in China.

BRI-related disputes are inevitable. These disputes will be international in scope, will usually be high value and will be complex.

International arbitration is a suitable means for resolving BRI-related disputes

There is no single forum designated for the resolution of BRI-related disputes. As in every contractual relationship, party autonomy is paramount, and it is up to the parties to decide how and where to resolve their disputes. However, international arbitration is arguably best suited for BRI-related disputes given that the vast majority are likely to be cross-border in nature, notwithstanding the availability of litigation in domestic courts. This would appear to be the case even considering recent innovations in the domestic court mode of dispute resolution in the PRC.

In June 2018, the Supreme People's Court of China established the First International Commercial Court in Shenzhen and the Second International Commercial Court in Xi'an (collectively known as the "CICC") to provide judicial support for the resolution of disputes arising out of the BRI. The CICC is viewed as China's attempt to reorientate BRI dispute resolution to China from proceedings overseas given that many Chinese companies, especially State-owned companies, are involved in BRI projects. That China focus is evident in the CICC's structure. While the CICC is seated with justices who are required to be familiar with international

treaty law, they must be capable of speaking in Mandarin Chinese, which is the only language of the proceedings before the CICC. All the justices must also be Chinese nationals, unlike the international commercial courts in Dubai and Singapore which have foreign judges on their rosters. Moreover, only Chinese-qualified lawyers are allowed to appear before China's international commercial courts thus – in contrast with most arbitral disputes – reducing disputing participants' free choice as to whom they want to represent them, which is usually a crucial consideration for any party involved in formal proceedings. The China-centric focus of these courts may dissuade foreign parties from submitting their disputes to these fora, especially where the counterparties themselves are Chinese.

Even so, China too recognises that international arbitration will have a major role to play in resolving BRI-related disputes.

In November 2019, China hosted the Belt and Road Arbitration Institutions Roundtable Forum with the China International Economic and Trade Arbitration Commission ("CIETAC"), the primary arbitral institution in China, together with eight other arbitral institutions. During the forum, over 40 arbitration institutions in China and from abroad signed the Beijing Joint Declaration of the Belt and Road Arbitration Institutions to promote arbitration as a means of dispute resolution for disputes arising out of the initiative.

Indeed, major arbitral institutions have recognised the potential role that they and international arbitration will play in the resolution of BRI-related disputes and have spent the last few years jockeying for position to encourage parties to use their services by including their model arbitration agreements in their contracts. Even more, in 2017, CIETAC promulgated new rules for the resolution of investment disputes and opened a "Silk Road Arbitration Centre" in Xi'an, one of the major trading hubs along the ancient Silk Road. In 2018, the Hong Kong International Arbitration Centre (the "HKIAC") embarked on efforts to promote Hong Kong and the HKIAC as a hub for resolving disputes arising out of the initiative, including by partnering with a leading Russian arbitral institution approved by the Russian government to administer international cases. Similarly, in the same year, the International Chamber of Commerce (the "ICC") also established a committee for the promotion of arbitration for BRI disputes. The Singapore International Arbitration Centre (the "SIAC") has also expanded its ties to and expertise in China, having opened a representative office in the Shanghai Free Trade Zone in 2016, and signing agreements with CIETAC, the Xi'an Arbitration Commission, the Shanghai International Arbitration Centre, the Shenzhen Court of International Arbitration and the Peking Law School.

This focus by international arbitral institutions on the BRI as a potential pipeline for disputes arguably reflects trends and preferences in international legal practice. In the 2021 Queen Mary International Arbitration Survey (the "Queen Mary Survey"), international arbitration was the preferred method for resolving cross-border disputes (of which there would be many in the BRI context) for 90% of survey respondents, either on a stand-alone basis (31%) or in conjunction with alternative dispute resolution (59%).

In deciding where to arbitrate, respondents in that survey also cited enforceability of arbitral awards as a major concern. Parties in cross-border disputes, such as those arising out of the BRI, would likely have to address enforcement of either court judgments or arbitral awards.

For arbitral awards, successful parties will have the New York Convention on their side, with only five countries out of the original 65 countries targeted by the BRI having not ratified the New York Convention, an international treaty governing the recognition and enforcement of arbitral awards.

What is the role of litigation finance in BRI-related disputes?

As the global economy recovers from the effects of the COVID-19 pandemic, corporate activity will continue to be dampened and there will be unabated pressure on companies and in-house legal departments to manage legal costs effectively. This will of course include the normally significant costs associated with prosecuting or defending claims arising out of their projects. BRI projects have not been spared from the pandemic. According to China's Foreign Ministry, by the summer of 2020, as much as 60% of BRI projects had been impacted by the pandemic. Contracting parties which have not made sufficient or any provision in their legal budgets for the costs of resolving their disputes will face some tough decisions about whether to pursue those disputes or give up on their entitlements. Most will be forced to consider other solutions. This is particularly the case where budgets are prepared on a project basis, at the outset of the project and at a time when disputes may be far from the minds of the front-end negotiators and those responsible for determining and setting project costings. Using external capital by way of litigation finance is one obvious solution when such a scenario arises.

What is litigation finance?

Litigation finance, or disputes finance, can be an invaluable tool to assist companies to pursue litigation in this pandemic climate. But even outside the COVID-19 context, companies should view litigation finance as a means of managing their litigation risk and cashflow, including for disputes involving the BRI.

But what is litigation finance? Litigation finance, also known as disputes finance, legal finance or third-party funding, is the use of external capital of an otherwise disinterested third party for payment of the costs incurred in a dispute by (normally but not always) a plaintiff or claimant. The types of costs which can be covered include legal fees, experts' fees, arbitral tribunal fees and other disbursements. In return for advancing those costs, the funder will seek repayment of its investment plus a return, with such sums taken from the proceeds of the successful action. Crucially, the funder only receives repayment and its return once a recovery is made by way of settlement, payment of a judgment sum by the opponent or enforcement. Winning is not enough to trigger the funded party's liability to the funder. The funding is provided on a non-recourse basis, meaning that if the claim is unsuccessful or no recovery is made after winning an arbitration or court case, the funded client has no obligation to the funder.

Viewed in another way, litigation finance is a means of investing in a company's contingent assets – in this case legal claims – and then working to profit from those claims either through settlement or final adjudication, whilst ensuring that the funded client comes out with the lion's share of the recovery. The return on investment required by the funder is usually a multiple of the funding advanced, a percentage of the recovered damages, or a combination of both.

What are the forms of litigation finance?

There are various methods of litigation finance that may be of use to parties involved in BRI projects when disputes arise.

First, parties may seek single case funding, which is the most common form of litigation financing used by parties in disputes. This type of funding remains the backbone of the litigation finance industry and involves singular investments in one-off cases. The client's need for external finance may arise out of necessity or they may make a conscious choice to use external capital to pursue their legal claims. There are various reasons why a corporate may make such a conscious choice, but they usually include a desire to push the risk of not succeeding onto another party (*i.e.*, the funder) or a desire to spend their own balance sheet resources on their core (and usually revenue generating) business. The cases that are most likely to attract outside financing on a single case basis are generally high value and involve an opposing party that has the resources to pay or is insured.

Second, parties may seek financing for a portfolio of disputes where a litigation funder provides financial resources for a number of disputes involving a party, often involving different opponents. Through that portfolio, the risk of a binary outcome in a single-funded case is removed and the funder's risk is spread across a whole book of disputes. The investment is cross-collateralised across the proceeds of all or any of the cases.

Portfolio financing may be particularly suitable for construction disputes or infrastructure companies of the type that would be part of the BRI. Companies involved in the BRI are likely to undertake obligations and risks across numerous projects under similar contractual arrangements. Financing can thus be secured by funding a group of disputes, and not just for the most winnable cases. This allows financing to be deployed even for claims which might not otherwise be funded on a stand-alone basis, including smaller claims and defence cases where the funded client is not the plaintiff or claimant. For example, an EPC contractor in a number of BRI projects may seek litigation financing for a portfolio of disputes involving different counterparties in multiple and even unrelated contracts (even possibly, in cases where the EPC contractor is a respondent and not a claimant). Funders will also consider including within a portfolio of financed cases matters for which there is no monetary outcome, such as a dispute in which the funded party is seeking declaratory relief as well as other disputes which the client may be involved in elsewhere, beyond those touching the BRI. Funders like LCM are highly experienced in working with clients to put together economically viable portfolios and providing solutions which assist such clients with the entirety of their book of disputes.

Beyond single case funding and portfolio financing, litigation finance can also be deployed in other contexts or stages of disputes, such as, for example, disbursement finance (where the client pays their legal fees – or their lawyers agree to act on risk on a contingency basis – and uses financing to pay for all out-of-pocket expenses in bringing a case to trial promptly without adverse effects to cashflow), security

for costs (where a client needs to satisfy an order for security of costs), or judgment enforcement funding (where a client has prevailed in the underlying litigation or arbitration and seeks to enforce a court judgment or arbitral award against an opponent who has not made payment willingly after losing).

Certain funders will also consider providing monetisation against awards, judgments or contingent and unresolved claims by extending working capital on a non-recourse basis to the funded client. The client can use the capital for its business and repayment of the sum plus the funders return will only occur when the fruits of the contingent assets are realised.

Why should parties consider litigation finance?

There are a number of compelling reasons why companies should consider using litigation finance for their disputes, including BRI-related disputes.

First, litigation finance is a risk mitigation tool which shifts some or all of the risk of an unsuccessful outcome in the dispute onto the litigation funder. As noted, the funder only recovers its investment if the claimant is paid any damages (winning the dispute is not enough; actual payment or recovery of damages is critical).

Second, litigation finance removes the costs set aside for disputes from the company's balance sheet. Litigation is one of those costs that companies regularly pay for in cash. Litigation finance frees up that cash and empowers companies to deploy their own resources for other purposes including for use on the company's core business. There are various other positive accounting benefits associated with using an external source of capital to finance a company's disputes, including some which relate to improving the valuation of the underlying business, but which are beyond the scope of this chapter.

Third, litigation finance also promotes access to justice because it allows parties which – but for the external capital – would not have the financial ability to pursue otherwise meritorious claims.

In which jurisdictions relevant to BRI-related disputes can parties use litigation finance?

While litigation finance began in Australia and has gained currency in jurisdictions such as England and Wales and the United States, Singapore and Hong Kong have also liberalised their legal systems to allow for the use of litigation finance for specified categories of disputes. Case law in both jurisdictions has also made it clear that funders can support liquidators appointed to insolvent companies to pursue claims for the benefit of the creditors of the insolvent estate.

Singapore amended its regulatory framework in March 2017 to permit litigation finance (provided by qualified funders) in international arbitrations and related proceedings (including related mediation, enforcement, or other court proceedings) – moving away from a regime where funding was previously prohibited on public policy grounds. Hong Kong followed suit with a 2017 announcement and subsequently amended its laws, with the changes coming into force in 2019. In those amendments, Hong Kong declared that litigation funding is allowed in domestic and international arbitration, including before emergency arbitrators and in related court proceedings. In June 2021, Singapore further extended its funding framework by confirming that domestic arbitration and cases commenced in the Singapore International Commercial Court (the "SICC") may be supported by third-party funding.

Singapore and Hong Kong are considered as the major arbitration hubs in Asia and, in the Queen Mary Survey, were cited as the top two preferred seats for international arbitration (together with London). Singapore and Hong Kong are home to some of the leading international arbitral institutions in the region, the HKIAC in Hong Kong, and in Singapore, the SIAC, and the Permanent Court of Arbitration. The ICC International Court of Arbitration has operations in both jurisdictions. These arbitral institutions are – because of their expertise and location – suitable for the types of complex international disputes that may arise out of BRI projects, including disputes that involve States, State entities, and international organisations. As noted, cases commenced in the SICC may be funded since June 2021 and it is expected that some BRI disputes may play out in that forum.

Beyond Hong Kong and Singapore, it is generally accepted that arbitration and litigation in India may be funded and there is no prohibition on third-party funding in China. Most other countries along the Belt and Road, as well as other countries where BRI wrangles may be resolved, do not expressly permit or prohibit the use of litigation finance. Funders generally take a broad view when faced with a case which meets their funding criteria but which is to be heard in a jurisdiction where the position on funding is not clearly provided for in statute or case law and will do what they can to assist with ensuring the financing can proceed.

How does a litigation funder determine which cases to finance?

In determining whether a case is suitable for litigation funding, funders like LCM weigh up several factors. The underlying merits of the case are clearly very important but the commerciality around the proposed investment is also given significant scrutiny (*i.e.*, whether it makes commercial sense for the funder to make the investment given the expected return, time frame for recovering that return and the ability to make a recovery in the event that the funded client prevails in its case(s)).

In assessing the merits of a case, funders typically look at whether the case is supported by clear legal principles. Cases which are based on novel legal arguments or theories that are heavily litigated are likely unsuitable for funding because of their inherent unpredictability in outcome and thus a greater risk of losing.

In connection with the strength of a party's legal arguments, funders must also look at whether the claims are supported by sufficient documentary evidence. Claims that are highly dependent on oral testimony are riskier because witness testimony can be unpredictable and dependent on factors that can be beyond a party's control.

Funders also look at the recoverability of any potential damages award, because after all, funders will only recoup their investment if the client is paid. An assessment of recoverability entails determining whether the respondent or defendant has sufficient assets to meet an award in the amount sought, the location of those assets and the law governing enforcement in those relevant jurisdictions.

Finally, funders also need comfort that the legal team handling the case has the necessary experience to litigate the claims to victory. This is because once a case is funded, the lawyers in conjunction with the client remain in control. Even with a funder's investment, the claim remains the claimant's and the funder's involvement is passive (unless the client wishes for the funder to bring to bear its experience in litigating high-value international disputes as an integrated part of the strategic team).

Conclusion

China's BRI is an historic and truly global infrastructure programme which, if successful, has immense potential to connect and contribute to the development of countries along the Belt and Road. But much like in any economic expansion or project of this magnitude, disputes are inevitable. Those disputes will likely have a cross-border nature because the BRI itself crosses international borders, involves various international players and, indeed, touches upon significant swathes of the world. An international initiative such as the BRI will lead to international disputes.

For well-resourced clients, those for whom budgets do not extend to the disputes which follow or interrupt their BRI projects and parties who have been pushed to the brink of impecuniosity by the actions of their contractual counterparties, litigation finance should be given serious consideration as an additional tool in their dispute resolution arsenal. The various financial products offered by funders allow the pursuit of meritorious claims even where the company has limited means to do so. It also shifts the risk of the dispute to the litigation funder. Moreover, it frees up capital so that companies can deploy their resources to further advance their core business and revenue generating activity, or, as in the case of many companies during these unprecedented times, to recover and rebuild their business.

Nick Rowles-Davies is currently LCM's Executive Vice Chairman and leads the origination side of the business globally.

In 2010, he co-founded an international litigation funding business. In 2014, he became Managing Director of Burford Capital and led it globally outside of the Americas. He then founded Chancery Capital with a clear focus on corporate client portfolios. In 2018, Chancery Capital merged with LCM.

As a pioneer of the global disputes finance industry, Nick is responsible for some of the largest and most innovative disputes financing transactions, including a €45 million portfolio financing deal for a FTSE 100 company and a £9 million insolvency portfolio transaction with Grant Thornton. He oversees many of LCM's corporate portfolio investments globally.

He is the author of Third-Party Litigation Funding, published by Oxford University Press, the current Chair of the UK's Commercial Litigation Association, and a regular speaker and media commentator on all aspects of litigation.

nrowles-davies@lcmfinance.com

Roger Milburn joined LCM in November 2018 as an Investment Manager upon the opening of LCM's Singapore office.

Prior to joining LCM, Roger spent over 12 years with Berwin Leighton Paisner (now Bryan Cave Leighton Paisner), where he specialised in international arbitration and gained experience of conducting arbitrations under the SIAC, LCIA, ICC and UNCITRAL rules as well as ad hoc arbitrations. After starting his career in London, Roger worked in BCLP's Singapore and Hong Kong offices from 2012 onwards, where he handled a broad range of complex, high-value, cross-border disputes with a particular focus on the Energy and Natural Resources, Financial Institutions, Construction and Technology sectors.

Roger is a Fellow of the Chartered Institute of Arbitrators (CIArb). He graduated with a degree in jurisprudence from Wadham College, Oxford University in 2004.

rmilburn@lcmfinance.com

William Panlilio is an Investment Manager and arbitration specialist in LCM's Singapore office. While he primarily focuses on international arbitration, he also has experience in cross-border litigation, including in the enforcement of foreign arbitral awards, foreign sovereign immunities and discovery in aid of foreign proceedings. He has additional expertise in global transactions, advising companies regarding share acquisitions, corporate restructurings, shareholder matters, power purchase agreements, fuel supply agreements, mining agreements, and financing agreements.

Prior to joining LCM, William was a Senior Associate for over five years in King & Spalding's Singapore office, as part of their Trial and Global Disputes team. Before that, he was an Assistant Legal Counsel at the Permanent Court of Arbitration in The Hague, The Netherlands for close to two years. While at the Court, he assisted arbitral tribunals in treaty and commercial arbitrations involving various combinations of States, State entities, international organisations and private parties.

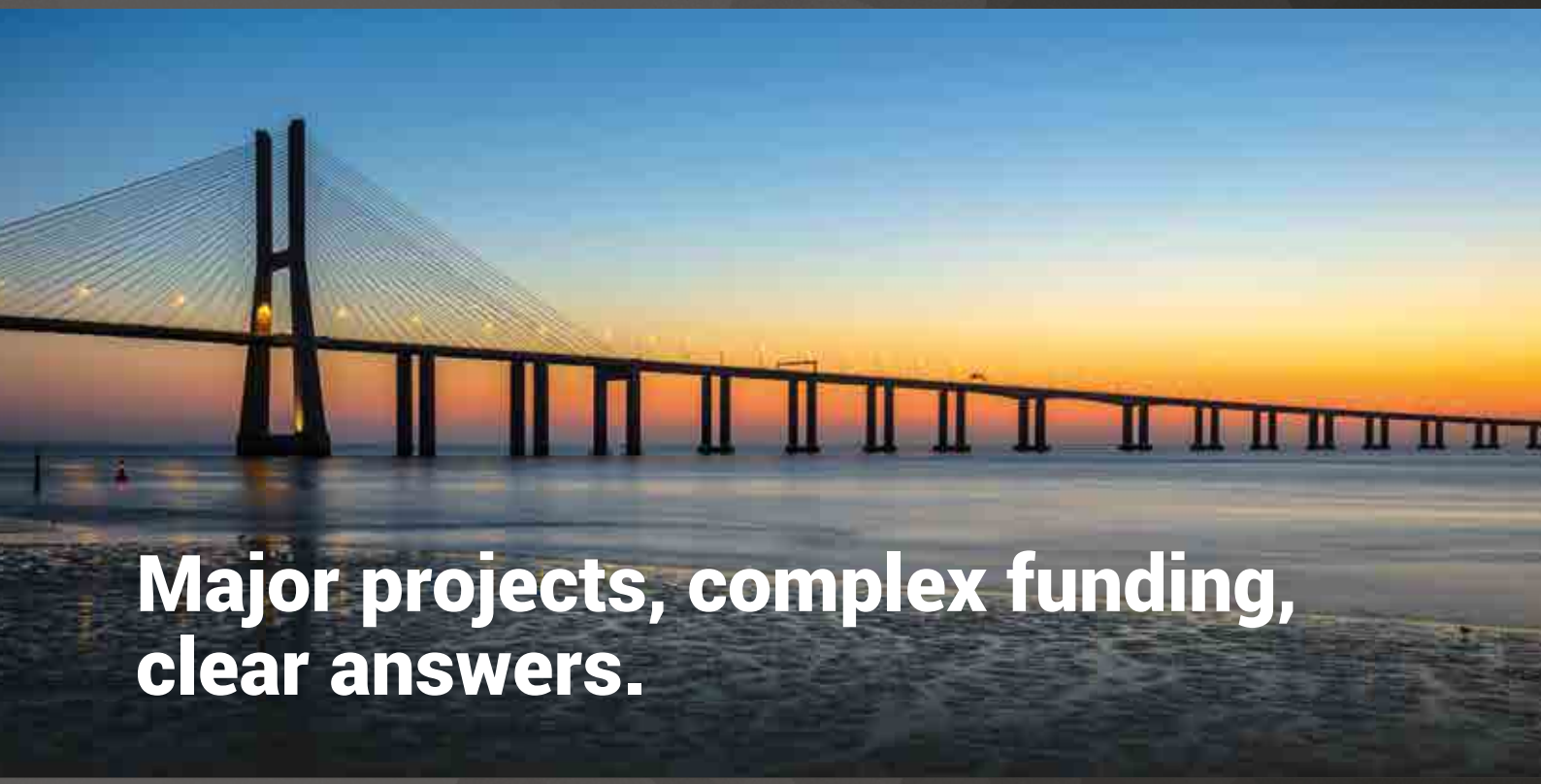
wpanlilio@lcmfinance.com

Joe Durkin joined LCM as an Investment Manager and arbitration specialist focused on disputes in the Middle East. Prior to joining LCM, Joe had been based in the Middle East since 2008 as a Partner with a Dubai-based law firm for several years and prior to that was a lawyer with the international law firm Maples and Calder.

He has a deep understanding of the litigation and arbitration processes in the region and has conducted over 100 commercial disputes in LCIA, ICC, DIAC, ADCCAC, DIFC Courts and DWT proceedings.

He is a Fellow of the Chartered Institute of Arbitrators (CIArb) and faculty member and lecturer in law with DREI, of the Government of Dubai Real Estate Regulatory Agency and a visiting lecturer at the University of Dubai, Master of Laws in Arbitration and Dispute Resolution. He is admitted as a Solicitor in England & Wales and Ireland.

jdurkin@lcmfinance.com



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Project Financing Issues and Complications Along the BRI

Chris Osborne
Osborne Partners

Nil Kalağoğlu
Osborne Partners

Ömer Kama
Osborne Partners

The BRI (originally described as the "One Belt One Road" or the "New Silk Road") was put forward by China's President Xi Jinping as a multi-decade global trade route and infrastructure development programme. The initiative was incorporated into the constitution of the CPC in 2017. At the time President Xi described the objectives of the initiative as follows:

"China will actively promote international co-operation through the Belt and Road Initiative. In doing so, we hope to achieve policy, infrastructure, trade, financial, and people-to-people connectivity and thus build a new platform for international co-operation to create new drivers of shared development."

The initiative has been described as encompassing six economic corridors (The Belt), and a New Maritime Silk Road (The Road), covering over 65 countries in Asia, Africa and Europe. Also proposed is a Polar Silk Road, made possible by the melting of the polar ice cap, although immediate prospects for this element remain unclear (The Economist (www.economist.com): "*Who controls the Arctic?*"; June 2021).

To date, the BRI has been primarily about investment; and it is the investment component that is the subject of this chapter. It is, however, only one part of the expressed vision for the BRI. Official statements mention five major cooperation priorities (Summarised from Belt and Road Portal (eng.yiadiyilu.gov.cn): "*Vision and actions on jointly building Silk Road economic belt and 21st century maritime road*"; March 2015):

- Policy coordination – including the promotion of intergovernmental cooperation, the expansion of shared interests, the enhancement of mutual trust, and others.
- Facilities connectivity – including investment corridors, communications infrastructure, energy infrastructure and alignment of standards.
- Unimpeded trade – including the development of Free Trade Areas, coordination of customs rules, and cooperation in emerging industries.
- Financial integration – including the alignment of financial regulation, expansion of currency trading, strengthening of regional development banks, and an increase in the use of renminbi-denominated bonds.
- People-to-people bonds – including student exchanges, the expansion of tourism, and greater collaboration on health issues.

There is no formal membership process, but countries typically sign a non-legally binding memorandum of understanding (MoU) with China to participate. China has said that it welcomes and invites all countries, with President Xi saying "*It [the BRI] does not differentiate countries by ideology nor play the zero-sum game. As long as countries are willing to join, they are welcome*" (China Internet Information Center (china.org.cn): "*Xi pledges to bring benefits to people through BRI*"; August 2018).

To date, 140 countries are reported to have signed MoUs or other forms of cooperation agreements in relation to the BRI (Belt and Road Portal (yidaiyilu.gov.cn): "*List of countries that have signed cooperation documents with China to jointly build the 'Belt and Road'*"; March 2021). The number of countries involved – significantly greater than the number of countries covered by the Belt, as above – makes it immediately clear that the boundaries of the BRI are not well defined. Eight Caribbean countries have signed up for BRI-based funding for infrastructure projects, as have a further 11 countries in Latin America (Belt and Road Portal (yidaiyilu.gov.cn): "*List of countries that have signed cooperation documents with China to jointly build the 'Belt and Road'*"; March 2021).

Likewise, the absence of an official project list makes it difficult to determine the totality of projects that have been classified as BRI-related. Some projects that were initiated before the introduction of the initiative in 2013 appear to have been rebranded as BRI projects. Some of the projects that are identified as relating to the BRI have little apparent relationship to the primary objectives described above (The Guardian (theguardian.com): "*What is China's Belt and Road Initiative?*"; July 2018).

A first key point is therefore that there is some disconnect between the way that the BRI is described – in a top-down way – and the way that investments made under the umbrella of the BRI brand are actually being made. A recent Chatham House research paper (Chatham House (chathamhouse.org): "*Debunking the Myth of 'Debt-trap Diplomacy' How Recipient Countries Shape China's Belt and Road Initiative*"; August 2020) argues that the BRI has in fact proceeded in a bottom-up manner, because "*SOE's – the key agencies involved in implementing (and sometimes*

initiating) Chinese development projects – are quasi-autonomous, profit-seeking firms, not simply instruments of economic statecraft".

Motivations

On a top-down basis, the BRI can be seen as a merged response to several of China's strategic objectives – for economic growth, national security, and global influence. The scope for increased global influence comes in part from the scale of the plan (in both geographic and financial terms), and in part from the extension of China's immediate sphere of influence and the planned increase in global use of the renminbi as a trading currency. Italy, a G7 member, signing up for the BRI in March 2019 was seen as a major victory for China and a significant step in advancing the BRI's wider agenda (Council on Foreign Relations (www.cfr.org): "*China's Belt and Road Gets a Win in Italy*"; March 2019).

Some commentators have understood the BRI primarily through the lens of China's national security objectives. (See, for example, US. Embassy & Consulates in Russia (ru.usembassy.gov): "*Remarks to Traveling Press by Secretary Pompeo*"; 6 May 2019. Or, US. Embassy & Consulates in China (china.usembassy-china.org.cn): "*United States Strategic Approach to the People's Republic of China*"; May 2020, page 6.) This view, and the related idea that investments under the BRI may involve a form of "debt-trap diplomacy", has gained currency (although the Washington Post has described it as a myth) (The Washington Post (www.washingtonpost.com): "*Five myths about China's Belt and Road Initiative*"; May 2019; article written by Jonathan Hillman, a director at the Center for Strategic and International Studies). From this perspective, the China-Pakistan economic corridor, linked to the port at Gwadar, provides an alternative to the narrow sea routes through the Straits of Malacca on which Chinese exports to the West otherwise depend (see, for example, Berkeley Political Review (bpr.berkeley.edu): "*The Malacca Dilemma: a hindrance to Chinese ambitions in the 21st century*"; August 2019).

Some 80% of China's oil imports and over 60% of China's total maritime trade pass through the South China Sea, mostly via the Straits of Malacca (Center for Strategic & International Studies, ChinaPower (chinapower.csis.org): "*How Much Trade Transits the South China Sea?*"; August 2020). From a Chinese perspective, this leaves them vulnerable, in the event of conflict, to a strategic blockade of the Straits. The development of the port at Gwadar, with associated pipelines and transport links, can be understood as a response to this vulnerability.

The Chatham House research paper referred to above, however, sees the BRI primarily through the lens of economic objectives – arguing that the BRI's implementation is too diffuse, and fragmented, for the initiative to be thought of as strategically-driven (Chatham House, page 8). Rather, the need for the BRI arises from China's initial domestic infrastructure development programme having run its course, requiring their construction companies – including many of the world's largest – to seek profitable projects abroad; and their financial institutions to do likewise. The authors note that (Chatham House, page 7):

"Approved BRI projects follow the logic of economics, not of geopolitics… Funding has been skewed heavily towards state-linked construction firms facing collapsing domestic demand."

It is relevant that the growth of China's economy has been accompanied by persistent trade surpluses, leading to large foreign currency reserves (amounting to some USD 3.2 trillion, the largest foreign exchange reserves in the world) (Reuters (www.reuters.com): "*China's April foreign exchange reserves rise to $3.2 trillion*"; May 2021). Most of China's reserves are invested in dollar-denominated assets, principally US treasury securities (Reuters (www.reuters.com): "*China may dump U.S. Treasuries as Sino-U.S. tensions flare: Global Times*"; September 2020). The BRI can also be understood as a mechanism by which financial institutions seek out more productive uses for this capital.

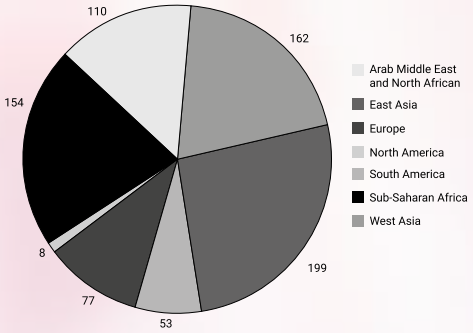
Another potential motivation behind the BRI is to reduce regional income disparities in China. The western and central regions have lagged behind the coastal provinces in terms of GDP per capita (The Economist (www.economist.com): "*Rich province, poor province*"; October 2016). The BRI could, in principle, contribute to the economies of these less developed regions through increased connectivity and enhanced trade with neighbouring countries (which may themselves benefit economically through increased trade driven by the BRI).

A second key point is therefore that there are competing views as to the primary motivation behind the BRI – essentially, as to whether it should be understood in geopolitical or economic terms. Those views affect the way in which some of the BRI's unsuccessful investments (a prominent example of which is discussed further below) are understood.

Investments under the BRI

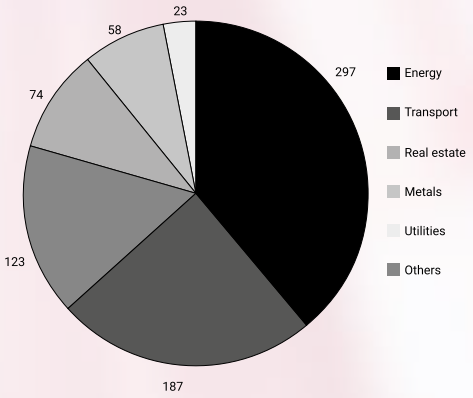
The US-based think tank American Enterprise Institute (AEI) maintains a dataset of Chinese investment overseas. As of December 2020, they identified over 1,400 investments, with a combined value of over USD 760 billion, as BRI-related. (Made up of approximately USD 460 billion of construction contracts and USD 300 billion of other forms of investment.) Nearly half of the total involves projects in Asia ("West Asia" includes countries such as Russia and Turkey, as well as Pakistan, Kazakhstan, etc.), with sub-Saharan Africa being the next largest region. Viewed by sector, energy and transport projects dominate the initiative, amounting together to some 63% of the BRI projects' total value (American Enterprise Institute (www.aei.org): "*China Global Investment Tracker*").

Figure 1 – BRI projects by geography, USD billion



Source: American Enterprise Institute, "*China Global Investment Tracker*".

Figure 2 – BRI projects by sector, USD billion



Source: American Enterprise Institute, "*China Global Investment Tracker*".

A third key point to note is that many of the countries along the BRI (and indeed elsewhere)

need investment of this kind – they lack both infrastructure and access to the scale of financing required to fund its development. The Asian Development Bank estimates that Asia, by itself, needs some USD 1.9 trillion of infrastructure investment annually to "*maintain growth momentum, eradicate poverty and respond to climate change*" (Asian Development Bank (adb.org): "*Meeting Asia's Infrastructure Needs*"; February 2017, Highlights). The BRI is one mechanism by which the investment shortfall might be alleviated (OECD (oecd.org): "*China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape*"; September 2018, page 6).

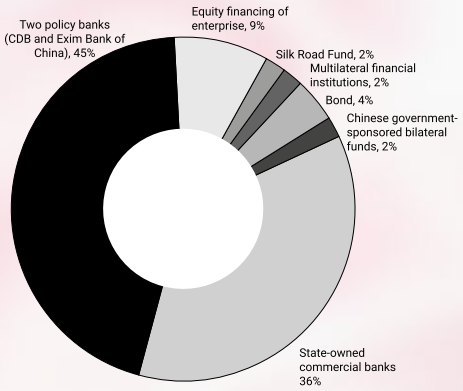
The BRI is not constrained to a specific size or type of investment: projects vary from ports to railroads, dams, airports and many others; ranging from construction from the ground up to acquisitions of already existing infrastructure or companies. Examples of investments include large-scale projects like the construction of the Padma Bridge in Bangladesh (for USD 1.5 billion), the Djibouti International Free Trade Zone (for USD 3.5 billion), and the acquisition of a majority share in, followed by an upgrade of, the Greek Port of Piraeus (by the Chinese state-owned company COSCO).

Financing

Notwithstanding the creation of the Silk Road Fund and the Asian Infrastructure Investment Bank (AIIB) (both announced by the Chinese government in 2014, linked to the BRI) the large majority of BRI projects have been funded either by the Chinese policy banks (China Development Bank and Exim Bank of China) or by the large Chinese state-owned banks (particularly the Bank of China and the Industrial and Commercial Bank of China). In 2018, according to the Reconnecting Asia database (Belt and Road database of Center for Strategic & International Studies, a US-based think tank), 89% of Chinese-funded projects involved Chinese contractors (Center for Strategic & International Studies (csis.org): "*China's Belt and Road Initiative: Five Years Later*"; January 2018).

The chart below, taken from research by the Centre for International Governance Innovation, shows the breakdown in sources of funding as of the end of 2018.

Figure 3 – BRI funding by source at the end of 2018



Source: Centre for International Governance Innovation: "*The Belt and Road Initiative - Motivations, Financing Expansion and Challenges of Xi's ever-expanding strategy*"; Alex He, September 2019, page 14.

Most of the financing of BRI projects is done through bilateral agreements between the lending banks and recipient governments – meaning that the terms of funding agreements are typically not made public. The World Bank has compiled data from recipient governments and noted in 2019 that interest rates vary: from interest-free government loans, notably in the China-Pakistan economic corridor, to more commercial rates elsewhere (World Bank (www.worldbank.org): "*Belt and Road Economics, Opportunities and Risks of Transport Corridors*"; August 2019, page 98):

"Interest rates that Chinese lenders apply to [Low Income Developing Countries] are on average more favourable than loans to [Emerging Economies] but remain higher than those available from other creditors for countries at low and moderate risk of debt distress."

The World Bank study also notes that some lending (into sub-Saharan Africa in particular) (World Bank, page 101; the Brautigam / Hwang study mentioned in the World Bank report concerns lending into sub-Saharan Africa) is collateralised against local resources – oil, in the case of Angola, one of the largest recipients of Chinese financial support; but other commodities elsewhere (World Bank, page 101).

"Some authors also suggest that about a third of Chinese loans may be collateralized (Brautigam and Hwang 2016). In a collateralized loan, the borrower has pledged or sold a specific asset to the lender as security against repayment of the loan. The underlying collateral can take many forms, such as the assets of an SOE, physical commodities destined for export markets, or a future revenue stream."

There are obvious macro-economic risks in

lending of this kind. The Rhodium Group, a New York-based research provider, notes that renegotiation requests were increasing, even prior to the effects of the current COVID-19 pandemic, and are likely to increase further. Some USD 28 billion of Chinese debt was identified as being under renegotiation at the time of the report. The authors conclude that (Rhodium Group (rhg.com): "*Seeking Relief: China's Overseas Debt After COVID-19*"; October 2020):

"As they deal with the fallout from 20 years of aggressive lending, China's banks face a stark reckoning. As much as 25% of China's overseas debt has already run into trouble. Ongoing domestic efforts to rationalise China's overseas lending – through the establishment of a new aid agency (CIDCA) and the introduction of new debt sustainability frameworks for policy banks – are becoming more urgent in a world shaken by COVID-19."

There are obvious risks, also, in any large-scale investment project whose costs and benefits are uncertain. As the World Bank points out, while "*BRI transport projects can expand trade, increase foreign investment and reduce poverty*", in some instances "*the costs of new infrastructure could outweigh the gains*". The study points to Azerbaijan, Mongolia and Tajikistan in particular as countries where infrastructure costs might exceed the gains available from integration (World Bank, page 5); and to debt sustainability issues in countries that are already heavily indebted. We return to this point further below.

Case study: Airport/Sea Port, Sri Lanka

Sri Lanka's location puts it directly in the path between the Malacca Straits and the Suez Canal, an important maritime trade route and one that is integral to the BRI. Total BRI investments in the country since October 2013 amount to some USD 8.8 billion (American Enterprise Institute). Sri Lanka is also a highly indebted country, with an estimated debt-GDP ratio of over 90%; and interest payments at some 70% of government revenues (Reuters (www.reuters.com): "*With debt crunch looming, Sri Lanka needs help from its friends*"; May 2020).

China's investments in Sri Lanka predate 2013, the start date of the BRI. An early investment was in the construction of the Mattala Rajapaksa International Airport (at a cost of over USD 200 million, largely financed by the Exim Bank of China) (Forbes (www.forbes.com): "*For Sale: The World's Emptiest International Airport*"; July 2016). The airport's design capacity was one million passengers per year (New York Times (www.nytimes.com): "*What the World's Emptiest International Airport Says About China's Influence*"; September 2017); but actual passenger volumes have been much lower, at only some 50,000 in 2017, and much less since the suspension of all scheduled services in 2018 (Gulf News (gulfnews.com): "*No more flights from Sri Lanka's second airport*"; June 2018).

Only 30km away from the Mattala Rajapaksa International Airport is the deep-sea port of Hambantota, constructed in phases at a total cost of USD 1.3 billion, financed by the Export-Import Bank of China (Daily FT (www.ft.lk): "*Sale of Hambantota Port – A fair deal?*"; November 2016). Expected traffic levels also did not materialise, and by the end of 2016, the port had recorded cumulative losses of over USD 300 million (Deutsche Welle (www.dw.com): "*Sri Lanka signs port deal for China's one-belt one-road plan*"; July 2017). In 2017, Sri Lanka reached an agreement with Chinese state-owned China Merchants Port Holdings Company, to operate the port on a 99-year lease (Chatham House, page 18).

An investigation following a change of government found that (Stanford University, Center on Democracy, Development and the Rule of Law: "*How the Belt and Road Gained Steam: Causes and Implications of China's Rise in Global Infrastructure*"; Bushra Bataineh, Michael Bennon, Francis Fukuyama, May 2019, page 16):

"None of the projects developed and financed by Chinese policy banks under Rajapaksa underwent competitive procurement, and little public information was available on the loan terms and the extent of Sri Lanka's indebtedness. It further surfaced that many of the infrastructure loans had recourse not only to the cash flows of the projects, but were under a sovereign guarantee by the Sri Lankan government. In total, Sri Lanka's debt to Chinese policy banks totalled more than $8bn."

The handover of the port, in particular, prompted fears that the provision of Chinese funding was a form of deliberate "debt trap". US Vice President Mike Pence said, in remarks at the Hudson Institute, in October 2018, that (Trump White House Archives (trumpwhitehouse.archives.gov): *"Remarks by Vice President Pence on the Administration's Policy toward China"*; October 2018):

"In fact, China uses so-called "debt diplomacy" to expand its influence. Today, that country is offering hundreds of billions of dollars in infrastructure loans to governments from Asia to Africa to Europe and even Latin America. Yet the terms of those loans are opaque at best, and the benefits invariably flow overwhelmingly to Beijing.

Just ask Sri Lanka, which took on massive debt to

let Chinese state companies build a port of questionable commercial value. Two years ago, that country could no longer afford its payments, so Beijing pressured Sri Lanka to deliver the new port directly into Chinese hands. It may soon become a forward military base for China's growing blue-water navy."

The Hambantota port handover is the example most often cited in support of the thesis that the BRI's investment choices are centrally driven, and that its primary objectives are geopolitical. An alternative perspective, and one given some credibility by the factual analysis set out in the Chatham House report (Chatham House, page 13), is that the project was driven initially by the Sri Lankan president, Mr Rajapaksa, for political and/or patronage reasons; that Sri Lanka's debt crisis was primarily the result of amounts owed to countries other than China; that the suggestion of leasing the port was made by Sri Lanka; and associated payments have been used to repay Western debt, with government debts to China remaining in place.

The alternative perspective is therefore one of poor governance on the part of Sri Lanka, rather than one of conspiracy on the part of China. On any basis, however, the airport and port projects can be characterised as investments whose benefits *did not* outweigh the associated costs – involving at a minimum some incompetence on the part of both the Sri Lankan and the Chinese actors.

That can be generalised into a fourth key point – in many cases, investments under the BRI have been entered into with inadequate risk management on the part of both the host governments and the Chinese financial institutions who provided funding. The leadership in China appears to recognise (as discussed further below) that this needs to change.

Case study: Jakarta-Bandung high-speed rail project, Indonesia

The Jakarta Bandung high-speed rail project is more recent. It is a 142km railway line, and the first high-speed rail project in Indonesia. It is anticipated to reduce the travelling time from Jakarta to Bandung, the third-largest city in Indonesia, from over three hours to 40 minutes. The project has been named a national strategic project by Indonesia and is expected to contribute to the country's GDP by 0.4% and create over 40,000 jobs (Journal Of Business And Political Economy: Biannual Review Of The Indonesian Economy Review: "*An Assessment of Economic and Financial Impacts of Jakarta-Bandung High-Speed Railway Project*"; Siddhartha Nath, Gusti Raganata, May 2020).

Since 2016, China has been Indonesia's largest trading partner, replacing Japan, and Indonesia was an early participant of the BRI. Indonesia lacks modern infrastructure and the country's difficult geography makes infrastructure development costly. A study by Indonesia's Centre for Strategic and International Studies noted the benefits, but also pointed to the risks, associated with the investment (Centre for Strategic and International Studies Indonesia (csis.or.id): "*Perceptions and Readiness of Indonesia towards the Belt and Road Initiative*"; Yose Rizal Damuri, Vidhyandika Perkasa, Raymond Atje, Fajar Hirawan, May 2019, page 10):

"The country's infrastructure is inadequate and relatively underdeveloped to sustain economic development, let alone to support a world-class trade hub. Note also that the dearth of investment in infrastructure development has deprived the country [of] a significant amount of its national income yearly in terms of direct and indirect (opportunity) costs."

Both China and Japan expressed interest in the project, but Japanese funding was contingent on Indonesia providing government guarantees, while China – through the China Development Bank – was prepared to offer funding on a non-recourse basis. The project is 75% debt financed, with the remaining equity portion provided by a Sino-Indonesian joint venture (with the Indonesian partners being state-owned) (China Railway Group Limited (www.crecg.com): "*Jakarta-Bandung High-speed Railway, Indonesia*"; May 2019).

Construction started in 2016 and was initially expected to last three years, at a cost of some USD 5.5 billion (AsiaNews (www.asianews.it): "*Jakarta chooses Beijing for the country's first high-speed train*"; February 2015). Delays – apparently due to the slow process of securing land rights – mean that the rail line is now scheduled to start operations in 2022 at the earliest (Reuters (www.reuters.com): "*Construction of China-funded railway in Indonesia seen completed in 2023 amid delays*"; September 2020). Recent reports put the total project cost at USD 6 billion (Reuters). In light of the rising costs, in April 2021, it was reported that the Indonesian parties in the joint venture

sought to negotiate with the Chinese partners for a reduction of the Indonesian companies' 60% stake so that they would bear a smaller share of the cost overruns (Reuters (www.reuters.com): "*Indonesian companies ask China to up stake in high-speed rail project*"; April 2021).

Notwithstanding the delays, the Jakarta-Bandung high-speed rail line appears to be an example of a project that has been enabled by the BRI, and is likely to prove beneficial to the Indonesian economy. The availability of non-recourse funding means that there are no associated issues of debt sustainability (although Indonesia's aggregate government debt, at under 37% of GDP, is not in any case high) (IMF World Economic Outlook Database (imf.org): "*Central Government Gross Debt, Percent of GDP*"; April 2021 (the estimate for 2020 is 36.6%)).

It is noteworthy, though, that the project is only loosely connected to the expressed objectives of the BRI. Although Indonesia is one of the originally identified 65 countries associated with the BRI, the investment benefits are fundamentally local (to Indonesia) and the investment does not directly influence trade prospects with other BRI countries. It is commonly identified as a BRI project, but its economic logic does not depend on the wider BRI programme.

Future directions

At the second Belt and Road Forum, in April 2019, President Xi committed to an improvement in transparency on BRI projects – "*everything should be done in a transparent way and we should have zero tolerance for corruption*", he said in his keynote speech. He also noted that: "*We also need to ensure the commercial and fiscal sustainability of all projects so that they will achieve the intended goals as planned.*" (BBC (www.bbc.co.uk): "*Xi Jinping vows transparency over Belt and Road*"; April 2019.)

Objectives of this kind are more easily expressed than achieved. They are clearly intended, however, to address reputational as well as economic concerns about the impact of the BRI. In effect, more of the BRI-enabled projects need to be, and be seen to be, value-added from the perspective of the recipient nations. This may well be an economic imperative, as well as a policy objective, for Chinese lenders to BRI projects.

The Center for Global Development, a US-based think tank, identified 23 countries that were "*significantly or highly vulnerable to debt distress*" of which eight countries (Maldives, Tajikistan, Laos, Kyrgyzstan, Djibouti, Pakistan, Montenegro, and Mongolia) were in that position because of "*an identified pipeline of project lending associated with BRI*" (John Hurley, Scott Morris, and Gailyn Portelance: "*Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*"; CGD Policy Paper, 2018).

China has, to date, tended to renegotiate distressed debt agreements primarily through deferrals. The Rhodium Group notes that renegotiation requests were increasing, even prior to the effects of the current COVID-19 pandemic, and are likely to increase further. Some USD 28 billion of Chinese debt was identified as being under renegotiation at the time of the report. The authors conclude that (Rhodium Group):

"As they deal with the fallout from 20 years of aggressive lending, China's banks face a stark reckoning. As much as 25% of China's overseas debt has already run into trouble. Ongoing domestic efforts to rationalise China's overseas lending – through the establishment of a new aid agency (CIDCA) and the introduction of new debt sustainability frameworks for policy banks – are becoming more urgent in a world shaken by COVID-19."

The World Bank study referred to above noted that "*[i]ncreased private sector participation can help sustain the BRI in the long term*", by bringing greater discipline to the lending process. Some commentators have noted a shift – Baker McKenzie, for example, suggested in early 2019 that (Baker McKenzie (www.bakermckenzie.com): "*Twists and turns on the BRI path point to risk management as a top business priority*"; October 2019, page 4):

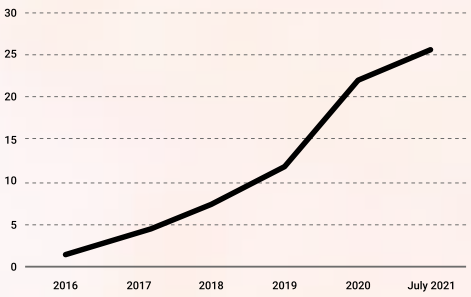
"There is definitely a change from BRI projects developed six years ago. Investment in and lending to BRI projects is no longer the exclusive domain of Chinese state-owned enterprises and lenders. We are seeing more involvement from international (i.e., non-Chinese) companies and financial institutions. This is in part due to the realization dawning on Chinese developers and lenders that there are advantages to involving international organizations in projects in BRI countries. They bring with them experience in and knowledge of doing projects in many BRI countries."

Increasing participation of non-Chinese construction firms is also relevant. Deloitte reported in 2018: that ABB had been involved in "*dozens of EPC deals undertaken by Chinese companies*"; that "*Caterpillar says it regards BRI as a long-term opportunity*"; that "*GE recorded orders worth $2.3*

billion in 2016, most under BRI projects, up from just $400 million in 2014"; that "*Honeywell and Siemens have also benefited from their technological offerings*"; and that "*Citibank and Zurich are among others getting more deeply involved*" (Deloitte (www2.deloitte.com): "*Embracing the BRI Ecosystem*"; 2018 (undated), pages 15–16).

The role of the AIIB has also been increasing. The AIIB is headquartered in Beijing, but has grown from an initial 57 founder members (and initial capital of some USD 100 billion) to now include 103 countries (Comprising 46 regional, 41 non-regional, and 16 prospective members). Since its foundation, AIIB investments have been steadily increasing, and as of July 2021 covered 130 projects – 27 in energy, 22 in financial institutions, and 20 in transport sectors – with some USD 26 billion of approved projects (Asian Infrastructure Investment Bank (www.aiib.org): "*Project Summary*").

Figure 4 – AIIB cumulative approved investments, USD billion



Source: AIIB Website, "*Project Summary*".

The AIIB is often seen as being *linked* to the BRI, and has in fact been an active lender to many BRI projects and geographies. It is, however, more similar in nature and applied standards to other well-established multilateral development banks (Forbes (www.forbes.com): "*The Real Role Of The AIIB In China's New Silk Road*"; July 2017). The bank operates in a more transparent manner and has collaborated with institutions such as the World Bank, Asian Development Bank and the European Bank of R4econstruction and Development (30 of the 63 AIIB projects as at the end of 2019 were co-financed with other institutions) (Asian Infrastructure Investment Bank (www.aiib.org): "*2019 AIIB Annual Report and Financials*").

In general, it appears that the ingredients for the early achievements of the BRI – a willingness to lend, an oversupply of construction capacity and a focus on infrastructure development – will not be enough to secure its continued success. An increasing focus on complementary reforms, debt sustainability, transparency and the participation of other countries (in both the delivery and funding of BRI projects) will also be required. The importance of the initiative to China's wider objectives (and to President Xi himself) make it likely that this shift in focus will arrive.

If that is right, then investments made under the BRI will become, progressively, more aligned with global best practice. Western firms, and their financial, legal and other advisers, will increasingly become involved; conventional disputes will increasingly arise, and will increasingly be resolved in conventional ways. The BRI will remain abnormal in the scale of its ambition, but will need to become more *normal* in the way in which that ambition is realised.

Prior to founding Osborne Partners, **Chris Osborne** was global head of FTI Consulting's Economic Consulting segment. He has more than 35 years' experience in bringing economic and financial analysis to complex commercial and regulatory disputes.

Involved in more than 200 cases of litigation and arbitration, as well as complex regulatory issues, across multiple industry sectors and geographies, Chris has a BSc in Civil Engineering and an MSc in Economics. He is also a Chartered Accountant.

He has given oral evidence on over 40 occasions – domestically as well as in various ICC, UNCITRAL and ICSID arbitrations in addition to the US Tax Courts, the US-Iran Tribunal, the Competition Appeals Tribunal, the then Restrictive Trades Practices Court and what was the Monopolies and Mergers Commission.

He was recently named in *Who's Who Legal's* "Global Elite Thought Leaders, Arbitration Expert Witnesses for 2021", among only seven in Europe. He also features as "Quantum of Damages Expert" and "Litigation Expert Witness" for 2020 and has consistently been identified as a leading expert witness in the *Who's Who Legal* listings since their inception in 2011.

chris@osbornes.com

Nil Kalağoğlu heads the Osborne Partners office in Istanbul and provides clients with financial and economic analysis and damages quantification for dispute management as well as expert witness services in commercial and investor-state arbitrations and assistance with monetary assessment of claims.

She has an MBA from INSEAD and 15 years' experience in consulting, business development, and project management positions. She spent five years in the UK and the US working for LECG's economic consulting segment. During this time, she worked on various intellectual property, fraud, and business interruption cases.

In Turkey, Nil has extensive experience in due diligence, valuation, tendering, commercial contract negotiation and management. She served as in-house business development consultant at Sabancı Holding, followed by Sabiha Gökçen Airport project with GMR group of India and Limak. Later on, for Akenerji, Nil developed and managed a 900MW greenfield natural gas fired power plant investment from feasibility up until start of commercial operations. She also served in the Executive Management Team of Hilti Turkey as Director of Strategic Business and Central Asian Partners.

nil@osbornes.com

Ömer Kama is a consultant at Osborne Partners. He has been involved in many international disputes, along with projects concerning valuation and regulatory issues. His experience comprises cases from a range of sectors, including telecommunications, banking, construction, energy and transportation.

Ömer holds a Bachelor of Science degree in Applied Mathematics and Economics from Johns Hopkins University.

omer@osbornes.com

Osborne Partners is a consulting firm specialising in complex business and legal challenges. We apply principles of economics, finance, valuation and accounting to a range of issues in the areas of economic regulation, public policy, commercial strategy and litigation.

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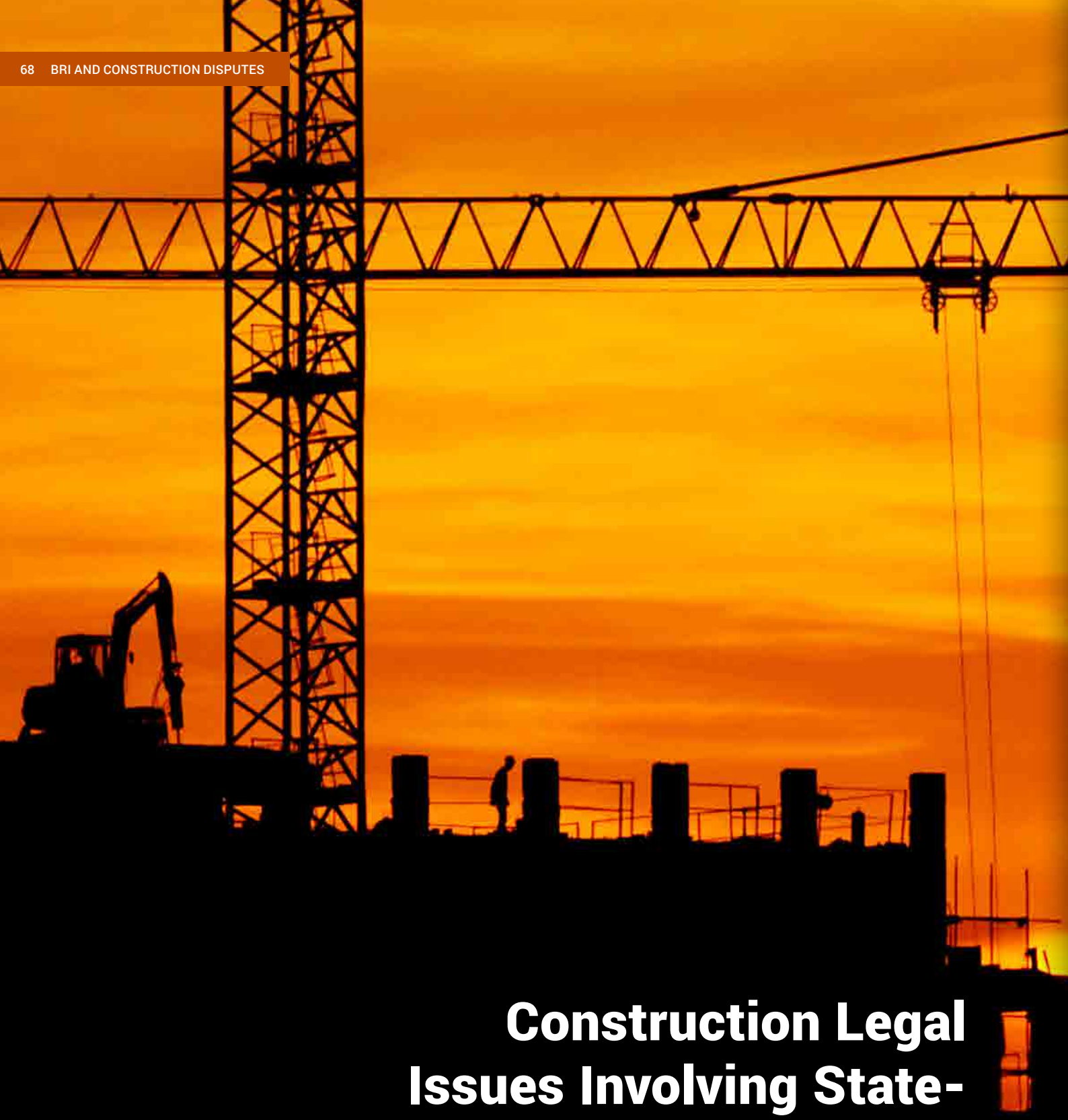

Construction Legal Issues Involving State-owned Companies and Contractors on the BRI

Amanda Lees
King & Wood Mallesons

Paul Starr
King & Wood Mallesons

Daniel Xu
King & Wood Mallesons

Jessica Fei
King & Wood Mallesons

THE Belt and Road Initiative (**BRI**) is improving connectivity between China and other regions of the world through the development of better infrastructure, trade and investment links. Since its launch in 2013, the BRI has encompassed large infrastructure projects in what can be challenging jurisdictions legally and practically for contractors. These are large-scale, long-term and capital-intensive projects in jurisdictions with very different legal, political and cultural traditions from China.

A feature of the BRI has been the involvement of Chinese state-owned enterprises (**SOEs**) as sponsors, contractors and lenders to projects. In this chapter, we focus on some of the issues that SOEs should consider when involved in BRI projects particularly as contractors. We draw out some of the risks and means for mitigating those risks through prudent contracting.

The political, operational and legal risk associated with many BRI projects means that claims are bound to arise, highlighting the necessity of paying close attention to the dispute resolution clause and modifying it where required.

In addition, we look at how SOEs can take advantage of investment treaty protections when involved in BRI projects. To date, South-East Asia, West Africa and Central Asia are the regions in which most BRI disputes have occurred, as these are the regions which have attracted most Chinese investment and construction companies.

Finally, we conclude with a case study on the challenges for SOE contractors in one region, the Middle East, to demonstrate the need for SOEs to involve international counsel with the experience and skill to navigate the challenges of a particular region.

The key risks in project and financing documents for infrastructure projects

SOEs participate in BRI projects as sponsors, contractors and lenders. The development of a BRI project will require SOEs to enter into various contracts which typically include, for government-contract projects, a concession/BOT agreement, construction contracts and financing documents. We set out below some of the key legal issues which apply in relation to these documents and how to mitigate them in the context of BRI projects.

Concession/BOT agreements

- **Project procurement**: SOEs are often involved in BRI projects at an early stage and their teams will spend substantial time on the ground, leading to the establishment of direct relationships with the authorities in charge. Given the time invested in developing these relationships, the possibility to be awarded a project by direct negotiations, rather than through a tender process, can be very tempting – it is quicker and provides certainty. There are also circumstances where SOEs are invited by the host country's government to enter into a contract without a tender in order to speed up project procurement. However, the host country's law may require a tender process. The breach of such a requirement can be fatal to a project and

lead to its termination. Even if no tender is required, carrying out one will be perceived as best practice and may help to mitigate the risks on the project of cancellation due to changes of government policies or political regime. If a project is nevertheless awarded by direct negotiations, an alternative mitigant is to have the project and contractual arrangements approved by the host country's parliament.

- **Legal gaps**: comprehensive, long-form concession/BOT agreements are often attractive to sponsors as they allow for gaps or uncertainties in the host country's legal and regulatory framework to be dealt with in a single legal instrument. Special consideration should be given to ensuring that the concession/BOT agreement addresses these gaps in a clear and understandable manner, while complying with local law. In some cases, addressing these gaps may require amendments to existing regulation or legislation, and even the enactment of a project-specific law or decree.
- **Counterparty risk**: the identity of the counterparty (grantor) to the concession/BOT agreement will often be a determining factor in the project sponsors' ability to raise finance on a limited recourse basis. Some SOEs tend to think of local government instrumentalities, agencies and authorities as emanations of a country and are happy to simply deal with the agency assigned to lead the project by the host country's government. However, in some countries there are government agencies with a better credit rating and contract implementation track record than others. This will be a primary concern for lenders. Depending on the circumstances, addressing counterparty credit risk might require the issuance of a government guarantee, which can be a lengthy process. Credit and reputational checks should therefore be carried out at an early stage so that any deficiencies can be addressed before execution of the relevant concession/BOT agreement.
- **Governing law**: in a number of countries covered by the BRI, investors and financiers will seek to use a foreign law as the governing law of concession/BOT agreements to limit the risk of a legislative change to the concessionaire's rights or grantor's obligations. However, this is very rarely agreed by host governments and grantors, who usually insist on the host country's domestic law being the governing law. The choice of arbitration forum (discussed below) will also be driven by the concessionaire's goal to be able to effectively enforce any award it may obtain against the host government or grantor.

Construction contracts

- **Risk allocation in intragroup contracts**: it is relatively common for SOEs who operate in the construction space to sponsor a project in order to secure the award of the construction contract. Such sponsorship can take the form of a minority investment, majority investment or even sole sponsorship. When acting as majority investor or sole sponsor, some SOEs will often document the relationship between the project company and the contractor entity through standard intragroup construction contracts. These can differ from internationally accepted turnkey contracts both in terms of style, pass-through of obligations and risk allocation. Sponsors should be aware that the resulting project documents package can be unattractive to lenders (including those lenders which are also SOEs) and should seek to balance the interests and the risk allocation as between the different entities involved to avoid the risk of having to amend or reopen the commercial terms of agreements at the financing stage.
- **Governing law**: key construction agreements in BRI projects are usually governed by a foreign law. To ensure that such a choice of law will be effective, sponsors and contractors should confirm at an early stage whether there are any mandatory public policy rules that apply to construction contracts in the host jurisdiction, such as tendering, pricing and payment requirements. English law is the most common choice. In some recent projects, SOEs have chosen PRC law as the governing law of some of the construction agreements. While in principle this should not be a problem, this can complicate the financing process if sponsors plan to source funds from international commercial lenders or multilaterals, as these types of lenders will be less familiar with the use of PRC law for these contracts.

Financing agreements

- **Validity of host country support:** if the financing is supported by the host government or the public sector (e.g. guarantee or preferential taxation terms), lenders will want to ensure that all applicable procedures have been complied with before the relevant contracts are executed by the government or public sector entities.

- **Governing law and dispute resolution:** the financing documents for BRI projects tend to follow market precedents based on LMA or APLMA language. These documents will most often be governed by English law.

General contracting tips

- **Ensuring valid execution:** when executing documents, our firm's practice is to recommend advance checking that the execution process and wording meets the requirements of: (1) the place of incorporation of the foreign company; (2) the governing law of the document; and (3) the place of execution.
- **SAFE registration of guarantees:** according to *Provisions on Foreign Exchange Control for Cross-border Security*, promulgated by the State Administration of Foreign Exchange (**SAFE**), various securities (such as guarantees issued by certain SOEs and their parent companies) are subject to registration with SAFE. The registration needs to be submitted to the relevant local branch of SAFE in the domicile of the security giver within 15 business days following the signing of the Deed. SAFE will issue a registration certificate upon the completion of the registration. Failure to do so may substantially reduce or even negate recoverability under the security.

Dispute resolution options

The dispute resolution clause merits its own special attention, particularly as many participants on the BRI overlook it at tender time and it often gets addressed last in contract negotiations. When one of our SOE clients was asked why it had chosen New York law and Singapore arbitration, it confessed that it hadn't even looked at the clause. Another international client had taken a precedent off Google for London arbitration. Concessions are sometimes made by clients over the dispute resolution clause in negotiations over other contractual terms without fully understanding the consequences of the choices made when it comes to enforcement of their rights.

A well-considered and drafted dispute resolution clause ensures that disputes are resolved:

- before an independent tribunal in a neutral forum – critical in a cross-border context;
- more efficiently by avoiding expensive jurisdictional battles and time-wasting debates at the start of the dispute. For example, many arbitration clauses fail to specify the law of the arbitration agreement (which can be different to the governing law), how many arbitrators should be

appointed and the language that should be used; and
- in a manner such that the judgment or award can be enforced at the end.

International arbitration should be the first choice

Of all the available forums, international arbitration is the first choice for BRI contracts. It is an optimal balance between fairness, efficiency, and enforceability. It gives SOEs the option to have their dispute resolved by a tribunal sitting in a neutral third state that includes an arbitrator of their choice. As the arbitration proceedings are seated in a neutral third state, the proceedings are governed by the laws of that third state and unlikely to be influenced by owner-state local protectionism. After the award is issued, any challenge to set aside the award has to be heard by the courts of the seat in the neutral third state, which means that the award is less likely to be overturned (provided the seat chosen is a pro-arbitration jurisdiction). While most of the BRI contracting states are also contracting states to the New York Convention, contractors sometimes face difficulties in enforcing the award in the local courts against the local party – this can be minimised by ensuring that local laws are taken into account when drafting the arbitration clause and getting good advice throughout the process.

The key choices to be made in arbitration clauses are:

- **Seat**: in which jurisdiction should the arbitration be seated? How good is the arbitration law? How good are the courts which will support the arbitration process and consider any application to set aside the arbitration award? Are interim measures available? Will I be able to enforce an award from this jurisdiction (as a minimum the seat should be in a New York Convention state)?
- **Arbitration commission/institution**: is it acceptable to both parties? Is it recognised internationally? How efficient is it? How good is its panel of arbitrators?
- **Procedural rules**: do the institutional rules allow for consolidation and joinder? Do the institutional rules include emergency arbitrator provisions for urgent interim relief? What is acceptable to both parties?

Most importantly, the Chinese SOE should push for the arbitration to be seated in a neutral third state. Arbitration seated in the local host state can be very difficult as the arbitral proceedings are subject to local court supervision, which increases the chances of local protectionism. In some countries such an arbitration may be considered a domestic arbitration and may be subject to a different legal regime for challenges and enforcement. Any challenge to the award will be heard in the courts of the host state. If the foreign party is fortunate enough to obtain an award in its favour, the foreign party is likely to face resistance when trying to enforce that award in the host state against the local company and the grounds for resisting enforcement could be wider than those in the New York Convention. The obligations in the New York Convention only apply to the enforcement of arbitration awards made in foreign jurisdictions not domestic arbitration awards.

For international arbitration in a neutral third state, the arbitral institutions most favoured by Chinese construction companies (including Chinese SOEs) are SIAC, ICC, and HKIAC, and the most common seats are Singapore, Hong Kong, London, and Paris. All of these are sensible choices being well-recognised international arbitration institutions with modern up-to-date rules and seats with pro-arbitration courts and well-understood legal frameworks. A recent survey of Chinese construction companies that operate overseas asked respondents to rank their choice of arbitral institution and seat by frequency of choice in the last five years. For arbitral institutions, SIAC was chosen 156 times, ICC 120 times, CIETAC 107 times, BIAC 93 times, and HKIAC 93 times. The most popular seats are Singapore, Beijing, Hong Kong, London, and Paris. (See *The BRI Construction Dispute Resolution Mechanism Research Report* on 20 April 2021 published by the Beijing International Arbitration Center, China International Contractors Association and Tianjin University (**BIAC Survey**). The Report is available for download at: https://www.bjac.org.cn/news/view?id=3919.)

There are strategic advantages to some seats over others and not just for the Chinese SOEs. The BRI country which said "let them (investors) arbitrate here" failed to understand the benefits which, for example, a Hong Kong seated arbitration can bring to its own nationals, when doing business with PRC companies anywhere in the world. The key here lies in the special, unique arrangements which the Mainland China and Hong Kong governments have made to benefit arbitration in both legal systems. Not least, the mutual arrangement regarding interim measures, whereby during or even prior to a qualifying arbitration parties can seek interim asset freezing orders and other like protection in the Mainland

and Hong Kong courts. For Hong Kong a qualifying arbitration means one administered by one of the named six key institutions, including HKIAC and CIETAC; for the Mainland, it is an arbitration before a Mainland arbitral institution "*registered with the administrative department of justice of the relevant province, autonomous region or municipality directly under the Central Government*" (Article 10 of the Arbitration Law). Due to those arrangements, we successfully obtained a USD 400 million asset preservation order in the Shanghai Financial Court right at the start of an arbitration in Hong Kong. Another unique arrangement concerns mutual enforcement of arbitration awards (with enforcement proceedings allowed simultaneously), and yet a third is a unique pilot scheme in certain parts of the Mainland to permit the work there of Hong Kong court-supervised liquidators.

On the flipside, if the Chinese SOE wanted to avoid interim measures being taken in Mainland China it should choose Singapore as the seat of the arbitration. While interim measures are available in the Singapore courts to support arbitrations seated anywhere in the world and tribunals in arbitrations seated in Singapore can order interim measures, Mainland courts cannot order interim measures for foreign seated arbitrations.

Singapore has a robust pro-arbitration legal framework, excellent courts and is the home of many internationally recognised counsel and arbitrators. It is not surprising that Singapore is now the most preferred seat globally (equal with London) and the most preferred seat in the Asia-Pacific region (see *2021 International Arbitration Survey: Adapting arbitration to a changing world* published by Queen Mary University of London and White & Case (**Queen Mary Survey**)). Chinese parties are comfortable arbitrating in Singapore and using SIAC – last year, as published in the SIAC Annual Report 2020, 195 new cases were filed at SIAC involving Chinese parties (147 claimants and 48 respondents).

What about litigation and other options?

A court judgment can be much harder to enforce in many jurisdictions. For example, Indonesia does not recognise and enforce foreign court judgments but is a signatory to the New York Convention on enforcing foreign arbitral awards. Courts in Mainland China have started to enforce some foreign judgments on the basis of reciprocity (including Singapore judgments) and Mainland China and Hong Kong have a mutual arrangement for the enforcement of each other's judgments.

It is risky for Chinese SOEs to agree to local litigation, due to local protectionism and differences in the legal system and cultural environment. Furthermore, it can sometimes be difficult for Chinese SOEs to obtain quality legal services in the project's host state to represent it in local litigation.

Often, lenders will request the benefit of a unilateral option to choose between court and arbitration if a dispute arises. An opinion from local counsel will be needed to confirm that such an option does not infringe public policy in the host country.

Other dispute resolution options that the Chinese SOEs have used in the past include high-level corporate negotiation, commercial mediation, and expert determination. The use of alternative dispute resolution (**ADR**) along with international arbitration is the most preferred option for dispute resolution internationally (59% of the respondents to the Queen Mary Survey chose international arbitration together with ADR as their preferred method of resolving cross-border disputes, 31% chose stand-alone international arbitration with only 10% preferring either litigation or ADR by itself as the preferred method) and we would expect SOEs to be no different from other parties in this regard.

Are many BRI disputes being resolved in Mainland China?

It is our experience, supported by public surveys, that BRI disputes between Chinese and non-Chinese parties in other jurisdictions are rarely resolved in China. (See BIAC Survey referred to above.)

Chinese SOEs usually act as the general contractor or sub-contractor in the BRI contracts. The owners are for the most part local SOEs or companies with strong local connections and considerable bargaining power. Very few contracts would designate disputes to be resolved in Chinese courts or arbitration administered by a Chinese arbitration institution in China for the obvious reason that the local owners would prefer to resolve the disputes at a place and under a legal system that they are more familiar with. If the imbalance of negotiating power is strong enough, the local owners would usually opt for litigation in their home court.

There are exceptions. First, we have seen contracts providing for disputes to be resolved by arbitration in China by a Chinese arbitration institution when the Chinese SOE acts as the lender or is financing the project and therefore

has more negotiation power. It should be noted that this is not a common scenario, the respondents to the BIAC Survey reported that 81.36% of projects are financed by the owners.

Second, there are instances in which both contracting parties are overseas subsidiaries that are controlled/owned by Chinese SOEs, e.g. in the context of a sub-contracting agreement. In those cases, the contracting parties would be more willing to consider resolving the disputes in China, e.g. arbitration seated in China, or even in Chinese courts. The highest number of respondents (83.09%) to the BIAC Survey recorded that the reason why a Mainland Chinese arbitral institution would be chosen to administer their arbitration would be if both parties were Chinese companies.

Do Chinese SOEs enjoy state immunity?

What if a dispute occurs on the BRI which has to be arbitrated or litigated against a Chinese SOE? Can the SOE successfully avoid suit and/or enforcement by claiming state immunity? What if the SOE expressly waived its right to assert immunity? Is that watertight?

The legal doctrine of sovereign immunity, or state immunity, historically provided that a state is immune to the jurisdiction of foreign courts and the enforcement of court orders, even if the acts involved are commercial in nature, unless it chooses to waive such immunity. This is referred to as the doctrine of "absolute immunity". Not until the mid-20th century when governments became more active in commercial activities, was the doctrine condemned to be unfair to private companies. Since the 1970s, the US and some European countries switched to the doctrine of "qualified immunity" or "restrictive immunity" by codifying exceptions to limit the application scope with respect to, for example, commercial transactions, personal injuries, and patents.

The United Kingdom, Australia and Singapore all take a restrictive approach to state immunity, including that an agreement to arbitrate is a waiver of immunity, proceedings in relation to commercial transactions entered into by the state are not covered by state immunity and that judgments can be executed against state property that is used for commercial purposes. That said, it is advisable when contracting with a state party to include a clause that waives state immunity in relation to both proceedings and the execution of judgments and awards.

In contrast, the PRC still adheres to absolute immunity, which means that states must be immune from suit and enforcement even if the claims arise out of purely commercial activities. Does absolute immunity attach to a SOE? The answer can be readily found in a line of Hong Kong decisions tackling this point, given that Hong Kong follows the Mainland practice on this topic. In Hong Kong, the Central People's Government (**CPG**) constitutes the "Crown" for the purposes of the *Crown Proceedings Ordinance (Cap. 300)* and at common law (*Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel 'Hua Tian Long'* [2010] 3 HKLRD 611).

Are Chinese SOEs covered by Crown immunity in Hong Kong?

A SOE will not inherently attract Crown immunity. The Hong Kong courts will apply the "control test" to determine whether a SOE (or other body corporate related to the CPG) is afforded the same immunities as the CPG. The material consideration being the "control" the CPG has over that corporation, which involves two primary questions:

1. Could the corporation be said to be subject to the control of the CPG?
2. Is the corporation in question able to exercise independent powers of its own?

In answering these two questions the courts will consider a number of factual matters, the determination of which will be particular to the circumstances of each case (*Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel 'Hua Tian Long'* [2010] 3 HKLRD 611; *TNB Fuel Services Sdn Bhd v China National Coal Group Corporation* [2017] HKCFI 1016).

To demonstrate how the "control test" will be applied in practice, the decision of *TNB Fuel Services Sdn Bhd v China National Coal Group Corporation* [2017] HKCFI 1016, which dismissed a SOE's assertion of Crown immunity, is instructive. The court noted:

- The party asserting Crown immunity bears the onus of establishing its assertion.
- Any application of the "control test" was on a case-by-case basis, depending on the circumstances and the evidence available, but relevant factors were:

- independent discretion enjoyed by the entity;
- control exercised by the Crown as investor;
- the separate legal personality of the entity;
- the power of the Crown to appoint and remove senior officers of the entity; and
- the financial autonomy of the entity.

- A letter from the Hong Kong and Macao Affairs Office stating that the SOE was an independent legal entity carrying out activities of production and operation on its own, with no special status or interests superior to any other enterprises, was not considered part of the CPG, was persuasive in defeating the assertion of Crown immunity.

Are Chinese SOEs covered by state immunity in Mainland China?

The practice is as above. It is worth further noting that moderate state interference does not grant sovereign immunity upon SOEs. Under the *Assets Law*, the state, as an investor is entitled to "*profits on the assets and the rights to participate in significant decision making and choice of the management members*". Therefore, to the extent that the degree of control imposed on the SOE by the state is deemed as an appropriate exercise of its power as an investor, the SOE will still be regarded as an independent business entity.

What if the SOE provides a waiver of immunity?

As stated above, in states that take a restrictive approach to state immunity it is possible to waive state immunity. For example, in the United Kingdom, Singapore and Australia, an agreement to arbitrate is a waiver and it is possible to agree contractually to waive immunity in relation to proceedings and the execution of judgments and awards.

By contrast, a waiver in itself will not provide adequate protection in Hong Kong and Mainland China.

The agreement to arbitrate is not itself a waiver. In the *Congo* decision (*The Democratic Republic of the Congo and others v FG Hemisphere Associates LLC FACV Nos 5, 6 and 7 of 2010*, 8 June 2011), the Hong Kong Court of Final Appeal held that an agreement to arbitrate is viewed purely as a contractual agreement and does not constitute a waiver of immunity.

A contractual agreement to waive immunity entered into prior to the commencement of proceedings is not an effective waiver. Rather, a party who holds immunity must waive its right to immunity in front of the court. In doing so, the party must waive both: (i) its jurisdictional immunity from suit; and (ii) the immunity of its property from execution (*The Democratic Republic of the Congo and others v FG Hemisphere Associates LLC FACV Nos 5, 6 and 7 of 2010*, 8 June 2011).

In very specific factual circumstances, the courts have held that a party can waive immunity through active participation in proceedings with knowledge of its right to claim immunity (*Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel 'Hua Tian Long'* [2010] 3 HKLRD 611).

Can SOEs take advantage of investor protection in bilateral and multilateral investment treaties?

As of 2020, there are 88 Bilateral Investment Treaties (BITs) in force between China and BRI nations as well as several Multilateral Investment Treaties (MITs). These allow investors to bring claims against BRI governments should their treaty-prescribed substantive investor rights be breached. Of these BIT contracting states, 71 are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also referred to as Washington Convention), which facilitates international enforcement of arbitration awards between signatories. Chinese contractors are starting to assert their treaty rights with two recent claims against African states being reported (Ross, "Chinese company brings claim against Ghana", 11 February 2021, Global Arbitration Review).

International investment disputes can be administered by the International Centre for Settlement of Investment Disputes (**ICSID**) as well as other institutions, such at the Permanent Court of Arbitration, depending on the provisions in the treaty.

Investment treaties typically provide several investment protections, including:

- **Fair and equitable treatment**: the obligation not only to foster a stable, predictable investment environment, but also to act fairly and transparently.
- **Compensation for expropriation** or

nationalisation of investor's assets by the state (be it direct or indirect).

- **Full protection and security**, which provides the positive obligation to protect investment by the exercise of reasonable care.
- **Non-discrimination** in taxes, fines, penalties, licences, permits and visa restrictions.
- "**Umbrella clauses**", which incorporate into the BIT, by reference, obligations entered into between a host state and investors in other contracts.

It is necessary both to fall under the definition of "investment" and be viewed as a qualified "investor" in order to be protected by investment treaties. Jurisdictional challenges are common in investment treaty arbitration and a significant number of claimants fail to establish that they are investors or have an investment under the treaty.

Typically, the definition of "investment" is broad and non-exhaustive and can encompass financing and construction contracts.

In order to be viewed as a qualified "investor", one must be a national of a contracting state, but not nationals of the host state. To determine the nationality of the investor, some treaties look to the place of incorporation, while others look to the place from which substantial control of investments is directed. Some definitions of "investor", such as the Ghana-China BIT, explicitly cover SOEs; however, other older treaties are silent on whether SOEs are covered, and it will be a matter of treaty interpretation. Tribunals have held that SOEs undertaking commercial activities are covered by treaty protection, as you would typically see in a BRI infrastructure project (*CDC Group plc v Republic of the Seychelles* , ICSID Case No ARB/02/14, Award, 17 December 2003). It would be different if the SOE was undertaking governmental activities as an agent for the government.

To minimise risk exposure, SOEs should carefully check the BITs and MITs between China and the BRI host state where an investment is being made and their specific provisions to ensure that their investment will be protected. Care should be taken to ensure that the treaty is actually in force and check the BRI host state's history of dealing with investor claims. BRI investors should choose the optimum investment structure from the beginning, as an investor is likely to not be covered should they try to structure an investment after a dispute arises in order to access treaty rights. For example, in the investment treaty dispute brought by Philip Morris Asia against Australia under the Hong Kong-Australia BIT, the tribunal found that it did not have jurisdiction as the dispute arose before Philip Morris Asia had an interest in the investments.

Case study: Dispute avoidance and management in the Middle East for SOE contractors

Construction is an industry in which common legal issues regularly arise. In the Gulf region certain of these issues take on particular importance and we highlight below some of the key legal issues for an SOE contractor on BRI projects in the region. These illustrate the importance of having infrastructure lawyers with a good understanding of the region involved at an early stage.

Powers of attorney

Although powers of attorney (**POAs**) are often a feature of doing business, whether in construction or otherwise, they are a critical requirement in the Gulf region.

Managers and other key persons at any contractor working on BRI projects in the region will need POAs to carry out their day-to-day duties when, for example, liaising with governmental bodies or commercial counterparties such as suppliers, sub-contractors, project owners, etc.

POAs in the region need to be in Arabic. Further, if a Chinese SOE is operating in the region via a branch rather than having established a local entity, it will need to arrange for POAs executed by a head office in the PRC to be notarised and legalised, incurring time and monetary costs. This can potentially lead to challenges when seeking to change key personnel at short notice.

Finally, checking the POAs of owners or senior contractors is important to do for SOEs and other contractors. One strategy in the event of a dispute to challenge the legitimacy of contracts or at least any arbitration provision in them on the basis that those executing the contract did not have the necessary authority. While becoming less common, it is always best to rigorously check the authority of signatories when entering into contracts.

Protecting bonds

BRI projects just like other construction projects

will in their contracts normally provide for the contractor to arrange for an advance payment and performance bond or guarantee.

Given the size and scope of BRI projects, such bonds will be substantial and if the owner calls in one or both bonds this can have very serious negative impacts on a contractor's cashflow and banking relationships. Owners are aware of this, and so in the event of a dispute arising will call in one or both of these bonds as leverage or recourse.

Although the legal systems in the region technically provide ways to challenge such action, these are difficult in practice to successfully pursue. When considering their involvement in projects, contractors need to go into BRI projects in the region aware that recourse to these bonds is a real possibility and make decisions accordingly.

Decennial liability

Like in many other jurisdictions and regions, the countries and jurisdictions of the Gulf region provide for decennial liability of contractors on a statutory basis. This liability cannot be contracted out of.

Given the nature of BRI projects, most of them would be likely to attract this liability which attaches, for example in the UAE, to the construction of buildings or other "fixed installations" where the construction or installation is expected to remain in place for a period of more than 10 years.

The high value and size of most BRI projects means that the joint liability with the architect for any defect threatening the stability or safety of a building could be very substantial.

Beyond planning for and being properly insured to address the risks of decennial liability, the high-profile nature of BRI projects also means that if any later problems arise with a project during the liability period, they may cause serious reputational damage to the contractors involved as well as financial liability.

Dispute resolution forum

While the various FIDIC books by default provide for disputes to be resolved via ICC-administered arbitration, SOE contractors should be aware that contracts for BRI projects in the region will often amend this to provide for disputes to be heard in local courts or resolved by arbitration administered by a local or regional arbitral institution.

Given that BRI projects also regularly relate to real property, the contracts involved will almost inevitably be governed by local law. This brings added risk as SOEs may not always be familiar with the local laws in the region or with the applicable procedures of local courts or rules of regional arbitration institutions.

Enforcement

Another common legal issue for SOE contractors in the region is that enforcement of judgments or awards against owners is regularly a long and drawn-out process.

Cashflow is always a paramount issue for contracting businesses. Accordingly, SOEs need to be mindful that pursuing an owner for non-payment will incur not just the immediate legal costs during the dispute resolution process but that any monetary recovery if successful will likely take a further period of years and also involve additional legal costs.

Given the size and importance of BRI projects in the region, the counterparties/owners will also often be governmental bodies or possibly local SOEs themselves. Enforcing against such parties can often be even more drawn out and difficult than might normally be the case.

These difficulties are one of the many reasons that a negotiated settlement is generally the preferable route to resolving disputes.

Conclusion

Our concluding tip, for SOEs and their international partners alike, is to get the infrastructure lawyers in early, at tender time. A proper evaluation/mitigation of risk, drafting as recommended above and consideration of likely problems based upon legal experience should be a must-have on every BRI project, when compared to the millions of dollars in legal fees and the business relationship damage that can be occasioned by a dispute which could have been avoided, or at least better catered for at tender.

Amanda Lees is a cross-border dispute resolution specialist and the Head of Dispute Resolution in KWM's Singapore office. She assists her clients to resolve disputes through international arbitration, litigation and mediation.

Amanda is an expert in international arbitration in the Asia-Pacific region, including in Malaysia, Indonesia, Vietnam, Myanmar, India, China, Hong Kong, Singapore and Australia, with significant experience in both commercial and investment treaty arbitration. She also acts as international counsel in complex cross-border litigation.

Amanda is quick to grasp complex and technical contractual disputes across a range of industry sectors, including financial services, energy and resources, commodities, construction, insurance, telecommunications, technology and manufacturing. Amanda takes a strategic approach to dispute resolution that keeps her client's commercial objectives at the fore. Evidencing the high regard in which she is held, Amanda has had 19 appointments as arbitrator by SIAC, ICC and LCIA including as sole arbitrator, emergency arbitrator, co-arbitrator and presiding arbitrator.

amanda.lees@sg.kwm.com

With over 35 years of experience in Hong Kong and Asia, **Paul Starr** has conducted and helped to resolve many of Asia's largest infrastructure disputes. He is an accredited arbitrator at HKIAC, CIETAC, SHIAC, SCIA, AIAC, BIAMC and an accredited mediator with HKIAC and AIAC. Paul's reputation on cross-border disputes and international arbitrations has earned him the prestigious "**Disputes Star of the Year**" by asialaw, the Benchmark Litigation Asia-Pacific Dispute Resolution award and recognition as a "*Pre-eminent Practitioner*" for Construction Disputes in Doyle's Guide.

Paul's caseload frequently includes high-stakes, high-value disputes for clients operating both domestically and internationally. His reputation has earned him numerous invitations to high-profile speaking engagements involving key business decisions makers and top-level government officials. He has been appointed by Hong Kong's Trade and Development Council onto their Professional Services Advisory Committee and is an Advisory Board Member of Hong Kong Red Cross and the Asian Academy of Law.

paul.starr@hk.kwm.com

Daniel Xu is a Singapore qualified partner in the dispute resolution group of KWM's Dubai office. Daniel focuses on international arbitration and cross-border dispute resolution such as construction, engineering and infrastructure-related disputes. He also has extensive experience advising international contractors and developers on issues regarding project risk management and dispute avoidance.

He has significant experience representing governments, state-owned entities, Fortune 500 companies and major corporations across the Asia-Pacific and Middle East regions in connection with a broad range of contentious and non-contentious matters.

In addition, Daniel is listed as an accredited arbitrator on the panel of the Dubai International Arbitration Centre (DIAC).

Having lived in the Middle East since 2010, Daniel is familiar with the culture and market conditions unique to the area.

daniel.xu@me.kwm.com

Jessica Fei has over 25 years' experience working with international arbitration institutions and leading firms in New York and Asia. She is a widely recognised leading international arbitration and dispute resolution practitioner. Her practice focuses on large-scale international arbitration, cross-border litigation and disputes avoidance matters in China, Asia, Europe and the US, for clients including Chinese state-owned enterprises (SOEs), multinationals and major regional corporates.

Jessica has extensive experience handling complex cross-border disputes in English and Chinese. Jessica also has a significant international background and experience as well as deep understanding of the Chinese corporate culture and law.

Jessica splits her time between Beijing and Hong Kong SAR.

feijia@cn.kwm.com

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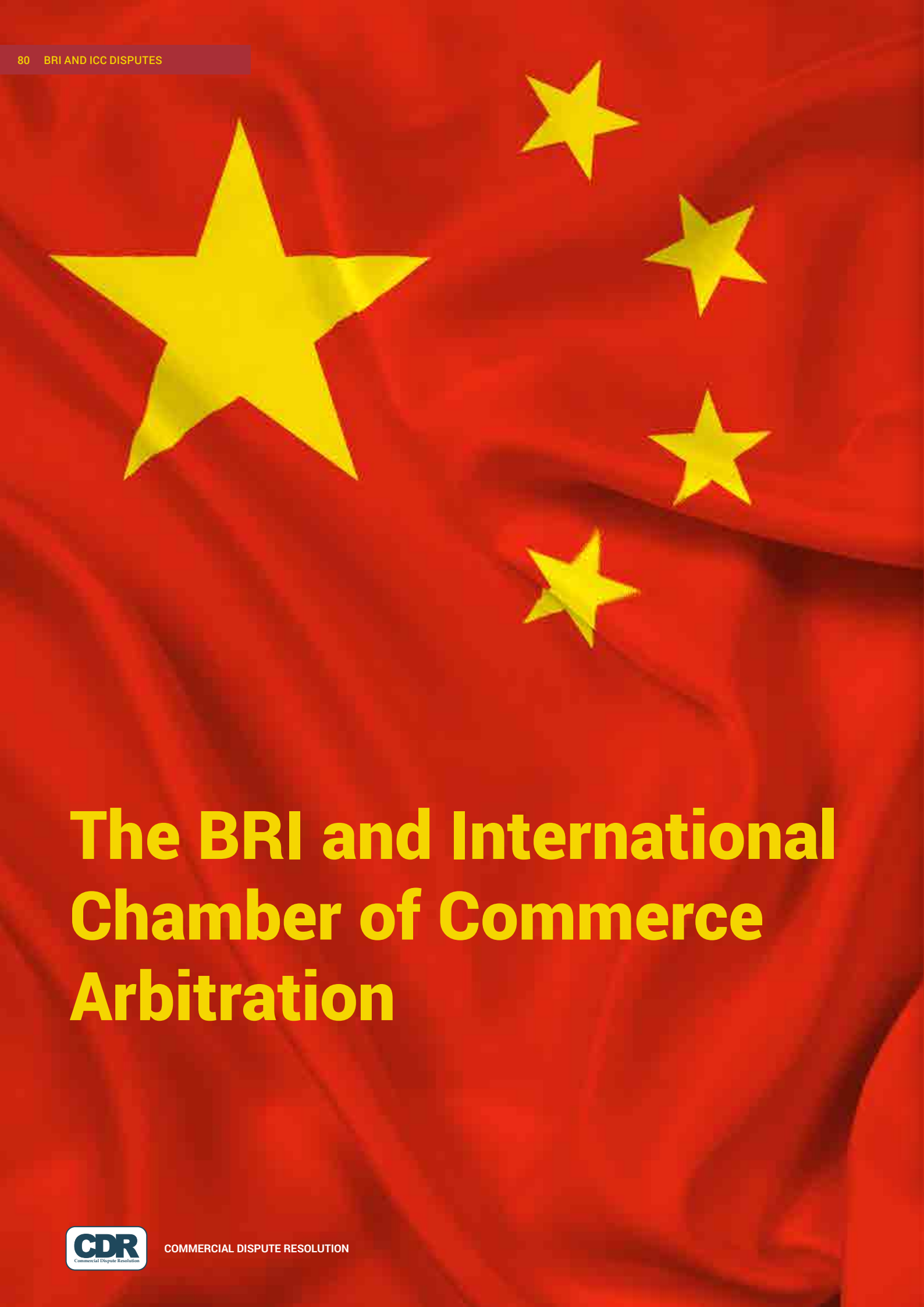


The BRI and International Chamber of Commerce Arbitration

Robert S. Pé
ICC

Susan Munro
ICC

Dr Zhijin (Donna) Huang
ICC

Baptiste Rigaudeau
ICC

Given the huge scale of the BRI, commentators have questioned its coherence and suggested that the primary link among many of the countries involved is China's strategic and economic interests. Part 1 of this chapter analyses the Chinese government's motivations for pursuing the BRI and looks at Chinese investment to date along the Belt and Road.

Commentators have observed that some target countries are fearful of China's embrace and of falling into a debt trap. Part 2 of this chapter focuses on Myanmar, a country that is rich in natural resources but impoverished after five decades of military dictatorship and economic mismanagement. In order to catch up with the outside world, it desperately needs infrastructure of all types. China appears keen to oblige, but what does that involve in practice and how are BRI projects impacted by the sudden regime change that occurred in Myanmar on 1 February 2021?

Lastly, commentators have suggested that the absence of common cultures and legal systems among the BRI participants creates significant political obstacles to the emergence of common legal practices or institutions across the BRI's geographic scope. Part 3 of this chapter looks at resolution of BRI commercial disputes, both inside and outside Mainland China.

Part 1: Motivations, aspirations and achievements

Chinese President Xi Jinping first spoke publicly about building the Silk Road Economic Belt and 21st Century Maritime Silk Road during his visits to Kazakhstan and Indonesia in 2013. Since

Figure 1: Timeline of BRI milestones, 2013–2021

September 2013	President Xi proposes BRI during visit to Kazakhstan
December 2014	Silk Road Foundation created
March 2015	BRI Vision and Action Plan created
December 2015	Asia Infrastructure Investment Bank created
April 2015	China-Pakistan Economic Corridor was launched
November 2016	BRI written into the UN General Assembly resolution
January 2017	"Pursuing a community with a shared future for mankind" established as a slogan
May 2017	First Belt and Road Forum convenes in Beijing
October 2017	BRI written into the Constitution of the CCP
January 2018	BRI commercial international dispute settlement mechanism and institutions created
April 2019	Second Belt and Road Forum convenes in Beijing

then, China has systematically promoted the BRI both domestically and internationally. The stated aim is for the BRI to facilitate economic and cultural cooperation among countries and there are six major goals, namely policy coordination, infrastructure connectivity, unimpeded trade, financial integration, closer people-to-people ties and industrial cooperation.

Economic motivation: shifting from "Made in China" to "Constructed by China"

China has developed a reputation as "the world's factory" and "made in China" labels are ubiquitous. However, in recent years it has suffered from excess production capacity and this has caused profits to shrink. By way of example, crude steel output in China jumped 9.9% in the first quarter of 2019, but demand was low and raw material costs increasing, thereby reducing profits.

Chinese President Xi Jinping talked of China's home-grown achievements in manufacturing, innovation and construction in his New Year's Speech in 2019. As the world's most populous nation, China continues to develop domestically and it is also establishing itself globally as a leader in infrastructure construction. For those BRI countries which have poor transportation and energy infrastructure but are richly endowed with natural resources, insufficient infrastructure investment is a bottleneck for their economic development. An aspiration behind the BRI is that, as China helps BRI countries to modernise their infrastructure and improve cross-border trade, it will forge strong bilateral trade and economic integration with those countries.

Accordingly, infrastructure connectivity is high on the BRI agenda. It envisages six economic cooperation corridors: the New Eurasian Land Bridge and the China-Mongolia-Russia, China-Central Asia-West Asia, China-Indochina Peninsula, China-Pakistan and Bangladesh-China-India-Myanmar corridors. China pictures an all-round, multi-level, and composite infrastructure framework centred on railways, roads, shipping, aviation, pipelines and integrated space information networks, in which Chinese construction and engineering companies will play significant roles. In addition to infrastructure, unimpeded trade is also an important goal for China. The export of "made in China" goods to BRI countries will help to absorb excess production capacity and stimulate domestic economic growth. After growing at high speed for more than 30 years, China's economy needs to shift down a gear and grow at a sustainable medium-to-high speed rate. The Chinese government thus believes that the BRI will provide a favourable external environment for this economic restructuring.

Political motivation: soft power in the international community

The BRI also offers an opportunity and platform for China to spread its experience of development to developing countries and further increase influence on the international stage. As the Chinese government presents it, China seeks to open a dialogue with the world, to enhance economic growth, connectivity and political engagement and to promote multilateralism, partnerships and mutually beneficial cooperation.

China has made a great effort to incorporate the BRI into the documents of international organisations. Although most international organisations that recognise the BRI are led by China, the United Nations, at its 71st session held in 2016, welcomed the Silk Road Economic Belt and the 21st-Century Maritime Silk Road Initiative and, in 2017, enshrined the core concept of "*a community of shared future for mankind*" in UN Security Council Resolution 2344. The Chinese government's stated hope is that with more countries and international organisations involved, the BRI will become a bigger and more diversified platform and will provide increased opportunities for multilateral cooperation.

In addition to sovereign states, which play the leading role in international relations, international organisations and non-governmental organisations also play an increasingly important role. By the end of November 2019, 137 countries and 30 international organisations along the Belt and Road had reached bilateral cooperation agreements with China.

After the breakout of the COVID-19 pandemic at the end of 2019, the positioning of the BRI has undergone a slight shift in emphasis from an economic strategy to an emphasis on internationally accepted standards of good governance. A keynote speech by Xi Jinping at the Boao Economic Forum, which took place in Mainland China in 2021, emphasised China's willingness to pursue goals with a shared future for mankind and work with other parties along the BRI to cooperate on high-quality health, connectivity, and green development, according to the principles of openness and inclusiveness

(see keynote speech by President Xi Jinping at the Boao Economic Forum for Asia Annual Conference 2021, 20 April 2021).

Volume of Chinese investment along the Belt and Road

According to China's Ministry of Commerce (MOFCOM), direct investment by Chinese enterprises in BRI countries had surpassed US$90 billion since 2015 by the first quarter of 2020 and the value of overseas contracted projects (activities of a Chinese enterprise in overseas construction projects) in the same timeframe had surpassed US$600 billion. Even though impacted by the COVID-19 pandemic in 2020, China's investment in BRI countries has continued to grow.

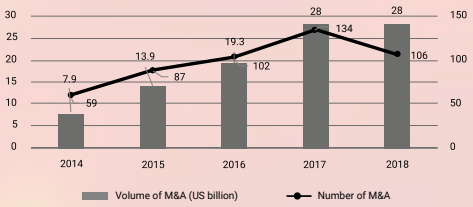
Figure 2: China's Investment volume to BRI countries, 2015–2020 (see http://fec.mofcom.gov.cn/article/fwydyl/tjsj/)

Year	2015	2016	2017	2018	2019	2020
US$ billion						
Direct investment	14.82	14.53	14.36	15.64	15.04	17.79
Contract value of overseas projects	92.64	126.03	144.32	125.78	154.89	141.46
Number						
Contracts for overseas projects	3987	8158	7217	7721	6944	5611
Investment countries	49	53	59	56	56	61

Method of Chinese investment along the Belt and Road

Chinese investment in BRI projects takes a variety of forms. Chinese businesses have merged with and acquired multiple companies in BRI countries. MOFCOM statistics regarding M&A activities are displayed in the below diagram:

Figure 3: China's Investment (M&A) in BRI countries, 2014–2018 (see http://fec.mofcom.gov.cn/article/fwydyl/tjsj/)



China has also invested in and developed overseas economic and trade cooperation zones,

which are generally funded and established by a Chinese holding company registered in mainland China. By way of example, the China-United Arab Emirates Industrial Capacity Cooperation Demonstration Zone (China-UAE Zone) represents a typical BRI investment model and is officially recognised by the National Development and Reform Commission of China as the first overseas industrial capacity cooperation zone. The central government of China and the government of the UAE have agreed a framework for cooperation, under which the UAE provides China with a designated area of land in which to invest. The Jiangsu Provincial Overseas Cooperation and Investment Company (JOCIC), a Chinese provincial state-owned enterprise (SOE) is tasked with implementing investment in and the operations of the zone. During the first phase of development, JOCIC will develop the necessary infrastructure inside the zone, such as roads, buildings, electricity grid and communication cables. In the second phase, JOCIC will invite Chinese small and medium-sized enterprises (SMEs) to invest in the zone and provide financial support to them in connection with the investment. Crucially, the Chinese SMEs, as the main investors, will deal with JOCIC, instead of dealing directly with local investment authorities.

According to Yi Wang, Minister of MOFCOM, a total of 86 overseas economic and trade cooperation zones had been established by the end of 2019 creating approximately 300,000 jobs in the relevant countries (see http://world.people.com.cn/n1/2019/0419/c1002-31039221.html).

Chinese SOEs on the Belt and Road

Even before the advent of the BRI, the United Nations Conference on Trade and Development (UNCTAD) had observed that Chinese SOEs were increasingly internationalising and becoming leading players in international investment (see, for example, UNCTAD's World Investment Report, 2013, *Global Value Chains: Investment and Trade for Development*). Under the BRI, this process has increased and accelerated. In most projects, Chinese SOEs bear the responsibility for top-level design of BRI projects. It is estimated that, by the end of 2018, Chinese central government-run SOEs had undertaken 3,116 projects under the BRI. This level of overseas activity has enabled such SOEs to generate substantial revenues, gain valuable experience, develop new skills and build their international profiles.

Part 2: Country focus on Myanmar

Myanmar has a population of over 50 million, a substantial land mass and a lengthy and largely pristine coastline. It benefits from a strategically important location, bordering Asia's two giants, China and India. It is richly endowed with natural resources, including oil, natural gas, gemstones, precious metals, jade and fertile agricultural land. For parts of the 1950s, Burma (now Myanmar) was the largest rice exporter in the world and Rangoon (now Yangon) airport was a busy regional hub. In 1962, there was a military coup, following which the country's dictator, General Ne Win, embarked on a policy of isolationism and what he inaccurately labelled the "Burmese road to socialism". This proved to be a quick route to poverty and, at the 23rd session of the United Nations Committee for Development Planning on 21–24 April 1987 in New York, the country was included on the United Nations' list of least developed countries.

In 2010, Myanmar started to emerge from five decades of military dictatorship when a civilianised government of retired generals led by President Thein Sein took over from the military. To the surprise of many, the Thein Sein government allowed substantive reforms, particularly on the economic front. It moved away from isolationism and proactively encouraged foreign investment into the country. It also released long-time opposition leader, Aung San Suu Kyi, from house arrest and allowed her and her colleagues in the National League for Democracy (NLD) to run for public office.

In April 2012, the NLD won 43 of 44 seats it contested in national by-elections and the winning candidates subsequently took up their seats in Parliament. In November 2015, the NLD achieved a landslide victory in a largely free and fair general election, winning around 80% of the popular vote. In April 2016, the new NLD government took office, thereby entering into an awkward power-sharing arrangement with the military, whose rights were protected by a 2008 Constitution of which they had been the architects. Aung San Suu Kyi adopted the specially created role of State Counsellor because the Constitution prevented her from becoming President, on the basis that she had been married to a foreign national and her two sons were foreign nationals (see section 59(f) of Myanmar's Constitution, 2008). She and her government

continued to pursue and accelerate economic reforms and market liberalisation.

On 1 February 2021, Myanmar's decade-long experiment with democratisation came to an abrupt end when Min Aung Hlaing, Commander-in-Chief of the *Tatmadaw* (military), seized power, detained State Counsellor Aung San Suu Kyi and President U Win Myint and launched a crackdown on the civilian population. This has thrown the country into disarray and triggered a large-scale Civil Disobedience Movement (CDM). A parallel National Unity Government (NUG) has been established and comprises members of the NLD and of key ethnic minority groups. Similarly, a People's Defence Force (PDF) has formed and appears to be collaborating with some of the long-established ethnic armed organisations.

Myanmar is a country of significant economic potential but, in order to realise its potential, it needs not only peace and stability but also infrastructure of all sorts, including power generation plants, roads, railways, pipelines, deep water ports and airports. In theory, it has the natural resources to pay for these; the jade trade alone was estimated to be worth up to US$31 billion in 2014 (Global Witness report, *Jade: Myanmar's "Big State Secret"*, 23 October 2015). From China's perspective, Myanmar is valuable both for these natural resources and because it provides a shortcut from Yunnan province in Southern China to the Bay of Bengal and the Indian Ocean, without the need to travel through the perilous Strait of Malacca and make the long journey up through the South China Sea.

The BRI received much fanfare in Myanmar, particularly after State Counsellor Aung San Suu Kyi attended the Belt and Road Forum for International Cooperation in Beijing in May 2017, received red carpet treatment and met with President Xi at the Great Hall of the People. At that time, her government and its advisers were cautiously enthusiastic about the BRI. She stressed that BRI-led projects should complement national priorities and take into account environmental concerns and the welfare of local communities. Key advisers highlighted the possibility of beneficial infrastructure investments that could connect the region, expand export markets and lower the cost of trade but, on the other hand, they pointed out the need to scrutinise debt arrangements and avoid falling into a debt trap. Businesses in Myanmar generally welcomed the investment boost for the country's infrastructure but many emphasised the importance of transparency, public engagement and adhering to international practices.

Myanmar's enthusiasm for the BRI subsequently grew further as the country was increasingly ostracised by the West because of the plight of the Muslim *Rohingya*, who fled from Buddhist Myanmar to Bangladesh, following a military crackdown in 2017. In April 2019, State Counsellor Aung San Suu Kyi attended the Second Belt and Road Forum in Beijing and again received red carpet treatment and met with President Xi. Chinese and Myanmar representatives agreed to nine deliverables, including three bilateral agreements. In January 2020, President Xi visited Myanmar and signed 33 bilateral agreements, which set out multiple projects to be built, but left some key bidding, financing and other details open to future negotiation.

The following three major BRI projects in Myanmar are worth highlighting:

The *Kyaukphyu Deep Sea Port* will offer China access to the Bay of Bengal and connect with a pipeline delivering natural gas and oil to Yunnan province. The original cost was fixed at US$7.3 billion but this raised concerns for Myanmar about a potential debt trap and led to the cost being slashed by over US$6 billion. In November 2018, a framework agreement was signed, under which Phase 1 will involve the construction of two jetties with a total investment of not more than US$1.3 billion. For Myanmar, there remain concerns about maritime security, environmental impact and the fact that the project is located in restive Rakhine state from where many *Rohingya* fled.

The China-Myanmar Economic Corridor (CMEC) is intended to be a parallel expressway and railway line, which will run from China's Yunnan province to Mandalay in Myanmar, where it will fork southward to Myanmar's commercial capital, Yangon, and West to Kyaukphyu. On 1 December 2017, President Xi Jinping and State Counsellor Aung San Suu Kyi reached a preliminary agreement on this proposed mega-project. However, the estimated cost of US$20 billion for the Kyaukphyu-Kunming railway again raised concerns for Myanmar about a potential debt trap. In October 2018, an MOU was signed for a proposed railway line from the Myanmar border town of Muse to Mandalay. The proposal for this first phase is that electric trains will run at speeds of 160 kph, which would represent a huge improvement in terms of connectivity. However, the project could easily provoke more armed conflict along the route in Myanmar's

Shan state where ethnic armed groups have been battling the military for decades.

The *New Yangon Development Project* is part of CMEC and envisages a complex of new towns, industrial parks and urban development projects. A framework agreement has been signed and the estimated cost of infrastructure is US$1.5 billion. Question marks remain about whether this project is necessary, as do concerns over the cost and potential floods.

A project which pre-dates the BRI but which is sometimes viewed as necessary for BRI projects to succeed is the *Myitsone Hydropower Project* in Myanmar's Kachin State. In 2009, Myanmar and a Chinese company signed an MOU for the development, operation and transfer of various hydropower projects, including this US$3.6 billion project, which is located at the source of Myanmar's Irrawaddy river in an area of great biodiversity. It involves construction of a dam, which would flood a huge area, destroying villages and displacing more than 10,000 people. There are concerns about potential disruption of the water flow downstream and speculation that the Chinese company running the project may have been using construction vehicles and trucks to remove valuable natural resources from the area and take them across the border. Kachin residents soon started to protest against the project, and this was followed by a widespread public outcry across Myanmar about what was perceived as being a violation of sovereignty. Then-President Thein Sein suspended the project in 2011 but made no final decision as to what should happen to it and passed the problem on to the NLD-led government when it took office in 2016. China pressed Myanmar to relaunch the project, but State Counsellor Aung San Suu Kyi resisted doing so. The underlying agreement contains an arbitration provision but both parties have been reluctant to pursue arbitration and have so far preferred to seek to resolve the dispute at a political level. Although the Myitsone hydropower project pre-dates the BRI, it highlights the problems that can arise with these mega-projects and the need for effective dispute resolution mechanisms.

Since seizing power on 1 February 2021, Min Aung Hlaing's military regime has sought to press ahead with BRI infrastructure projects agreed by the previous NLD government (The Irrawaddy, *Myanmar regime reorganizes Committees to press ahead with BRI projects*, 18 May 2021). However, the practical difficulties for such projects have been heightened by the growth in Myanmar of anti-China sentiment because of Beijing's perceived support for the military regime. This is notwithstanding the fact that publicly Beijing has sought to present a neutral stance. In March 2021, there were multiple arson attacks on Chinese-backed factories in Yangon (The Irrawaddy, *Chinese-owned factories on fire while Myanmar military regime's protest crackdowns escalate*, 14 March 2021) and these have been followed by bomb attacks (The Irrawaddy, *Bomb explodes at a Chinese-backed factory in Myanmar*, 11 June 2021) and threats to blow up pipelines exporting oil and gas from Myanmar to China. All of this highlights the risks to the BRI of local and regional instability.

Part 3: Resolution of disputes

What is a BRI commercial dispute?

Leading Chinese academics have sought to clarify what constitutes a BRI project and it is clear that not all of China's overseas projects in BRI countries are BRI projects. Generally, in order to qualify as a BRI project, a project must: (i) realise common development of enterprises or other institutions; (ii) promote policy communications, facility and infrastructure connectivity, and facilitate trade, financial connectivity and "connect hearts"; and (iii) explore new modes of international cooperation and global governance at a corporate level. Therefore, it is important to distinguish between cross-border disputes involving parties in BRI countries and disputes concerning true BRI projects.

BRI projects could give rise to disputes in three areas: investment disputes between non-state investors and states; investment disputes between states; and private commercial and investment disputes. So far, only the latter category has generated disputes.

A large proportion of BRI-related transactions involve corporate entities established in Mainland China, or their subsidiaries established in other jurisdictions. Not all parties to transactions are from Mainland China, however, since government entities, construction companies, related service companies and financial institutions in BRI countries are all parties to contracts. Further, a wide range of materials and equipment

suppliers and engineering services companies support BRI projects. The scope of BRI transactions therefore is extremely broad, ranging from investments by consortia of Chinese SOEs in large infrastructure projects and related financing by Mainland China financial institutions, to relatively small transactions involving sales of goods or services that are directly or indirectly related to projects. Typically, large projects involve one or more of direct investment in joint venture greenfield projects by Chinese entities or cross-border M&A, investment in energy and infrastructure projects, construction, road, railways and ports, project finance and securitisation, land acquisition, environmental compliance, intellectual property rights, international trade, logistics, labour and employment. Trade in goods and services, whether as part of a project or as outcomes of BRI projects, potentially expand the scope of BRI disputes.

So far, there have been relatively few published examples of major cross-border disputes regarding BRI projects. A review of limited media sources conducted by the authors revealed that the majority of disputes reported in the media concern changes in political circumstances that have disrupted BRI projects and/or land acquisition and environmental compliance issues that have caused delays.

BRI commercial dispute resolution in Mainland China

Given the wide range of disputes that potentially could arise in connection with BRI projects, Chinese authorities have sought to expand mutual judicial assistance arrangements and construct a domestic dispute resolution system that addresses all types of BRI disputes.

In June 2015, the PRC Supreme People's Court (SPC) promulgated *Several Opinions Concerning Providing Judicial Services and Safeguards by the People's Court for Development of the Belt and Road Initiative*. The court's intention was to support the BRI by: expanding bilateral and multilateral mutual judicial assistance arrangements; promoting use of international commercial arbitration and maritime arbitration; promoting use of mediation; promoting recognition and enforcement of foreign judgments in Mainland China; and releasing judicial interpretations and model cases for guidance purposes. So far, the SPC has published a series of 24 guiding cases related to the BRI.

In January 2018, the Comprehensively Deepening Reform Leading Group of the Chinese Communist Party published *Opinions on Establishing Belt and Road Dispute Resolution Mechanisms and Institutions*, which set forth Mainland China's approach to BRI dispute resolution. The Opinions state that Mainland China will establish a BRI dispute resolution system and institutions, with the intention of protecting the legitimate rights and interests of Chinese and foreign parties equally, and creating a stable, fair and transparent business environment. In pursuit of this goal, two new International Commercial Courts have been established in Xian and Shenzhen in Mainland China, with Chinese judges and secretariat members (see the official website of the China International Commercial Court: http://cicc.court.gov.cn/html/1/218/347). The international courts are supervised by the SPC and determine a range of international disputes, not only those related to BRI projects. As of 30 December 2019, the international courts had accepted 13 international commercial cases and finalised five.

Not all BRI-related disputes referred to litigation in Mainland China, however, are heard by the new international courts, many cases are heard by regular courts. For example, in 2019 the Tianjin Maritime Court disclosed that it had heard 272 BRI-related cases. Those cases involve 25 countries and regions including Saudi Arabia, Bangladesh, Greece, Egypt, Singapore, Italy, Vietnam, and Denmark. In 2018, the Shanghai Higher People's Court disclosed that from October 2013 to September 2018, courts in Shanghai heard 2,636 BRI-related cases at first instance. Insufficient information is available to determine whether all of these disputes arose in connection with "true" BRI projects.

In addition to litigation, many arbitral institutions in Mainland China (currently approximately 255 in total) accept BRI cases. The China International and Economic Trade and Arbitration Commission (CIETAC), which is headquartered in Beijing with sub-commissions in Shanghai, Tianjin, Wuhan, Hangzhou Shenzhen, Chongqing and the Hong Kong SAR, regularly administers cross-border commercial disputes. In September 2020, the Guangzhou Arbitration Commission disclosed that 80% of the 276 cases that it had accepted between September 2019 and August 2020 involved BRI countries, although it is unclear whether those

disputes were directly related to BRI projects.

BRI commercial dispute resolution outside of Mainland China

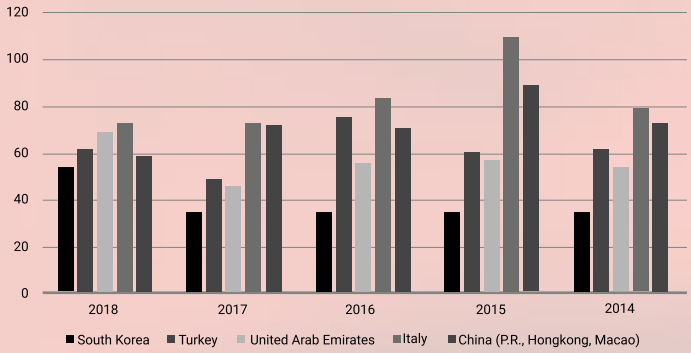
Many leading international arbitration centres have expressed an interest in handling BRI disputes. In particular, the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC), supported by their respective governments, have promoted themselves as appropriate venues for BRI disputes.

Not only has BRI dispute resolution garnered international interest, but the BRI has given impetus to new dispute resolution channels and methods. For example, in Hong Kong, the Department of Justice has supported the establishment of an online platform for dispute resolution, eBRAM.hk, which could be suitable for some BRI-related disputes. Additionally, mutual assistance between Mainland China and Hong Kong has been increased with the 2019 *Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in support of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong SAR*. Under the arrangement, parties involved in HKIAC or International Chamber of Commerce (ICC) arbitration seated in the Hong Kong SAR may apply to courts in Mainland China for interim measures in support of arbitration (see 2019 ICC note at: https://iccwbo.org/content/uploads/sites/3/2019/12/icc-note-on-arrangement-interim-measures-mainland-china-hong-kong-sar.pdf). Both the HKIAC and the ICC's office in Hong Kong are listed by the Hong Kong Department of Justice as arbitral institutions able to administer cases subject to the Arrangement.

Given the geographic scope of BRI projects and the potential complexity and sensitivity of disputes, there is a strong argument for a consistent global approach to dispute resolution. Currently, the only international arbitral institution that offers global services for commercial dispute resolution is the ICC International Court of Arbitration. The ICC and its Secretariat have a long history and a wealth of experience of administering arbitrations arising from disputes similar to potential cross border BRI disputes.

From a geographic perspective, of 2,282 parties involved in ICC arbitration in 2018, 1,044 parties were incorporated in 93 jurisdictions that are recipients of BRI investment. Approximately 46% of all parties involved in ICC arbitration cases in 2018 were from BRI countries. In 2018, the top five most active countries in ICC arbitration that are also recipients of BRI investment were Italy (87 cases), the United Arab Emirates (69 cases), Turkey (62 cases), China (59 cases) and South Korea (54 cases). In 2017, Italy was again the most active country in ICC arbitration (73 cases), followed by China (72 cases), Turkey (49 cases), the UAE (46 cases) and South Korea (35 cases). These five countries have consistently been the most active BRI countries in ICC arbitrations from 2014 to 2018.

Figure 4: BRI – most active countries



In 2018, out of a total of 60 countries selected as seats of arbitration in ICC arbitration cases, 32 countries were BRI countries (approximately 53% of the seats of arbitration).

In January 2018, the ICC Court of Arbitration created the Belt and Road Commission, which engages with the full spectrum of BRI stakeholders in Mainland China and beyond. The ICC has also published *Guidance on Mediation of Belt and Road Disputes* (see https://iccwbo.org/publication/icc-guidance-mediation-belt-road-disputes). Another feature supporting the ICC's global approach is its network of national arbitration committees, which covers a large number of BRI countries. National committees, which assist the ICC in aligning with the requirements of local users of ICC dispute resolution services, are integral to the ICC's decentralised approach. Some 59 of 91 ICC national committees are located in BRI countries.

From a substantive point of view, the two sectors that have generated the largest number of disputes administered by the ICC are the Construction/Engineering and Energy sectors. In 2018, 224 new cases involving these sectors were filed, representing 27% of the total ICC caseload. Those sectors also generated the most mediation disputes handled by the ICC International Centre for ADR, representing 35% of the total caseload in 2018 (see *ICC 2018 Dispute*

Resolution Statistics Report at: https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018). Parties in these sectors are also frequent users of multi-tiered dispute resolution involving, for example, recourse first to dispute resolution boards, which can be administered by the ICC International Centre for ADR, then mediation and ultimately arbitration.

In conclusion, the BRI has had a positive impact on the development of measures for resolution of cross-border disputes in Mainland China. The BRI has also driven the development of dispute resolution outside Mainland China, all of which should help create the framework for a harmonised and knowledgeable approach to future BRI and other cross-border disputes involving China.

Robert S. Pé is an independent arbitrator and mediator. He is a fellow of the Chartered Institute of Arbitrators, a member of the International Court of Arbitration of the International Chamber of Commerce and Co-Chair of the ICC's Belt and Road Commission. He also served two full terms on the Council of the Hong Kong International Arbitration Centre (HKIAC) and is a member of the AIAC, CIETAC, HKIAC, KCAB, LCIA, SIAC, SHIAC and THAC panels of arbitrators. He has dealt with multiple commercial disputes, in which the governing laws of the underlying transactional documents have included Cayman, Delaware, English, Hong Kong, Indian, New York, PRC and Singapore law.

robert.pe@arbchambers.com

Susan Munro has advised financial institutions, multinational companies and investment funds on regulatory and investment matters for more than 20 years. She regularly assists clients with China market entry and exit strategies, mergers and acquisitions and strategic investments, and has extensive experience in the chemicals, pharmaceuticals and medical devices, energy, semiconductor, food, apparel and software industries, as well as the financial services sector.

In her international regulatory practice, Susan assists clients in China with various US, UK and EU regulatory compliance matters, including anti-corruption, anti-money laundering, economic sanctions and trade control matters. For the past 15 years Susan has also conducted numerous China-related Foreign Corrupt Practices Act and SEC investigations in China and throughout Southeast Asia. She is Co-Chair of the ICC's Belt and Road Commission.

smunro@steptoe.com

Dr Zhijin (Donna) Huang, Director of ICC Arbitration and ADR, North Asia. She is in charge of business development for ICC Arbitration and ADR services in Asia, with a focus on North Asia. Donna developed her experience working as a law professor, counsel, legal expert, and consultant in a Chinese University, a law firm as well as for ICC and the Chinese Ministry of Commerce. Donna has been active in government-level academic exchange before she joined ICC. She was granted Fulbright Fellowship and EU Erasmus Fellowship and has published widely on issues of international law in China.

donna.huang@iccwbo.org

Baptiste Rigaudeau is a member of the ICC's Belt and Road Commission. He specialises in international arbitration, with a focus on commercial and investor-State disputes. He has experience working as counsel and secretary to international arbitration tribunals under ICC, HKIAC, SIAC, SCC, CIETAC, CMAP, ICSID and UNCITRAL rules, in proceedings governed by various procedural and substantive laws, both common and civil. He has experience in the energy, particularly in oil and gas, construction, banking, telecommunications, hotel and pharmaceuticals sectors. He also has experience in cross-border litigation and asset recovery matters.

brigaudeau@lalive.law

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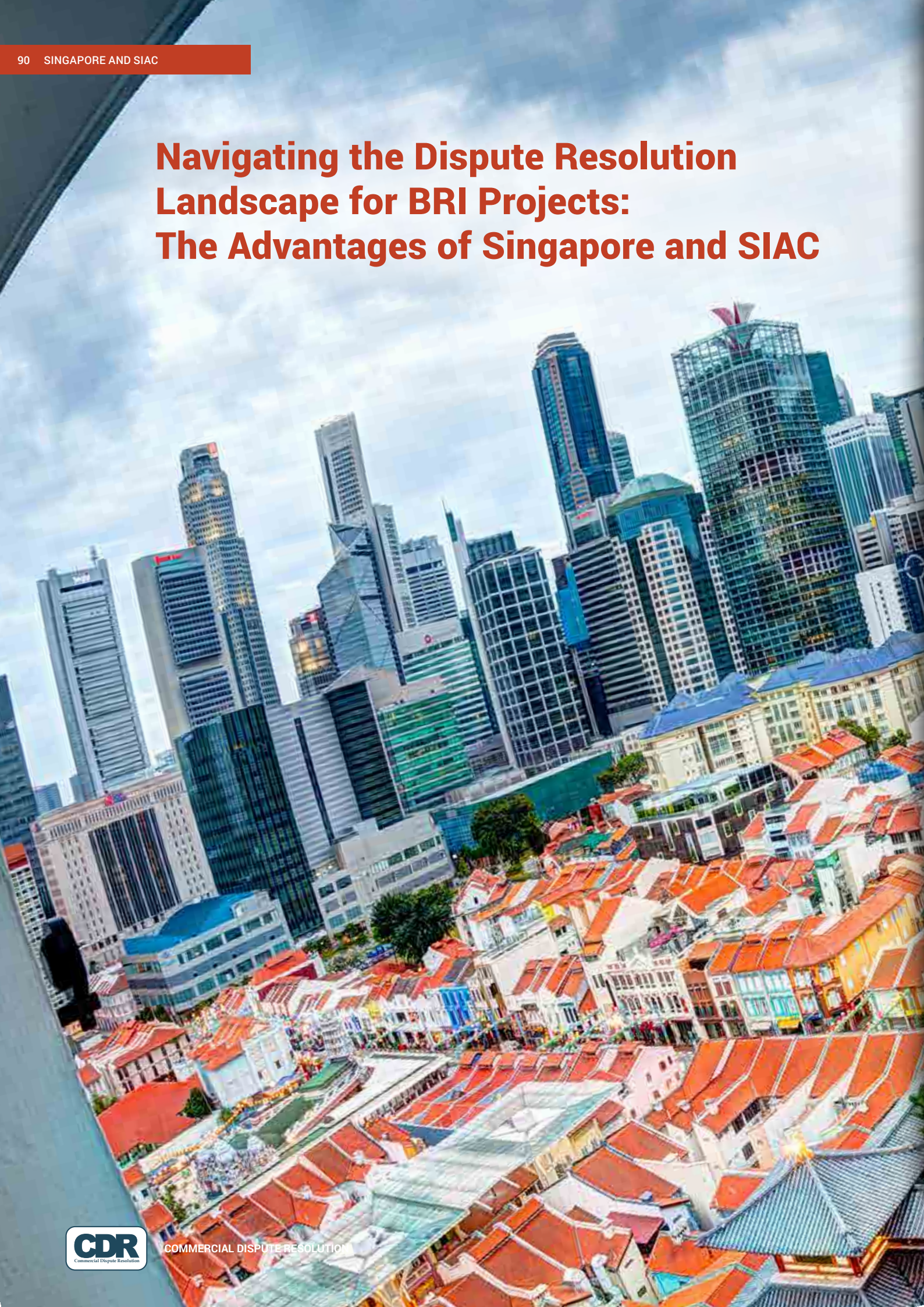
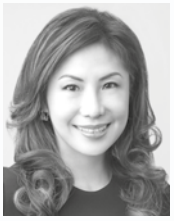
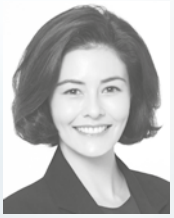
Navigating the Dispute Resolution Landscape for BRI Projects: The Advantages of Singapore and SIAC





Seok Hui Lim
SIAC



Michele Park Sonen
SIAC

Qian Wu
SIAC

Introduction

In recent years, Asia has taken centre-stage in the global economy due to its rapid growth and economic development. China's Belt and Road Initiative (**BRI**) has contributed to this growth. Often described as the 21st century Silk Road, the BRI consists of a "belt" of economic and overland transport links connecting China to Central Asia and Europe, and a "road" or network of maritime routes connecting Asia, the Indian Ocean, the Middle East, Africa and Europe.

The multi-party, multi-contract, and cross-border nature of BRI projects results in disputes that tend to be complex and present unique challenges and concerns. Access to a dispute resolution mechanism that is flexible, efficient, final and enforceable is essential for companies engaged in BRI projects.

Singapore and SIAC provide such a mechanism. International arbitration has enjoyed robust growth throughout Asia as the preferred mode of dispute resolution for cross-border disputes. In 2021, Singapore jointly ranked with London as the most popular arbitral seat in the world and the most preferred seat in Asia-Pacific (2021 International Arbitration Survey: Adapting Arbitration to a Changing World, Queen Mary University of London and White & Case, available at www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey). In the same year, SIAC reaffirmed its global standing when it was ranked the most preferred arbitral institution in Asia-Pacific and second among the world's top five arbitral institutions.

Background of BRI projects

Since its launch in 2013, the BRI has achieved substantial progress. As of January 2021, 140 countries have jointed the BRI by entering into Memoranda of Understanding with China (Nedopil, Christoph (2021): "Countries of the Belt and Road Initiative", Beijing, IIGF Green BRI Center, available at www.green-bri.org). The BRI has reached the far corners of the globe, with a substantial number of participating countries based in Asia, but also including countries in the Middle East, Africa, and Europe.

BRI projects have strengthened interconnection in communication, trade, finance and infrastructure among BRI countries. It has also strengthened Chinese economic engagement. From 2013 to 2018, the aggregate amount of imports and exports between China and other BRI countries exceeded USD 6 trillion. By November 2019, Chinese contractors earned over USD 400 billion in profits from overseas projects (Xinhua News, "*China issued 'One Belt One Road: Progress, Contribution and Prospects' report*", available in Chinese at www.xinhuanet.com//world/2019-04/22/c_1124399473.htm). In 2020, Chinese investments in BRI countries amounted to USD 47 billion (Nedopil Wang, Christoph (January 2021): "China's Investments in the Belt and Road Initiative (BRI) in 2020", Green BRI Center, International Institute of Green Finance (IIGF), Beijing).

A key objective of the BRI is to connect Asia to Africa and Europe through overland and maritime transport corridors. These corridors provide rich opportunities for cross-border cooperation in developing railways, roads, ports, and telecommunication construction. BRI infrastructure projects necessarily involve the destination country's government or State-owned enterprises, and risks associated with such projects include, among others, security, political instability, legal and regulatory hurdles and disruptions to the labour market (The Economist Intelligence Unit, "*Prospects and Challenges on China's 'One Belt, One Road': a Risk Assessment Report*", p. 11).

Case Study

A concluded case at SIAC illustrates the types of

disputes that might arise from regulatory risks in BRI projects. The case concerned an infrastructure project involving several contracts in connection with the construction of infrastructure in the host State, and involved a foreign investor (who was also the contractor for the project) and an Asian country. The investor claimed that the State had unlawfully terminated the contracts based on the contractor's alleged failure to satisfy regulatory requirements. The contractor maintained that it was familiar with the regulatory scheme, having operated in the State for more than 10 years on various projects, and had fully complied with the requirements. The contractor commenced arbitration against the State seeking compensation for the allegedly unlawful termination of the agreements.

The Case Study illustrates some typical features of disputes that may arise from BRI infrastructure projects, namely, multiple contracts, involvement of cross-border parties and a State, and regulatory risks. With these issues in mind, parties to BRI projects should take proactive steps to prepare for potential disputes by selecting a dispute resolution forum that is tailored to meet the needs of BRI projects.

Advantages of Singapore and SIAC for resolving BRI disputes

Arbitration as the preferred mode of dispute resolution for BRI disputes

With any cross-border project, differences may arise from time to time. When selecting a dispute resolution method to resolve those disputes, companies must consider the specific needs of their projects. Most BRI projects are related to infrastructure, construction or long-term energy exploration and supply. These projects are typically large-scale and long-term, and they generally involve several parties, including project owners, investors, contractors, sub-contractors, States, or State-owned entities from various jurisdictions. Given the complex and long-term nature of these projects, effective dispute resolution requires the sensitive handling of business relationships with counterparties, the ability to resolve related disputes against several parties in a single forum, finality, enforceability, flexible procedures, confidentiality, efficiency, and cost-effectiveness. This will ensure that the dispute is resolved quickly with minimal disruption to the project and preserve the working relationship between the parties.

International arbitration is well suited to resolve disputes arising out of BRI projects. Compared to litigation in national courts, arbitration respects party autonomy and allows users the flexibility to craft their dispute resolution process to suit the special circumstances of their case. Arbitration also provides a neutral forum, internationalised procedures and rules, confidentiality, and international enforceability of final and binding arbitral awards through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**).

Flexible procedures and party autonomy. Arbitration provides parties with the flexibility to craft a process that meets the specific needs of the dispute at hand. For instance, parties may choose to limit the scope of document production by applying the IBA Rules on the Taking of Evidence to documents that are relevant and material to the outcome of the case. For added convenience and efficiency, parties may rely on virtual hearings in place of in-person hearings when parties and members of arbitral tribunals are located in different locations, and utilise procedures such as chess-clock arbitrations or "hot-tubbing" of expert witnesses. Parties have the right to select their arbitrators taking into account particular factors such as the technical expertise required or cultural or language considerations.

The COVID-19 pandemic underscored the value of flexibility as institutions like SIAC, users, practitioners, and tribunals quickly embraced technology to allow arbitrations to proceed uninterrupted amid travel restrictions and lockdowns. To illustrate, in 2020, 53% of merits hearings at SIAC were conducted virtually, as compared to 5% in 2019.

Neutral forum. International arbitration offers parties the option of an impartial and independent forum for the resolution of their disputes. In contrast, there may be perceptions of home-court advantage for the local counterparty in a national court litigation.

Internationalised procedures and rules. Applicable court rules and procedures vary from country to country, particularly among common law and civil law jurisdictions. International arbitration offers more predictability and neutrality as it applies procedures that incorporate features from both civil and common law legal systems and that have been widely accepted across various jurisdictions.

Confidentiality. Another cornerstone of the arbitral process is the ability to keep the dispute

confidential and have the dispute heard in a private setting. By contrast, in litigation, the hearings are often conducted in open court where the public is permitted to attend, and most national courts make certain case information available to the public, including the parties' submissions and evidence in many cases. Preserving confidentiality will not only safeguard the reputation of the parties, but may also protect the parties' businesses from being affected by the ongoing dispute.

Finality. Arbitral awards offer parties greater finality than court judgments due to the limited avenues for appeal in international arbitration. The SIAC Rules (Rule 32.11, SIAC Rules 2016), for example, provide that "any Award shall be final and binding on the parties". Any judicial review of arbitral awards is generally limited to the narrow grounds for refusing enforcement of an award under the New York Convention or for setting aside an award at the arbitral seat under the national law of the arbitral seat.

Cross-border enforceability of arbitral awards. The New York Convention is the cornerstone of international arbitration. Under the Convention, an award rendered in any of the contracting States may be enforced in another contracting State, with only limited grounds for review by domestic courts.

With 168 contracting States (as of 30 June 2021), including the vast majority of countries that participate in the BRI, the New York Convention makes arbitration a highly effective dispute resolution tool for BRI projects. The complex and cross-border nature of BRI projects means that disputes often involve multiple parties from several different jurisdictions. The Convention's enforcement regime helps ensure the broad enforceability of awards arising out of these disputes.

SIAC and Singapore are well placed to resolve disputes arising out of the BRI

Singapore as the arbitral seat

Singapore and SIAC are well positioned to support the needs of parties for a trusted and neutral third-party forum to settle their BRI disputes. As noted in the Introduction, in 2021, Singapore jointly ranked with London as the most preferred arbitral seat in the world. There are several reasons behind Singapore's ranking. Singapore is recognised worldwide as a neutral, independent, and stable arbitration forum. As a party to the New York Convention, Singapore offers parties

broad enforceability of awards rendered in Singapore.

Singapore has progressive and arbitration-friendly legislation that facilitates the arbitral process. Singapore is an UNCITRAL Model Law jurisdiction, and its international arbitration laws are regularly updated to incorporate global best practices and jurisprudential developments. In 2012, Singapore was the first jurisdiction globally to adopt legislation expressly making awards and orders issued by emergency arbitrators enforceable in Singapore courts. In 2017, Singapore passed legislation making third-party funding agreements legal and enforceable for international arbitrations and related court proceedings and mediation. Third-party funding allows parties to manage the risks of financing BRI disputes, which can be costly.

Singapore's judiciary maintains a policy of "minimal curial intervention in arbitral proceedings" (*Prometheus Marine Ptd Ltd v King Ann Rita*, [2017] SGCA 61 at [57] (citing *AKN v ALC* [2015] 3 SLR 48 at [37]-[39])), and is widely regarded as being pro-arbitration.

Geographically, Singapore is an ideal choice given that a significant number of BRI projects are based in Asia. Singapore is conveniently located in the heart of Asia and is a hub for international dispute resolution and trade. It has excellent connectivity and infrastructure, and world-class hearing facilities are available at Maxwell Chambers. Maxwell Chambers also offers secure virtual hearing services, which can provide parties with added convenience and cost-efficiency.

The Singapore Convention on Mediation, which seeks to increase the enforceability of mediated settlement agreements across countries, further enhanced Singapore's status as a premier dispute resolution hub. Singapore delegates played a key role in the negotiations and drafting of the treaty, and the Convention opened for signature at a signing ceremony in 2019 hosted by Singapore.

SIAC is a premier global arbitral institution that provides best-in-class services to parties involved in BRI projects

With BRI investments frequently involving massive infrastructure projects with parties from several jurisdictions, including States and State-owned entities, it is essential for parties to select an arbitral institution that has a reputation for offering trusted, even-handed and best-in-class case management services.

SIAC is a premier global arbitral institution with one of the world's largest international administered caseloads. In 2020, SIAC's annual case filings reached 1,080 new case filings (including two sets of related cases involving 261 cases and 145 cases), 98% of which were administered by SIAC. Over the course of a decade – from 2010 to 2020 – new case filings at SIAC increased by more than five times.

As testament to SIAC's prominence as a dispute resolution forum, SIAC's users came from over 100 jurisdictions from 2015 to 2020, with an average of 59 jurisdictions per year. By the end of the decade, 94% of SIAC's annual case filings were international.

At the same time, with roots in Asia, SIAC understands the cultural and legal context of disputes that arise in Asia and involve Asian parties. SIAC incorporates this specialist knowledge into its case management and arbitrator appointments.

SIAC's people

SIAC offers parties involved in BRI projects expertise as well as the twin advantages of language and cultural fluency. SIAC's case administration is supervised by the SIAC Court of Arbitration, which is comprised of eminent arbitration experts from common law and civil law jurisdictions around the world, including several well-known Chinese arbitration experts and leading Singaporean practitioners who are fluent in Chinese. The President of the Court, Mr. Gary Born, is one of the world's foremost authorities on international commercial arbitration and international litigation.

The SIAC Court is responsible for the overall supervision of case administration, and its functions include determining jurisdictional objections, applications for consolidation and joinder, and challenges to arbitrators. The SIAC Court is involved in rule revisions to ensure that the SIAC Rules are progressive and responsive to the constantly evolving needs of the international business community.

When SIAC makes an arbitrator appointment, the President of the SIAC Court makes the appointment. Appointments are made on the basis of SIAC's specialist knowledge of an arbitrator's expertise, experience, and track record. In making appointments, SIAC looks first to its Panel of Arbitrators, which is made up of over 500 arbitrators from over 40 jurisdictions. Over 100 arbitrators on the SIAC Panel from 25 jurisdictions have experience in the energy, engineering, procurement and construction sectors, which constitute the bulk of BRI projects and investments. The standards for admission to the SIAC Panel are rigorous. Applicants must have, among others, at least 10 years' post- qualification experience, experience as an arbitrator in five or more cases, and completed at least two commercial arbitration awards.

The SIAC Secretariat is comprised of a team of experienced, international lawyers qualified in common law and civil law jurisdictions, including Canada, China, England and Wales, India, Indonesia, Malaysia, the Philippines, Singapore and the US, who are able to administer arbitrations in several languages including Chinese and other languages used in BRI countries such as Bahasa Indonesia and Tagalog.

SIAC Rules and Procedures

The SIAC Rules adopt globally recognised best practices in international arbitration and incorporate elements from common law and civil law legal systems. SIAC has significant case management expertise in handling cases from civil and common law jurisdictions, as reflected in SIAC's top 10 foreign user rankings, which include a broad spectrum of civil and common law users. Chinese parties are a top foreign user of SIAC and have been a strong contributor to SIAC's caseload in the last several years. SIAC is also popular with non-Chinese BRI parties, including parties from Malaysia, Indonesia, Philippines, Thailand, and the UAE, which also rank among the top foreign users at SIAC.

SIAC awards are routinely enforced in BRI jurisdictions around the world, including China, Vietnam, and Indonesia.

Pursuant to Rule 32.3 of the SIAC Rules 2016, prior to making any award, the Tribunal is required to submit the award in draft form to the Registrar of SIAC. SIAC's scrutiny process enhances the enforceability of awards. The Registrar may suggest modifications to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw the Tribunal's attention to points of substance. No award shall be made by a Tribunal until it has been approved by the Registrar as to its form.

SIAC is cost-competitive and efficient. In a March 2018 comparative analysis published in an article on the cost and duration figures released by HKIAC, LCIA, SCC and SIAC in their respective costs and duration studies, the authors concluded that SIAC arbitrations are "*the most efficient in comparison to the other arbitral institutions*" and that "*for three-arbitrator cases in particular, SIAC remains significantly cheaper than LCIA and SCC where the costs extend to six-digit figures*" (CMS Holborn Asia and the Society of International Law (Singapore), "Costs and Duration: A Comparison of the HKIAC, LCIA, SCC and SIAC Studies", available at www.cms-lawnow.com/ealerts/2018/03/costs-and-duration-a-comparison-of-the-hkiac-lcia-scc-and-siac-studies?_ga=2.62008740.946824904.1521515320-2038661890.1521190603).

SIAC's cost calculation method also provides parties with certainty and transparency at the outset, which enables companies to more accurately budget for an impending dispute. SIAC's Schedule of Fees is based on an *ad valorem* system, in which the costs of the arbitration are generally based on the sum in dispute in a particular case. When an arbitration is first commenced, SIAC will estimate the maximum costs of the arbitration with reference to the total value of the claim(s) and counterclaim(s) in the arbitration proceedings in accordance with the SIAC Schedule of Fees. Prior to the constitution of the Tribunal, parties may elect an alternative method to determine the Tribunal's fees, such as hourly rates, but rarely do so. An objective assessment of the arbitrator and administration fees is carried out by the Registrar at the end of the arbitration, taking into consideration time incurred, complexity, hearings, questions of law and efficiency.

SIAC prioritises time and cost-effectiveness, and the SIAC Rules contain several mechanisms to help parties save time and reduce costs. Time-saving mechanisms can help parties to BRI disputes quickly resolve disputes that arise in the middle of a long-term project and prevent lengthy delays to the project.

SIAC's most popular time and cost-saving provisions are: (1) the Emergency Arbitrator procedure; (2) Expedited Procedure; (3) Consolidation and Joinder; (4) Early Dismissal; and (5) the SIAC-SIMC Arb-Med-Arb Protocol.

Emergency Arbitration. SIAC's Emergency Arbitrator (**EA**) mechanism provides parties with access to urgent interim relief prior to the constitution of the Tribunal. It was first introduced into the SIAC Rules in 2010, and SIAC was the first arbitral institution based in Asia to introduce an EA mechanism in its rules. EA is particularly useful when a party may face difficulties or be precluded from obtaining urgent relief from the local courts.

Under the SIAC Rules (Schedule 1, SIAC Rules 2016), the President of the SIAC Court will appoint an EA within one calendar day. The EA is then required to issue an interim order or award within 14 days from his or her appointment.

As of 31 December 2020, SIAC had received 114 applications from parties to utilise the procedure.

Expedited Procedure. SIAC also offers an Expedited Procedure when: (i) the total amount in dispute does not exceed SGD 6 million (approximately USD 4.4 million); (ii) in cases of exceptional

urgency; or (iii) by party agreement (Rule 5, SIAC Rules 2016). Under the SIAC Rules, an arbitration conducted under the Expedited Procedure must be concluded with issuance of a final award within six months from the constitution of the Tribunal.

As of 31 December 2020, SIAC had received 622 applications to conduct arbitrations under the Expedited Procedure. More than half of these applications have been accepted.

Consolidation and Joinder. Consolidation (Rule 8, SIAC Rules 2016) allows parties to consolidate two or more arbitrations, and joinder (Rule 7, SIAC Rules 2016) allows parties to join additional parties to an existing arbitration. BRI disputes commonly involve multiple contracts and multiple parties, and SIAC's consolidation and joinder rules facilitate resolving related disputes involving multiple contracts or parties in a single arbitration. The benefits of resolving related disputes in a single arbitration include enhancing efficiency, reducing costs, and preventing inconsistent findings by multiple tribunals.

Early Dismissal. The Early Dismissal (**ED**) mechanism allows parties to dismiss frivolous claims and defences at an early stage of the proceedings (Rule 29, SIAC Rules 2016). Pursuant to the ED procedure, claims and defences may be dismissed when they are manifestly without legal merit or manifestly outside the Tribunal's jurisdiction. SIAC was a first-mover with respect to ED, as it was the first major commercial arbitral institution to introduce the mechanism in its rules in 2016.

ED has the potential to significantly reduce time and costs when an opposing party has asserted frivolous claims or defences. For instance, in a successful case at SIAC, a case valued at SGD 30 million (approximately USD 22 million) was concluded within six months when the Tribunal determined that all of the Claimant's claims were "manifestly without legal merit" and dismissed those claims pursuant to the ED mechanism.

Arb-Med-Arb Protocol. Arbitration and mediation are complementary forms of alternative dispute resolution that give parties greater flexibility for the efficient, expert and enforceable resolution of their disputes. Recognising this, SIAC and the Singapore International Mediation Centre (**SIMC**) introduced the SIAC-SIMC Arb-Med-Arb Protocol in 2014 to allow parties to formally consider mediation as part of their dispute resolution process. The Arb-Med-Arb protocol allows parties to move seamlessly between arbitration at SIAC and mediation at SIMC. In the event that parties are able to settle their dispute, the mediated settlement agreement can be recorded as a consent award to benefit from the New York Convention for cross-border enforcement.

Case Study

The Case Study discussed in the "Background of BRI projects" section of this chapter is an illustrative example of how SIAC's procedures can benefit BRI infrastructure projects. In that case, the State had been issued a performance bond to guarantee the project. When the dispute arose, the State threatened to call on the bond on the ground that the contractor had caused undue delay, in part due to its alleged failure to comply with regulatory requirements. In response, the contractor used SIAC's EA procedure. Upon filing its Notice of Arbitration, and before the Tribunal was constituted, the contractor filed an EA application to enjoin the State from calling on the bond. SIAC accepted the application and appointed an EA to rule on the request for interim relief. On the 13th day after its appointment, the EA ruled in favour of the contractor and enjoined the State from calling on the bond pending a decision on the merits by the Tribunal.

The contractor also relied on SIAC's consolidation provisions. As the dispute had arisen under several separate contracts with the State, the contractor had commenced a separate arbitration under each of the contracts and sought to consolidate the separate arbitrations. The SIAC Court, after reviewing the contractor's consolidation application and the State's response, concluded that the agreements in the separate contracts were compatible and the disputes arose out of the same legal relationship, and consequently, granted the consolidation. This resulted in, among other benefits, substantial cost savings for both the contractor and the State, as the costs of the arbitration and legal fees were limited to costs arising from a single arbitration instead of multiple arbitrations.

SIAC Model Arbitration Clause

To ensure that parties' intention for arbitration at SIAC under the SIAC Rules is reflected clearly and unambiguously in their contract, SIAC rec-

ommends that parties include the following SIAC Model Arbitration Clause in their contracts:

> *"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.*
> *The seat of the arbitration shall be [Singapore].**
> *The Tribunal shall consist of _____** arbitrator(s).*
> *The language of the arbitration shall be _____.*
>
> * Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").
> ** State an odd number. Either state one, or state three.
>
> Parties should also include an applicable law clause. The following is recommended:
>
> *"This contract is governed by the laws of _____.***"*
>
> *** State the country or jurisdiction.

Following the delocalisation of the seat of arbitration in the SIAC Rules 2016, "Singapore" is no longer the default seat of arbitration in the event that it is not specified in the arbitration clause. Rule 21.1 of the SIAC Rules 2016 provides that: "The parties may agree on the seat of the arbitration. Failing such an agreement, the seat of the arbitration shall be determined by the Tribunal, having regard to all the circumstances of the case."

The choice of the seat of the arbitration is important as it determines which procedural law would apply to the arbitration for procedural matters, and which national court has the authority to supervise the conduct of the arbitration and review the arbitral award in the event of a setting aside application. As awards are deemed to be made at the seat of the arbitration, the choice of the seat would also determine the enforceability of the award under the New York Convention. It is thus important that parties specify the seat of arbitration in their arbitration clause, to avoid complications over the applicable seat of arbitration. In contrast to the "seat", the "venue" of the arbitration refers to the place where the arbitration hearings are to be held.

As mentioned earlier in the chapter, Singapore is a popular seat of arbitration with parties, due to its pro-arbitration judiciary and its trusted legal system. Singapore is also a popular venue for arbitration hearings due to its excellent connectivity and infrastructure, and its world-class hearing facilities at Maxwell Chambers.

SIAC Investment Arbitration Rules

As BRI projects require significant investments by foreign investors in host States, the SIAC Investment Arbitration Rules 2017 (**SIAC Investment Rules**), which is a dedicated set of arbitral rules for investment arbitrations, would be particularly useful.

The SIAC Investment Rules are a specialised set of arbitration rules carefully tailored to provide an impartial and balanced framework for the resolution of investment disputes involving States, State-controlled entities or intergovernmental organisations whether arising out of a treaty, statute or other instrument.

The SIAC Investment Rules apply to any type of arbitration. There is no objective criteria for the existence of an "investment" or "investor", or the presence of a State or State entity (Introduction (ii), Investment Arbitration Rules). This seeks to minimise issues of jurisdictional criteria, which are often the subject of significant dispute. An agreement to refer disputes to arbitration in accordance with the SIAC Investment Rules will constitute a waiver of any right of immunity from jurisdiction, but this will not prejudice a party's right to immunity from execution (Rule 1.3, Investment Arbitration Rules).

Some of the key features of the SIAC Investment Rules include:

a) A default list procedure for the appointment of the sole or presiding arbitrator and an opt-in mechanism for the appointment of an EA.
b) Strict timelines on challenges to arbitrators with built-in discretion for the arbitration to proceed during the challenge.
c) A procedure for early dismissal of claims and defences.
d) Provisions for submissions by non-disputing parties.
e) Provisions to enable the Tribunal to order

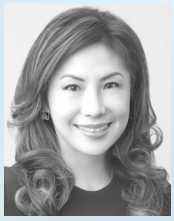
the disclosure of third-party funding arrangements and to take such arrangements into account when apportioning costs.

f) Timelines for the closure of proceedings and the submission of the draft Award.

g) Provisions relating to confidentiality and the discretionary publication of key information relating to the dispute.

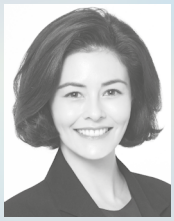
Conclusion

As BRI projects continue to grow in scope and complexity, parties will require an effective dispute resolution mechanism to address the unique challenges that may arise from time to time. By providing a neutral, independent forum for the efficient, expert and enforceable resolution of international commercial and investment disputes, Singapore and SIAC are well positioned to support the needs of companies, businesses and investors in BRI projects all over the world.



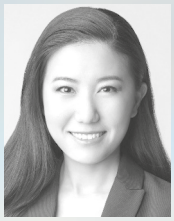
Seok Hui Lim is the Chief Executive Officer of SIAC. As the CEO, Ms Lim is responsible for the overall management and operations of SIAC, including business development. She formerly practised in Singapore and Hong Kong SAR as a corporate and M&A lawyer with international as well as Singapore law firms, and has also held General Counsel positions in various multinational corporations. She is called to the Singapore Bar and the Bar of England & Wales, and is also admitted as a solicitor in England & Wales and Hong Kong SAR. Ms Lim previously held a concurrent role as the first Chief Executive Officer of the Singapore International Mediation Centre (SIMC), and currently sits on the Board of Directors of SIMC.

seokhuilim@siac.org.sg



Michele Park Sonen is the Head (North East Asia) at SIAC where she oversees SIAC's activities in South Korea and Japan. Prior to joining SIAC, Michele worked with the International Arbitration Practice Group of a leading Korean law firm where she represented clients in international arbitrations arising out of a broad range of commercial disputes. Michele is qualified as an attorney in the United States, and she previously served as law clerk to a federal appeals court judge and a federal district court judge in the United States.

michelesonen@siac.org.sg



Qian Wu is a Counsel with SIAC and has administered more than 200 arbitration cases conducted under the SIAC Rules/UNCITRAL Rules. Qian assists the SIAC Court of Arbitration with various procedural applications and the constitution of the arbitral tribunal. Qian is also the Assistant Editor of the *Asian International Arbitration Journal*.

qianwu@siac.org.sg

Since commencing operations in 1991 as an independent, not-for-profit organisation, **SIAC** has established a track record for providing best in class arbitration services to the global business community. SIAC is a global arbitral institution providing cost-competitive and efficient case management services to parties from all over the world. Our Board of Directors and Court of Arbitration consist of eminent lawyers and professionals from all over the world. Our Panel of Arbitrators has over 500 experienced arbitrators from more than 40 jurisdictions. The SIAC Rules provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all sizes and complexities involving parties from diverse legal systems and cultures.

www.siac.org.sg

SIAC
Singapore International Arbitration Centre

Brunei

Dr Colin Ong QC
Dr Colin Ong Legal Services

Connection to Belt and Road Initiative projects

1.1 Anticipated role of Brunei within Belt and Road Initiative scheme

The Belt and Road Initiative (BRI) is one of the most significant projects of its kind to have been launched in the 21st century. The BRI is China's brainchild, and it seeks to expedite connectivity of infrastructure, unimpeded trade and financial integration covering 65 core countries in Asia, Africa and Europe.

The countries along the BRI are able to boost their own individual economic and trade exchanges with China and other countries along the BRI. Further, the countries along the route of the BRI play an important part in acting as an unofficial platform of communication, promoting closer economic and trade cooperation and development between the countries.

Countries within the BRI understand that the possibility of attracting more foreign direct investment (FDI) into their country will lead to the creation of more jobs for their population as well as spin-off commercial opportunities for their local businesses.

After Singapore, Brunei is the second-smallest country in the ASEAN region. It has the smallest population but enjoys the second-highest level of Gross Domestic Product (GDP) (nominal) per capita within the ASEAN region. The oil and gas and hydrocarbon industries have always been the backbone to its economy and economic achievements. Like other oil-rich countries, Brunei is also looking for diversification to its economy in order to become less dependent on its oil and gas revenues. The Brunei Government's national vision of "*Wawasan 2035*" has 13 specific strategies, of which infrastructure is a key priority.

Brunei's commitment to continued prosperity and stable macroeconomics is underscored by Brunei's vision of "*Wawasan 2035*", the objectives of which fit in perfectly with the BRI. The objectives of China's BRI are not very different from Brunei's vision of "*Wawasan 2035*", and both share a lot in common. Brunei has expressed its readiness to expand cooperation on all fronts with the BRI scheme and China has also expressed its willingness to align the BRI with "*Wawasan 2035*" to boost regional connectivity and development.

Brunei recognises that the BRI will assist Brunei to speed its transition to a diversified economy through investments made in the country, and the increase of trade exchanges

between the two countries is in line with Brunei's vision of "*Wawasan 2035*".

1.2 Expected types of investments in BRI projects

Brunei has offered foreign investors a wide range of sectors for business opportunities in the fields of agriculture, communications, construction, economy, environmental technologies, food processing and packaging, franchising, fisheries, forestry, manufacturing, wholesale and retail trade, transport and storage, real estate, petrochemicals, mining, health technologies, information technology and financial services and others.

Brunei is also keen to increase its experience in developing emerging industries such as the digital economy and e-commerce.

According to the latest data available in the country report of Brunei by the International Monetary Fund (IMF), Brunei did not attract foreign investment for real estate as every transfer of ownership of land property requires the approval of "*His Majesty in Council*", which is a council of officials representing the Sultan. Perhaps the only legislation that has directly affected and dampened the investment climate in Brunei Darussalam in a negative way is the century-old Land Code (Cap 40). At present, companies cannot own land in their own name. When compared with neighbouring countries in Southeast Asia, there is often no or very little transparency in regard to the policies of the Land Department, and it is often very difficult, or even impossible, to transfer land, private property or commercial property titles, even amongst Bruneian citizens.

1.3 Known ongoing or anticipated BRI projects

China is one of Brunei's top trading partners and Chinese companies have been steadily investing in the modernisation of Brunei's infrastructure for a number of years. In 2014, the Brunei-Guangxi Economic Corridor was established with the objective of better connecting the Southern Chinese province of Guangxi to the Sultanate and to facilitate Chinese investment in Brunei.

Chinese companies are also eager to partner with Brunei firms on infrastructure construction projects as these types of projects assist China in its plans to improve connectivity across Asia.

The largest current BRI project in Brunei is the joint petrochemical venture between Brunei and China. Since 2018, Brunei's industrial complex with a deep-water seaport in Muara has been operated by Hengyi Industries Sdn Bhd (which is owned by China's Zhejiang Hengyi Group) and Damai Holdings, a wholly-owned subsidiary of the Brunei Government's Strategic Development Capital Fund. This has become a flagship project under the framework of the Brunei-Guangxi Economic Corridor.

The joint petrochemical venture project has overall responsibility for the 955-hectare Pulau Muara Besar (PMB) Industrial Park. The PMB Industrial Park, which is set on an island in Brunei Bay, is home to a vast oil refinery and petrochemical installation. This joint petrochemical venture project is a shining example of a venture under the BRI.

The installation work for this joint petrochemical venture project began in 2017, with the first stage taking place on a 276-hectare piece of land with an investment in the sum of USD 3.5 billion to secure its development and implementation, while investment towards the development of the second phase of the project is in the sum of USD 12 billion. This project has captured the attention of financial markets around the world.

After successful completion of the first phase of the project, it is estimated to have increased Brunei's GDP by USD 1.33 billion in 2020 alone.

China's construction firms have also made significant in-roads into infrastructural projects, including the construction of major bridges and highways. A key project under Brunei-China BRI relations is the completion of the Temburong Bridge with investment of USD 1.2 billion from the Brunei Government. Being 30 kilometres long, it is the longest bridge in Southeast Asia. It was officially opened on the 17 March 2020 and links the capital city, Bandar Seri Begawan, with the Temburong District. The Temburong Bridge was jointly built by the China State Construction Engineering Corporation, a Chinese state-owned company, and Daelim, a South Korean company.

The Temburong Bridge is the largest and most influential transportation infrastructure project in Brunei as it now links the two halves of the country. It is part of the broader trend of growing ties between China and Brunei. It has allowed Chinese companies to demonstrate their technological strength while at the same time generating good economic and social results.

While the real impact of the Temburong Bridge lies in transportation, people-to-people travel and the economic growth of the district itself, the Temburong Bridge project continued to build upon the expanding bilateral ties between the two countries.

There was no formal announcement of BRI backing for the 18.6-kilometre Telisai Lumut Highway project. However, this dual carriageway project was built by Surati Construction Sdn Bhd in partnership with China Communication

Construction Company Third Harbour Engineering Co Ltd and completed in June 2016. This project was solely financed by the Brunei Government for the sum of USD 98.2 million. The joint-venture Muara Port Company Sdn Bhd was formed by China's Guangxi Beibu Gulf Port Group and Brunei's Darussalam Assets in 2017 to operate Brunei's largest container terminal. It has been dedicated to improving the port's operational efficiency, cutting logistics costs and boosting cargo-handling capacity.

Brunei recently attended the Boao Forum for Asia (BFA) Annual Conference in Boao, People's Republic of China on 20 April 2021. It is expected that there will be more additional and upcoming Brunei-China BRI projects, which have yet to be announced, but will be in due course.

II Country overview

2.1 Economy

Brunei's economy has continued with a modest pace of growth, despite a decrease in the activities of oil and gas. According to the Department of Economic Planning and Statistics, Brunei's GDP in 2019 was USD 13.469 billion. The GDP in the last nine months of 2019 and first nine months of 2020 recorded a positive growth while the GDP in the fourth quarter of 2020 posted negative growth of 1.4%. The negative growth was due to both the onset of the COVID-19 pandemic and the decline in demand in both oil and gas.

In the fourth quarter of 2020, the non-upstream oil and gas sector continued to increase by 7.4%. The downstream activities, including new production of petroleum and chemical products, also led to the expansion of the non-upstream oil and gas sector.

Meanwhile, the agriculture, forestry and fishery sector increased by 27.5% due to the increase in the demand for production of vegetables, fruits and other agricultural products by 10.9%, livestock and poultry by 24.0% and fishery by 47.4%. Concurrently, the production of forestry has declined by 17.9%.

A 0.8% decrease in the industrial sector was mainly attributed to the decline in oil and gas mining by 8.8%, manufacture of wearing apparel and textiles by 5.3% and electricity and water by 0.5%. However, the manufacture of food and beverage products upsurged by 30.8%, followed by the manufacture of liquefied natural gas and other petroleum and chemical products by 18.1%. Following that, other miscellaneous manufacturing increased by 5.7% and construction by 4.4%.

The service sector also decreased – by 3%. As a result of the negative growths recorded in air transport by 83.6%, land transport by 51.0%, other transport services by 42.8%, water transport by 9.7%, education services by 9.1%, business services by 6.5%, hotels by 4.8%, finance by 3.2%, Government services/public administration by 2.4% and communication by 0.9%, the service sector has overall decreased. There has, however, been an increase recorded in health activities (9.8%), wholesale and retail trade (7.5%), other private services (3.8%), restaurants (2.5%), real estate and ownership of dwellings (2.4%) and domestic services (2%).

Regardless of the GDP in the fourth quarter of 2020 posting negative growth, the overall growth in 2020 was achieved after the GDP in the first nine months recorded a positive growth. This growth was largely contributed by the increase in the non-oil and gas sector by 9% whilst the oil and gas sector recorded a decrease of 4.9%.

Further, Brunei economic growth reached the lowest rate of 1.2% in 2020 due to the COVID-19 pandemic, after having expanded by 3.9% in 2019. However, the economy is projected to grow by 2.5% in 2021 and subsequently by 3% in 2022, depending on an external environment expecting a recovery in global demand and higher oil and gas prices.

2.2 Currency

The official national currency of Brunei is the

Brunei Dollar (BND). It is be divided into 100 cents (Section 12 of the Currency and Monetary Order, 2004). The BND has been used as the official currency since 1967. Under a Currency Interchangeability Agreement in 1967, the BND is interchangeable with the Singapore dollar at par and the BND is accepted in Singapore as "customary tender" just as the Singapore dollar is accepted as "customary tender" in Brunei.

Currently, the BND is available in BND 1, BND 5, BND 10, BND 20, BND 25, BND 50, BND 100, BND 500, BND 1,000 and BND 10,000 polymer notes; and in 1-cent, 5-cent, 10-cent, 20-cent and 50-cent coins.

The Brunei Darussalam Central Bank, previously known as the Autoriti Monetari Brunei Darussalam, has the sole right to manage and issue legal tender in the form of notes and coins (Section 13 of the Currency and Monetary Order, 2004).

The Brunei Darussalam Central Bank is governed by the Brunei Darussalam Central Bank Act. It was recently effected on 27 June 2021 to officially replace the Autoriti Monetari Brunei Darussalam Act.

2.3 Government and stability/security

Brunei is an Islamic Sultanate ruled by a monarch. His Majesty Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah Ibni Al-Marhum Sultan Haji Omar 'Ali Saifuddien Sa'adul Khairi Waddien, who is both the Head of State and also Head of Government, is the 29th and current Sultan and Yang Di-Pertuan. His Majesty the Sultan is an experienced and beloved monarch who rules the Sultanate as the Prime Minister of Negara Brunei Darussalam. His Majesty the Sultan retains the titles of Minister of Finance and Economy, Minister of Defence and Minister of Foreign Affairs.

His Majesty the Sultan is the Head of State with absolute powers and full executive authority, including emergency powers. He is assisted by five councils, namely the Privy Council, the Council of Cabinet Ministers, the Legislative Council, the Religious Council, and the Council of Succession. The members of the Legislative Council are appointed in accordance with Article 24 of the Constitution of Brunei Darussalam.

The Sultan, who is effectively the supreme ruler, has occupied the position of Prime Minister since the resumption of independence in 1984. The Sultan has ruled peacefully through emergency decree and has the sole power to amend the provisions of the existing laws. The administrative system is centred on the Prime Minister's Office.

Brunei has a dual legal system, which run parallel to each other – one is presided over by the Common Law Court and based on the English Common Law, but with codification of a significant part of it; and the other by the Syariah Court, which deals mainly in matters concerning Muslim marriage, maintenance of dependants, wills, division of inheritance of property in its civil jurisdiction. The Magistrates and Judges in both the Common Law Court and the Syariah Court are appointed by the Brunei Government.

The Common Law Supreme Court comprises of the High Court and the Court of Appeal, while the Common Law Subordinate Court consists of the Magistrates' Court and the Small Claims Tribunal. The system of civil law within the Civil Courts is generally administered by UK-qualified Judges. In addition, the majority of leading private legal practitioners were educated and obtained their professional qualifications in the UK.

An important piece of legislation in the Sultanate is the Application of Laws Act. This statute essentially stipulates that the common law of the UK and the doctrines of equity, together with statutes of general application, as administered or in force in England prior to 25 April 1951, shall be in force in the Sultanate as well. The important proviso to this is that said common law, doctrines of equity and statutes of general application shall only be in force so far as circumstances permit. They are also subject to be quali-

fied by local circumstances and customs. The Contracts Act and Specific Relief Act embody a codified system of contract law and laws of equity based on English common law.

The structure of the Syariah Court is similar to the Common Law Court – it consists of the Syariah Subordinate Court, the Syariah High Court and the Syariah Appeal Court.

2.4 Political/cultural considerations

Brunei is a small equatorial country on the northern coast of the island of Borneo in Southeast Asia and its culture is mainly derived from the old Malay world, which encompassed the Malay Archipelago and from this stemmed what is known as the Malay Civilisation. While Standard Malay is the official language of Brunei Darussalam, languages such as Brunei Malay and English are most widely spoken. Other languages include Chinese Mandarin as well as various Chinese dialects.

Article 3 of the Constitution of Brunei Darussalam stipulates that Islam is the official state religion of Brunei Darussalam. However, other religions including Catholicism, Christianity and Buddhism are freely practised in the country.

Since the resumption of independence in 1984, Malay Islamic Monarchy (also known as *Melayu Islam Beraja*) was officially proclaimed as the national philosophy of Brunei by His Majesty the Sultan. The concept of Malay Islamic Monarchy seeks to consolidate a national identity, born of convergence on a dominant Malay culture, and long-binding loyal citizenry to an absolute monarch. Malay Islamic Monarchy contains three major components – *Melayu*, which means Malay culture and values as the traditionally predominant culture in the country; Islam, as the official and traditional religion of the country; and *Beraja*, which means monarchy as the traditional system of government.

2.5 Natural resources

Brunei has been blessed with rich natural resources and a strategic location within the ASEAN region. The prosperity of Brunei is due to its natural resources of petroleum, natural gas and timber.

In terms of oil and gas, Brunei has proven crude oil reserves of 1.4 billion barrels and natural gas reserves of 320 billion cubic metres, which can be mined for more than 25 years.

In addition to its oil and gas reserves, Brunei has abundant mineral resources such as gold, mercury, antimony, lead, bauxite and silicon. Brunei also has abundant forest resources since the majority of the country is covered in tropical rainforests teeming with exotic flora and fauna. In addition to promoting the conservation of its lush surroundings, this also creates eco-tourism which helps in the country's economic activities. Approximately 86% of the forest reserves are primeval forests producing tropical crops such as rubber, coconut and pepper.

Brunei also has good deep-water seaports, such as Muara Port, and it is the major entrance for international trading. More than 90% of import and export items go through Muara Port. In order to promote Brunei as a trade hub of the region, the main seaport is established as a Free Trade Zone and is called the Muara Export Zone (MEZ). On the 22 December 2020, the Muara Port Company Sdn Bhd, a joint venture between Brunei and China, signed an agreement with the Brunei Government to develop and operate the country's largest fishing complex. The rivers and territorial seas are rich in aquatic products such as fish and shrimp.

2.6 Infrastructure

Several public infrastructure developments are actively being carried out in support of economic diversification, which has led to significant spending in various infrastructure projects throughout Brunei – from the national transport network to telecommunication to industrial parks.

Brunei's infrastructure in relation to its road networks, including highways, connecting roads, elevated roads and roundabout interchanges, have been developed all across the country. The Brunei National Roads System, as the major national road network, has expanded and

modernised the road network serving the entirety of Brunei. The network and connectivity of efficient roads services play an important support in achieving the aims of "*Wawasan 2035*".

Brunei is making good strides in infrastructure development. According to the Global Competitiveness Report 2017–2018 released by the World Economic Forum, Brunei scored 4.5 out of 7 – this is considered high among the Southeast Asian economies, including Indonesia and Singapore – and ranked 46th out of 137 economies worldwide.

Currently, there are six major highways in Brunei namely Muara Tutong Highway, Sultan Hassanal Bolkiah Highway, Tungku Highway, Kuala Belait Highway, Telisai-Limit Highway and Brunei-Temburong Highway, including Temburong Bridge.

Brunei has three ports: a major and large, deep-water harbour at Muara known as Muara Port; a smaller port at Kuala Belait; and Bangar Port. All of these ports are under the jurisdiction of the Ports Department of the Ministry of Communication. Direct shipping of import and export items to several other international destinations go through Muara Port since the facilities of Muara Port are of the highest level locally.

There are two main airports in Brunei. An expanded international airport is located at Bandar Seri Begawan known as the Brunei International Airport (BIA). BIA is managed by the Brunei Government and is used as the base for Royal Brunei Airlines (RBA) that serves short-haul destinations to East Malaysia and Indonesia and long-distance destinations in Asia, Australia, the Middle East and Europe. The other one – Anduki Airfield in the Seria Anduki District – is a small, commercial airport managed by Brunei Shell Petroleum.

Brunei has made great improvements in the field of communications. In 2019, the Brunei Government consolidated all of the country's existing telecommunication operators (i.e. Telekom Brunei Berhad, Datastream Technology Sdn Bhd, Progresif Cellular Sdn Bhd and Brunei International Gateway Sdn Bhd) under the management of a new government-owned wholesale network operator Unified National Networks Sdn Bhd (UNN). UNN is a wholly-owned subsidiary of Darussalam Assets Sdn Bhd.

The establishment of UNN has critically transformed the ICT journey in Brunei as Brunei progresses towards to being a more connected and digitally integrated country. It is important for Brunei to continue to develop its telecommunication infrastructure by expanding into the digital economy so as continue to build upon the foundations for economic diversification while at the same time creating more gainful employment.

2.7 Investment limitations

2.7.1 Access to industrial land by foreigners

Even though mortgages are recognised in Brunei, only local Brunei nationals are allowed to own landed property. Foreign nationals and permanent residents can only hold properties under long-term leases. Every ownership of property requires the approval of "*His Majesty in Council*", which is a council of officials representing the Sultan. The process is very lengthy and at most times opaque.

The proposed amendments of the Land Code have been considered since 2006 to ban past practices of proxy land sales to foreigners and permanent residents through the use of Powers of Attorney and Trust Deeds. Powers of Attorney, as well as Trust Deeds, are no longer recognised by the Land Department as valid mechanisms in land transactions involving foreigners and permanent residents. The proposed amendments, once approved, will also be retroactive, converting all existing property owned through Powers of Attorney and Trust Deeds into 60-year leases. Given that the occupation of the land is for agricultural, commercial, housing or industrial purposes, the Government may grant temporary occupation permits over state land to the applicants. The licences are usually unregistered and are only granted for renewable annual terms.

2.7.2 Policies, laws and regulations on FDI

FDI in Brunei plays an increasingly significant

role in the country's economic and technological development and, thus, Brunei encourages FDI in the domestic economy through various investment incentives offered by the Ministry of Finance and Economy.

The Investment Incentive Order 2001 and Income Tax Act (Cap 35) (formerly known as Income Tax Order 2001) are the primary pieces of legislation governing FDI in Brunei. The objective of the Investment Incentive Order 2001 is to make provisions for encouraging economic development in strategically important industrial and economic enterprises and, through the Ministry of Finance and Economy, offers investment incentives through a favourable tax regime.

2.7.3 Business facilitation in Brunei

Brunei has put in place an FDI fast-track system to ensure and assist foreign investors to obtain all necessary Government permits, licences and approvals, including, amongst others, development and construction approvals, and recruitment of foreign labour.

As part of Brunei's effort to attract FDI, the Government established the Brunei Economic Development Board (BEDB) and Darussalam Enterprise (DARe) to act as facilitating agencies under the Ministry of Finance and Economy in order to smooth the process of obtaining permits, approvals and licences.

BEDB acts as the Government's frontline agency to promote and facilitate FDI into the country. It works closely with foreign investors to try to understand their business needs and aspirations. BEDB also works in tandem with the Brunei Darussalam FDI Action and Support Centre (FAST) for evaluating investment proposals, liaising with Government agencies and obtaining project approvals.

2.7.4 Limits/Restrictions on foreign control and right of foreign ownership

Foreign ownership of companies in Brunei remains completely unrestricted to foreign nationals. However, the Companies Act requires locally incorporated companies to have at least one of the two directors, or if more than two directors, at least two of them to be ordinarily resident in Brunei, although exemptions may be obtained in certain circumstances. The rate of corporate income tax is the same whether the company is locally owned or foreign owned and managed.

In addition, all businesses in Brunei must be registered with the Registry of Companies and Business Names at the Ministry of Finance and Economy. Foreign investors can fully own incorporated companies, foreign company branches or representative offices, but are not entitled to register sole proprietorships and partnerships. Unlike many countries, FDI from multinational corporations do not require a local partner in setting up a subsidiary in Brunei if at least one company director is a Brunei citizen or a permanent resident.

2.7.5 Expropriation of foreign-owned property and compensation

There is no history of any expropriation of foreign-owned property reported in Brunei. There are only cases of domestically owned private property being expropriated for infrastructure development, but in such cases the Government has provided compensation.

2.7.6 Local content requirements

In order to improve domestic employment and industrial performance, the Brunei Government launched a Local Business Development Framework which aims to facilitate an increase in the use of local goods and local services, training of a domestic workforce and to develop Bruneian businesses by placing requirements on all companies operating in the oil and gas industry to meet local hiring and contracting targets.

The provisions of the Framework apply equally to information and communication technology firms that work on Government projects – the Framework has set local content targets based on the difficulty of the project and the value of the contract. It allows more flexible local content requirements for projects requiring highly specialised technologies or projects with a high contract value.

The Framework further puts in place a sliding scale of local requirements from "best endeavours" for local content and employment for highly specialised work to achieve a target of 70% local content and 90% local employment for "basic" work. However, the Framework has yet to be extended to a requirement of local hiring targets to other sectors of the economy.

2.7.7 Sector restrictions

The leading key sectors of Brunei's economy are the state owned enterprises (SOEs) which receive preferential treatment when tendering for lucrative Government contracts. The priority business sectors under SOEs are identified as halal (pharmaceuticals and health supplements, aquaculture, agriculture, food processing/manufacturing and distribution, cosmetics), business services (transportation and logistics, financial services, business process outsourcing), technology and creative industries, tourism and downstream oil and gas.

III International dispute settlement

In relation to international contractual agreements, the use of arbitration as the main means of dispute resolution has continued to increase since the revision of the Brunei Constitution in 2004, which provided for complete immunity of the Government of Brunei Darussalam from being sued before the Brunei Courts of Law. This has meant that all contractual matters involving the Brunei Government and their counterparts are all to be subjected to arbitration.

The Arbitration Order 2009 (AO) regulates domestic arbitrations and the International Arbitration Order 2009 (AIO) regulates international arbitration. Both statutes are based on the UNCITRAL Model Law on International Commercial Arbitration and came into force in February 2010.

The Arbitration Association Brunei Darussalam (AABD) is the only independent arbitral appointing institution in Brunei. It was formed in 2004 and became the default statutory appointing body under both the AIO and the AO when the legislation was first introduced in 2009. It assisted the Attorney General's Chambers in drafting the AIO and AO. Part of the AABD's objectives is also to assist Brunei Darussalam in developing and providing advisory and assistance support in the field of arbitration. The AABD seeks to assist parties who wish to resolve their disputes by way of arbitration and also tries to arrange places for arbitration hearings, and to ensure that the panel of international arbitrators are kept to a very high standard and there is a wide choice of diversity of leading international arbitrators, who are currently mainly (90%) non-Brunei nationals.

3.1 Local Courts and legal tradition

3.1.1 Scope of jurisdiction

To commence litigation in Brunei, the nature and amount of the claim determines which Court will have jurisdiction. If the amount claimed is **lower than BND 50,000.00**, then the claim is generally filed in the **Magistrates'** Court. If the claim is **between BND 50,000.00 to BND 300,000.00**, then it is filed in the **Intermediate** Court. Further, the claim is filed in the **High** Court if the amount **exceeds BND 300,000.00**.

Nonetheless, the Supreme Court of Brunei Darussalam, in recognising the importance of protecting investors' rights and contract enforcement, announced the establishment of a Commercial Court in Brunei to deal with foreign business-related cases in 2016. The Commercial Court has been fully operating since February 2016 and the first case was registered on 2 February 2016.

The establishment of the Commercial Court aims to improve the business environment with speedier resolutions, fostering innovation within the judicial process and attract FDI. A reliable and robust legal system provides assurance to both local businesses and foreign investors that their cases will be handled efficiently and with utmost professionalism. Significantly, the Commercial Court has introduced a process called Case Management Conference (CMC) where the Court will usually exercise its broad

- case management powers to direct how the case should be conducted going forward, including making the first order for directions and setting a timetable for necessary steps up to trial.

Since the Commercial Court is a dedicated avenue for commercial cases within the jurisdiction of the Intermediate Court, the claim process generally begins by issuing a Writ of Summons or Originating Summons and the governing rules are the Rules of the Supreme Court of Brunei Darussalam, Cap 5.

The Brunei Court of Appeal is comprised of visiting retired Judges from the Hong Kong Court of Appeal and Court of Final Appeal, while the High Court consists of both local Judges, former Hong Kong High Court Judges, English and Singapore Court Judges.

Local Brunei Judges are generally educated and obtain professional qualifications in the UK. For civil matters, parties to a dispute can mutually agree before the commencement of the trial or the handing down of the Court of Appeal judgment to agree the Judicial Committee of the Privy Council in the UK as the Brunei Court of final appeal for their case. The language of law Courts is English, and laws are enacted in English, with a Malay version made available. Legislative enactments are included as laws.

Further, the amendments made to the Bankruptcy Act, Cap 67 in 2012 have increased the minimum threshold for a creditor to present a bankruptcy petition against a debtor from BND 500.00 to BND 10,000.00 and required the debtor to deliver all his properties under his possession to the Deputy Official Receiver as the trustee. The Deputy Official Receiver also has unfettered power to direct the Controller of Immigration to impound and retain the debtor's passport, identity card or travel document(s) to prevent the debtor from leaving the country.

3.1.2 Sophistication

The Magistrates, Registrars and Judges in both the Common Law/Supreme Courts and Syariah Court are appointed by the Government of Brunei Darussalam. They are provided with full judicial and in-house training by the State Judiciary Department of the Prime Minister's Office in Brunei.

The Registrars of the Intermediate Court and Commercial Court are fully trained in conducting mediation with a number of Registrars registered as accredited mediators under international mediation centres.

3.1.3 Reliability of Judiciary/Corruption

The Brunei Judiciary has maintained great efforts to uphold a reliable, clean and transparent approach to the justice system and continuously works to improve the judicial professionalism of the Magistrates, Registrars and Judges.

While judicial transparency is one of the strengths of the legal system, Brunei is sometimes perceived as lacking in transparency and accountability. There is little to no transparency in law-making processes, nor is there any available information available to members of the public or even to other ministries on the possible impact of new legislation prior to each Ministry proposing new laws and regulations. Each Ministry in Brunei is responsible for proposing new legislation and this process is done in coordination with the Attorney General's Chambers. Both the Ministry and the Attorney General's Chambers will then work together to draft the proposed legislation. However, the draft legislation is generally not disclosed for review by others outside the two institutions and there is no external feedback based on broad reviews before the passage of the new legislation.

In addition, the Judiciary has set up the *Online Judgment Search* on its website as the main platform for the publication of all Court judgments and rulings. This measure is an important step towards greater transparency of the Brunei legal/judicial system.

In Brunei, corrupt practices in any form are not acceptable and not tolerated. Since 1982, Brunei has been very active in enforcing the Emergency

(Prevention of Corruption) Act (EPCA), and the Anti-Corruption Bureau (ACB) was also established for the purpose of enforcing the EPCA. The EPCA was renamed as the Prevention of Corruption Act (Cap 131) in 1984. The Prevention of Corruption Act provides specific powers to the ACB to investigate accusations of corruption and it also concurrently authorises the ACB to investigate certain offences under other written laws, provided such offences were disclosed during the course of an ACB investigation.

Corrupt practices are punishable under the Prevention of Corruption Act, Cap 131, the application of which is extended to Brunei citizens abroad.

3.1.4 Speed

The speed of Court litigation for straightforward/simple cases has been varied. It can be expeditious for simple cases, and these can be completed within six months to less than a year. However, for more complex commercial High Court matters, cases may last for more than several years.

The establishment of the Commercial Court has given priority to the commercial cases before the Commercial Court on early trial dates subject to the availability of Court dates in order to speed up the resolution or settlement of disputes.

The Brunei Court of Appeal Judge only sits twice a year for about six weeks each time. All of the Court of Appeal Judges in the history of the Brunei Judiciary have always been visiting foreign Judges who come from England or Hong Kong to hear the appeals.

3.1.5 Efficiency

Brunei's Court system has continued to improve on efficiency over the years. An electronic management system known as the Judiciary Case Management System (JCMS) was implemented by the State Judiciary Department on 23 March 2015, with the aim to establish and maintain an efficient way to manage Court documents as well as services for both the public and legal community. The system has played a positive role in enhancing the productivity, efficiency and effectiveness of Court management nationwide.

Further, an online portal known as Electronic Filing System (EFS) was designed to increase the efficiency of the Court system especially in gaining access ranging from pre-registration of cases, filing case documents and right down to the retrieval of case information and their schedules.

The Case Management System (CMS), an end-to-end computerised Court operation, was also introduced in order to increase efficiency of the assignment of cases, hearing schedules, retrieval of documents, searches for information on Court cases, record of case notes and judicial decisions. The system also helps to facilitate archiving, recordkeeping and search purposes upon disposal of cases.

Another system known as Queue Management System (QMS) was also designed to allow the public and legal community to obtain an updated list of Court hearings and statuses and schedules of the cases both in the Supreme Court and the Subordinate Court.

These systems clearly provide an efficient, effective and systematic way to manage Court resources where information of cases can easily be accessed and cases are processed more efficiently.

3.2 Arbitration

3.2.1 Arbitrability

Both the AIO and AO are based on the UNCITRAL Model Law. As such, in principle, all commercial disputes may be arbitrated in Brunei. Under Brunei law, any dispute that the parties have agreed to submit to arbitration may be decided by arbitration unless the subject matter of the dispute is inarbitrable or if it is of a nature that would make it contrary to public policy for the dispute to be determined by arbitration. Examples of subject matters that are regarded as non-arbitrable in Brunei would include estate, succes-

sion, testamentary matters (grant of probate and letters of administration) family disputes, and disputes relating to rights and liabilities which give rise to or arise out of criminal offences.

Brunei is a signatory to the New York Convention and has a good reputation as an arbitration-friendly jurisdiction. Foreign awards are enforced without any issue.

It is important to highlight Section 84B(2) of the Brunei Constitution. Section 84B provides as follows:

"*(1) His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity. His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him during or after his reign in either his personal or any official capacity.*

(2) Any person acting on behalf, or under the authority, of His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him in his official capacity…"

As the Brunei Government has absolute immunity under Section 84(B)(2) from being brought before the local Brunei Courts, arbitration remains the only means for contracting parties or investors to resolve their disputes.

3.2.2 Local arbitral institutions

The AABD is the oldest and only independent arbitration institution in Brunei and has no connection with the Brunei Government. The AABD does not have any Brunei Government employees on its Council nor panel of arbitrators. The AABD strongly encourages all of its arbitrators to adopt the latest international arbitration practices and cost-controlling techniques. Originally, under both pieces of arbitration legislation, the AABD was statutorily designated as the default appointing body, in the event of default or failure by the parties to appoint an arbitrator or a failure by the two appointed arbitrators to appoint a presiding arbitrator. This lasted from the inception of the AO and AIO until 2016. The Brunei Government then formed its own wholly owned company, called the Brunei Darussalam Arbitration Centre (BDAC), and designated it to be the default appointing authority from 2016 to date. The BDAC board of directors is completely selected by the Government and three-quarters of the board include senior members of the Government. The Chairman of the BDAC board would also concurrently hold at least one key Government position, including Permanent Secretary of the Prime Minister's Office. To date, the BDAC has not been known to have opened its physical office, nor has it made a single arbitral appointment since its incorporation in 2016. To date, foreign and local investors prefer to include a choice-of-arbitration agreement specifically stipulating the AABD as the neutral arbitral institution when they have to adopt Brunei as the seat of arbitration.

Under the AIO, it remains the statutory position that, in the event of a default, the Chairman of the BDAC may only select an arbitrator from the panel of arbitrators maintained by the AABD. The AABD has continued to appoint arbitrators upon request by the parties. There is also an alternative preference for ICC Arbitration.

3.2.3 Regional centres for arbitration

There is an alternative preference for parties in Brunei to consider ICC Arbitration clauses seated in Singapore as well as HKIAC Arbitration. Parties have also agreed on AIAC, SIAC and ICC Arbitration in London.

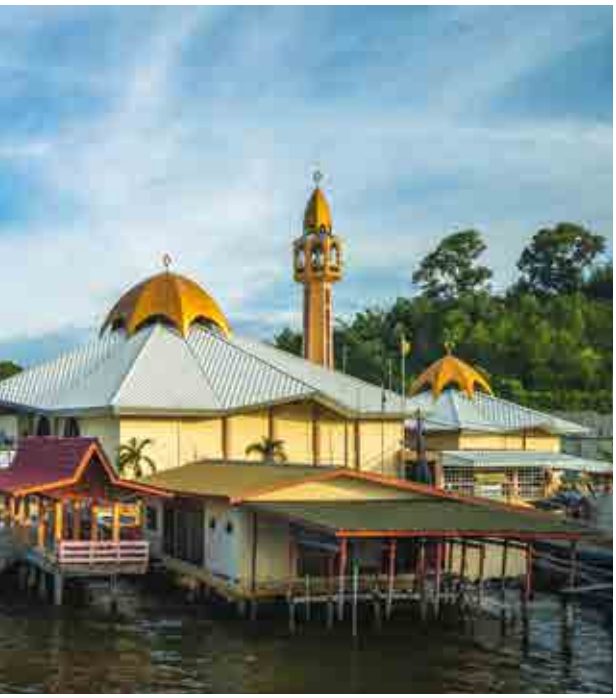
3.3 Mediation

The AABD promotes mediation as an additional form of Alternative Dispute Resolution (ADR) and many of the AABD Council members are also experienced mediators.

3.4 International treaties

3.4.1 Bilateral investment treaties with BRI countries

Brunei is a party to several bilateral investment treaties (BITs). Brunei has, to date, signed eight BITs. In terms of BRI countries, the most important treaty is the Brunei Darussalam-China Bilat-



eral Investment Treaty 2000. There is, therefore, every possibility for Brunei to be made subject to an investment treaty arbitration claim if a joint-venture contract entered into between the Brunei Government or a Brunei SOE and a foreign contracting party are subject to BDAC arbitration rules. There would be an immediate conflict of interest taking place for the Chairman of the BDAC to make any default appointment of a sole arbitrator or presiding arbitrator since the Chairman of the BDAC/Permanent Secretary of the Prime Minister's Office would also be the most senior civil servant of the Brunei Government. This has not happened as foreign parties have either insisted on AABD arbitration or ICC Arbitration.

3.4.2 Other cross-border/regional treaties

Brunei is a party to the ASEAN Agreement on the Protection and Promotion of Investment, which applies to all ASEAN countries.

3.4.3 Relationship with the EU

Brunei has not signed any international treaties with the EU.

3.4.4 Reciprocal arrangements for the recognition and enforcement of Court judgments with BRI countries

The enforcement of foreign judgments in Brunei is governed by the Reciprocal Enforcement of Foreign Judgments Act 1996 (Revised Edition 2000) (Cap 177) as well as by common law rules. Brunei recognises and enforces the Court judgments of both Malaysia and Singapore, which are also BRI countries.

3.5 Is Brunei a signatory to the New York Convention? In practice, are foreign awards enforced?

Brunei has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the only reservation is reciprocity. The Brunei Courts are extremely supportive of the arbitration process and will enforce foreign awards from contracting states of the New York Convention subject to reciprocity.

Dr Colin Ong Legal Services is an internationally recognised leading commercial and dispute resolution law firm in Brunei Darussalam, acting for a broad spectrum of clients. It is one of the very few commercially focused law firms in Brunei and has been consistently listed as a leading banking, arbitration and commercial law firm by independent legal publications such as: *Who's Who Legal*; *IFLR1000*; and *AsiaLaw Leading Lawyers*. The firm and its lawyers are to date the only Brunei lawyers to have been listed in *Euromoney's International Who's Who Legal Series* in five categories and also in *Expert Guides* in Commercial Arbitration, Commercial Litigation and Best of the Best categories. In addition to international commercial arbitration and litigation services, other main areas of practice include: banking law and the setting up and marketing of funds; aviation; energy disputes; coal mining and supply disputes; company law; oil and gas; intellectual property; joint ventures; production sharing contracts; project finance; shipping matters; technology transfer; and foreign investments. The firm is often instructed to act for and against multinationals and also for and against quasi-government companies within the ASEAN region and for several major global banks, and has regularly acted for and against many of the leading international and regional law firms in the world. Some members of the firm are also visiting academics and contributing authors for various leading loose-leaf works in the fields of banking, arbitration and litigation, for several international legal journals in Asia, the UK and the US, including: APRAG e-journal; Arbitration (CIArb); Badan Arbitrase Nasional Indonesia (BANI) Arbitration Journal; Butterworth's Journal of International Banking & Financial Law; China-ASEAN Law Review; and Maritime Risk International.

Dr Colin Ong Legal Services

Dr Colin Ong QC is senior partner at Dr Colin Ong Legal Services (Brunei), counsel at Eldan Law LLP (Singapore) and Queen's Counsel at 36 Stone (London). Chartered Arbitrator and Arbitration Fellow at various institutions (including FCIArb, FMIArb and FSIArb). President of Arbitration Association Brunei Darussalam; Advisor to the Indonesian National Board of Arbitration (BANI); Chairman of the International Advisory Board, Thailand Arbitration Center (THAC); Appointing Committee member of the Chinese European Arbitration Centre (Germany); Chair, Advisory Board (JIIART, Japan); Co-Chair, IBA APAG; Vice-President, APRAG; and Advisory Committee Member of the China-ASEAN Legal Research Centre. Dr Ong was previously Appointing Council of the Cambodian National Commercial Arbitration Centre (NCAC) and former Chairman, Regional Arbitral Institutes Forum. He has extensive Court experience with important reported judgments pertaining to arbitration matters. He is regularly instructed as counsel or arbitrator on major commercial and construction arbitrations within Brunei, England, China, Hong Kong, India, Japan, Qatar, Indonesia, Malaysia, Singapore, South Asia, Thailand, and the UAE. He is a visiting professor of Civil Law as well as Common Law jurisdictions and has handled cases under many different governing laws including Brunei, Canadian, English, Hong Kong, Indian, Indonesian, Japanese, Korean, Malaysian, Mongolian, New York, Philippine, PRC, Singaporean, Thai, Sri Lankan, Swiss and Vietnamese law. He has acted as arbitrator or as counsel/lead counsel in over 370 international arbitrations under most major arbitration rules, including AAA, BANI, CIETAC, HKIAC, ICC, LCIA, LMAA, MNAC, KCAB, KLRCA, OIC, SCMA, SIAC, TAI, UNCITRAL and WIPO. He was lead counsel in *PGN v CRW* [2015] SGCA 30, which was the runner-up in the *GAR* Awards 2016 in "*the most important decision*" category. He is the first ASEAN national lawyer appointed English Queen's Counsel and elected Master of the Bench of the Inner Temple (2010). *Legal 500 The English Bar (AP) Commercial* (2021) says that he is: "*A superb tactician with brilliant strategies who is exceptionally adept at thinking out of the box.*" *Leading Counsel Arbitrators: Legal 500 UK 2020* states that he is "*experienced in both common and civil law*".

contacts@onglegal.com

Bulgaria

Kostadin Sirleshtov
CMS Sofia

Diyan Georgiev
CMS Sofia

I Connection to Belt and Road projects

1.1 Bulgaria's place on the map

Bulgaria has been actively supporting the One Belt, One Road Initiative and the "17+1" cooperation initiative between China and the countries of Central and Eastern Europe.

The visits of representatives of China and executives of Chinese companies involved in the implementation of the Belt and Road Initiative are now an integral part of government-supported summits. It is widely recognised in Bulgaria that the most important factor for the development of the Initiative is the transport link between China and Europe, and in this regard Bulgaria's strategic geographical position determines the shortest and most feasible route of this transport connection. In this sense, the Belt and Road Initiative could put Bulgaria on the global logistics map as a gateway to Europe. This provides an opportunity, which is very welcomed by Bulgaria, for the realisation of large construction projects in the railway, highway, and maritime-port infrastructure of the country.

The Chinese-friendly investment environment is greatly stimulated by the complete lack of any protectionist restrictions in the field of Bulgaria's policy towards Chinese investments.

Bulgaria and China continue to expand and deepen their economic and business relations. Chinese investors have long viewed Bulgaria as a potential investment destination, while diplomatic relations between the two nations have remained very strong for decades. EU membership, low taxes, increasing consumption and strategic location are among the main reasons why Bulgaria is considered a very tempting destination for doing business by Asian entrepreneurs. China is traditionally Bulgaria's largest trading partner in Asia. Despite the challenges the world faced in 2020, bilateral trade reached USD 2,806.2 million, up 6.6% year-on-year. Bulgarian exports to China amounted to USD 1,054.8 million (+14.1%) and imports amounted to USD 1751.4 million. (+2.6%).

The economic relations between the two countries are based on the Agreement on Economic Cooperation (in force since 2007) and the Agreement on Avoidance of Double Taxation (in force since 2003), which create the

necessary legal conditions for the development of trade and economic cooperation.

1.2 Paving the road

Chinese direct foreign investments in Bulgaria are still relatively small. They are mainly in the energy sector – renewable energy power plants, agricultural sector, automotive industry, electrical engineering, mechanical engineering, information technology, telecommunications and trade. However, some large Chinese investors have already become household names in Bulgaria such as ZTE, Huawei, Insigma Group, Great Wall, China Communications Construction Company, China Development Bank and others, due to participating in industry-defining investments in Bulgaria for their respective field of activity.

In the energy sector, Chinese investors are represented by Astronergy/Chint Solar, ReneSola, Sky Solar, ILB Helios/Hareon and other stakeholders in the renewable sector and, in particular, the photovoltaic sub-sector. The interest of the Chinese investors in the production of electricity from renewable energy sources proves the opposite of the speculations that the Initiative will hamper Bulgaria's progress in meeting its commitments to reduce carbon emissions, which the country has made to the European Union (EU).

A similar boost of investment opportunities is provided by the EUR 1.5 billion framework agreement, signed between the China Development Bank and the Bulgarian Development Bank. Under the agreement, the parties are cooperating closely as part of the Chinese government's One Belt, One Road Initiative. The financing, which is provided in the form of loans from the China Development Bank to the Bulgarian Development Bank, is to be used as co-financing, project financing, financing with private capital investments and syndicated lending for projects of mutual interest. The eligible projects can be in the energy, communications, transport and agriculture sectors, and involve small and medium-sized enterprises. The two banks are also discussing options for setting up joint venture capital funds to support start-ups in Bulgaria.

In addition, private companies in the two countries maintain close contact to strengthen cooperation in the fields of transport and infrastructure. Chinese companies working in this field have gained extensive international experience, have sufficient available financial resources and many established practices in terms of technology and management of infrastructure projects that they could share. Currently, Chinese companies are showing serious interest in projects related to the Black Sea highway and the tunnel under Shipka Peak. We hope that with the support of the governments of China and Bulgaria, the companies in the two countries will reach joint agreements as soon as possible and will contribute to the economic and social development of the two countries. Given Chinese vast know-how regarding the implementation of huge infrastructure projects, which is currently lacking in Bulgaria, Bulgaria is negotiating with the Chinese government on the implementation of a number of strategic transport infrastructure projects, including several highways and tunnels.

Work on the plans for the Shipka tunnel project were re-opened in 2019 but further progress has been delayed from the Bulgarian side. The companies that provided their interest in time for participation in infrastructure projects in Bulgaria are China Communications Construction Company, China Road and Bridge Corporation, CITIC Construction, Mizrahi Real Estate Group, China Machinery Engineering Corporation, Quantum Global Solutions and PowerChina International.

China is also inviting international banks to potentially finance a project to build a high-speed railway line connecting Bulgaria's Black Sea coast with Greece's Aegean ports, which will be of huge benefit not only for Bulgaria and Greece but for the whole Initiative due to the important ports on the coast of the Black Sea and Aegean Sea. The railway connection will lower the costs of transportation and at the same time significantly reduce the timeframe for transportation.

Since the beginning of the Chinese One Belt, One Road Initiative, Chinese businesses have made steady progress in investing in Bulgaria. The facility, co-managed by Litex Motors from Bulgaria and Great Wall Motors from China, has started production. The investment project of Tianjin Farms Agribusiness Group has been progressing smoothly. The Chinese National Building Materials Group's Devnia cement project is also developing successfully.

In the last few years, the Bulgarian Prime Minister, the Chairman of the National Assembly, and the President of the country have successfully visited China, and the Bulgarian side has held a series of investment and tourism forums in Beijing, Shanghai, Shenzhen and other cities in China. The established contact has helped to increase the knowledge of the two countries about each other and encouraged cooperation between the companies in different fields.

The latest example of Chinese-Bulgaria

cooperation is the cogeneration unit in Sofia to produce heat and electricity from refuse-derived fuel. The consortium that won the EUR 150 million tender was led by a Bulgarian construction company with the extremely important cooperation of Dongfang Electric, Everbright Environment and China DGE Engineering.

Before the start of the global COVID-19 pandemic, the two countries reached serious agreements on Chinese investments in Bulgaria for manufacturing electric buses and automobiles. Unfortunately, those plans had to be put on hold.

1.3 The expected developments

Although 2020 was a year filled with various types of obstacles preventing mutual cooperation, overall, in recent years, due to the attention of state leaders and joint efforts of the two countries, Chinese-Bulgarian economic relations have been developing steadily, trade has been constantly increasing, investment projects and cooperation projects have been developing consistently and generally have excellent prospects for development. It is expected on both sides that this trend will continue. Naturally, there are still many aspects of trade and economic cooperation between China and Bulgaria that both countries need to focus on. Business contact between the two countries is still not sufficient, there is not enough in-depth knowledge of the market conditions in the other country, and many opportunities for cooperation have not yet been fully used. However, a positive trend of transparent, stable and investment-orientated legislation in Bulgaria creates the must-have condition for all large investors to feel safe to invest in Bulgaria.

At present, the areas of bilateral trade and economic cooperation are broad, covering communications, electronics, the automotive industry, the energy sector, transport, ecology, agriculture, and other areas. However, the two countries still have huge potential for cooperation in agriculture, electricity generation and infrastructure. For example, Bulgaria has unique conditions for agriculture, while the demand for such products on the Chinese market is huge – cooperation between the two countries is complementary and the potential in this regard is significant. In the last few years, the governments of the two countries have successfully signed protocols for the export of agricultural products. These documents will pave the way for the export of high-quality Bulgarian agricultural products to China.

The Bulgarian government has repeatedly stated that it highly appreciates China's foreign policy in the field of international cooperation, which is beneficial for the international community. That is why Bulgaria appreciates the mutual friendship between the two countries and will work with China to deepen collaboration under the Belt and Road Initiative and to expand exchanges in all available areas. Bulgaria will also make continuous efforts to promote the Initiative in the countries of Central and Eastern Europe.

The lack of foreign control investment legislation and a favourable tax environment,

combined with the huge EU market, mean that there is essentially a "red carpet" before Chinese businesses willing to invest in Bulgaria.

II Country overview

2.1 Economy

Bulgaria has undergone significant transformation over the last three decades. It has moved from a highly centralised, planned economy to an open, market-based, middle-income country, a member of the EU. In its initial transition, Bulgaria went through a decade of slow economic restructuring and growth, high indebtedness, and loss of savings.

Progress in structural reforms that began in the late 1990s, the introduction of the currency board and the prospect of EU accession have led to a decade of extremely high economic growth and an improved standard of living. Yet, several legacies from this early period, the global economic crisis of 2008 and a period of political instability in 2013–2014 undermine some of these gains.

The COVID-19 pandemic took its toll over the economy in 2020.

In the recovery phase, the biggest task for politicians will be to ensure only a gradual withdrawal of support measures and the optimal use of an unprecedented amount of EU funds, estimated to be at EUR 29 billion for 2021–27. In the future, the key challenge for the country's development remains the transition to a faster, more inclusive and greener growth path, including the costly decarbonisation of its coal-dependent and highly energy-intensive economy. Convergence to EU average incomes can only accelerate if the productivity gap with the rest of the EU is significantly reduced and weaknesses in governance and institutions are adequately addressed.

In 2020, Bulgaria joined the waiting room for the Eurozone, the EU exchange rate mechanism (ERM-II) and the European Banking Union. This became possible after the government compiled a list of previous commitments in the areas of banking and non-banking financial supervision, management of state-owned enterprises and money laundering, among others.

The economic results in 2020 were largely driven by waves of domestic containment measures. GDP contracted by 4.2% as private consumption, which contracted in the second quarter of the year during the national blockade, jumped sharply in the third quarter.

The sectors most affected were tourism and related activities. Investment has declined due to escalating uncertainty and public capital expenditure savings being used to partially offset the government's response package and automatic fiscal stabilisers. The budget deficit increased to 3% of GDP (against 1% in 2019), while public debt increased to about 25% compared to 20% at the end of 2019.

Restrictive measures led to significant disruptions in the form of work stoppages and reduced hours, although this did not affect core unemployment, which was rising moderately. Although government wage subsidies and pension supplements have helped stabilise the incomes of some, disruptions in work and higher food prices have led to a moderate increase in poverty.

2.2 Economic prospects

The biggest risks to the prospects stem from the epidemiology of COVID-19 and the government's vaccination programme. The latter depends not only on the availability of vaccines and the organisation of a well-accelerated vaccination process, but also on popular beliefs, as scepticism remains high and can only decrease with a stronger vaccination campaign.

Bulgaria is expected to grow by 2.6% in 2021 and to reach its level of real output before the crisis (2019) in 2022. The baseline scenario assumes that vaccinations in Bulgaria will gain

momentum in the second and third quarters of year, which will gradually help restore consumer and business confidence. With expectations of a reduced infection rate in the summer and increased inoculations in the main Bulgarian market, the EU, foreign sales of goods are likely to recover, but tourism is expected to remain below pre-crisis levels.

Inspections of the EU's recovery and sustainability mechanism are not expected before the fourth quarter of 2021, with a limited impact on this year's investment and growth. Although non-performing loans (NPLs) have grown moderately (to 7.4% from 6.5% a year ago) and the banking sector remains well-capitalised, NPL levels may rise more sharply after the lifting of the current moratorium on servicing bank loans.

In addition to the challenges of the pandemic, the first and second general elections held in April and in July 2021 have also increased uncertainty. As of the date of writing (August 2021), no new government has been assembled, which is a prerequisite for the smooth continuity of fiscal response measures and the restoration of investor confidence as vaccinations gain momentum. The implementation of fiscal consolidation plans also depends on the outcome of government assembling a dialogue between the political parties.

Excluding all unforeseen events concerning COVID-19 and with high levels of vaccination, poverty is expected to decrease in 2022, because of an improved economy that brings favourable labour market conditions and normalised food prices.

III Dispute settlements in Bulgaria

3.1 Structure of the judicial system

Individuals and legal entities have the right of judicial protection in case of violation of their rights and freedoms, which cannot be denied to them. The court proceedings are of three instances: first instance, appellate and cassation, unless otherwise provided in the procedural law. The aim is to ensure maximum protection of the rights and legitimate interests of the subjects of law, and in making their decisions the magistrates are guided by the law and their inner conviction. Extraordinary courts are not allowed. Specialised courts may also be established by law. All courts are budget-supported legal entities. The decision of the court of first instance is not final and can be appealed before a higher instance as the case is again heard on the merits. The cassation instance confirms the decision of the lower instance or returns it for reconsideration.

The Regional Court is the main court of first instance.

The District Court hears, as a first instance, civil and criminal cases determined by law. As a first instance, the District Court hears administrative cases, and its decisions are appealed to the higher court. The District Court considers, as an appellate instance, cases instituted on appeals and protests against judicial acts of the Regional Courts. The District Court may return it to the Regional Court for a new hearing, but before a new panel of judges if procedural inaccuracies have been admitted. Civil, commercial, criminal and administrative divisions may be established at the District Court. The District Court directs and controls the activity of the Regional Courts of its judicial district. The District Court hears cases in a panel of three judges, unless otherwise provided by law.

The Court of Appeal is always the second appellate instance. The Court of Appeal directs and controls the activity of the District Courts of its judicial district. The Court of Appeal shall sit in a panel of three judges, unless otherwise provided by law.

The Supreme Court of Cassation is the highest court in criminal and civil cases. It exercises supreme judicial supervision over the accurate and uniform application of the laws by all

courts in these cases. Its jurisdiction extends to the entire territory of the Republic of Bulgaria. The Supreme Court of Cassation consists of a civil, commercial and criminal board.

The Supreme Administrative Court is the highest judicial instance in the administrative judiciary for the exercise of supreme judicial supervision for the accurate and uniform application of laws. Its jurisdiction extends to the entire territory of the Republic of Bulgaria.

3.2 Current problems in relation to the judicial system / judicial reform

Judicial reform in Bulgaria has been a gradual process with important implications for judicial independence and public confidence. Challenges remain, in particular on the need to finalise, taking into account the Venice Commission opinion, the reform process commenced in 2019 regarding legal procedures concerning the effective accountability and criminal liability of the Prosecutor General. The composition and functioning of the Supreme Judicial Council and its Inspectorate have also been subject of further debate, leading to new reform proposals. More generally, attacks against the judiciary are reported to have increased without proper reaction from the competent authorities. Controversial provisions relating to the automatic suspension of magistrates in case of a criminal investigation, and to the obligation for magistrates to declare their membership in professional organisations, have been repealed.

In 2017 and 2018, Bulgaria carried out a comprehensive reform of its legal and institutional anti-corruption frameworks. The reform has led to improved cooperation between the relevant authorities. A number of high-level investigations were launched in the first half of 2020 and charges have been brought in a number of cases. The new reforms provide for public access to the property and interests declarations of senior public office holders, which can be considered a good practice. Nevertheless, important challenges remain, as also illustrated by the perception surveys that show a very low level of public trust in the anti-corruption institutions. Lack of results in the fight against corruption is one of the key aspects raised throughout the summer of 2020. A solid track-record of final convictions in high-level corruption cases remain to be established. Better and more effective communication as regards the development and implementation of the anti-corruption strategy would be beneficial. It is important that the authorities are provided with sufficient resources to be able to fight corruption effectively. A legal framework is in place for conflict of interest, yet concerns exist as regards lobbying, which remains unregulated by law, and the transparency and predictability of the legislative process in the country.

3.3 Arbitration

Arbitration is a popular and frequently used tool for resolving commercial disputes since the adoption of the Bulgarian Arbitration Act. Bulgaria has reputable institutions covering trade disputes, both domestic and international.

The arbitral tribunal shall settle the dispute according to the choice of the parties as the applicable law. Unless otherwise provided, the choice of law of the parties is related to substantive law and does not oblige the arbitral tribunal to apply the conflict-of-law rules of the state whose applicable law has been chosen. According to the Bulgarian Arbitration Act, foreign substantive law can be applied to a domestic arbitration dispute only if the legal relationship between the parties has an international element. If the parties have not stated their choice of applicable law, the arbitral tribunal shall apply the substantive law as set out in the conflict-of-law rules which the arbitral tribunal considers to be applicable in the particular circumstances. In any event, the arbitral tribunal shall respect the agreement of the parties, as reflected in the terms of the arbi-

tration agreement, and shall take into account all relevant commercial practices.

The decision from the arbitration has the same force and effect as a court decision. As a result, the same dispute (i.e. arising from the same facts and between the same parties) cannot be reviewed before a national court. If the claim seeks to change the legal relationship between the parties (for example, by terminating a contract), a favourable solution will lead to a change in that legal relationship.

The oldest and most reputable Bulgarian arbitration institution is the Arbitration Court of the Bulgarian Chamber of Commerce and Industry. It has significant experience in domestic and international disputes. This court can also provide mediation services.

3.4 Mediation

Mediation is a voluntary and confidential procedure aimed at out-of-court dispute resolution and involving a third-party mediator that assists the parties to the dispute in reaching a mutually acceptable settlement.

There are many differences between mediation, litigation and arbitration. In the court and arbitration proceeding, the dispute is resolved by a judge or arbitrator. However, in mediation, parties resolve their dispute on their own, assisted by a mediator. In the court and arbitration proceeding the resolution is based on the applicable law, but in mediation the resolution is based on parties' interests. The court and arbitration proceedings are formal and based on strict rules, provided for by a statute or any legal regulations. In mediation there are clear stages and rules, but it is much less formal, flexible, and controlled by the parties than the court or arbitration proceedings.

Nevertheless, for some cases, mediation is the most appropriate approach to settle a dispute. The process is controlled by the parties over the dispute and its outcome. They are directly engaged in the negotiations for the dispute resolution. The parties reach and prepare an agreement on their own that corresponds to their needs and interests. The nature of mediation is voluntary, meaning that even if the parties have agreed to refer their dispute to mediation, they are not obliged to continue with the mediation procedure after the first meeting. Thus, parties always control mediation. Whether the mediation procedure will continue or not depends entirely on party's decision. The meaning of voluntary mediation also means that a resolution cannot be imposed on the parties in dispute. To reach an agreement, parties should voluntarily agree thereon.

In most cases, mediation takes a few days. Since, in many cases, mediation is held at an earlier stage of dispute before the relations have worsened, an agreement can be reached much faster than in litigation.

Moreover, mediation is less expensive compared to litigation and arbitration. Parties save funds by reducing the expenses and the time for resolution.

CMS Sofia is a full-service law firm, the largest international law firm in Bulgaria and one of the largest providers of legal services in the local market. The breadth and depth of our practice means that our lawyers are specialised, with a level of specialisation that few of our competitors can match. CMS Sofia is the Bulgarian branch of CMS, a top 10 legal and tax services provider with offices across the whole world. CMS entered the Bulgarian market as one of the first internationally active law firms in 2005 and is now among the most respected legal advisors in the country. In our work, we focus on energy and projects, M&A, tax, banking & finance, IP and IT law, real estate, construction law, labour law, competition law, procurement law and any kind of dispute resolution. We also take care of the entire legal management of our clients' projects. CMS Sofia is top-ranked for energy and project development (along with most other practice areas we are active in) by *Chambers and Partners*, *The Legal 500* and *IFLR1000*.

cms.law

Kostadin Sirleshtov is Office Managing Partner of CMS Sofia and Head of Energy, Projects and Construction (EPC) for Central and Eastern Europe and for Bulgaria, where he also coordinates the Real Estate team in the office.

His particular area of expertise is in conventional power, renewables, electricity, nuclear, oil & gas, infrastructure, projects, PPP, public procurement, underground resources. He has worked as the Chief of the Minister's cabinet for the Ministry of Energy and Energy Resources 2002–2004 and Chief of Minister's cabinet in the Ministry of Defence 2005–2007. As part of the team at the Ministry of Energy and Energy Resources, Kostadin was a member of the working group, which prepared the current energy legislation of Bulgaria, including the Energy Act 2003 and the Energy Efficiency Act 2004.

Kostadin has been the lead partner advising various energy clients, such as Acwa Power, ContourGlobal, ReneSola (China), SunEdison, Enfinity, ILB Helios, DK Energy, Chint Solar (China) HTMAS (Slovakia), Sky Solar (China) and China Development Bank in all of their endeavours in Bulgaria and the Central and Eastern Europe Region.

kostadin.sirleshtov@cmslegal.bg

Diyan Georgiev is an Associate in the CMS Sofia Energy, Projects and Construction team. He has been involved in major international infrastructure and concession projects in Bulgaria, as well as public procurement procedures. He has experience in advising international companies on their undertakings regarding public-private partnerships with Bulgaria. Some of the clients to whom Diyan has been providing legal support in public procurement tenders and concessions are HNA Airport Group on the 35-year concession of Plovdiv Airport and Vier Gas Transport on participation in Gas Interconnector Greece-Bulgaria.

Diyan has expanded his expertise in the energy sector, by working with renewable energy investors who chose Bulgaria to grow their portfolio.

diyan.georgiev@cms-cmno.com

China

Walter (Fayun) Chen
Grandall Law Firm

Dan Guo
Grandall Law Firm

Tammy Zhe Chen
Grandall Law Firm

I Connection to Belt and Road projects

1 China and the Belt and Road Initiative

In October 2013, China launched the initiative of jointly building the Silk Road Economic Belt and the 21st Century Maritime Silk Road (hereinafter referred to as the B&R Initiative or B&R) with neighbouring countries and beyond. The B&R Initiative focuses on countries and regions in Asia, Europe and Africa, but is virtually open to all global partners. It focuses on policy coordination, infrastructure connectivity of infrastructure, unimpeded trade, financial integration, etc. As of June 2021, China has signed 206 B&R cooperation agreements with 140 countries and 32 international organisations.

2 Investment and projects under the B&R Initiative

Infrastructure connectivity is prioritised on the B&R agenda. B&R countries have made efforts to build an all-round and multi-level infrastructure framework of railways, roads, shipping, aviation, pipelines and digital information networks, which will greatly reduce the transaction costs of goods, capital, information and technologies. Over the past few years, the New Eurasian Land Bridge has largely reinforced the regional cooperation, gearing up economic and trade exchanges between Asia and Europe. Additionally, with the operation of China Railway Express Cargo Trains, an international railway operation mechanism has been established. As of May 2021, the China-Europe rail service had connected 151 cities in

22 countries.

China has signed bilateral intergovernmental air transport agreements with 128 countries/regions by the end of 2020. It has expanded the arrangements for air traffic rights with Luxembourg, Russia, Armenia, Indonesia, Cambodia, Bangladesh, Israel, Mongolia, Malaysia and Egypt. Over the past seven years or so, it has witnessed the opening up of more than 1,000 new international routes between China and B&R countries.

In respect of sea route construction, in Pakistan's Gwadar Port, routes for regular container liners have been built up together with the supporting facilities in the Gwadar Free Trade Zone. An important transit hub has also been completed at the Port of Piraeus in Greece, and the Khalifa Port Container Terminal Phase II in the United Arab Emirates was officially opened in December 2018.

China has also carried out extensive cooperation with B&R countries in other fields of electricity, oil and gas, coal, nuclear power and new energy to ensure the safe operation of oil and gas pipeline networks, ultimately optimising the configuration of energy resources between the countries and regions along the route of the B&R Initiative.

II An overview of China

1 Social culture and political system

China, a country with time-honoured history and over 5,000 years of civilization, is guided by the principles of Confucianism and social harmony. Stretching over 9.6 million square kilometres of land and populated by over 1.4 billion people, China is rich in natural resources. Chinese people on the whole are industrious, self-disciplined and courteous. A high percentage of young labours are well educated and equipped with knowledge and skill of modern science and technologies.

The socialist system is the basic system of the People's Republic of China. The State Organs system of the People's Republic of China includes, among others, the National People's Congress, the State Council, people's congresses and governments, supervisory commissions, courts and procuratorates at various levels. The National People's Congress and its Standing Committee exercise national legislative power; the State Council wields the highest administrative power in China; the Supreme People's Court and the Supreme People's Procuratorate are the highest judicial and procuratorial organs. China is a stable, secure and prosperous country since its modernisation and economic reform started over 40 years ago. It has since paved its way towards being the largest developing country and the second-largest economy in the world with peace and prosperity.

2 Economic system

A socialist market economy with Chinese characteristics is China's current economic system. Within the framework of market-oriented economy, enterprises and businesses can operate freely and independently within the scope prescribed by law and limited government intervention.

China has made remarkable achievements in infrastructure construction, which has laid a good foundation for the national economic development. China today has established brand-new and sprawling highway networks, with high-speed railway mileage taking up more than 60 per cent of the world's total.

Since the launch of the B&R Initiative in 2013, great efforts have been put to liberalise and facilitate cross-border trade and investment between the participating countries and regions. In May 2017, China issued the *Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road*, to which 83 countries and international organisations have subscribed. In 2020, the value of trade in goods between China and other B&R countries reached US$1.35 trillion and the value of trade in services between China and other B&R countries amounted to over US$84 billion.

3 Finance and currency

Eleven Chinese-funded banks have set up 76 institutions in 28 B&R countries; whilst 50 banks from 22 B&R countries and regions have opened

7 corporate banks, 19 branches, and 34 representative offices in China. China has entered into bilateral currency swap arrangements with more than 20 B&R countries. China has made Renminbi clearing arrangements with 7 B&R countries. The Renminbi has strengthened its function as a currency for international payment, trade, investment and reserve. The *Cross-Border Interbank Payment System* now covers some 40 countries and regions involved in the B&R Initiative.

4 Investment mechanism

Foreign direct investment, an important engine of the economy, is expected to grow faster in China with the promulgation of the *Foreign Investment Law of the People's Republic of China* in March 2019 and the issuance of relevant regulations and rules such as the *Catalogue of Encouraged Industries for Foreign Investment Industries (2020)*, *Special Administrative Measures (Negative List) for Foreign Investment Access (2020)*, and *Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2020)*. From 2013 to 2019, countries along the B&R route have invested more than US$50 billion in China and established more than 20,000 enterprises there. From 2013 to 2019, China's non-financial direct investment in the countries along the B&R route exceeded US$100 billion.

China adopts the regulatory system of pre-establishment national treatment combined with a negative list for foreign investment. The state has shortened the negative list and continues to simplify the approval process for foreign-invested enterprises and improve the transparency of the foreign investment mechanism in order to further liberalise and facilitate foreign investment.

III International dispute settlement

While the B&R Initiative may make for large-scale economic opportunity, it also triggers the possibility of myriad international commercial disputes. Legal safeguards are indispensable to a sound international trade and investment environment. China has tried to build mechanisms for B&R Initiative dispute resolutions, protecting the interests of both domestic and foreign parties. This part of the chapter will provide readers with basic information on China's dispute settlement mechanism with the focus being mainly on international commercial dispute resolution, consisting mainly of litigation, arbitration and mediation.

1 Litigation

1.1 Courts in China

Dispute settlement is a process shaped by historical, cultural, political, economic and judicial factors, a result of China's long history of civilization emphasising social harmony and lessening confrontational disputes resolution.

China practises a two-instance trial and four-level pyramid court system. As the highest judicial organ, the *Supreme People's Court* ("SPC") supervises the judicial work of local courts and special courts. Local courts consist of three levels, namely the *High People's Court* ("HPC") at provincial level, the *Intermediate People's Court* ("IPC") at municipal level, and *Primary People's Court* ("PPC") at district and county level. Special courts in China are composed of *Intellectual Property Courts*, *Maritime Courts*, *Financial Courts*, *Military Courts*, etc. To assist its supervisory and judicial work across the vast broad territory of China, the SPC has established six *Circuit Courts* in Shenzhen, Shenyang, Nanjing, Zhengzhou, Chongqing and Xi'an. Additionally, to facilitate effective dispute resolution for the B&R Initiative, the SPC has established two *International Commercial Courts* in Shenzhen and Xi'an in 2018, with jurisdiction over foreign-related disputes with an amount in dispute over RMB 300 million, etc.

1.2 Scope of jurisdiction

To commence litigation proceedings in China, the case is generally filed at the court located at the place of the defendant's domicile. In accordance with the *Civil Procedure Law of the People's Republic of China ("CiPL")*, parties to disputes of contracts or other property rights may, by agreement in

writing, select a court which has an actual connection with the dispute. The actual connection may be the place where the domicile of the plaintiff or the defendant is located, where the subject matter is located, where the contract is signed or performed, provided that the choice is not contravening the hierarchical and exclusive jurisdiction rules.

The following cases come under the exclusive jurisdiction of China's courts: (1) disputes over real estate comes under the jurisdiction of the court where the property is located; (2) disputes arising from port operations comes under the jurisdiction of the court where the port is located; and (3) disputes over succession to inherited property comes under the jurisdiction of the court of the last domicile of the person whose property is inherited or where the major portion of the estate is located.

Further, *CiPL* confers Chinese courts' exclusive jurisdiction over disputes arising from Sino-foreign equity joint venture contracts, Sino-foreign cooperative joint venture contracts and Sino-foreign cooperative exploration and exploitation of natural resources contracts which are performed in China. In other words, parties involved in cases which are under the exclusive jurisdiction of a court of China cannot agree on choosing foreign courts for disputes resolution, except the choice of arbitration.

The amount in dispute of a case is a determining factor in ascertaining the jurisdiction of the court at various levels. For foreign-related commercial litigation, it is worth noting that the first instance jurisdiction usually rests with the IPC, and if the amount in dispute is more than RMB 5 billion, the first instance jurisdiction rests with the HPC. "Foreign-related" commercial litigation refers to those cases in which one party or both parties are foreigners (natural persons or legal persons) or have their habitual residence outside of China, or the subject matter is located in a foreign territory, or the legal facts that give rise to, modify, or extinguish the commercial relationship occur abroad and other circumstances which could be deemed as such. For cases involving Hong Kong and Macao Special Administrative Regions and Taiwan region, the special provisions on foreign-related civil procedures of the *CiPL* apply *mutatis mutandis*. Parties to foreign-related commercial contracts may choose Chinese or foreign-related arbitration institutions to solve their disputes with their chosen applicable law, subject to provisions of mandatory rules and regulations. The *Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations* stipulates that the parties concerned can explicitly choose laws applicable to the foreign-related civil relations, where the laws of China have compulsory provisions on foreign-related civil relations, such compulsory provisions shall apply directly.

1.3 Limitation of action

According to the *Civil Code of People's Republic of China (2020)*, unless otherwise stipulated, the limitation of action for protection of civil rights is three years, calculated from the date when an obligee knows or should have known that his or her rights have been infringed upon and who the obligor is, while the limitation period for bringing a suit or applying for arbitration regarding disputes over contracts for international sale of goods and contracts for technology import and export is four years.

1.4 Trial and appeal

Unlike the adversarial approach prevailing in common law countries, the Chinese court adopts an inquisitorial approach at trial, where judges play a dominant role throughout the trial. At a trial, litigants are entitled to appear before the court themselves or be represented by their counsel. However, litigants are prohibited from engaging foreign lawyers to appear in Chinese courts.

The burden of proof lies with the litigants. They are obliged to present evidence to substantiate their claims within specified time limit. If they are unable to collect evidence due to "objective reasons" prescribed by law, the litigants may apply to the court to collect evidence. The court may allow it if it considers necessary.

The *CiPL* provides that litigation documents in domestic civil proceedings shall be served on the parties directly, or through post or public announcement under certain circumstances. For foreign litigants who have no domicile within the territory of China, direct service is rather difficult. There are some judicial interpretations on the foreign-related litigation procedures, such as the *Provisions of the SPC on Service of Judicial Documents in Foreign-related Civil or Commercial Cases (amended 2020)*. Besides, China is a party to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965)*, pursuant to which litigation documents can be served. In addition, there are some special arrangements made between Mainland China and the Hong Kong and Macao Special Administrative Regions, regarding service of judicial documents.

The decision of a court will be given in the form of a judgment concerning substantive law issues or a ruling concerning procedural law issues. Any party dissatisfied with a judgment or a ruling (limited to rulings on non-acceptance, challenge to jurisdiction and dismissal) of first instance has

the right to file an appeal with the upper-level court within prescribed time limit of 15 days or 10 days, respectively, after receipt of the judicial decision. In respect of litigation concerning a party without domicile within China, the party has the right to appeal against a judgment or a ruling of first instance within 30 days of receipt of the judicial decision. Judgments or rulings of SPC of first instance not appealed and of appellate courts are final and binding. However, if there are serious errors spotted in these legally effective judgments and rulings, the cases concerned may still be re-tried through the trial supervision procedure. The re-trial application must be filed within six months from a judgment or ruling taking legal effect.

1.5 Trial period

In accordance with the *CiPL*, a trial of first instance applying general procedures should be disposed of within six months from the date of establishment of case file. Where special circumstances warrant an extension of time, a six-month extension may be granted by the approval of the court's president. An appeal proceeding against a judgment should be disposed of within three months from the date of establishment of case file for the trial of second instance and may be extended by the approval of the appellate court's president.

Due to the relative complex nature of foreign-related cases, difficulties in service, evidence collection and other litigation process issues, the abovementioned time limits for concluding adjudication do not apply to foreign-related litigation in China. However, it should be noted that although there is no compulsory time limit in the *CiPL* regarding trial of foreign-related litigation, some courts are trying to set their own time limits for foreign-related commercial litigation. For example, the Shanghai HPC issued a procedure rule in 2012 that requires the courts in Shanghai to follow the general time limit of six months when resolving foreign-related commercial cases.

1.6 Enforcement

All parties to a litigation shall comply with the legally binding judgment. If any party refuses to comply with the effective judgment, the other party is entitled to apply to the court for enforcement within two years from the judgment going into effect if no performance period is specified in the judgment. If an effective judgment made by a foreign court requires to be recognised and enforced by a Chinese court, in accordance with international treaties concluded by the People's Republic of China or on the principle of reciprocity, the party concerned may apply directly to the IPC with jurisdiction over the assets or domicile of the party being enforced. If the Chinese court considers that such judgment neither breaches the basic principles of Chinese law nor violates state sovereignty, security or social public interests, the court may issue an order on recognition and enforcement of the foreign judgment. Otherwise, the court may reject the application.

To enhance the B&R Initiative, in June 2015, the SPC issued the *Opinions on People's Courts Providing Judicial Services and Guarantees to the Construction of the Belt and Road Initiative*. This essentially

mandates that China's courts may provide judicial assistance to other countries first before the counterpart countries do so in order to establish a positive cycle for the establishment of reciprocity relationship between China and other B&R Initiative countries.

Within the framework of bilateral judicial assistance agreements involving mutual enforcement, the judgments can also be enforced in the manner as set out in those bilateral judicial assistance agreements. As of the end of 2018, China had signed and ratified judicial assistance agreements for civil and commercial matters with 38 countries, of which 34 include mutual enforcement of civil and commercial judgments. Up until today, China has not yet signed any such bilateral agreements with its most significant trading partners, such as the US, UK, Germany, Japan, South Korea, Canada, Australia, and New Zealand. However, it is worth noting that some bilateral investment protection treaties contain certain provisions for recognition and enforcement of court judgments, even though only in relation to investment disputes.

Within the framework of multilateral international conventions, China signed the *Convention on Choice of Court Agreements* in September 2017 and *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* in July 2019, both of which are yet to be ratified by the National People's Congress of China.

1.7 Reliability of judiciary

To keep apace with the rapid increases in China-foreign trade and economic development, China has constantly overhauled and updated its legislation and judicial practices over the past four decades to make the judicial litigation a more professional, transparent, fair, and efficient vehicle for foreign-related commercial disputes. China has spared no efforts in improving the judicial professionalism and expertise of judges. The requirement of passing *China's unified qualification exam for legal professionals* is a mandatory pre-requisite for judge appointment and court practice. A university diploma, specifically a law degree, is another requirement for judge appointment. For the most developed parts of China, the diploma requirement for judges has been elevated to a Master's in Law degree. With nearly seven years of systematic legal training and the test of *China's unified qualification exam for legal professionals*, the professionalism and expertise of judges has been greatly enhanced.

Judicial transparency has also been one of the focuses on improving the quality of judicial work. Specifically, *China Court Trial Online* (http://tingshen.court.gov.cn) and *China Enforcement Information Online* (http://zxgk.court.gov.cn/zhixing)

have been set up as the main platforms for the publication of information regarding court trials and enforcement proceedings. Since 2014, except for those not suitable for publication online as stipulated by SPC, all court judgments and rulings shall be published on a specialised website of *China Judgements Online* (http://wenshu.court.gov.cn). These measures are important steps towards greater transparency of the Chinese judicial system.

In addition, the internal evaluation mechanism within the courts has played a positive role in enhancing the quality of judicial work. According to SPC's latest report, more than 13 million civil and commercial cases of first instance were concluded by China's courts in the year of 2020. The huge volume of disputes resolved in China's courts is surely a demonstration of the efficiency and reliability of the Chinese judiciary system.

2 Arbitration

China acceded to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")* in 1987. The accession to the *New York Convention*, which facilitates enforcement of arbitral awards among member states, has boosted the preference of arbitration as alternative dispute resolution by commercial contract parties in China. With the rapid development of the Chinese economy, together with promulgation and implementation

of the *Arbitration Law of the People's Republic of China ("Arbitration Law")* in 1995, arbitration has become the most preferred vehicle to resolve international commercial disputes in China.

Although the *Arbitration Law* of China did not directly follow the provisions of the UNCITRAL Model Law, many important principles of modern commercial arbitration have been introduced into the *Arbitration Law*, including the principles of party autonomy, impartiality and independence of arbitration institution, and finality of arbitration awards. Since the *Arbitration Law* is brief and general in nature, the SPC interpretations in respect of arbitration are often referred to determine the validity of arbitration clauses, the enforcement of arbitral awards, and the comprehensive judicial implementation issues of the *Arbitration Law*. In 2017, the *Arbitration Law* was revised and the SPC issued several judicial opinions on the judicial review of arbitral awards. The revised arbitration law and specific judicial interpretations provide vigorous support for arbitration and further restrict judicial interventions in the arbitration process, upholding commercial arbitration as an important dispute resolution vehicle in China.

2.1 Arbitrability

The *Arbitration Law* applies only to commercial disputes, which refer to "arbitrable disputes" as any disputes between citizens, legal persons or other organisations of equal status that involve contractual rights or property rights. It specifically rules out any administrative disputes. Disputes in relation to marriage, adoption, guardianship, family maintenance and inheritance matters are also excluded by arbitration.

An arbitration process must be based on a valid arbitration agreement between the contract parties. According to the *Arbitration Law*, a valid arbitration agreement shall: (1) have the intent to arbitrate; (2) prescribe the matters to be arbitrated; and (3) select a specific arbitration commission. The arbitration proceeding commences from the filing to the arbitration institution of a written application which contains the arbitration agreement.

The principle of separability which recognises the independence of arbitration clause or agreement from other parts of the contract is confirmed by the *Arbitration Law*, which specifies that the arbitration agreement exists independently and the amendment, recession, termination or invalidity of the contract does not affect the validity of the arbitration agreement. For the determination of validity of a foreign-related arbitration agreement, the Interpretation of the *Supreme People's Court on Certain Issues relating to Application of the Arbitration Law of the People's Republic of China (2008)* stipulates that the applicable law shall be the one as agreed upon by the parties; where the parties have not agreed upon an applicable law but have agreed upon the seat of arbitration, the law of that seat shall apply to the arbitration; where the parties have agreed upon neither the applicable law nor the seat of arbitration or where they fail to clearly agree upon the seat of arbitration, the law of the place where the court is located shall apply. The *Law of the People's Republic of China on the Application of Laws to Foreign-related Civil Relations* further stipulates that when the parties concerned have not made a choice, the laws in which the arbitration institution is located or the seat of arbitration shall apply.

2.2 Enforcement of arbitral awards

The valid arbitral award is binding and may be submitted to the relevant IPC for enforcement. An application to enforce an arbitral award must be made within two years from the award going into effect if no performance period is specified in the award.

In respect of enforcement of an arbitral award made by a foreign-related arbitration institution, where the respondent presents evidence to prove that the arbitral award falls under any of the following circumstances, upon examination and verification by the court that the assertion is true, the court shall rule on non-enforcement: (1) the

parties concerned have not included an arbitration clause in the contract or reached a written arbitration agreement subsequently; (2) the respondent has not received a notice from the designated arbitrators or notice on arbitration procedure, or the respondent is unable to make representation due to any reason not attributable to the respondent; (3) the composition of the arbitral tribunal or the arbitration procedure does not comply with the arbitration rules; or (4) the arbitration matter does not fall under the scope of the arbitration agreement or the arbitration institution has no right to carry out arbitration. Where a court deems that enforcement of the arbitral award violates public interest, the court shall rule on non-enforcement.

Since China is a member state of the *New York Convention*, Chinese courts are under treaty obligations to recognise and enforce valid foreign arbitral awards pursuant to the *New York Convention* acceded to by the People's Republic of China or in accordance with the principle of reciprocity.

Considering the complexity of foreign-related arbitration cases, the SPC has introduced a special *Reporting Mechanism* to enhance the quality of court decisions on foreign-related arbitration cases. Specifically, if an IPC considers a foreign-related arbitration agreement invalid, it must first report to the corresponding HPC for review. If the HPC shares the same opinion with the IPC, it shall further report the case up to the SPC. Before the SPC replies, the IPC cannot make the formal decision. Similarly, if an IPC decides not to enforce a foreign or foreign-related arbitral award, it should also follow the same case-by-case supervision procedure to report to the SPC. The introduction of this report and verification mechanism sends a signal to foreign and foreign-related commercial disputants that their arbitration cases will receive due support from China's courts and be treated with justice.

It is worth noting that the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region 2019* and the *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region 2020* have together further strengthened the comprehensive cooperation between Mainland China and the Hong Kong Special Administrative Region on arbitration preservation measures and arbitral award enforcement.

2.3 Leading arbitration institutions in Mainland China

The leading arbitration institutions in Mainland China include, among others, China International Economic and Trade Arbitration Commission ("CIETAC"), China Maritime Arbitration Commission ("CMAC"), Beijing International Arbitration Centre ("BIAC"), Shanghai International Arbitration Centre ("SHIAC") and Shenzhen Court of International Arbitration ("SCIA").

CIETAC, with its head office in Beijing, is one of the most important commercial arbitration institutions in China. Accredited with a panel of reputable professors, former judges and renowned professionals, CIETAC has extensive experience in the settlement of international commercial disputes. In 2012, CIETAC set up an arbitration centre in Hong Kong. In order to provide high-quality and convenient arbitration service, CIETAC also set up the Silk Road Arbitration Centre in Xi'an (China) in 2017, the CIETAC North America Arbitration Centre in Vancouver (Canada) and the CIETAC European Arbitration Centre in Vienna (Austria) in 2018.

In order to improve its flexibility and to be more competitive on the international arbitration market, CIETAC revised and updated its arbitration rules in 2015. The *CIETAC Arbitration Rules 2015* incorporated some new arbitration practices that emerged in recent years, such as joining additional parties, consolidation of proceedings, and emergency arbitrator. A party may apply for joining additional parties to an ongoing proceeding if the additional parties are, on *prima facie* evidence, bound by the arbitration agreement under which the ongoing proceeding has been initiated. In emergency arbitrator proceedings, the emergency arbitrator is empow-

ered to grant interim relief.

In 2017, CIETAC adopted its *International Investment Dispute Arbitration Rules ("IIDA Rules")* in response to the fact that China has become one of the largest countries of both inbound and outbound investments. The *IIDA Rules* represent the first set of investment arbitration rules in China dealing with state-investor disputes in international investment. The *IIDA Rules* combine arbitration with mediation, and has established a specific panel list of arbitrators for international investment disputes.

Another noteworthy development regarding international arbitration institutions in China occurred in the Shanghai Pilot Free Trade Zone. In November 2015, *Hong Kong International Arbitration Centre ("HKIAC")* opened its representative office in the Shanghai Pilot Free Trade Zone. In 2016, *ICC International Court of Arbitration* and the *Singapore International Arbitration Centre ("SIAC")* set up their respective representative offices in the Shanghai Pilot Free Trade Zone. In October 2019, the *World Intellectual Property Organization Arbitration and Mediation Centre* was established and permitted to operate in Shanghai. The permission to open representative offices and to practise locally by renowned international arbitration institutions in China indicates a further openness to the Chinese arbitration market.

2.4 Local arbitration institutions in China

Over the years, more than 250 local arbitration institutions in China were established at the municipal level. With regard to the jurisdiction, local arbitration institutions and CIETAC are similar and can accept both domestic and foreign-related commercial cases. However, in practice, a large portion of the local arbitration institutions caseload is taken up by domestic cases. CIETAC is still China's flagship arbitration institution which is considered to be the most preferable by foreign investors and traders.

3 Mediation

Mediation for commercial dispute resolution is a vehicle by which mediators try to bridge the gaps between the disputant parties and help them render an acceptable compromise to solve the dispute. The mediation process is much more flexible, time- efficient, and cost-saving, in comparison to litigation and arbitration. Confidentiality, voluntariness and cost-effectiveness are key factors for disputants to choose mediation. As the social influence of commercial mediation institutions are beefing up, mediation is becoming more appealing to resolve commercial disputes in China.

The *Law on People's Mediation of the People's Republic of China* was promulgated in 2010. As of late 2013, concerted and intensified efforts were made by the Chinese state government and the SPC to improve and strengthen a Mechanism for Pluralist Dispute Resolution (PDR), in which litigation, mediation, arbitration, administrative ruling, administrative reconsideration and other non-litigation methods are organically linked and mutually coordinated to solve civil and commercial disputes. In 2017, the *Opinions of the Supreme People's Court and the Ministry of Justice on Piloting the Lawyer Mediation System* were issued to encourage lawyers' participation in mediation. Other SPC judicial interpretations promulgated also encourage participation by professional mediators from arbitrators, professors, retired judges and prosecutors, etc.

Mediation in China may be categorised into the following types: (1) people's civil mediation; (2) administrative mediation (including specialised mediation for labour dispute and traffic accident dispute, etc.); (3) judicial mediation; (4) institutional commercial mediation; (5) industry mediation; and (6) lawyer's mediation, etc.

To date, while many mediation institutions have been established to resolve commercial disputes, the existing leading arbitration institutions such as CIETAC in China have also set up mediation centre to consolidate institutional commercial mediation with Med-Arb (mediation in arbitration process) practice. Mediation under CIETAC is conducted by the Mediation Centre in accordance with the *Mediation Rules of CIETAC*. Once a

mediation settlement is reached, for the purpose of enforcing the mediation settlement abroad, the parties, if they so choose, may request the arbitration tribunal to be formed to convert the mediation settlement into an arbitration award which will be enforced under the *New York Convention*.

On 7 August 2019, the grand signature ceremony of the *United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention")* was held in Singapore. The *Singapore Convention* aims at making commercial mediation more appealing among international disputants through harmonising rules to make enforcement of mediation settlement much easier to materialise within the member states. China is among the first states to sign the Singapore Convention, which is yet to be ratified by China's legislature.

IV Conclusion

China is a country of political stability, economic prosperity, and legal system soundness. China's commercial dispute resolution regime mainly includes litigation, arbitration, and mediation. Chinese court litigation at various levels is impartial, efficient, and transparent. The judicial system in China has always maintained a friendly and neutral attitude towards arbitration, giving vigorous support to arbitration as an alternative means of dispute resolution. Commercial arbitration has made great progress in the past decades. Besides the advances of litigation and arbitration in China, civil and commercial mediation is becoming more and more popular in recent years. The Chinese government and the *Supreme People's Court* jointly endeavour to encourage the establishment of pluralist dispute resolution mechanisms in China and integrate litigation, arbitration, and mediation to settle international commercial disputes with more efficiency and fairness. Against the backdrop of the B&R Initiative, the mechanisms for pluralist dispute resolution will further flourish, affirmatively safeguarding and facilitating the trade and investment activities between China and countries along the route of the B&R Initiative.

Walter (Fayun) Chen is S.C (Senior Counsel), Partner, Member of Arbitration Committee of ICC China, Fellow of Hong Kong Institute of Arbitrators (*FHKIArb*), Member of the Database of Arbitrators of LCIA, and Vice President of the UK Sub-Association of Western Returned Scholars Association of China. He is listed on the panel of arbitrators of SIAC, THAC, HKIAC, KCAB International, DIFC-LCIA, CIETAC, CMAC, BIAC, etc., and sits regularly as arbitrator in commercial cases applying UNCITRAL Rules, HKIAC Rules, DIFC-LCIA Rules, CIETAC Rules, etc.

He is one of the very few leading international commercial dispute resolution practitioners in China who can effectively handle cases in both English and Chinese as counsel and arbitrator. He has a proven track record for representing and assisting clients in handling complex and high-profile legal matters and commercial cases heard before Chinese courts, US courts, Hong Kong courts, etc., and arbitration institutions such as CIETAC, SIAC, HKIAC, and the ICC International Court of Arbitration.

walterchen@139.com / chenfayun@grandall.com.cn

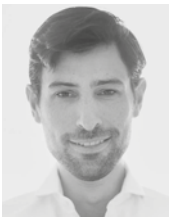
Dan Guo works as an associate in Grandall Law Firm (Nanjing) and is also an associate professor of law in Nanjing Audit University. She has been focusing on research of commercial law for more than two decades and is an expert on company law, securities law, partnership law, and insolvency law. She has published numerous research papers and academic works on the subject of commercial disputes. She has advised domestic and foreign clients on corporate and business law, and has represented clients for commercial dispute cases at courts of various levels in China.

guodan@grandall.com.cn

Tammy Zhe Chen is an associate in Grandall Law Firm (Nanjing). She possesses an American and Chinese business and legal education background with LLM (ECUPL), MBA (NYIT), BS (NYIT) and B.Admin (NUPT) degrees. She advises clients –domestic and foreign – in areas of international trade, cross-border investment and mergers & acquisitions, corporate and other foreign-related legal matters. She represents and assists clients in international arbitrations filed with SIAC, HKIAC, and the ICC Court of International Arbitration, etc., and in courts of various levels in China.

chenzhe@grandall.com.cn

Hong Kong



Duncan Watson QC
Quinn Emanuel Urquhart & Sullivan, LLP

Tom Brebner
Quinn Emanuel Urquhart & Sullivan, LLP

The role of Hong Kong in the Belt and Road Initiative

Hong Kong's role in the Belt and Road Initiative (***BRI***) is largely a function of its long-standing status as an interface between the Chinese Mainland and other economies. The city has been described by its former Chief Executive CY Leung as a "super-connector" in the Initiative (Leung, Chun-ying "Foreword: An Ideal Superconnector in the Belt and Road", in Lam, Kin-chung, *et al.*, *Hong Kong in the Belt and Road Initiative* (The Chinese University of Hong Kong Press, 2020)). Despite the recent political issues (which are beyond the scope of this chapter), it remains a popular venue for the resolution of international disputes.

Hong Kong has long been seen as a conduit to Chinese business interests, which leverages off its colonial history and institutions to provide a familiar environment for cross-border investment. Hong Kong is Asia's second-largest private equity centre (see Hong Kong Monetary Authority, "Hong Kong: Asia's premier private equity hub", 18 May 2020), as well as being China's largest source of foreign direct investment (World Investment Report, United Nations Conference on Trade and Development, June 2020), and the largest recipient of direct investment from Mainland China (see Zhiwen Gong, Fung Chan, and Yan Wu, "Borrowing Hong Kong's International Standards: A Steppingstone for the Chinese "Belt and Road" Going Out?", *Sustainability*, 2021, 13, 3485, Table 3).

Hong Kong has a strong framework to facilitate investment in BRI projects. Hong Kong currently has 19 bilateral investment treaties in force, eight of which are with BRI countries (UAE, Chile, Kuwait, Thailand, Austria, Italy, New Zealand, Republic of Korea). It is the largest offshore renminbi (***RMB***) bond market in the world, and has the largest offshore RMB liquidity pool. This is a strategic advantage for BRI projects, given Chinese authorities have long sought to accelerate the use of the RMB as a BRI financing vehicle (see "Hong Kong's Intermediary Role on Funding the BRI: How Does it Fare Against Singapore?" in *Thought Leadership Brief* (Hong Kong University of Science and Technology, November 2020, No. 44)). Hong Kong has a favourable taxation regime, and an industry of expert advisors

that has built up around that. English remains one of Hong Kong's official languages, and its currency (the Hong Kong Dollar) is pegged to the US Dollar (***USD***).

Hong Kong is uniquely placed to provide sophisticated service support for the cross-border investments that comprise the Initiative. The service industry contributes over 90% of Hong Kong's GDP, with finance and insurance alone contributing approximately 20% (see Hong Kong Census and Statistics Department, Table 36: Gross Domestic Product (GDP) by major economic activity - percentage contribution to GDP at basic prices). Hong Kong's professional services such as legal, accounting, auditing, architecture, engineering, information technology and advertising have the breadth of cross-border experience necessary to meet the demands of the Initiative. Hong Kong's professional community also has a profound understanding of Mainland culture and business operations which allows it to best service BRI investment.

In addition, there is some expectation that, as a result of the pandemic, Chinese policy banks, which were financing much of the BRI, may turn toward supporting China's own growth, such that cross-border financing of the BRI will be required (see "Hong Kong's Intermediary Role on Funding the BRI: How Does it Fare Against Singapore?" in *Thought Leadership Brief* (Hong Kong University of Science and Technology, November 2020, No. 44)). Hong Kong could play a key role in that, given its status as a regional hub for foreign banks and the relationships those banks have with Chinese business.

II Settlement of international disputes in Hong Kong

Hong Kong is an attractive dispute resolution venue for Chinese parties seeking geographical proximity and cultural familiarity, and non-Chinese parties seeking independence, neutrality and international best practice supported by leading practitioners. Accordingly, it is well positioned as a venue for BRI disputes.

Hong Kong was ranked as the third most preferred arbitral seat in the 2021 Queen Mary University of London and White & Case International Arbitration Survey (the ***2021 Queen Mary Survey***): 50% of respondents selected Hong Kong as a preferred seat, an increase from 28% in the 2018 survey (White & Case and Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world,* pp. 6–7).

The legal framework

One reason traditionally cited for Hong Kong's leading status as a dispute resolution hub was the independence of its institutions. The enactment of the National Security Law has raised questions internationally in that regard.

The full extent to which this impacts Hong Kong's competitiveness as a dispute resolution hub is yet to be seen, though the results of the Queen Mary Survey suggest that any such concerns may be overstated (see also Denis Brock, "The National Security Law and Dispute Resolution in Hong Kong: Back to Basics", *Hong Kong Lawyer* (April 2021)). To date, there have been no reported examples of the National Security Law directly impacting the determination of a commercial dispute. In a June 2020 press release, the Hong Kong International Arbitration Centre (***HKIAC***) sought to assuage concerns, stating that users can remain confident that Hong Kong will continue to be a neutral and effective seat of arbitration. HKIAC cited the following points in support of that proposition:

- the domestic legislation that regulates and supports international arbitration in Hong Kong is based on the UNCITRAL Model Law, and remains unchanged (accordingly, Hong Kong's arbitration law remains closely aligned to international practice and is internationally recognisable and accessible when considering Hong Kong as an arbitration venue);
- arbitral tribunals appointed by the parties or HKIAC determine the outcome of arbitrations, and there is no question that these tribunals are neutral and independent;
- HKIAC's own decision-making bodies are comprised of international and local dispute resolution experts;
- a specialist list of judges in the Hong Kong Court of First Instance deals with arbitration matters; and
- the courts have enforced arbitral awards against entities of various nationalities, including Hong Kong entities, Mainland Chinese entities (including Chinese state-owned enterprises) and foreign entities alike. Hong Kong's highest court, the Court of Final Appeal, includes overseas non-permanent judges which are among the most eminent judges of other common law jurisdictions (HKIAC Press Release, "Hong Kong Remains a Neutral and Effective Seat of Arbitration", 29 June 2020).

Hong Kong courts are regarded as being very pro-arbitration. (Note that, like many jurisdic-

tions, the Hong Kong courts have struggled to address the delay and expense of litigation, and civil justice reforms instigated in 2009 have not proven especially successful [see, for example, CJR Monitoring Committee, *Statistics on Ten Years' Implementation of the Civil Justice Reform from 2 April 2009 to 31 March 2019*, p. 21, which shows the average time from the first case management conference to the end of the trial has increased from 181 days in the first year following reform to 399 days in the 10th year].)

As noted above, arbitration-related cases are heard at first instance by specialist judges, and the judiciary is known for taking a "hands off" approach (for example, in the period between 2011 and 2014, there was no instance where a Hong Kong court refused to enforce an award). The Hong Kong courts have express powers to enforce urgent relief ordered by emergency arbitration in or outside of Hong Kong (see *Arbitration Ordinance*, s 22B).

Many disputes in Hong Kong are arbitrable (the following disputes are non-arbitrable: criminal cases; actions *in rem* against ships; competition and antitrust disputes; divorce proceedings; guardianship applications; and matters reserved for resolution by state agencies and tribunals (e.g., taxation, immigration and national welfare entitlements): see Peter Yuen, "Commercial Arbitration: Hong Kong" in *GAR Insight*, 20 May 2021). The Courts adhere to the principle of presumptive validity of arbitration agreements (see Peter Yuen, "Commercial Arbitration: Hong Kong" in *GAR Insight*, 20 May 2021). In Hong Kong, third parties can be bound by an arbitration clause even if they have not executed an arbitration agreement. In *Dickson Valora Group (Holdings) Co., Ltd v Fan Ji Qian*, a Hong Kong court held that a dispute should be referred to arbitration, and granted an anti-suit injunction restraining mainland Chinese court proceedings, even though the defendant was not a party to the contract containing the arbitration clause (*Dickson Valora v Fan Ji Qian* [2019] 2 HKLRD 173 – this decision was based on the third party having sought to enforce a contractual right under the agreement containing the arbitration clause). Furthermore, according to section 12 of the Contracts (Rights of Third Parties) Ordinance, a third party may assign to another person its right to enforce a term of a contract, unless the contract expressly provides otherwise, and the third party may be treated as a party to the arbitration agreement for the purposes of the Arbitration Ordinance (see *Contracts (Rights of Third Parties) Ordinance*, sections 4 and 12).

While, in principle, a Chinese state organ can claim crown immunity in Hong Kong, the Hong Kong courts have enforced awards against Chinese government entities. In particular, in *TBN Fuel Services SDN BHD v China National Coal Group Corporation* [2017] HKCFI 1016 (*TBN Fuel Services SDN BHD v China National Coal Group Corporation* [2017] HKCFI 1016), the Hong Kong Court of First Instance ordered the execution of an award against the assets of a mainland Chinese state-owned entity (***SOE***), providing a strong indication that commercially active and operationally independent SOEs do not enjoy crown immunity against the execution of awards in Hong Kong (see Sarah Grimmer, "Distinction and Connection: Hong Kong and Mainland China, a View from the HKIAC", 24 May 2019, in *The Asia-Pacific Arbitration Review 2020*).

Hong Kong's legislative innovations

Hong Kong's position as a leading dispute resolution hub was further advanced by the commencement on 1 October 2019 of an arrangement between Hong Kong and Mainland China, which empowers Mainland courts to grant interim measures in support of Hong Kong arbitrations. The arrangement extends to arbitrations seated in Hong Kong and administered by HKIAC or other qualified arbitral institutions, rather than *ad hoc* arbitration (see *Arrange-*

ment Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region, Article 2). It allows parties to obtain orders from Mainland Chinese courts for preservation of property or evidence, such as orders freezing bank accounts. The arrangement increases the attractiveness for parties to China-related transactions to select Hong Kong as their seat for arbitration, as they can arbitrate in Hong Kong whilst being assured that they can apply for interim relief in Mainland China. Hong Kong is the only jurisdiction outside the Mainland to benefit from interim measures ordered by the Mainland courts. Since the arrangement came into force, applications for interim measures have been made in Beijing, Dalian, Hangzhou, Jinan, Lianyungang, Nanjing, Shanghai, Shenzhen, Xiamen, Yantai and Zhaoqing. The total value of assets sought to be preserved across all applications was approximately USD 1.4 billion (HKIAC Press Release, "Hong Kong-Mainland China Arrangement on Interim Measures: HKIAC Update", 27 August 2020).

As for the enforcement of arbitral awards, China is a signatory to the New York Convention (of the 65 original BRI jurisdictions, only two countries have not ratified the New York Convention (Turkmenistan and Yemen)). Hong Kong is a Special Administrative Region (***SAR***) of China, meaning that it is not a separate party to the Convention. However, China extended the application of the Convention to Hong Kong upon its resumption of sovereignty over Hong Kong on 1 July 1997. This is subject to the initial reservations made by China upon accession to the Convention, being the reciprocity reservation and the commercial reservation.

Enforcement of Hong Kong awards in the Mainland are governed by a specific and clear legal regime, which was most recently amended on 27 November 2020 (see *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* [note that Hong Kong also has an arrangement with its neighbour Macao for mutual enforcement: *Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region*]). The amendment expanded the scope of the existing arrangement and removed certain restrictions, further strengthening Hong Kong's role as an arbitration seat. The amendment makes clear that the regime applies not only to the enforcement of arbitral awards but also to the recognition of arbitral awards, and permits simultaneous enforcement applications to be made in both the Mainland and Hong Kong.

In addition, there are other innovative ways in which Hong Kong has sought to develop its role as a dispute resolution centre. For example, on 29 June 2020, the Hong Kong government launched a pilot scheme to facilitate the short-term entry into Hong Kong of non-Hong Kong residents entering in order to participate in arbitral proceedings (though participation in the scheme has been disrupted by the pandemic). Non-Chinese nationals and individuals who do not hold a Hong Kong Identity Card are permitted to act as arbitrators in Hong Kong, and there are no separate immigration or other requirements imposed on foreign arbitrators (see *Arbitration Ordinance*, section 24: no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties); Hong Kong has also recently permitted third-party funding of arbitrations (see *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*).

Although parties have a great deal of flexibility in the procedure they adopt for Hong Kong-seated arbitrations, there are certain provisions of the Hong Kong Arbitration Ordinance that are considered mandatory rules governing the

- conduct of the arbitration, including (see Paul Starr, Mathew Briggs, Suraj Sajnani and Felicity NG, "Arbitration procedures and practice in Hong Kong: overview", within *Practical Law UK* (Thomson Reuters)):
  - Arbitration agreements must be in writing (section 19).
  - The court has the power to order a stay of court proceedings in favour of arbitration (section 20).
  - The High Court has the power to grant interim protection measures (section 21).
  - Arbitrators are obliged to disclose circumstances that cast doubt on their independence and impartiality, and an arbitrator can be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties (section 25).
  - The arbitral tribunal has competence to rule on its own jurisdiction (section 34).
  - The parties must be treated with equality and the arbitral tribunal must be independent and act fairly and impartially as between the parties (section 46).
  - There are requirements as to the form and content of an arbitral award (section 67).
  - The court has the power to set aside an arbitral award (section 81).

Mediation

Mediation is also encouraged and facilitated in Hong Kong. The courts are empowered to make orders as to mediation, and Practice Direction 31 requires solicitors acting for each party to file a Mediation Certificate stating whether their client is willing to attempt mediation, and if not, stating the reasons for this. In exercising its discretion on costs, courts can take into account any unreasonable failure of a party to engage in mediation. The Mediation Ordinance regulates the confidentiality of mediation communications.

Hong Kong's arbitral institutions

Hong Kong is the home of HKIAC, which was ranked as the third most preferred arbitral institution in the world according to the 2021 Queen Mary Survey. HKIAC's case load has continually increased over the last decade (see HKIAC 2020 Statistics, available online at: https://www.hkiac.org/about-us/statistics).

HKIAC's arbitration rules are modern and market-leading, and encourage the timely and efficient resolution of disputes (HKIAC-administered arbitrations have a median duration of 12.43 months and median arbitration costs

of USD 106,503: see "Why HKIAC", available online at: https://www.hkiac.org/arbitration/why-choose-hkiac). Parties can choose to pay the tribunal on an hourly basis, or on a scale based on the amount in dispute. Consolidation of multiple arbitrations and joinder of parties is allowed, and single arbitration proceedings can be commenced under multiple contracts. Emergency arbitrators can be appointed to provide urgent injunctive relief (see "Why HKIAC for Belt and Road Disputes", available online at: https://www.hkiac.org/Belt-and-Road/why-hkiac-belt-and-road-disputes). HKIAC has no formal procedure for scrutinising awards, which reduces the length and cost of disputes. Where at least one of the disputing parties is a developing nation, the institution offers its hearing and meeting rooms to the parties free of charge. This is of particular relevance to the BRI, given that 70% of BRI counties are eligible (HKIAC Press Release, "HKIAC Offers Free Hearing Space in Cases Involving Developing States", 18 October 2016).

HKIAC has positioned itself as the premier forum for the resolution of BRI disputes, by providing model clauses for BRI contracts and hosting BRI events (Tang, Stephanie, "HKIAC's New Belt and Road Programme: Does More Need to be Done?" 27 June 2018, available online at: http://arbitrationblog.kluwerarbitration.com/2018/06/27/hkiacs-new-belt-road-programme-need-done). Since 2013, HKIAC has handled more than 360

cases involving BRI jurisdictions, with one-third of cases in 2017 involving a party from China and another party from a different BRI country (see "Why HKIAC for Belt and Road Disputes", available online at: https://www.hkiac.org/Belt-and-Road/why- hkiac-belt-and-road-disputes). In addition, in 2018, HKIAC announced the Belt and Road Programme, which introduced the Belt and Road Advisory Committee, a committee comprised of experts from the finance, infrastructure, insurance, construction and maritime sectors. The Programme also includes an online resource platform for BRI disputes.

The ICC, ranked in the 2021 Queen Mary Survey as the most preferred arbitral institution in the world, has had a Secretariat office in Hong Kong since 2009. The office was the Secretariat's first branch outside Paris (see "ICC opens Hong Kong centre", *PLC Dispute Resolution*, 19 November 2008). The ICC has established a Belt and Road Commission to promote and develop the ICC's existing services to support BRI disputes.

The China International Economic Trade Arbitration Commission (***CIETAC***) is the most established arbitration institution in China, and opened the CIETAC Hong Kong Arbitration Center in 2012, its first sub-commission outside Mainland China. CIETAC has sought to support the BRI. It has created the CIETAC Investment Arbitration Rules, which commenced from 1 October 2017, and which provide a new avenue for the resolution of investor-state disputes.

III Conclusion

Hong Kong's long history as a facilitator of international investment means it stands in good stead to participate in and benefit from the BRI. It is a leading venue for the settlement of international disputes, and is regularly seeking to consolidate its position through innovative new measures.

Quinn Emanuel Urquhart & Sullivan, LLP is a 875+ lawyer business litigation firm – the largest in the world devoted solely to business litigation and arbitration. Our lawyers have tried over 2,300 cases and won 88% of them. When we represent defendants, our trial experience gets us better settlements or defence verdicts. When representing plaintiffs, our lawyers have won over $70 billion in judgments and settlements. We have also obtained five nine-figure jury verdicts, 43 nine-figure settlements, and 19 ten-figure settlements.

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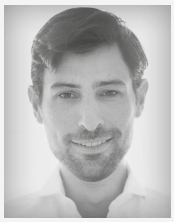

Duncan Watson QC is a partner in Quinn Emanuel's Hong Kong and Perth offices (having also practised in our London and Sydney offices). Duncan specialises in international arbitration, and is qualified in both Australia and England & Wales. *Who's Who Legal* (2021) listed him as one of the nine "*most highly regarded*" young arbitration partners in the Asia Pacific, and quoted peers who described him as "*an exceptional adviser and advocate*" and "*certainly among the very best of his generation*". Duncan was appointed Queen's Counsel (England & Wales) in March 2021.

Duncan has acted as counsel in international commercial and investment treaty arbitrations under most arbitral institutions and rules, including UNCITRAL, ICSID, ICC, HKIAC, LCIA, ICDR, SCC, CAA, and SCAI.

Duncan has acted for multinational corporations and high-net-worth individuals based in Korea, Indonesia, China, India, Russia, Denmark, South Africa, the Middle East, Australia, the US and the UK. He represents clients in a broad array of industries, including private equity and financial services, energy and resources, manufacturing, infrastructure, and intellectual property.

duncanwatson@quinnemanuel.com

Tom Brebner is a senior associate who joined the Sydney office in 2013 and relocated to Hong Kong in 2016. He acts for clients of both offices, and his practice focuses on international commercial arbitration, complex litigation, and insurance disputes. Prior to joining the firm, Tom worked as an associate to the Honorable Justice Sulan of the Supreme Court of South Australia.

tombrebner@quinnemanuel.com

Israel

Gilad Katz
S. Horowitz & Co.

Tal Sticker
S. Horowitz & Co.

I Connection to Belt and Road projects – Infrastructures overview

1.1 Anticipated role of Israel within the Belt and Road scheme

Israel views the sector of national, physical, infrastructure as a positive and effective route for channelling and fostering economic growth throughout the country. Each year, the Israeli government publishes an implementation plan, based on a multiyear programme earmarked for infrastructure projects, specifying the contemplated national projects budgeted for that year encompassing the fields of transportation, communication, water, health and environmental protection.

In January 2019, the Israeli government published its multiyear programme for infrastructure projects and development for the years 2020–2024. The planned projects are valued at billions of US dollars, and reflect the Israeli government's commitment to developing and modernising national, physical infrastructures, amidst the perception that doing so will enable infrastructures to continue to serve as a major growth engine and stimulus for the country's economy. Specifically, the current multiyear programme places special emphasis on transportation and road infrastructure projects, with the execution of major projects in such fields being valued at hundreds of billions of US dollars.

The above perception of the Israeli government therefore aligns perfectly with the Belt and Road Initiative. As is known, Israel is strategically located at the junction of three continents, Europe, Asia and Africa, along the eastern coastline of the Mediterranean Sea and comprises Africa's only land link to Europe and Asia. The Chinese government therefore recognises the potential in Israel serving as a vital conduit for promoting the Belt and Road Initiative and reviving the historic "Silk Road" trade route by connecting China to the west both overland and by sea and has thus taken strides to invest in Belt and Road projects in Israel, as elaborated later on in this chapter.

Moreover, in recent years, many Belt and Road projects that have laid dormant in the "planning" phase have been revived. Planning mechanisms made way for tenders and other fair and competitive processes in which both local and international companies could freely participate. As a consequence, the projects began their implementation phase, and with "boots-on-the-ground"

workers (both foreign and local), the major Belt and Road transportation projects are expected to be completed within the coming successive years.

A very prominent group that actively participates in infrastructure projects in Israel are Chinese companies and groups that specialise in the planning, construction and implementation of major infrastructure projects, and especially belt projects such as ports, railways, light rails, trams, subways and tunnels. Equipped with their unique experience and expertise from having successfully executed massive infrastructure projects throughout China and globally, these companies and groups have begun to play an active and prominent role in the arena of massive transportation projects in Israel, with more and more projects being awarded to them.

1.2 Expected types of investments in Belt and Road projects

One of the most major Belt and Road projects undertaken in recent years in Israel, and which is still ongoing and evolving, is the construction of Israel's new main harbour, known as the "HaDarom Port" project, and which is expected to be the main maritime gateway to Israel, in terms of serving as the main port for the import and export of cargo and goods. The project, which commenced back in 2014, is in its final phases and its construction is expected to be finalised in 2021. The tender for the project was awarded to China Harbour Engineering Company (CHEC) and the project works are being executed by its Israeli subsidiary, Pan Mediterranean Engineering Company (PMEC).

According to Israel Ports Development & Assets Company Ltd. (IPC), which is responsible for the development, operation and maintenance of Israel's ports, the HaDarom Port project, which is being constructed in the city of Ashdod in southern Israel, is the flagship of belt and transportation projects that is expected to accelerate the flow of trade into and out of Israel. Specifically, the project also includes the expansion of several docks in the already existing port of Ashdod (called the "Dock 21" project, which is also being executed by PMEC), thereby allowing for the docking of large vessels which, due to its lack of capacity, Israel has simply been unable to accommodate. Essentially, it is hoped that the larger docking capacity will truly "open up" Israel to the world by allowing for the docking of state-of-the-art large vessels.

A second significant Belt and Road project that is currently underway in Israel is the construction of a new port, adjacent to the existing port of the city of Haifa (in northern Israel), called the "Gulf port" (as it is stationed in the midst of the

gulf of Haifa – the only natural harbour in Israel). Construction of the Gulf port, which commenced in 2015, is expected to be completed in 2021, and should likewise substantially increase the capacity and speed of maritime trade into and outside Israel, in addition to fostering and promoting economic, industrial and logistical prosperity in northern Israel. As with other major naval infrastructure projects, the new Gulf port was leased to the Chinese Shanghai International Port Group, which was also awarded the tender for the operation and maintenance of the new port, for a period of 25 years.

The largest and perhaps most significant infrastructure project, in Israel, is the construction of a completely new mass transit (Light Rail) system in Gush Dan (the Dan Region), which apart from being the most populated region in Israel, is the metropolis of Tel Aviv and the centre of the country's trade and business sector. Essentially, Israel has no existing mass transit system to service the area and, therefore, the project (which involves the design and construction of light rail and subway networks) is probably truly unique and has no parallel comparison in the world. This huge and ambitious project, which is valued at billions of US dollars, is expected to overhaul completely the entire urban landscape of Gush Dan.

Execution of the mass transit system project largely consists of the laying down and construction of over 200 km of railway tracks, roughly 140 km of them underground, through dedicated tunnels, with six different lines and more than 100 new stations and stops. As noted above, the mass transit system is being built "from scratch",

without reliance being made of any existing infrastructure and is expected to provide an immediate and adequate solution to Israel's busiest metropolis as well as support Israel's economy and Israeli society at large. By its very nature, the project entails a massive investment of resources, time and labour and its value is therefore estimated to be roughly NIS 200 billion (roughly US$ 50 billion). This sum is not final as it relates only to the construction costs and does not take into account the additional operation and maintenance costs.

The company that is overseeing the execution of this ambitious project is the Israeli governmental company NTA Metropolitan Mass Transit System Ltd (NTA). NTA hires contractors to execute the construction of the different lines, as each line requires different engineering and construction qualifications (e.g., some lines are mostly at ground level, whilst others are mostly, or completely, underground). As noted above, also with this project, the involvement of Chinese companies in both constructing the railway tracks, belts and stations and in operating and maintaining them in the future is clearly discernible. For example, in 2019, China State Construction Engineering Corporation Ltd. (CSCE) participated as a bidder, and was ultimately awarded the tender, for the construction and tunnelling of the "Green Line", one of the most complicated lines in the Light Rail project, both from an engineering and planning perspective, that is expected to pass through the very heart of Tel Aviv city centre.

As another example, very recently (in September 2020), three Chinese companies (CHEC, CRCC and CREC) formed part of three groups of bidders (out of five groups) that submitted bids in the most intriguing and lucrative tender ever published thus far in Israel – a tender for the operation and supply of maintenance services for the Green and Purple Lines of the light rail. This was the largest tender – in terms of monetary scope – ever published by an Israeli governmental body, and attracted many competitors seeking to be awarded this long-term tender and the substantial revenues it will certainly generate upon it becoming fully operational. This again demonstrates Israel's huge desire and commitment to developing large-scale Belt and Road projects in the country as well as its willingness to invest heavily in this infrastructure sector with the object of promoting and boosting economic growth throughout the country.

Lastly, it is also worth mentioning a few major road construction projects that continue to be executed in Israel on a frequent and regular basis. Throughout the last decade, Israel took a tremendous step in developing and broadening its existing network of roads throughout the country, with many new roads being built while others were expanded or streamlined into freeways. An example of one significant project of this nature concerns the construction of a new road – Road 16 – at the newly renovated entrance to Jerusalem, Israel's capital, where the Israeli government sought to alleviate the heavy congestion encountered daily on the existing roads. Planning and constructing the new Road 16 embodies a major engineering feat, as the topography in and around Jerusalem is challenging, due both to the city being located on high ground and the mountainous area upon which it is built. In this respect too – some of the companies that competed in the tender for the works in relation to those road projects are Chinese infrastructure groups and companies.

1.3 Anticipated Belt and Road projects

To sum up, since the dawn of the millennium, Israel has concentrated on investing substantially in infrastructure projects throughout the country, and is continuing to strive to develop and enhance, on a frequent and ongoing basis, those infrastructure projects deemed essential to it, covering every sector of industry possible. This phenomenon has thus opened up the "playing field" by offering numerous players in the infrastructure sector, both local and international, the opportunity to similarly enhance their reputation and invest in unique and lucrative infrastructure projects in Israel, particularly those players engaging in Belt and Road projects which, as may be discerned from the above, make up a considerable portion of the anticipated projects.

Our firm accordingly expects that in the

coming years the involvement of foreign countries in internal infrastructure projects, and especially in Belt and Road projects, will intensify.

II Country overview

2.1 Economy

Israel is characterised as a highly advanced free-market and, primarily, as a knowledge-based economy. The prosperity of Israel's advanced economy allows the country to have in place a sophisticated modern infrastructure network and an exceedingly robust high-technology sector. Israel has the second-largest number of startup companies in the world after the USA and the third-largest number of NASDAQ-listed companies after the USA and China. This therefore clearly shows that the main sectors of the Israeli economy derive from high-tech and industrial manufacturing. Israel is also renowned for its diamond industry, which comprises one of the world's centres for diamond cutting and polishing. As of 2016, cut diamonds account for 23.2% of Israel's total exports.

In September 2010, Israel was invited to become a member of the OECD. Israel has also signed Free Trade Agreements (FTAs) with Canada, Egypt, the European Free Trade Association, the European Union, Jordan, Mexico, Turkey, Ukraine and the USA, and on 18 December 2007, became the first non-Latin-American country to sign a FTA with the Mercosur trade bloc.

In the past, the agricultural sector formed the backbone of the Israeli economy and also comprised a major part of Israel's total exports. However, over the years this sector has shrunk incessantly and today comprises roughly a mere 2.5% of Israel's GDP. The industrial sector, on the other hand, has preserved its formidable status in the Israeli economy and continues to play a vital role in the nationwide economy. In particular, Israel is renowned for its well-developed chemical industry with many of its products aimed at the export market. Israel Chemicals Ltd. (ICL) is one of the largest fertilizer and chemical companies in Israel and the sixth largest producer and supplier of potash products in the world. In addition, ICL's subsidiary, Dead Sea Works in Sdom, is the world's largest producer of bromine and bromine-based products.

In terms of GDP, in 2020 GDP in Israel was US$ 395.098 billion and GDP per capita was US$ 43,588, so that in terms of GDP in other countries, Israel would be ranked 30th worldwide. The current estimated GDP in Israel for 2021 as gauged by the International Monetary Fund ranks Israel 27th worldwide. According to the last report of the UN Human Development Index (published in 2018), Israel is ranked 18th worldwide, thereby placing it in the category of a "Very Highly Developed" country.

2.2 Currency

Israel's currency is the New Israeli Shekel, which was implemented in 1985, after replacing the "old" Israeli Shekel. One New Shekel is divided into 100 agorot ("cents"). The New Shekel is the only legal currency in Israel.

Since 2003, the New Shekel has been a freely convertible currency. Since 7 May 2006, it became possible to engage in New Shekel derivative trading, thus making the New Shekel one of only 20 or so world currencies for which widely available currency futures contracts can be traded in the foreign exchange market. On 26 May 2008, CLS Bank International announced that it would settle payment instructions in New Shekels, making the currency fully convertible.

2.3 Government and stability

Israel is a liberal parliamentary democracy, where the legislative authority, the Israeli Parliament (the Knesset), is elected directly by the population and is considered the sovereign of the country. The government is sworn in by the Knesset, and is dependent upon its support. The 36th government of Israel serves as the current sitting government, after having been sworn into office on 13 June 2021.

The parliamentarian characteristic of Israel, i.e., the fact that a government has to be sworn in, and supported by, a coalition formed within the legislative authority, lends itself to being somewhat unstable. Nonetheless, this arrangement has yet to cause any major constitutional or governmental

crisis and actually has inherent advantages, in that it commands a flexible ruling system that can respond quickly to changes and also has a better representation of the general public.

The current government was formed as a broad coalition and "unity government" to, among other things, deal with and oversee the exponential financial and medical challenges posed by the current COVID-19 pandemic. This government has also tended to adopt a somewhat liberal free-market economy approach and is seeking to alleviate or remove altogether any restrictions or unnecessary market regulations.

2.4 Political/Cultural considerations

The population of Israel is extremely heterogeneous, divided into various groups based on diverse ethnic, cultural and religious sects. Roughly speaking, one could divide Israel into two major population groups, comprising of Jews and non-Jews, with the former comprising 74.1% of Israel's total population, and the latter the remaining 25.9%.

Notwithstanding this, it is also possible to find within the Jewish population, similarly diverse ethnic, cultural and religious sects, such as those having origins in Europe, Africa or Asia; religious and secular; ultra-orthodox; and others. Therefore, Israel is indeed a very pluralistic country. Such diversity can of course lead to tension and widen the divide between the different groups, but with proper hindsight, tolerance and integrity, it can also encourage collaboration and bolster attempts to bridge any gaps that might arise in order to promote coexistence and foster a healthy, independent, "out of the box thinking" and tolerant society.

In particular, the government invests considerable resources to assist and encourage the equal and fair integration of under-represented populations within society – mostly the non-Jewish population and minorities and, specifically, the Israeli Arab population as well as the ultra-orthodox religious community who, due to their customs, beliefs and practices, require greater understanding and assistance, more suited to their lifestyle and needs. The required efforts are disparate and include, for example, affirmative action within the civil service and educational institutions, as well as allocating specific budgets to encourage the integration of those population groups to form part of mainstream society.

2.5 Natural resources

Unfortunately, Israel lacks significant quantities of natural resources, and mostly relies on the importation of raw goods to propel and facilitate manufacturing within the relevant sectors of industry, save for two exceptions.

First, Israel is relatively rich in natural mineral resources, found mostly in and around the Dead Sea in southern Israel. These mineral resources largely comprise phosphates and potash. Second, at the dawn of the millennium, starting in 1999, a natural gas field was discovered (holding roughly 33 billion cubic metres of natural gas) near the shores of the city of Ashkelon, within Israel's territorial waters. Later on, a major discovery of a far larger natural gas field was made in 2009, when the "Tamar" gas field was found to exist offshore, west of Haifa (holding 223 billion cubic metres of natural gas). A third discovery, "Leviathan", was made in 2010 (holding 45 billion cubic metres of natural gas).

As of 2017, Israel is considered an exporter of natural gas, when a natural gas export treaty was signed between Israel and Jordan. This feat is truly remarkable when considering the fact that during the years 2005–2012 Israel was a customer and had to actually import natural gas from Egypt.

2.6 Infrastructure

As noted above, Israel regards the infrastructure sector as a future and solid base for stimulating economic growth; in other words, by expanding, developing and modernising its entire infrastructure network, the whole country will benefit, both in the immediate short term and in the long run.

In terms of communications, Israel is connected to the world's major commercial, financial and academic data networks and is fully integrated into the international communications systems by means of underwater fibre-optic lines and satellite link-ups.

As also mentioned above with regard to transportation, roads and railways, in recent years, there

- has been a massive expansion and improvement in the road network in order to accommodate the rapid increase in the number of vehicles as well as to make even the most remote communities accessible. Israel Railways operates passenger and freight services to the major industrial and population centres. In recent years, both rail freight and passenger usage has increased exponentially. In terms of seaports, three major ports are currently active and provide a gateway to marine transportation: the ports of Haifa and Ashdod, connecting Israel to the western hemisphere through the Mediterranean Sea; and the port of Eilat, connecting Israel to the eastern hemisphere through the Red Sea.

2.7 Investment limitations

In terms of simplifying investment and "doing business" in Israel more efficiently – the Israeli regulatory authorities have sought to take a more positive approach in so far as foreign investment is concerned and have gradually untethered the relevant regulations and statutes that might be deemed bureaucratic or as obstructing foreign investments and/or hindering foreigners from investing directly in the Israeli market. Over the past decades, as a policy, the Israeli government has actively sought to remove unnecessary regulations and restrictions that had pulled back the possibility of doing business in Israel or which resulted in the incurrence of unnecessary expenditure. Clear evidence of this positive disposition and gradual improvement is the "Ease of Doing Business Index" (adopted by the World Bank), which in 2020 ranked Israel in 34th place (i.e., as "very easy"), up from 49th in 2019.

Unfortunately, even today, foreign investors wishing to invest in Israel would be subject to certain restrictions and limitations which although cannot be fully covered in this chapter, require specific mention. Principally, potential foreign investors may expect to encounter one fundamental legal restriction – relating to the ownership of land in Israel) – that should be taken into consideration. Generally, the basic laws of Israel (Basic Law: Israel Lands) explicitly state that the ownership of land in Israel is restricted to government and government-associated bodies only. However, some exceptions were made, as specified in the Land Law, 1969, all of which apply to local entities having Israeli citizenship or residence. Foreign investors may therefore acquire ownership rights in land in Israel only in accordance with the terms and conditions as stipulated in the Israel Lands Law, 1960, and will also need to comply with the complex requirements for obtaining the necessary authorisations in order to be vested with such ownership rights.

III International dispute settlement

As a preliminary note, it should be mentioned that each of the following dispute resolution mechanisms (courts, arbitration, mediation) can be used, freely, fully and independently in relation to almost every commercial transaction. In Israel, parties to commercial transactions are at liberty to decide whether disputes that may arise between them in the future should be settled through the courts or, alternatively, by arbitration or mediation.

Thus, and particularly in the field of Belt and Road projects, it is possible to find different dispute resolution mechanisms in place to suit the contracting parties' needs. For example, in the agreement signed between CSCEC and NTA for the execution of the Tel Aviv Light Rail project, the parties must refer their dispute to arbitration. However, in the agreement signed between CHEC and IPC regarding the execution of the HaDarom Port project no such provision exists, so that any disputes arising between the parties can only be settled through the courts.

3.1 Local courts and legal tradition

Broadly speaking, Israel has a three-tier court system. The first tier comprises of magistrates' courts situated in most cities across the country. In the second tier are district courts, which serve as both appellate courts and courts of first instance (for commercial disputes surpassing certain threshold amounts, for criminal cases where the sanction for the relevant offence falls within a certain threshold, or for specific petitions against administrative bodies). They are situated in five of Israel's six districts. The third and highest tier is the Supreme Court, located in Jerusalem; it serves a dual role as the highest court of appeals and the High Court of Justice. In its latter role, the Supreme Court rules as a court of first instance, allowing individuals, both citizens and non-citizens, to petition against decisions rendered by the state authorities. In addition, there are religious tribunals that have jurisdiction to deal with personal matters, such as marriage and divorce within the recognised religious communities (Jewish, Muslim, Druze and Christian).

Therefore, the scope of jurisdiction conferred on the Israeli courts is broad and encompasses all of the borders of Israel (save for the territories administered in Judea and Samaria). In terms of extra-territorial jurisdiction, generally, certain laws and regulations in Israel, most notably the Civil Procedure Regulations, 1984, allow for expansion of the jurisdiction of the Israeli courts beyond the Israeli territory, provided that the plaintiff seeking

the jurisdiction of the Israeli court extra-territorially can point to several "links" (nexuses) that justify the case being tried in Israel.

Israeli jurisprudence combines three legal traditions: English common law; civil law; and Jewish law. It is based on the principle of *stare decisis* (precedent) and is adversarial by nature. Lawsuits are decided by professional judges, rather than juries. The election of judges is carried out by a committee comprising of two Knesset members, three Supreme Court justices, two Israeli Bar members and two ministers. Therefore, the Israeli legal system is professionally-oriented and politically-neutral. The judiciary system in Israel enjoys total and complete independence from the other governing/regulatory authorities and as such is considered highly trustworthy and uncorrupted.

Regarding the speed and efficiency of the court system, despite the number of cases and workload having increased exponentially over the past decade, the judiciary posts have regrettably not grown at the same pace. Moreover, the Supreme Court, which, as noted above, serves as the highest appellate instance (when appealing on magistrates' courts' rulings) or the first appellate instance (when appealing on district court decisions), has likewise not seen an increase in the number of Supreme Court justices appointed to the bench and there are still too few. As a result, 20 Supreme Court justices are assigned to deal with more than 4,000 cases filed with it annually. This has led to an inordinate delay in the handling of cases brought before the Israeli courts so that, on average, it can take between 1.5–3 years until a regular commercial lawsuit is concluded in the trial court.

3.2 Arbitration

Arbitration in Israel is codified and regulated under the Arbitration Law, 1968, which essentially provides that any commercial matter can be resolved by arbitration, provided that the parties to the dispute agreed in a written agreement to settle their dispute by arbitration. In so doing, the agreement becomes binding on the parties and is enforceable by the courts.

The Arbitration Law also confers on the agreed arbitrator powers equivalent to those conferred on judges, in terms of the imposition of enforcement measures as well as in providing temporary remedies (if and to the extent sought). The final arbitration award is enforceable by law, and can be submitted to the court for ratification and execution. The Arbitration Law does not restrict the parties with regard to the identity of the arbitrator and, in practice, it is common in Israel for retired judges, commercial practising lawyers, economic experts, etc., to serve as arbitrators.

The grounds allowing the court to intervene and set aside the arbitration award are strictly restricted to, among other things, severe fundamental flaws in the justice or fairness of the arbitration and/or if the award is found to contradict public policy. However, the parties can agree, prior to initiation of the arbitration, to the award being appealable before a second arbitrator. Alternatively, the parties can agree to the award being appealable before a court, subject to appropriate leave being granted by the relevant appellate court. Under such latter scenario, several restrictions are imposed on both the arbitration proceedings and the arbitrator, most notably the requirement that the arbitrator must rule according to the substantive law (an obligation that would otherwise not exist, except where the parties specifically require this).

3.3 Mediation

Mediation is a highly developed area in Israel and is largely encouraged by the courts as a reliable

and cost-effective alternative dispute resolution mechanism. Due to the heavy backlog of cases awaiting adjudication throughout the Israeli court system, the courts at times tend to take a proactive approach and recommend that litigants engage in mediation in an attempt to resolve their dispute amicably.

Referring a case to mediation requires the full agreement of the litigants. Mediation proceedings enjoy full confidentiality and if the mediation fails, the parties cannot later use or rely on any document exchanged or disclosed during the mediation. The Israeli courts enforce this rule strictly.

Mediation can be used to resolve an array of cases – ranging from commercial disputes and extending to marital/divorce disputes, family disputes and even municipal or administrative disputes. Recent statistics in Israel show that roughly 25% of the cases referred to mediation were indeed resolved by means of an amicable settlement. Settlements reached in mediation can at a later stage be enforced by the courts.

3.4 International treaties

Bilateral investment treaties with Belt and Road countries

Israel has signed bilateral investment treaties (BITs) with many countries around the world (including Belt and Road countries) aimed at enhancing, fostering and protecting investments both in Israel and abroad. For example, Israel is party to BITs signed with Argentina, Bulgaria, China, the Czech Republic, Estonia, Germany, India, Japan, Latvia, Lithuania, the Republic of Korea, Thailand, Turkey, Ukraine, Uzbekistan and other countries. As may be discerned, the BITs signed with all such countries are clearly intended to protect investments in Belt and Road projects.

For example, the BIT between Israel and China was signed on April 10, 1995, and became effective on January 13, 2009. The BIT provides protection for investors, such as compensation for losses that may be incurred as a result of the outbreak of war or some other national emergency, the scope of which shall be not less than the compensation granted to investors in other countries. Additional protection provided in the BIT is intended to combat losses sustained due to inequitable treatment, unfair expropriation or nationalisation.

Relationship with the EU

The Association Agreement establishing an association between Israel and the Member States of the European Union was signed on November 20, 1995, and ratified on June 1, 2000. This agreement replaced the previous cooperation agreement signed between the parties in 1975. The Association Agreement creates a comprehensive cooperation regime covering many areas of trade and commerce such as government acquisitions, rules of origin and standardisation tools, subsidies and competition law. The Association Agreement also covers collaboration in the technology, energy, transportation and other sectors.

Moreover, relations between Israel and the European Union are also governed by the "European Neighbourhood Policy", implemented through an Action Plan (agreed between the parties at the end of 2004 and ratified by them in 2005). The Action Plan expands the mechanisms of cooperation set forth in the Association Agreement including, among other things, in areas spanning transportation, energy, science and technology.

Reciprocal arrangements for the recognition and enforcement of court judgments with Belt and Road countries

In Israel, there are two routes for the reception of foreign judgments:

1. Enforcement – Israeli law prescribes five conditions facilitating enforcement of a foreign judgment in Israel: (1) the judgment was given within the scope of jurisdiction recognised by the Israeli court; (2) the judgment is no longer appealable; (3) the judgment is enforceable under Israeli law and does not contradict public policy; (4) the judgment is enforceable in the country in which it was given; and (5) reciprocity in enforcement. With regard to the latter condition, the Israeli Supreme Court has held that in

order to satisfy the reciprocity requirement, it is sufficient that there is a reasonable likelihood of an Israeli judgment being enforceable in the relevant country. In addition to the above conditions, several defences may be raised against the enforcement of a foreign judgment in cases where, for example, the foreign judgment was obtained fraudulently.

Currently, Chinese court judgments are enforceable in Israel, despite no formal agreement having been signed between Israel and China regarding the recognition and mutual enforcement of court judgments in the two jurisdictions. In 2017, the Supreme Court enforced a judgment rendered by a Chinese court on a commercial matter. Principally, the Court held that the reciprocity in enforcement condition had been met because it was not proven that China does not enforce Israeli judgments. The Court also emphasised the importance of enforcement in light of principles such as efficiency, legal and business certainty, as well as in view of the developing and growing business relations between Israel and China (CA 7884/15 *Reitman v. Jiangsu Overseas Group Co Ltd.* (2017) (Isr.)).

2. Recognition – there are two types of recognition: (1) direct recognition; and (2) incidental recognition. The difference between the two depends on the circumstances of recognition – direct recognition is possible when the foreign judgment constitutes the main cause of action being heard in the Israeli court, while incidental recognition is relevant when the foreign judgment arises during deliberations on another (albeit incidental) issue.

The condition enabling direct recognition of a foreign judgment is the existence of a signed treaty between the states. Thus, in the absence of a treaty, foreign judgments will not be accorded direct recognition in Israel. Currently, Israel is party to only four bilateral treaties of this nature (*viz.*, those signed with Austria, Germany, the UK and Spain).

However, with regard to incidental recognition, no formal treaty is required. Incidental recognition of a foreign judgment is dependent on the following factors: the judgment was given with the proper authority; it was not obtained fraudulently; the proceedings were fair; and the judgment does not contradict public policy in Israel.

3.5 The New York Convention

Israel became party to the New York Convention on January 5, 1959. The Convention was adopted into Israeli law in several stages. Initially, in 1968, the Arbitration Law adopted the provision concerning a stay of proceedings and referral of the parties to arbitration. Subsequently, in 1974, the provisions relating to the enforcement of foreign arbitration awards were adopted, and in 1978 regulations for implementation of the New York Convention were enacted.

Regarding a stay of proceedings, the Supreme Court has ruled that except in cases provided for in the Convention (namely, the agreement is null or void, inoperative or incapable of being performed), the court has limited discretion not to stay proceedings where the agreement includes an international arbitration clause.

Thus, in a business dispute between a foreign transportation company (which was involved, among other things, in the Light Rail project in Jerusalem and the Light Rail project in Tel Aviv) and the representation company with which it contracted in Israel, the Supreme Court rejected the representation company's request to conduct legal proceedings in Israel, due to an international arbitration clause having been included in the agreement between the parties. The court nonetheless ruled that proceedings can be conducted in the Israeli court in respect of projects which were not subject to any written agreement and contained no arbitration clause, since it was not possible to read into the parties' relationship arbitration clauses included in previous agreements (CA 2216/13 *Daria Engineering Ltd. v. Alstom Transport SA* (2014) (Isr.)).

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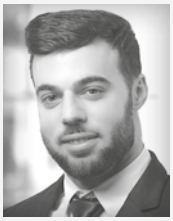
Gilad Katz is a partner in the Dispute Resolution Practice Group of the firm. He has extensive experience acting for clients on a broad range of high-value corporate and commercial cases disputes before the entire range of Israeli courts and tribunals.

Gilad's practice encompasses high-volume commercial disputes, complex construction and infrastructure disputes (having the uniqueness of representing both contractors, employers and managing companies in huge national projects), complex real estate disputes and zoning disputes.

Gilad also has experience acting for NGOs, non-profits and charities on governance issues and disputed bequests. In addition, within his capacity as the legal counsel of the Israel Cancer Association, Gilad has provided legal advice on a number of proceedings that sought to set aside bequests and donations made to the charity.

giladk@s-horowitz.co.il



Tal Sticker is an associate in the Dispute Resolution Practice Group of the firm. He represents international and domestic companies, government companies, financial institutions and high-net-worth individuals on a broad range of civil and contractual matters, with particular focus on challenging and reviewing the decisions of public authorities and public bodies in the administrative courts, defending class actions disputes relating to the real estate, construction and healthcare sectors, complex contractual disputes and tender-related disputes.

Tal.Sticker@s-horowitz.co.il

Japan

Shin-Ichiro Abe
Kasumigaseki International Law Office

Yoshihiro Takatori
Kasumigaseki International Law Office

Connection to Belt and Road projects

The Belt and Road Initiative is a significant project for China and other related countries. China is Japan's largest trading partner. Japan is China's second-largest trading partner behind only the United States. The amount of total trade between China and Japan was USD 3.5 billion in 2018, a 7.4% increase from 2017 (https://www.digima-japan.com/ knowhow/ china/16342.php). The number of Chinese tourists who visited Japan was 9.59 million in 2019, the largest number in history. It is clear that the relationship between the two countries has been very close and important for years.

Unfortunately, Japan has not signed a Belt and Road Initiative contract with China. We think Japan can contribute to some of the priorities of the Belt and Road Initiative. The Japanese government has engaged with the Belt and Road Initiative, and attended the second Belt and Road Forum held in Beijing in 2019, where famous Japanese business people from various business sectors and several influential politicians attended to promote the relationship between China and Japan.

The five priorities of the Belt and Road Initiative are: 1) Policy consideration; 2) Facilities connectivity; 3) Unimpeded trade; 4) Financial integration; and 5) People-to-people bonds (https://www.beltroad-initiative.com/belt-and-road).

We believe that Japan can take a step-by-step approach to contributing to the achievement of the priorities before officially signing a Belt and Road Initiative contract with China.

Regarding priority 2) Facilities connectivity and priority 3) Unimpeded trade, the Japanese business sector is very active in working with its Chinese counterparts despite the COVID-19 crisis. For example, *Nikkei News* reported that the number of cars sold in China manufactured by Toyota has increased by 110% and by Honda 310% in April compared to that of last year (https://www.nikkei.com/article/DGXZQOGM082BE0Y1A500C2000000).

We need to identify which part of the trade sector should focus on smoothening mutual trade and then examine the reasons and cure methods for problems, and whether or not we can resolve the problems before signing the contract. It is worth conducting such an examination now, because we can develop a resolution method and quickly move on to this work once the contract is signed.

We must also stress the importance of priority 5) People-to-people bonds. China and Japan have a history of relations spanning over 1,800 years.

We should increase communication, especially person-to-person, direct communication among professionals, from both sides to develop a broad scheme and a "To Do List" in relation to priorities 2) and 3) mentioned above. We believe that such efforts will help move both countries further in deciding whether to sign a contract in the future.

II Country overview

1. Economy

(1) Overview of the Japanese economy

- Japan's real GDP in 2019 was USD 4,553,028,000,000 (USD 4.553 trillion), the third-largest in the world.
- Japan's real GDP growth rate had been positive for eight consecutive years from 2011 until 2019, but due to the impact of the COVID-19 crisis, the real GDP growth rate in 2020 was negative 5% ("Invest Japan Report" (*JETRO*)).
- Japan's inward direct investment in 2019 increased by 37.3% year on year to about JPY 4 trillion, the second-largest amount since 2014 (22nd in the world) ("Balance of Foreign Assets and Liabilities in Japan" (*Ministry of Finance*, *Bank of Japan*), "National Accounts" (*Cabinet Office*)).
- In 2019, the balance of Japan's FDI was approximately JPY 33.9 trillion.
- On the other hand, Japan's FDI was approximately USD 227 billion in 2019, making Japan the world's largest investor for the second consecutive year.

(2) Effects of the COVID-19 crisis

- Japan was the second country outside of China where the infection was confirmed, but the number of deaths was only about 1,800 (as of November 2020), so the damage has been minimised compared to other countries and regions.
- In April 2020, February 2021 and April 2021, the Japanese government declared a state of emergency in some areas based on the Act on Special Measures against Pandemic Influenza, etc., and requested certain businesses, such as restaurants, to suspend operations and cancel events involving gatherings of large numbers of people. In addition, in February 2020, the Japanese government established a list of countries and regions that are subject to denial of entry into Japan. As a general rule, travellers from designated countries and regions are not allowed to enter Japan, except for those who are eligible for Japanese citizenship and those with special circumstances.
- The COVID-19 crisis has harmed companies in the country, resulting in a decline in overall capital investment. On the other hand, the government is encouraging digitalisation, such as telework, and many regions have reported plans to increase investment in digital transformation, so investment in this area is expected to increase.
- Concerning consumer demand, the COVID-19 crisis has significantly reduced consumer confidence, while demand for online shopping and cashless payments has increased.

(3) Currency

- In Japan, the JPY is used, issued by the Bank of Japan, Japan's central bank.
- The JPY is currently available in JPY 10,000, JPY 5,000, JPY 2,000, and JPY 1,000 banknotes, and in JPY 500, JPY 100, JPY 50, JPY 10, JPY 5, and JPY 1 coins.
- The JPY has been fluctuating within the range of JPY 105–115 to the USD from 2017 to 2020, but since July 2020, there have been occasions where it has fallen below JPY 105 to the USD.

(4) Government and stability/security

- Japan has a bicameral system consisting of the House of Representatives and the House of Councilors, and a parliamentary cabinet system with both houses of parliament.
- As of May 2021, the Japanese government consists of the Liberal Democratic Party (LDP) and the New Kōmeito Party (NDP).
- Yoshihide Suga, a member of the House of Representatives of the LDP, took office as the 99th Prime Minister on September 16, 2020, succeeding former Prime Minister Shinzo Abe.

(5) Political/cultural considerations

- Japan is a safe country, with Tokyo ranked first in the world and Osaka third in the world in the 2019 Safe Cities Index ("Safe Cities Index 2019"(*The Economist*)).
- The official language is Japanese.

(6) Natural resources

- As of FY2018, approximately 85% of Japan's energy comes from fossil fuels (oil, coal, and LNG), with 99.7% of oil, 99.5% of coal, and 97.7% of LNG coming from overseas ("Japan's Energy 2020" (*Ministry of Economy, Trade, and Industry*)).
- As for energy resources other than fossil fuels, nuclear power accounted for about 11% of the total as of FY2010, but due to the impact of the Great East Japan Earthquake, it has decreased to about 3% as of FY2018. On the other hand, renewable energy has increased from about 4% in FY2010 to about 12% in FY2018.
- The composition of renewable energy in FY2018 was 7.7% hydro, 6.0% solar, 2.2% biomass, 0.7% wind, and 0.2% geothermal.

(7) Infrastructure

- In the R&D sector, Japan is ranked first in the

world, as well as ranked as the most attractive R&D location in Asia ("The Global Startup Ecosystem Report 2020" (*Startup Genome*)).

- Japan ranks second in the world in terms of the quality of its legal and administrative systems ("The Global Competitiveness Report 2019"(*World Economic Forum*)). In particular, Japan is ranked first in the world in terms of bankruptcy resolution ("Doing Business 202" (*The World Bank*)).
- Japan has the world's most efficient public transport service, the world's third-best airport connectivity, and the world's second-best access to electricity.
- Internet usage per capita is 91%, cell phone subscriptions are 141 per 100 people, and other IT infrastructure is also well developed ("Individuals using the internet (% of the population)", "Secure Internet servers (per 1 million people)", "Mobile Cellular subscriptions (per 100 people)" (*The World Bank*)).

(8) Investment limitations

Obligation to give prior notification in the case of making an inward direct investment

- When **(i) foreign investors** (ii) execute **inward direct investment, etc.**, it is necessary, in principle, to submit a prior notification to the Minister of Finance and the minister having jurisdiction over the business via the Bank of Japan.
- "***Foreign investors***" are defined as the following (for details, see Q2 of "Q&A on the Foreign Exchange and Foreign Trade Law" (*Bank of Japan*, *International Bureau*), https://www.boj.or.jp/about/services/tame/faq/t_naito.htm):
  1) Individuals who do not reside in Japan.
  2) Corporations and other organisations established under foreign laws and regulations, or corporations and other organisations with their principal offices in foreign countries that do not fall in the category described at point 4) below.
  3) Companies in which the total voting rights held directly or indirectly by the parties listed in 1) or 2) above account for 50% or more.
  4) Partnerships or limited liability partnerships engaged in the investment business in which non-residents contribute over 50% of the total amount of investment by all partners, or in which a majority of the managing partners are non-residents.
  5) Japanese companies or other entities in which any majority of the directors or officers with representative authority are non-resident individuals.
  6) Other persons who make inward direct investment, etc., or specified acquisitions on behalf of a foreign investor without being in the name of the said foreign investor.
- "***Inward direct investment, etc.***" is defined as including the following transactions or acts:
  1) Transactions or acts in which foreign investors acquire shares or voting rights of a listed company in Japan, and the investment percentage or voting rights percentage is 1% or more, respectively (including transactions or acts by investors who are closely related to foreign investors).
  2) Acquisition of shares or equity interests in

an unlisted Japanese company by foreign investors (excluding the acquisition from other foreign investors).

3) Transactions or acts in which individuals who acquired shares or equity in an unlisted Japanese company while residing in Japan transfers such shares or equity to foreign investors after ceasing to reside in Japan.
4) The foreign investors agreeing to transactions or acts which (a) substantively change the business purpose of the Japanese company, (b) are a proposal for the election of directors or auditors, or (c) are a proposal for a business transfer (if the company is a listed company, (a) is limited to cases where foreign investors hold one-third or more of the total voting rights, and (b) and (c) are limited to cases where foreign investors hold 1% or more of the total voting rights).
5) Establishing a branch office, factory, or other places of business in Japan, or substantially changing the type or the purpose of the business by foreign investors who are individuals or foreign companies that do not reside in Japan.
6) Lending in which foreign investors lend money to a Japanese company for over one year (excluding lending JPY by foreign investors residing in Japan), and which meets both of the following conditions:
   i) The balance of loans from foreign investors to the Japanese company after the lending exceeds an amount equivalent to JPY 100 million.
   ii) The total amount of the outstanding loans from the foreign investor to the Japanese company after the loan and the outstanding bonds issued by the Japanese company owned by the foreign investor exceeds over 50% of the liabilities of the Japanese company.
7) Foreign investors succeed the business of a resident (limited to a corporation) through a business transfer, absorption-type demerger, or merger.
8) Foreign investors' acquisition of corporate bonds issued by a Japanese company, in which the offer of the corporate bonds was made for a specific foreign investor, the period from the date of acquisition of the corporate bonds to the date of redemption of the principal is over one year, and which meets both i) and ii) below (excluding cases where a foreign investor residing in Japan acquires bonds denominated in JPY):
   i) The amount of bonds from the foreign investor to the Japanese company after the acquisition of the relevant bonds exceeds an amount equivalent to JPY 100 million.
   ii) The total amount of the outstanding bonds from the foreign investor to the Japanese company and the outstanding cash loan from foreign investors to the Japanese company after the acquisition of the bonds exceeds 50% of the liabilities of the Japanese company.
9) Foreign investors' acquisition of equity securities issued by a corporation established under a special law, such as the Bank of Japan.
10) In the case of discretionary investment by foreign investors in the shares of a listed company in Japan, where the investment percentage based on real shares or the voting percentage based on real ownership, etc., is 1% or more.
11) In the case where a foreign investor accepts the authority to represent another party in the exercise of voting rights of a Japanese company directly held by the other party, and the case falls under the following conditions set at (a) or (b), and also falls under any of the following at i) to iii):
   (a) Voting proxy exercise of voting rights of a listed company in Japan, where the percentage of voting rights based on the voting rights held by the proxy after the exercise of such voting proxy is over 10%.
   (b) Voting proxy appointment for voting

rights of unlisted companies, which is received from other than foreign investors who directly hold voting rights.

i) The assignee is other than the company or its officers.

ii) The agenda for which the voting right is to be exercised falls under any of the following:
- Appointment or dismissal of directors.
- Shortening of the term of office of directors.
- Amendments to the Articles of Incorporation (relating to changes in business purposes).
- Amendments to the Articles of Incorporation (relating to the issuance of shares with veto rights).
- Business transfer, etc.
- Absorption-type merger agreement, etc.
- Consolidation-type merger, etc.

iii) Those that involve solicitation by the recipient to allow him or her to represent him or herself in the exercise of voting rights.

12) Acquisition by foreign investors who acquire the authority to exercise voting rights, etc., and the percentage of voting rights based on the actual holding of voting rights, etc., of the acquirer after such acquisition is 1% or more.

13) Transactions or acts in which individuals who acquired shares or equity in an unlisted Japanese company while residing in Japan delegate proxy authority to foreign investors after ceasing to reside in Japan.

14) Obtaining the consent of another non-resident individual or corporation, etc., who holds voting rights of a listed company, etc., to jointly exercise voting rights of a listed company, etc., and the percentage of voting rights based on voting rights of beneficial ownership, etc., which is calculated by adding the number of voting rights of beneficial ownership, etc. held by the consent acquirer and the number of voting rights of beneficial ownership, etc. held by the other party to the consent acquisition, is 10% or more. The percentage of voting rights based on beneficially owned voting rights, which is the sum of the number of voting rights held by the consent acquirer and the number of voting rights held by the other party to the consent acquisition, will be 10% or more.

Obligation to give prior notice in the case of specified acquisition

- If (1) **foreign investors** (2) conduct a **specified acquisition** of (3) the business of the investee or its subsidiary or half-voting subsidiary includes a designated industry of the specified acquisition, it is necessary, in principle, to submit an advance notification to the Minister of Finance and the minister having jurisdiction over the business via the Bank of Japan before the acquisition.
- "***Specified acquisition***" is defined as the acquisition of shares or equity interests in an unlisted Japanese company by foreign investors through an acquisition from other foreign investors.

Exemption from prior notification

- As mentioned above, in principle, prior notification is required for inward direct investment by foreign investors, but exceptions are allowed as follows:
  - (1) If foreign investors other than the one who is especially required to undergo an investigation (Q10 of "Q&A on the Foreign Exchange and Foreign Trade Law" (*Bank of Japan*, *International Bureau*)), (2) makes an inward direct investment, etc. (specified acquisition) other than one that is highly likely to fall under the category of inward direct investment, etc. (specified acquisition) of national security, etc. ("***core industries***"), (3) satisfies certain criteria (Q8 of "Q&A on the Foreign Exchange and Foreign Trade

Law" (*Bank of Japan, International Bureau*)), prior notification will not be required. In this case, if the investment percentage or the voting rights percentage is 1% or more, an *ex post* report must be submitted within **45 days** from the date of the inward direct investment, etc.

- "***Core industries***" include arms, aircraft, satellites, nuclear reactors, pharmaceuticals, cybersecurity, electric power, gas, telecommunications, water supply, railroads, and oil (for details, see Q23 of "Q&A on the Foreign Exchange and Foreign Trade Law" (*Bank of Japan, International Bureau*)).

III International dispute settlement

1. Local courts and legal tradition

(1) Scope of jurisdiction

All commercial and civil matters, including family matters, under Japanese applicable laws, including the Code of Civil Procedure, which provides jurisdiction based on the defendant's domicile and over actions involving contractual obligations, consumer contracts and labour relations, property rights as well as patent and design rights.

(2) Sophistication

The Japanese local courts and legal tradition have developed a sophisticated practice through judicial institutions including sophisticated professional judges, constituting the judiciary system. The system has practically matured as a civil law type of legal system and culture.

(3) Reliability of judiciary/corruption

Very reliable as judiciary institutions, which are not locally or nationally biased and quite fair/neutral. No concerns on corruption under strict laws and rules.

(4) Speed

While the speed of court litigation has been relatively slow, compared with arbitration, the speed is improving, especially on certain intellectual property disputes. While typical/normal commercial or civil cases are completed within one or two years, some complicated or large cases may last more than several years. One of the causes for delays may derive from the periodical rotation system of Japanese judges, who are rotated, usually around every three years to different regions across Japan. This requires a newly assigned judge to become familiarised with cases succeeded from a judge rotated to a different region of Japan.

A large portion of civil/commercial cases are settled through judge-initiated mediations, which have been helpful in speeding up resolution or settlement of disputes.

(5) Efficiency

Very efficient, as dispute resolution by a sophisticated procedure led by sophisticated judges, with some limitation under the civil law system, including strictly limited document production, is recognised, which may be pointed out as a limitation of efficient resolution.

Further, a judicial mediation procedure, which can combine a judge's legal skills/experience and an expert's special skills/experience, is effective for party interests, including commercial objectives.

2. Arbitration

(1) Arbitrability – can you arbitrate certain commercial disputes?

Yes, commercial disputes as well as civil disputes and investment treaty related disputes can be arbitrated in Japan as the seat of arbitration and the venue of proceedings. The Japanese Arbitration Act is based upon the UNCITRAL Arbitration Model Law, while some provisions are not reflected by the UNCITRAL Arbitration Model Law – amendments from 2006 have not been adopted yet, including enforcement of interim measures and preliminary orders. Currently, the Japanese Ministry of Justice is undertaking preparatory discussions for possible amendments to the

Japanese Arbitration Act, to follow amended provisions of the UNCITRAL Arbitration Model Law, including whether possible enforceability of interim measures and preliminary orders should be limited to cases for which the place of arbitration is Japan, or should include cases for which the place of arbitration is outside of Japan.

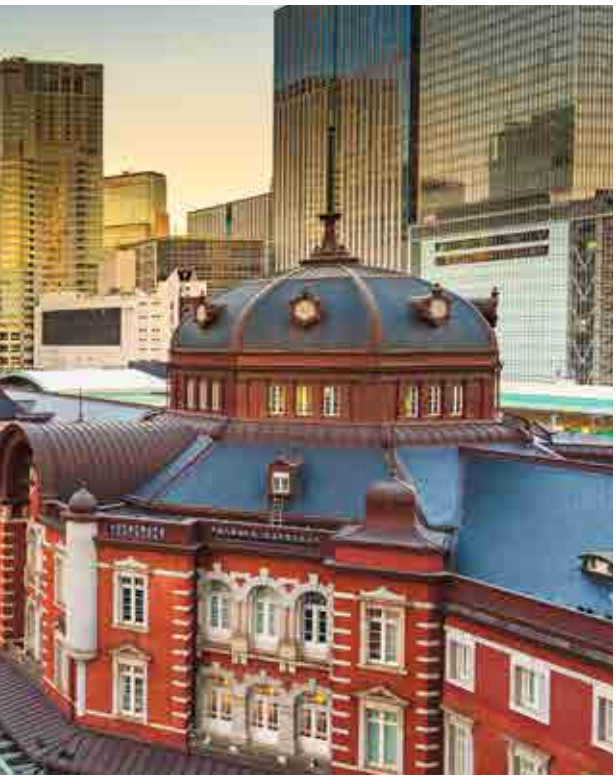
Additionally, jurisdiction of disputes related to international arbitration is under discussion, with the Ministry of Justice seeking exclusive jurisdiction for the Tokyo and Osaka courts and concentrated jurisdiction, which can facilitate efficient judicial assistance for international arbitration practice.

(2) Local arbitral institutions

1) JCAA

The primary arbitration institution is the Japan Commercial Arbitration Association (JCAA), which offers three sets of arbitration rules, i.e., (1) the UNCITRAL Arbitration Rules, (2) Commercial Arbitration Rules, and (3) Interactive Arbitration Rules, each of which has their own features to best meet the needs and preferences of the parties. Parties are free to adjust any of the rules as they deem appropriate (JCAA website: https://www.jcaa.or.jp/en/arbitration/rules.html). Unless the parties agree to apply (1) the UNCITRAL Arbitration Rules or (3) Interactive Arbitration Rules, (2) the Commercial Arbitration Rules shall apply as the default rules. The UNCITRAL Arbitration Rules provide a high degree of flexibility for arbitrators based on party autonomy. JCAA intends to provide a global standard of international arbitration, including relatively higher fee rate for arbitrators compared to the Commercial Arbitration Rules. The Commercial Arbitration Rules provide expedited procedures, which is advance speedy dispute settlement and significantly reduced arbitration costs. Expedited arbitral proceedings are conducted on a document-only basis without any evidentiary hearing, unless the tribunal considers a hearing necessary. The rules also provide for an emergency arbitrator and measures by which the parties may obtain interim relief even before the constitution of the arbitral tribunal.

(3) The Interactive Arbitration Rules are aimed at offering maximum predictability and efficiency of arbitrations by adopting a more "civil law approach". Arbitral tribunals are encouraged to actively manage the proceedings and establish an open "dialogue" with the parties in the course of arbitration (JCAA website: https://www.jcaa.or.jp/en/arbitration/rules. html).



2) Other arbitration institutions

International Arbitration Center in Tokyo (IACT) administrates IP Focus arbitration, and is well-suited to resolving international disputes involving standard essential patents. As a time limit, each resolution will proceed with a one-year time limit from the formal initiation, unless otherwise agreed by the parties. The arbitrators are selected from major jurisdictions around the globe (IACT website: https://www.iactokyo.com).

The Japan Shipping Exchange, Inc. administrates international arbitration on maritime matters.

The Japan Sports Arbitration Agency administrates sports-related arbitration, including doping cases, providing its rules and arbitrators' list.

Additionally, while the International Chamber of Commerce (ICC) does not have an arbitration institution in Japan, it has an international arbitration committee, which provides recommendations of arbitrator candidates for ICC arbitration, including cases, the place of which is Japan.

3) Regional centres for arbitration

The Japan International Dispute Resolution Center (JIDRC) was established in February 2018 as the only international arbitration facility in Osaka, Japan. In March 2019, the Tokyo facility was established. The JIDRC contributes to the activation of international arbitration and international mediation in Japan. The main function of the JIDRC is to provide affordable exclusive facilities in Tokyo and Osaka that are accessible and enable a safe stay as the venue for hearings for arbitration and mediation institu-

tions all over the world as well as *ad hoc* proceedings (JIDRC website: https://idrc.jp/en/).

The JIDRC provides not only regional facilities, but also online/web hearing capabilities for international arbitration, mediation and seminars. It also provides a model protocol cybersecurity agreement to be used for online hearings.

The JIDRC's facilities in Tokyo and Osaka can be utilised for various forms of institutional arbitration, such as JCAA arbitration, ICC arbitration, as well *as ad hoc* arbitration, as a hub facility for such online hearings and proceedings, linked with overseas institutions, facilities, conference rooms, law offices and users' offices.

3. Mediation – what is being done to promote this type of ADR?

JIMC-Kyoto

The Japan International Mediation Center in Kyoto (JIMC-Kyoto) was established in November, 2018 in Kyoto, the centre of Japanese culture and history, famous as the former imperial capital of Japan for more than 1,000 years.

While JCAA has been administrating some international mediation, implementing and operating its own rules, JIMC-Kyoto is the first international mediation centre in Japan and provides world-class mediation services for various kinds of cross-border disputes between foreign and Japanese parties, with its own rules and mediators' list, including experienced foreign mediators and trained Japanese mediators. It is administered by a committee of the Japan Association of Arbitrators (JAA), an independent public interest incorporated association which consists of notable international lawyers and professors in the international ADR field in Japan. It is located in Doshisha University, one of the leading universities in Japan with a strong academic reputation. Users of JIMC-Kyoto can use many facilities of Doshisha University, and users have the option to use the facilities of Kodaiji Temple, one of the most famous Zen temples in Kyoto, and experience the atmosphere of genuine Zen in Kyoto (JIMC-Kyoto website: https://www.jimc-kyoto.jp/about2), which can be a basis for an amicable atmosphere, facilitating settlement negotiation.

Joint Mediation Protocol by JIMC and the Singapore International Mediation Centre

The JIMC is collaborating with the Singapore International Mediation Centre (SIMC) to operate the Joint COVID-19 Protocol, which provides cross-border businesses with better access to online mediation and its benefits (https://www.jimc-kyoto.jp/library/5b8e48310902ab466192eb0b/5f5dd469fb377cde0e9f19ba.pdf). The joint protocol entered into force in September 2020. It provides cross-border businesses, including companies along the Japan-Singapore corridor, with an economical, expedited and effective route for resolving commercial disputes amid the COVID-19 pandemic. This protocol is thought to be the first joint online mediation protocol between two international dispute resolution centres committed to providing expedited mediation during the pandemic.

Discussion on the Singapore Convention

Regarding the Singapore Convention on Mediation, which can be the basis for enforceability of mediation/settlement agreement, in Japan, currently, the Ministry of Justice and public institutions, including the Japan Federation of Bar Association, are discussing whether Japan should be a signatory of the Convention, to promote and further vitalise ADR practice in Japan, especially for international dispute resolution. In terms of promotion of international ADR, including activation of Arb.Med.Arb. combination practice, the international ADR community in Japan, including arbitrators and ADR practitioners, is in support of Japan becoming a signatory of the Convention, while some amendments may be needed in relation to the domestic laws of Japan.

4. International treaties

We provide below the countries that have signed investment-related agreements with Japan.

The TPP11 is a broad economic partnership agreement with 30 chapters, including chapters on intellectual property, financial services, electronic commerce, and disciplines for state-owned enterprises, to liberalise not only tariffs on goods but also services and investment in the Asia-Pacific region.

ASEAN was established by the Bangkok Declaration in 1967. ASEAN is a regional community of 10 Southeast Asian countries established by the Bangkok Declaration in 1967, and the ASEAN Economic Partnership Agreement, which stipulates liberalisation and facilitation of trade in goods, promotion of cooperation in the fields of intellectual property, agriculture, forestry, and fisheries, liberalisation of trade in services, and liberalisation and protection of investment, has been agreed and entered into force among ASEAN member countries.

(1) Asia

- Korea: Investment Treaty.
- China: Investment Treaty.
- Hong Kong: Investment Treaty.
- India: EPA.
- Indonesia: EPA, ASEAN.
- Uzbekistan: Investment Treaty.
- Kazakhstan: Investment Treaty.
- Cambodia: ASEAN, Investment Treaty.

- Singapore: TPP11, ASEAN, EPA.
- Sri Lanka: Investment Treaty.
- Thailand: ASEAN, EPA.
- Pakistan: Investment Treaty.
- Bangladesh: Investment Treaty.
- Philippines: ASEAN, EPA.
- Philippines: ASEAN, EPA.
- Brunei: TPP11, ASEAN, EPA.
- Vietnam: TPP11, ASEAN, EPA, Investment Treaty.
- Malaysia: TPP11, ASEAN, EPA.
- Myanmar: ASEAN, Investment Treaty.
- Mongolia: EPA.
- Laos: ASEAN, Investment Treaty.

(2) Oceania

- Australia: TPP11, EPA.
- New Zealand: TPP11.
- Papua New Guinea: Investment Treaty.

(3) North America

- Canada: TPP11.

(4) Latin America

- Uruguay: Investment Treaty.
- Colombia: Investment Treaty.
- Chile: TPP11, EPA.
- Peru: TPP11, EPA, Investment Treaty.
- Mexico: TPP11, EPA.

(5) Europe

- EU: EPA.
- Armenia: Investment Treaty.
- United Kingdom: EPA.
- Ukraine: Investment Treaty.
- Switzerland: EPA.
- Russia: Investment Treaty.

(6) The Middle East

- United Arab Emirates: Investment Treaty.
- Israel: Investment Treaty.
- Iraq: Investment Treaty.
- Iran: Investment Treaty.
- Oman: Investment Treaty.
- Kuwait: Investment Treaty.
- Saudi Arabia: Investment Treaty.
- Turkey: Investment Treaty.
- Jordan: Investment Treaty.

(7) Africa

- Egypt: Investment Agreement.
- Kenya: Investment Agreement.
- Cote d'Ivoire: Investment Agreement.
- Mozambique: Investment Agreement.

5. Is Japan a signatory to the New York Convention? In practice, are foreign awards enforced?

Yes, Japan is a signatory to the New York Convention, and foreign awards can be enforced, in practice, through the Japanese judicial legal system, while there are some avenues for challenging enforceability of arbitration awards, under Japanese Arbitration Act, which is basically in accordance with the New York Convention. Based upon the arbitration-friendly practice in Japan, the Singapore Convention on Mediation is currently under discussion, in terms of efficient combination of arbitration and mediation, as mentioned above.

Shin-Ichiro Abe is the Chairman of Japan Institute of International Arbitration Research and Training and has 25 years of experience as a lawyer working in both domestic and international dispute resolution. Professor Abe is a visiting law professor both at Chuo Law School and at Kokushikan University (Master and Doctor of Law). Professor Abe is the founder of Kasumigaseki International Law Office (International Arbitration Chambers) and was formerly one of the heads of Baker & Mckenzie Japan's departments.

Professor Abe has contributed to numerous publications and spoken at many domestic and international events in the fields of arbitration/mediation, and corporate law. He speaks regularly at arbitration conferences and seminars across the world but has a particular interest in the ASEAN region.

Professor Abe's more recent publications relating to arbitration include:

(1)"Interaction between Arbitral Tribunals Seated in Japan and Japanese Courts", *International Business Law* (Second Edition), Wolters Kluwer, September 2019.

(2)"Recent Trends in Japanese ADR for Restructuring Insolvent Business", *KLRI Journal of Law and Legislation*, Vol.9 Number2 2019, KOREA REGULATION RESEARCH INSTITUTE, November 2019.

sabe@kiaal.com

Yoshihiro Takatori, after heading the dispute resolution practice at the Paul Hastings and Orrick Tokyo Office, joined Kasumigaseki International Law Office (International Arbitration Chambers) in May 2020. He conducts training sessions for Japanese judges, including at the IP High Court, Tokyo High Court and Tokyo District Court, on international ADR, including SEP dispute resolution, requested by the Japanese government, and various Bar Associations, such as those of Singapore, Hawaii and Frankfurt.

Mr. Takatori is Executive Director of the Japan Arbitrators Association, Co-Convener of the Chartered Institute of Arbitrators, Japan Chapter, and Advisory Board/Chair of the Web Hearing Committee. He was named as one of the Top 10 most innovative lawyers in Asia Pacific, and as the only Japanese lawyer in the Top 10, by the *Financial Times* in 2019. He is also ranked in Band 1 for Dispute Resolution by *Chambers*, and as a Leading Lawyer by *The Legal 500*. Mr. Takatori is listed as Arbitrator at SIAC, JCAA and KCAB, and as Japan Expert Mediator at SIMC.

He is an Attorney at Law, admitted to practise in New York and Japan, a Fellow of the Chartered Institute of Arbitrators (F.C.I.Arb.), and holds an LL.M. from Harvard University.

ytakatori@kiaal.com

Kazakhstan

Bakhyt Tukulov
Tukulov & Kassilgov Litigation LLP

Dinara Otegen
Tukulov & Kassilgov Litigation LLP

Dilbar Kassymova
Tukulov & Kassilgov Litigation LLP

I Connection to Belt and Road projects

1.1 Anticipated role of Kazakhstan within Belt and Road scheme

Kazakhstan is the largest landlocked country and the ninth largest in the world. Sharing a border to the East with China, together with a small part of Western Mongolia, it also borders Russia to the North, and Kyrgyzstan, Uzbekistan, and Iran to the South. The Caspian Sea reaches the Western part of Kazakhstan.

Kazakhstan is geographically ideal for connecting China and the West, and it plays an important role in the Belt and Road Initiative (the "**BRI**"). As of today, two out of six economic corridors of BRI pass through Kazakhstan connecting China with Europe, Iran and Western Asia.

1.2 Expected types of investments in BRI projects

BRI comprises two physical routes with several intermediate hubs along the way connecting China with Europe, Africa and Southeast Asia. We expect that BRI will concentrate on investments in a wide array of assets, including ports, roads, railways, airports, power plants, oil and gas pipelines, and refineries.

1.3 Known ongoing or anticipated BRI projects

Kazakhstan has made significant investments to strengthen its position as a transit corridor. BRI comprises 51 projects worth more than

USD 27 billion. For example, more than USD 3.5 billion were invested in the International Center for Border Cooperation Khorgos-Eastern Gate, a dry port on the Eastern border with China.

Other significant investments include the Shalkar-Beyneu railway, the Zhezkazgan-Saksaul railway, the Kuryk seaport, the Trans-Caspian International Transport Route (the "**TITR**"), the Unified Information System of Management "NOMAD", Almaty-Shu railway line, Almaty bypass railway, etc.

Kuryk seaport has direct access to railway tracks. The port is well located at the intersection of the East-West and the North-South trade corridors (Iran, India, Russia), creating one of the fastest multimodal routes for cargo delivery. Kuryk seaport is meant to perform two missions – increase Kazakhstan's trade with the Caspian region countries and the transit potential of the Caspian Sea.

TITR is a 6,500-km corridor that links Asia with Europe and passes through countries including Kazakhstan, Azerbaijan, Georgia, and Turkey. TITR is aimed to coordinate all transporters along the route from Asia to Europe and *vice versa*.

The Khorgos International Center for Border Cooperation has become one of important projects within BRI and the Nurly Zhol state programme of infrastructure development. This new dry port has become an entry point for Chinese goods shipped to Central Asia or Europe.

II Country overview

2.1 Economy

Kazakhstan has an export-oriented economy, highly dependent on shipments of oil and related products (73% of total exports). In addition to oil, its main export commodities include ferrous metals, copper, aluminium, zinc, and uranium.

Before the COVID-19 pandemic, Kazakhstan's economy was in a relatively favourable position with low unemployment (4.9%), real GDP growth (4.1%), and relatively low public debt. The consequences of the COVID-19 pandemic have affected the economy of Kazakhstan stronger than the financial crises of 2008 and 2015. The spread of the COVID-19 pandemic decreased global demand for Kazakhstan's exports. In April 2020, the average oil price fell to a two-decade record low of USD 21 per barrel.

The Kazakh authorities took measures to support the economy. Businesses have been granted a tax deferral and postponement of some other obligations. Support programmes have been expanded through subsidised loans, along with direct financial support for low-income and quarantine-affected citizens.

In April 2021, the Kazakh economy grew for the first time since March last year. In the first half of 2021 the Kazakh economy grew 2.2%. The Government forecasts 3.7–4% growth by the end of 2021.

2.2 Currency

The Kazakhstan tenge (the "**KZT**") is the national currency of Kazakhstan.

The Law on Currency Regulation and Currency Control stipulates that residents and non-residents of Kazakhstan may enter into transactions in foreign currency. However, transactions between residents of Kazakhstan must be in KZT except for cases permitted by law.

Legal entities may buy and sell foreign currency in the Kazakhstan domestic currency market only through authorised banks (second-tier banks) subject to certain restrictions. The National Bank of Kazakhstan (the "**NBK**") (or, in certain cases, authorised banks) monitors and registers currency contracts. Banks that process payments or transfers in foreign currency are required to notify the NBK of

transactions if their amount equals or exceeds certain thresholds.

For transactions that exceed the equivalent of USD 50,000, a resident legal entity must notify the NBK. For amounts exceeding USD 500,000, a transaction must be registered.

2.3 Government and stability/security

Kazakhstan gained independence on 16 December 1991.

State power is divided into three branches: legislative; executive; and judicial.

Kazakhstan is a unitary state with Presidential rule. The President is the head of state and commander-in-chief of the armed forces. The President has primary responsibility for domestic and foreign policy and represents Kazakhstan in international relations. Following the resignation of Nursultan Nazarbayev, the long-serving former President, a Presidential election was held on 9 June 2019, in which Kassym-Jomart Tokayev won and became the second President of Kazakhstan.

Legislative functions are performed by the Parliament, which is the highest representative body and consists of two chambers: the Senate; and the Mazhilis.

The Government of Kazakhstan acts as the supreme executive body, headed by the Prime Minister.

Judicial power is vested in the Supreme Court.

2.4 Political/cultural considerations

The political party system is in early stages of development. The principal party is Nur Otan, with other main political parties including the Ak Zhol Democratic Party, the People's Party of Kazakhstan, the Nationwide Social Democratic Party, and the Auyl People's Patriotic Democratic Party, and the political party Adal.

Kazakh culture is generally open to foreigners. We are not aware of any serious cultural issues which foreigners have faced in Kazakhstan.

Although many Kazakhs relate themselves to Islam, most of the population do not observe Islam strictly. Kazakhstan declares itself as a secular state.

2.5 Foreign relations

Since gaining independence in 1991, Kazakhstan has established diplomatic relations with 186 countries.

Kazakhstan is a member of the CIS, the United Nations, the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development, the Asian Development Bank, the International Finance Corporation, the Islamic Development Bank, and several other international organisations.

Kazakhstan became a member of the World Trade Organisation ("**WTO**") in December 2015. Kazakhstan is also a member of the Organisation for Security and Cooperation in Europe, the Shanghai Cooperation Organisation and the Eurasian Economic Union.

2.6 Natural resources

Kazakhstan is rich in natural resources: oil and natural gas; coal; and minerals, including iron ore, chromium, uranium, copper, nickel, cobalt, gold, and many others. In terms of proven reserves of most types of minerals, Kazakhstan is among the top 10 leading countries in the world. At the same time, the share of Kazakhstan in world reserves of tungsten is 63%, chromium – 48%, uranium – 12%, silver – 6%, and copper – more than 4%.

Today, according to the World Bank's Doing Business rating, Kazakhstan has risen from 41st to 25th place in terms of the ease of doing business in three years. In addition to that, in 2018, law reform in the field of subsoil use was carried out – a new Subsoil Use Code was adopted. This innovation significantly improved the conditions for doing business in the field of subsoil use, which ultimately allowed Kazakh-

stan to rise in the rating of the Fraser Institute for investment attractiveness from 73rd to 24th.

Kazakhstan attracts large foreign investments for the development of the oil and gas sector. Foreign capital was attracted for 27 large projects related to the development of fields, prospecting and exploration works, reconstruction of refineries, and transportation of oil and gas. Thus, the oil industry is becoming the main source of long-term economic growth.

Extraction of mineral raw materials today is also the largest sector of the economy which makes it overly dependent on world market prices for mineral resources. In order to develop non-resource sectors of the economy, several investment support institutions have been created, including the Development Bank of Kazakhstan and Investment Fund JSC.

2.7 Infrastructure

The Nurly Zhol (Shining Path) infrastructure development programme was launched in November 2014 to create an efficient transport and logistics infrastructure in Kazakhstan. As part of the Nurly Zhol, Kazakhstan is expected to invest USD 9 billion in the development and modernisation of roads, railways, ports, airports, and IT infrastructure.

Kazakhstan is rapidly developing as a transport and logistics hub in Central Asia. The transport sector is expected to grow over the next five years, with the railway sector performing the best against the background of BRI. The largest volume of investments in infrastructure was in Atyrau, Nur-Sultan (formerly Astana, capital of Kazakhstan), and Almaty.

External financing from international financial institutions such as the Asian Development Bank, the European Bank for Reconstruction and Development, and the Islamic Development Bank will stimulate growth of the construction and infrastructure industries in Kazakhstan over the next five years. International development institutions are currently funding 32 projects in Kazakhstan, representing 34% of all projects progressing in the country, which is more than the total number of projects in the other four Central Asian markets.

The Government is also interested in the development of infrastructure, including the repair and construction of roads in the region. The Government plans to invest over USD 4 billion in four major road construction projects.

2.8 Investment limitations

There are some restrictions on foreign investment in sectors related to national security.

Foreign investments control is regulated by the National Security Law. Making transactions on the use of strategic resources and (or) use, acquisition of strategic objects of Kazakhstan, if this may concentrate rights in one person or a group of persons from one country, requires permission of the competent state body. Compliance with this condition is also mandatory in relation to transactions with affiliated persons.

The Securities Market Law provides for the right of the Government to establish restrictions on the ownership of strategic resources (objects) of Kazakhstan to ensure national security. In order to implement the relevant decisions (acts) of the Government, the issuer, the controlling stake of which is directly or indirectly owned by the national management holding, when placing shares on the organised securities market, may not sell shares to a foreign investor.

In certain sectors of the economy, participation of foreign investors is limited by way of quotas.

Foreign investors are prohibited from directly and (or) indirectly owning, using, disposing, and (or) managing more than 20% of the shares (participation interest) of a legal entity that owns a mass media company in Kazakhstan, or carries out activities in this area.

It is also prohibited to directly and (or) indirectly own, use, dispose and (or) manage in aggregate more than 49% of voting shares (participation interest) of a legal entity operating in telecommunications as an operator of long-distance and (or) international communications, which owns terrestrial (cable, including fibre-optic, radio relay) communication lines, except with the approval of the Government.

Foreign investors are prohibited from managing or operating trunk communication lines.

Foreign investors registered in certain offshore jurisdictions (for example, Andorra, the Commonwealth of the Bahamas, Cyprus, Cayman Islands, or Grenada) are prohibited from owning shares in a Kazakh bank/insurance organisation.

A non-resident founder of a bank or an insurance (reinsurance) company must provide a document from relevant foreign regulator confirming that such founder is allowed to purchase shares of a bank or an insurance (reinsurance) company in Kazakhstan or a statement that such permission is not required.

The Land Code provides the following restrictions related to ownership of land plots:

- land plots intended for agricultural produc-

tion and forestation cannot be privately owned by foreign investors;
- land plots located in the border zone of the State Border of Kazakhstan cannot be owned by foreign investors, citizens of Kazakhstan who are married (married) to foreigners, as well as legal entities of Kazakhstan with foreign participation; and
- foreigners cannot obtain permanent land use rights.

III International dispute settlement

3.1 Local courts and legal tradition

3.1.1 Court system

Kazakhstan's court system is comprised of three tiers of courts: (i) special district courts/general district courts; (ii) appellate courts; and (iii) the cassation court (the Supreme Court).

Special district courts review special categories of cases, such as administrative, commercial, criminal, etc. The vast majority of commercial disputes are tried in Special Commercial (economic) District Courts. These courts have jurisdiction to review all commercial disputes, regardless of their size, provided both parties to the dispute are legal entities and/or entrepreneurs. General Jurisdiction District Courts review all civil cases that do not fall within the jurisdiction of Special Commercial District Courts.

Public disputes such as tax, customs, anti-trust, environmental, investment disputes, as well as other disputes challenging actions/acts of state bodies, are tried in Special Administrative District Courts.

The distribution of courts according to specialisation exists only at the level of district courts (first instance). There is no such distribution in the appellate courts and the cassation court. However, within the appellate courts and the cassation court, there are special boards that focus on certain categories of cases (civil, administrative, and criminal).

Special Commercial District Courts are spread throughout 16 administrative regions, two cities which have republican significance, and the capital city, with each administrative region having one special district court and appellate court. Generally, each town and smaller district comprising the administrative region would have a general district court.

The main difficulties that claimants may face in Kazakh courts are as follows:

Issues with administration of justice. The quality of legal proceedings in Kazakhstan can vary greatly from judge to judge even in one and the same court. Difficulties with administration are common (lack of proper notice, overloaded judges, insufficient qualification of judges, etc.).

Corruption/Lack of independence. Corruption in the courts of Kazakhstan is not uncommon. Apart from corruption, difficulties may arise in cases in which the state and/or companies affiliated with the state are defendants. Judges are usually uncomfortable issuing judgments against the state, but this trend is expected to change with the establishment of new Administrative Courts in 2021 and the introduction of

- the Administrative Procedure Code.

High state duty. Kazakhstan has an unusually high fee for filing a claim, which is 3% for legal entities and 1% for individuals. The state duty is paid out of the amount of the claim and has no upper limit. The state duty is recoverable from the respondent if the claim is granted or settled.

Irregularities in interpretation and application of the law. Kazakh courts barely follow judicial practice. In fact, judicial practice is unclear or controversial on many basic issues of commercial law. The Supreme Court has not been able to properly systematise judicial practice and guide the lower courts. As a result, contradicting judgments on the same set of facts are not uncommon.

Issues with accessing the cassation court (the Supreme Court). The cassation court does not commence proceedings on all of the motions submitted to the court. The court has discretion to commence proceedings only if it finds "significant violations of substantive or procedural law". As the criteria for selecting cases reviewed by the Supreme Court is vague, it is difficult to predict whether or not in a specific case the Supreme Court would commence a review. It is believed that the Supreme Court initiates a review in relation to less than 10% of appeals.

3.1.2 Speed

The judicial process is relatively quick. Courts are generally driven by form rather than substance, which is a general feature of most post-Soviet courts. Courts are strict in terms of observing formalities, e.g. in relation to documentary evidence.

District courts review cases within three to four months (20 business days for the preparation stage and two months for the proceedings on merits). In exceptional circumstances, the court may extend the preparatory stage by one month. If the judgment of the district court is not appealed, it would become binding following expiration of a term for appeal (one month).

Appellate courts would review cases within two months. The resolution of the court would become binding following an announcement by the appellate court. Usually, a judgment would become binding after appellate review. It takes 4–6 months following filing a claim to have a binding judgment.

The cassation court (the Supreme Court) would only review cases where it finds significant violations of law (as mentioned above, it is believed that the Supreme Court would not initiate proceedings in more than 90% of cases).

There is an option to appeal further to the Chairman of the Supreme Court. But the threshold for appeal is very high, and it is very rarely successful.

If the cassation court commences review, it would take 1.5–3 months to review and decide the appeal.

3.1.3 AIFC Court

The Court of the Astana International Financial Centre (the Astana International Financial Centre ("**AIFC**") is a financial hub in Nur-Sultan (formerly Astana) that officially launched on 5 July 2018, https://aifc.kz) (the "**AIFC Court**") operates separately from the court system of Kazakhstan. The main features of the AIFC Court are: (i) the court considers mainly contractual disputes; (ii) cases are heard by retired judges from England, USA, Singapore and other common law jurisdictions; (iii) the language of legal proceedings is English; (iv) the rules of procedure of the AIFC Court are similar to those of the courts in England and Wales; and (v) judgments of the AIFC Court have the force of a domestic Kazakh judgment (there is no need to follow a procedure to ratify judgments of the AIFC Court).

The AIFC Court has jurisdiction to review the following categories of disputes: (i) if the parties submit to the Court by written agreement (there is no requirement for the parties to have any connection to the AIFC); (ii) if the

contract is governed by AIFC law; (iii) disputes that arise from transactions made on the territory of the AIFC; and (iv) disputes between companies registered within the AIFC.

3.2 Arbitration

Arbitration is a popular option for resolving domestic and international disputes. The scope of arbitrability is relatively broad and extends to "civil law relations". To submit to arbitration the parties must enter into an arbitration agreement in writing. It can take the form of an arbitration agreement in a contract or executed by way of exchanges of letters, telegrams, fax messages, electronic documents and other means that are capable of recording the parties and their intent.

Kazakh courts restrictively approach arbitration agreements executed electronically, requiring that, for an arbitration agreement to be valid, the exchange of electronic documents be certified by digital signatures issued according to relevant local procedures.

There are dozens of arbitration institutions in Kazakhstan. The following three are the most popular: Kazakhstan International Arbitrage; the Court of International Arbitration at the Atameken Chamber of Entrepreneurs; and the International Arbitration Court of the AIFC. The latter stands apart from the rest of the arbitral institutions in Kazakhstan for the reasons stated below.

The Arbitration Law is based on the UNCITRAL Model Law with certain specific features. The law was seriously improved in the past two years which made it more liberal. Still, the law has certain serious restrictions which must be borne in mind. For example, the law provides that state entities and companies in which the state directly or indirectly holds more than 50% of capital cannot submit to arbitration without the consent of a relevant state authority. This effectively means a ban on arbitration involving the state sector.

One of the key obstacles to further expansion of arbitration in Kazakhstan is the risk that Kazakh courts may set aside or refuse to recognise and enforce the award. Although our research shows that Kazakh courts have recognised and enforced approximately 89% of awards, the likelihood of refusal to recognise an arbitral award may increase *pro rata* to the amount of the claim.

One of the key benefits of arbitrating at the AIFC is that awards issued at the AIFC International Arbitration Court must be recognised and enforced exclusively through the AIFC Court (not through Kazakh courts). This ensures the very high likelihood that awards of the AIFC International Arbitration Court would be recognised and enforced. We have been told that the AIFC Court and the Kazakh Ministry of Justice signed a memorandum relating to enforcement of AIFC judgments to ensure smooth and expedited enforcement.

3.3 Mediation

Mediation is not very popular in Kazakhstan. It is commonly used as a technical tool in situations where parties settle a dispute anyway, as mediation allows the claimant to reimburse state duty paid to the court for filing the claim. The key procedural advantage of mediation in Kazakh law is the possibility to settle the dispute beyond the scope of the initial claim (normally, one cannot settle a dispute in the Kazakh court beyond the scope of the original claim, so mediation allows greater flexibility).

Parties to litigation or arbitration are not required to consider alternative dispute resolution ("**ADR**"). In the course of civil proceedings, the court must inform parties of the possibility to settle the dispute by, among other things, mediation.

3.4 International treaties

3.4.1 Bilateral investment treaties

Kazakhstan has signed 51 bilateral treaties on the encouragement and mutual protection of investments – 43 of which are in force

(https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan). Kazakhstan is also a party to several regional and multilateral agreements concerning foreign investments such as the Energy Charter Treaty (1994), the Eurasian Investment Agreement (2008), and the Treaty on Eurasian Economic Union (2014).

Investment treaties provide guarantees to nationals of member countries such as most favoured nation treatment, protection against discrimination, requisition and nationalisation, and the right to resolve investment disputes by international arbitration.

Kazakhstan has signed bilateral investment treaties with the following BRI countries: North Macedonia; Estonia; Serbia; Romania; Austria; Vietnam; Slovakia; Jordan; Armenia; Latvia; Pakistan; Tajikistan; Bulgaria; Russia; Kuwait; Uzbekistan; Kyrgyzstan; Czech Republic; Georgia; Azerbaijan; Malaysia; Iran; Israel; Hungary; Mongolia; Poland; Ukraine; Lithuania; Egypt; China; Turkey; United Arab Emirates (not in force); Singapore (not in force); Qatar (not in force); and Greece (not in force).

So far, Kazakhstan has faced over 20 international arbitrations for failure to observe international obligations under bilateral or multilateral investment treaties. A number of awards issued against Kazakhstan are available on the website of the World Bank.

3.4.2 Regional agreements

Kazakhstan has been a member of the WTO since 30 November 2015. The WTO accession documents impose market access obligations in several areas (financial services, construction, medical services, management consulting, telecommunications and transportation).

Kazakhstan, together with Armenia, Belarus, Kyrgyzstan, and Russia, is a member of the Eurasian Economic Union ("**EAEU**"), an international organisation for regional economic integration. The EAEU provides for free movement of goods, services, capital and labour, and pursues a coordinated, harmonised and single policy in sectors determined by the treaty and international agreements within the EAEU.

Kazakhstan is also part of the Commonwealth of Independent States ("**CIS**") (several former Soviet Republics located in Eurasia). Kazakhstan has signed a number of treaties within the scope of the CIS.

3.5 Is Kazakhstan a signatory to the New York Convention? In practice, are foreign awards enforced?

3.5.1 Enforcement of foreign arbitral awards

Foreign arbitral awards are usually recognised and enforced by Kazakh courts in accordance with the Convention on Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**", New York, 1958), European Convention on International Commercial Arbitration (1961), and domestic civil procedure law. Kazakhstan is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID**", Washington DC, 1965).

One can seek to enforce a foreign arbitral award within three years following its entry into effect. To enforce an arbitral award, a party seeking enforcement shall file a respective application to the competent court at the debtor's location or the location of its assets. The application must be supported by an application fee (a state duty of approximately USD 32), a certified or original copy of the arbitral award and the arbitration agreement, relevant certified translations, etc. The application would be reviewed by the court within 15 business days. The court would invite the counterparty to express objections to the application.

Kazakh courts are not allowed to reconsider the award on merits and enforcement may only be refused on procedural grounds outlined in the New York Convention, which are also duplicated in Kazakh law. The court's ruling to recognise and enforce an arbitral award or to refuse the same could be appealed to the appellate court and further to the cassation court. If the court issues a ruling to recognise and enforce an arbitral award, the court will issue an enforcement writ, which could be immediately submitted for enforcement.

Our review suggests that, since 1 January 2016, Kazakh courts enforced approximately 89% of foreign arbitral awards. However, the larger the amount of the award, the greater the risk of issues at the stage of review of the application and enforcement. Among those 11% of rejected applications, we have found the following grounds, some of which are strange:

- No proof of proper notice to the respondent.
- The invalidity of a guarantee based on which an arbitral award was issued.
- No proof of partial enforcement or non-enforcement outside Kazakhstan.
- Cancellation of an arbitral award.
- No proof of entry of the arbitral award into effect.

3.5.2 Enforcement of foreign court judgments

Kazakh courts would recognise and enforce foreign judgments on the basis of an international treaty or, in the absence of which, on the basis of reciprocity. Kazakh courts would view foreign litigations as having the effect of *lis pendens* or otherwise recognise foreign litigation only to the extent there is an international treaty with a relevant foreign state. A foreign court judgment may be enforced within three years following entry into effect.

Kazakhstan is a party to more than 10 bilateral treaties on the recognition and enforcement of foreign judgments (e.g., with China, India, Turkey, and the UAE). Kazakhstan is also a party to two multilateral treaties signed within the framework of the CIS on the recognition and enforcement of judgments within several former Soviet Republics.

The possibility to enforce foreign judgments on the basis of reciprocity was introduced in 2016. Although we are aware of successful cases where Kazakh courts enforced foreign judgments on the basis of reciprocity, there is still little judicial practice on this subject. Many issues relating to the criteria of reciprocity remain unclear. So far, Kazakh courts have not required proof of reciprocity in the claimant's jurisdiction and have not expressed an opinion on who bears the burden to prove reciprocity.

Tukulov & Kassilgov Litigation LLP is the first law firm in Kazakhstan specialised in dispute resolution. Kazakhstan is a challenging jurisdiction for dispute resolution work. It is important not only to correctly formulate a position, but also to take into account other factors that may impact a judge's thinking. Our main goal is to minimise the unpredictability factor in resolving disputes as much as possible in the realities of Kazakhstan, while respecting high standards of professional and business ethics. By bringing together several lawyers highly experienced in domestic and international dispute resolution, we seek to ensure a case strategy which benefits from robust challenge and testing, before it reaches the courts, ensuring that a client benefits from the optimum mix of strategy and tactics.

We intend to provide our clients with the best results of the collective thinking of our partners and lawyers for the price of a local law firm. Our vision is to become the Kazakhstan's top dispute resolution practice.

tkl.kz/en

Bakhyt Tukulov worked for eight years at Kazakhstan's largest law firm, and led its Dispute Resolution Practice over the past five years. Before that, Bakhyt worked for four years at a large international law firm with an office in Kazakhstan.

Chambers & Partners, an international rating agency, assigned Bakhyt with an individual rating, naming him among the best dispute resolution lawyers in Kazakhstan. He is also recommended by other international rating agencies such as *The Legal 500* and *Asia Law Profiles*.

Bakhyt has been involved in a large number of high-profile civil cases in Kazakhstan. He has significant experience acting as an arbitrator in Kazakhstan's arbitration institutions. He acted as an expert and drafted expert opinions on numerous litigation and arbitration proceedings conducted in England, Cyprus, Germany, and Russia.

bt@tkl.kz

Dinara Otegen has over six years of experience in the Kazakhstani legal services market. Dinara has worked at GRATA International, Integrites International Law Firm and Ernst & Young.

Dinara focuses her practice on corporate and commercial disputes. Her previous experience covered a wide range of finance transactions, including project finance and capital markets, infrastructure transactions as well as M&A transactions and financial services regulation.

do@tkl.kz

Dilbar Kassymova has over four years of experience in the Kazakhstani legal services market. Dilbar has worked at GRATA International and Integrites International Law Firm.

Dilbar specialises in commercial and corporate disputes. Her previous experience focused on labour and corporate law, finance transactions, including project finance and capital markets, infrastructure transactions, as well as M&A transactions and financial services regulation.

dk@tkl.kz

Malaysia

Lam Ko Luen
Shook Lin & Bok

Victoria Loi
Shook Lin & Bok

Nina Lai
Shook Lin & Bok

"Malaysia, truly Asia"

This section aims to give a brief overview of the democratic nation that is Malaysia.

1.1 The location

Malaysia is a strategically located South-East Asian country with two non-contiguous regions, namely Peninsular Malaysia and East Malaysia, separated by the South China Sea, and is made up of 13 states, namely, Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Melaka, Johore, Kelantan, Terengganu, Pahang, Sarawak, Sabah, and 3 Federal Territories, namely, Kuala Lumpur, Putrajaya and Labuan. Kuala Lumpur is the capital city of Malaysia.

Peninsular Malaysia borders the Kingdom of Thailand to the North and is connected to the Republic of Singapore by the Woodlands Causeway and the Tuas Second Link in the South.

East Malaysia borders the Republic of Indonesia and Negara Brunei Darussalam on the Island of Borneo.

1.2 The political system

Malaysia is a nation that practises parliamentary democracy with a constitutional monarchy where His Majesty the King is the Head of State (**Parliament of Malaysia**, 2020).

For over 60 years since achieving independence from the British in 1957, Malaysia has been governed by the same political party known as Barisan Nasional. That is until the Pakatan Harapan coalition won the historic 14th General Election in May 2018.

The Pakatan Harapan coalition's rule was however short-lived due to a series of political

realignments which led to its collapse in February 2020. A new government known as the Perikatan Nasional coalition was thus formed in March 2020.

1.3 The people

Perhaps one of the most culturally diverse nations in South-East Asia, Malaysia is home to a population of more than 32.75 million (**Department of Statistics Malaysia**, 2021).

1.4 The availability of natural resources

Rich in natural resources, petroleum, natural gas, rubber, palm oil, tin, bauxite, copper, iron and timber are some of Malaysia's major resources.

1.5 The infrastructure

Malaysia has relatively well-developed infrastructure with easily accessible highways, railways, international airports, international ports and the telecommunications industry that is ever-developing.

Malaysia is home to several international airports, with the Kuala Lumpur International Airport being the busiest, several Federal ports, with Port Klang being the largest in Malaysia and one of the largest in South-East Asia, and several expressways, with the North-South Expressway being the longest at 748km.

1.6 The Malaysian economy

The Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations, more commonly known as "Movement Control Order" (MCO), under the Prevention and Control of Infectious Diseases Act 1988 were issued in early 2020 to combat the spread of the COVID-19 pandemic in Malaysia. The initial implementation of the MCO saw the restriction of movement and closure of premises save for those deemed "essential". The closure of international borders, ban on inter-state travel and restriction on economic activity have adversely impacted the economy.

The economy has nevertheless seen some improvement in Q1 of 2021 with a smaller decline of 0.5% in Gross Domestic Product (GDP) as compared to a decrease of 3.4% in Q4 of 2020. On a quarter-on-quarter seasonally adjusted basis, the GDP has increased to 2.7% in Q1 of 2021 as compared to -1.5% in Q4 of 2020. This is mainly supported by the continued growth of the export-oriented and domestic-oriented industries in the manufacturing sector (**Central Bank of Malaysia**, 2021).

Improvements can also be seen in the agriculture, mining and quarrying and construction sectors (**Department of Statistics Malaysia**, 2021).

The increasingly aggressive rollout of COVID-19 vaccines through the National COVID-19 Immunisation Programme is expected to aid in economic recovery (**Department of Statistics Malaysia**, 2021), with an expected growth in GDP ranging from 6.0% to 7.5% in 2021. The current Governor of the Central Bank of Malaysia, Datuk Nor Shamsiah Yunus, is of the view that despite the uncertainty and risks, "*with sound policies and effective implementation of key structural reforms, Malaysia will emerge stronger from this global health crisis*" (**Central Bank of Malaysia**, 2021).

1.7 The Ringgit

Malaysian Ringgit (MYR) is the currency unit in Malaysia. The Central Bank of Malaysia reports that the MYR depreciated by 3.5% against the United States Dollar (USD) in Q1 of 2021 mainly due to the strengthening of the USD (**Central Bank of Malaysia**, 2021).

1.8 The attraction to foreign investments

In 2020, Foreign Direct Investment (FDI) in Malaysia recorded a net inflow of MYR14.6 billion, a reduction of 54.8% from 2019, contributed in part by the COVID-19 pandemic, which has caused global economic uncertainties. The manufacturing sector and financial and utilities activities in the service sector were the main FDI contributors in 2020, followed by mining and quarrying (**Department of Statistics Malaysia**, 2021).

MYR54.9 billion was recorded as the total approved FDI in the manufacturing, services and primary sectors in Q1 of 2021, a substantial increase from the recorded MYR11.4 billion in Q1 of 2020 (**Malaysian Investment Development Authority**, 2021).

Recently, Malaysia ranked 25th out of 64 economies in the World Competitive Yearbook 2021, an improvement from its 27th placing in 2020 (**Malaysian Investment Development Authority**, 2021), 12th out of 190 economies in the World Bank's Ease of Doing Business Ranking (**World Bank**, 2020), and 16th out of 169 countries in the DHL Global Connectedness Index 2020 (**DHL**, 2020).

In terms of a manufacturing hub, Malaysia placed 4th out of 17 economies in the Cost of Doing Business Index 2020. Malaysia tied with China, Mexico and Vietnam for the highest Primary Cost Index, i.e. most competitive, in terms of compensation costs, real estate costs and corporate tax rates (**KPMG LLP**, 2020).

II One Belt, One Road, 1Malaysia

Malaysia was one of the first countries to support the Belt and Road Initiative (BRI) when it was unveiled in 2013. This section aims to give a brief overview of Malaysia's journey with the BRI and what can be expected in the near future.

2.1 The Malaysia-China relationship

Malaysia has been trading with China for over 47 years. Since 2009, China has been Malaysia's largest trading partner. In Q3 of 2020, Malaysia's trade with China formed 19.1% of Malaysia's total trade, at MYR88 billion. Electrical and electronic products form the bulk of Malaysia's exports to China, followed by palm oil, musical instruments and parts and accessories, iron and steel bars, rods, angles, shapes and sections, natural gas, measuring, checking, analysing instruments and apparatus, aluminum (including alloys), residual petroleum products, refined petroleum products and copper (including alloys), forming 73% of total exports to China in Q3 of 2020. Despite the outbreak of the COVID-19 pandemic, trading with China has seen positive growth (**Department of Statistics Malaysia**, 2020).

With Malaysia and China recently becoming members of the Regional Comprehensive Economic Partnership (RCEP), there is ample opportunity for both countries to further strengthen cross-border trade (**Malaysian Investment Development Authority**, 2020).

2.2 The BRI projects

The BRI projects in Malaysia are predominantly infrastructure-related.

With the change of government in May 2018, the BRI investments in Malaysia had to be adjusted and with that several projects were halted. Since 2019, some of these projects have been revived while some projects have been terminated. Some of the ongoing BRI projects in Malaysia are discussed below.

2.2.1 The Bandar Malaysia Project

Focusing on connectivity and accessibility to public transportation and the road system, the Bandar Malaysia Project is a 486-acre development with a gross development value of MYR140 billion, making it one of the biggest, if not the biggest, in the BRI scheme.

The master developer for the project is IWH-CREC Sdn. Bhd., a joint venture between Iskandar Waterfront Holdings Sdn. Bhd. and China Railway Engineering Corp (M) Sdn. Bhd. China Railway Engineering Corp (M) Sdn. Bhd. is part of the Fortune Global 500 company, China Railway Engineering Group.

Aimed at attracting, amongst others, financial, medical and education institutions, FDI, multinational companies, Fortune 500 companies and tourism-related companies, the government of Malaysia is offering tailor-made incentives to eligible companies to set-up their operations in this "*intelligent and digitally driven*" development (**Tan**, 2020).

To quote Malaysia's 4th and 7th Prime Minister, Tun Dr. Mahathir bin Mohamad, this long-term project, which will take approximately 20 to 30 years to complete, will "*allow potential co-action in the fields of finance, technology and entrepreneurship*" that will significantly impact the Malaysian economy.

2.2.2 The East Coast Rail Link Project

Pursuant to the change in government after the 14th General Election in Malaysia in 2018, the **East Coast Rail Link (ECRL) Project** was one of the few mega projects put on hold pending

re-negotiations on the terms of the contract.

Fast forward to 2021, the ECRL Project is now underway and scheduled to be operational in 2027.

The developer of the ECRL Project is Malaysia Rail Link Sdn. Bhd., a wholly-owned subsidiary of the Minister of Finance Incorporated, while the main contractor for the project is China Communications Construction Company Ltd.

Scheduled for completion in December 2026, the 665km-long rail project boasts of passenger trains travelling at 160km/h to cut travel time between the East Coast and West Coast of Peninsular Malaysia.

This key BRI project may lead to a dramatic surge in property value particularly in industrial towns in light of better connectivity between the outskirts and the city centre (**Malaysian Reserve**, 2021).

Upon completion of the ECRL Project, the convenience of travel to and fro the East Coast states could see increase in traffic volume in terms of passenger and freight, which would in turn promote growth in the commercial, tourism and logistics sectors, to name a few. With that in view, the Malaysian Investment Development Authority established the ECRL Unit for purposes of facilitating and promoting the development of the Economic Accelerator Projects along the ECRL corridor (**Malaysian Investment Development Authority**, 2019).

2.2.3 The Malaysia-China Kuantan Industrial Park Project

Officially launched in February 2013, the **Malaysia-China Kuantan Industrial Park (MCKIP)** is strategically located in the special economic zone of the East Coast Economic Region (ECER) in Kuantan, State of Pahang.

MCKIP is split into three phases, namely MCKIP 1 and MCKIP 2, catering to heavy and medium industries, and MCKIP 3, catering to the logistics hub, light industries, residential and commercial sectors. The target industries include steel and non-ferrous metals, clean technology and renewable energy, petrochemical, research and development, electrical and electronic energy and machine and equipment manufacturing.

MCKIP is the "*sister park*" to China-Malaysia Qinzhou Industrial Park (CMQIP) in Qinzhou, China. Under the concept of "Two Countries, Twin Parks", the project aims to enhance trade and investment relations between Malaysia and China (**Tsang**, 2017). The first industrial park in Malaysia jointly developed by the two countries aims to attract foreign investment, which will in turn promote job opportunities and enhance economic growth.

The master developer for the project is MCKIP Sdn. Bhd., a joint venture between the Malaysian consortium consisting of the Pahang State Government, Sime Darby Property Berhad and IJM Land Berhad, and the China consortium consisting of Beibu Gulf Port Group and Qinzhou Investment Development Co., Ltd.

The infrastructure for MCKIP 1 has since been completed. The first and currently the largest investor in MCKIP is **Alliance Steel (M) Sdn Bhd**, a state-owned joint-stock entity jointly invested by Guangxi Beibu Gulf Port International Group Co., Ltd, and Guangxi Shenglong Metallugical Co., Ltd., that has invested approximately MYR4.2 billion to build an integrated steel plant across 710 acres of land in MCKIP 1 and has been operating since 2017.

2.2.4 The Kuantan Port Expansion Project

A "*deep water, all-weather, multi-cargo seaport that stands at the heart of global trade and industrial activity*", **Kuantan Port** is positioned to be a maritime gateway under the BRI with the potential to be a pivotal regional multi-purpose **port**.

The port is presently managed by Kuantan Port Consortium Sdn. Bhd., jointly owned by IJM Corporation Berhad and Beibu Gulf Holding (Hong Kong) Co., Ltd.

To complement the increasing economic development and industrial activities, the Kuantan Port Expansion Project aims to develop the port to cater to larger vessels and increase its cargo capacity by constructing a New Deep Water Terminal (NDWT). Terminal Phases 1A and 1B have been operational since 2018 and 2019, respectively, with

the construction of Terminal Phase 2 underway.

Kuantan Port is also an important catalyst for MCKIP in the provision of logistic services with an **estimated shipping time** of three to four days from Kuantan Port to Qinzhou Port and four to eight days to other Chinese ports, serving as the "*fastest shipping route from Malaysia to China*".

Upon the completion of the NDWT, the largest port on the East Coast of Peninsular Malaysia will be able to accommodate bulk carriers of up to 200,000 DWT and container ships of up to 18,000 TEUs.

2.2.5 The Forest City Project

Said to be "*the gateway connecting Singapore and Malaysia*", **Forest City** is a megacity land reclamation project consisting of four man-made islands located within the Iskandar special economic zone off the coast of Singapore.

Country Garden Pacificview Sdn. Bhd., a joint venture between Country Garden Holdings Co. Ltd., one of China's leading property developers, and Esplanade Danga 88 Sdn. Bhd., is the master developer for the project.

Set to be "*a smart and green futuristic city that combines environment, technology and cutting-edge technology to create an ideal, idyllic and technology-driven living and working space ecosystem*", the eight key industries targeted for development in Forest City are healthcare, e-commerce, education and training, near-shore finance, emerging technology, regional headquarters, tourism and meetings, incentives, conventions and exhibitions (MICE) and the green and smart industry.

With Forest City's strategic location, locally it aims to strengthen the economic integration between Malaysia and Singapore by attracting investors to take advantage of the lower operation costs in Malaysia while utilising the available platforms in Singapore and by providing better connectivity between the two countries thus allowing residents to enjoy metropolitan Singapore whilst enjoying lower costs of living in Malaysia. Regionally, it aims to increase economic growth by attracting industrial spillovers from Singapore and further aid Asia-Pacific economic and trade cooperation by positioning itself as a community base in South-East Asia.

2.2.6 The Gemas-Johor Bahru Electrified Double-Tracking Project

The Gemas-Johor Bahru Electrified Double-Tracking Project, which is expected to be completed in October 2022 (**Rizalman**, 2020) with an estimated cost of MYR7.5 billion, involves the electrification and double tracking of 192km of railway stretching from Gemas, a town in Negeri Sembilan, to Johor Bahru.

The project was awarded to a Chinese consortium consisting of China Railway Construction Corp Ltd, China Railway Engineering Corp and China Communications Construction Corp, which subsequently appointed the SIPP-YTL consortium, being a joint venture of SIPP Rail Sdn. Bhd. and Syarikat Pembenaan Yeoh Tiong Lay Sdn. Bhd., as the local sub-contractor.

With the rail upgrade, the implementation of the new Electronic Train Service (ETS) will be an improvement from the current diesel-powered passenger trains, cutting travel time and thus providing a viable alternative to road-based transport. Cutting through central Johor, the ETS will pass through districts which are presently less accessible. The project will also aid in increasing freight capacity by enabling large-scale freight shipments between the two largest ports in Malaysia, Port Klang and Tanjung Pelepas (**Hutchinson and Zhang**, 2020).

2.3 Moving forward

The COVID-19 pandemic has caused much disruption to the BRI projects in Malaysia, with some being terminated before realising their full potential.

The silver lining to this is that the pandemic has brought about cooperation amongst the BRI participating countries, leading to the building of a "*Health Silk Road*" and a "*digital Silk Road*", as stated by Tan Sri Ong Tee Keat, the Founding Chairman of the Centre for New

- Inclusive Asia (**Belt & Road News**, 2021).

It remains to be seen what further advancements the BRI will bring to Malaysia post-pandemic.

III International dispute settlement

3.1 Local courts and legal tradition

Malaysia is a common law jurisdiction and its legal tradition is greatly influenced by English law. The adversarial system is practised in the Malaysian Courts and the main sources of law are local statutes as well as decided cases (by application of the principles of *stare decisis* or judicial precedent).

The Malaysian Courts' hierarchy starts at the Magistrates' Courts, followed by the Sessions Court, High Court, Court of Appeal and, finally, the Federal Court. Article 121 of the Federal Constitution stipulates that there shall be two High Courts of co-ordinate jurisdiction and status, namely the High Court in Malaya (West Malaysia), and the High Court in Sabah and Sarawak (East Malaysia).

The jurisdiction of the superior courts, i.e. the High Court, Court of Appeal and the Federal Court, is governed by the Courts of Judicature Act 1964, whereas the jurisdiction of the subordinate courts, i.e. the Magistrates' Courts and the Sessions Court, is governed by the Subordinate Courts Act 1948.

Generally, as a court of first instance, i.e. where an action is commenced, the Magistrates' Courts may hear and decide civil actions up to a value of MYR100,000.00 (see Section 90 of the Subordinate Courts Act 1948), the Sessions Courts may hear and decide civil actions up to a value of MYR1 million (see Section 65(1)(b) of the Subordinate Courts Act 1948) and the High Court which also has appellate jurisdiction, i.e. jurisdiction to hear appeals from the subordinate courts, may hear and decide civil actions above the value of MYR1 million.

The civil rules of procedure generally applicable at the Magistrates' Court, Sessions Court as well as the High Court are contained in the Rules of Court 2012.

The Malaysian Courts embarked on its first phase of digitisation in 2009. The use of information technology (IT) has incrementally permeated to almost all facets of the Malaysian Courts. The proceedings in the Malaysian Courts have also become increasingly paperless. All correspondence and documents are typically e-filed. Case management meetings are carried out via the e-review system. It has also become commonplace to have hearings through virtual platforms such as Zoom or Skype.

Through amendments to the Courts of Judicature Act 1964 (Section 15A) and the Subordinate Courts Act 1948 (Section 101B) that took effect on 22 October 2020, the superior courts as well as the subordinate courts may, in the interest of justice, conduct proceedings through remote communication technology.

In January 2021, the Malaysian Courts discontinued the use of facsimile machines.

Disputes are generally decided based on the law and evidence presented and as the Malaysian Courts apply the principles of *stare decisis* or judicial precedent, there is some degree of certainty and consistency in the judgments delivered by the Courts, in particular, in respect of common issues.

The Malaysian Courts also play a very active role in the management of cases from the very beginning, resulting in speedy disposal of cases at the court of first instance. Prior to the onslaught of the COVID-19 pandemic and the imposition of several Movement Control Orders, it was not unheard of for matters at the courts of first instance to be disposed of within nine months.

3.2 Arbitration

Generally, all commercial disputes can be arbitrated. Under Malaysian law, any dispute that the parties have agreed to submit to arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy. (Section 4 of the Malaysian Arbitration Act 2005

provides that: "*(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy. (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.*")

Most arbitrations in Malaysia arise from disputes relating to construction contracts but not exclusively so. The most commonly used local standard form building contracts, i.e. the Malaysian Institute of Architects / *Pertubuhan Akitek Malaysia* (PAM) standard form contracts for private projects and the Public Works Department (PWD) / *Jabatan Kerja Raya* (JKR) standard form contracts for government projects, contain arbitration clauses. The PAM standard form contracts provide for arbitration under the PAM Arbitration Rules whereas the current JKR standard form contracts provide for arbitration under the Asian International Arbitration Centre (AIAC) Arbitration Rules. In Malaysia, arbitration clauses are also commonly found in shipping-related contracts and insurance contracts.

Malaysia has a well-established arbitration legal framework. Previously, arbitration was governed by the Malaysian Arbitration Act 1952 (Act 93) (the 1952 Act) that was based on the English Arbitration Act of 1950 (The Malaysian Arbitration Act 2005 (Amended 2011), An Annotation (2013) by Datuk Sundra Rajoo, page 4). The 1952 Act was repealed and replaced by the current Malaysian Arbitration Act 2005 (Arbitration Act 2005). The Arbitration Act 2005 is substantially based on the UNCITRAL Model Law. Subsequent amendments in 2011 and in 2018 have made the 2005 Act even more arbitration-friendly and in line with the Model Law. The Arbitration Act 2005 is available in English and Malay, with the English version being the authoritative text.

The main centre of arbitration in Malaysia is the **AIAC**, formerly known as the Kuala Lumpur Regional Centre for Arbitration (KLRCA). The AIAC was established in 1978 under the auspices of the Asian-African Legal Consultative Organization (AALCO). The AIAC moved to its present location in a refurbished heritage building known as Bangunan Sulaiman, Kuala Lumpur in 2014.

The AIAC administers its own range of arbitration rules and its own mediation rules. The AIAC also manages and operates the Asian Domain Name Dispute Resolution Centre (ADNDRC), which was formed by the Hong Kong International Arbitration Centre (HKIAC) and the China International Economic and Trade Arbitration Commission (CIETAC). The AIAC also provides arbitration-related services. Its premises are a popular venue for arbitration hearings and arbitration/other ADR events.

The Director of the AIAC is also the default appointing authority for arbitrators under the Arbitration Act 2005. The AIAC also administers adjudications under the Construction Industry Payment and Adjudication Act 2012 (CIPAA) and the Director of the AIAC is the default appointing authority for adjudicators under CIPAA.

The AIAC maintains panels of arbitrators, adjudicators and mediators of various nationalities, backgrounds and expertise.

In terms of local arbitral institutions, there are two non-governmental and non-profit organisations that are based in Malaysia, i.e. the Chartered Institute of Arbitrators (CIArb) (Malaysia Branch) and the Malaysian Institute of Arbitrators (MIArb). Both organisations currently operate out of the same building as the AIAC, i.e. Bangunan Sulaiman, Kuala Lumpur.

CIArb (Malaysia Branch) was established to, amongst others, promote international and domestic commercial arbitration, to promote education and training relating to ADR, and advise and assist various entities including government departments in formulating and making recommendations in respect of legislation and procedures relating to ADR.

MIArb was established in 1991. It was set up with the main aim of promoting the determina-

tion of disputes by arbitration. MIArb has since widened its objectives to promoting and facilitating other forms of ADR such as mediation and adjudication. MIArb also educates and trains the public and its members in ADR, and collaborates with other organisations in furtherance of its objectives.

3.3 Mediation

Apart from arbitration, mediation is another form of ADR that has been promoted and encouraged in Malaysia for many years.

In 1999, the **Malaysian Mediation Centre (MMC)** was set up under the auspices of the Bar Council of Malaysia. The **MCC** provides, amongst others, professional mediation services by trained mediators accredited and appointed to the panel of mediators of the MCC, venue for mediation sessions and training in mediation techniques, procedures and skills. Pursuant to a Memorandum of Understanding and Cooperation Agreement signed on 19 September 2017 under the Belt and Road Initiative, the **Malaysia-China Business Mediation Centre (MCBMC)** was jointly set up by the Bar Council of Malaysia, the Mediation Centre of the China Council for the Promotion of International Trade (CCPIT) and the China Chamber of International Commerce (CCOIC) in Beijing.

The Malaysian Courts have encouraged parties in disputes to consider undergoing court-annexed mediation at least since 2010 and routinely recommend that parties consider mediation during case management meetings. The **Kuala Lumpur Courts Mediation Centre** was set up in 2011. In 2016, the Federal Court, the apex court in Malaysia, set up a Mediation Division to, amongst others, set up mediation centres in all state courts and to establish policies and provide relevant training.

The Malaysian Mediation Act 2012 (Act 749) (Mediation Act), which generally governs the practice and procedure of private mediations, has been in operation since 1 August 2012. However, further developments or changes in the law regarding mediation may be expected since Malaysia signed the **United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation)** on 7 August 2019.

Recently and as a result of the impact caused by the COVID-19 pandemic, the government of Malaysia has enacted the Temporary Measures for Reducing the Impact of Coronavirus Diseases 2019 (COVID-19) Act 2020, also known as the COVID-19 Act. The COVID-19 Act came into force on 23 October 2020 and it provides that any dispute in respect of any inability to perform contractual obligations arising from certain specified categories of contracts (including construction contracts, performance bonds granted pursuant to construction contracts, professional services contracts, lease or tenancy of non-residential immovable property) due to measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19 may be settled by way of mediation (Section 9(1) of the Temporary Measures for Reducing the Impact of Coronavirus Diseases 2019 (COVID-19) and Schedule). The Prime Minister's Department of Malaysia has since set up a **COVID-19 Mediation Centre** for the conduct of mediations of disputes that fall within the COVID-19 Act that do not exceed MYR300,000.00.

3.4 International treaties

There are 40 **bilateral investment treaties** (BITs) in force **between Malaysia** and countries reported to be part of the BRI, including Cambodia, China, Kazakhstan, Vietnam, the Republic of Korea and the United Arab Emirates.

There are also BITs in force between Malaysia and countries not reported to be part of the BRI, including Argentina, Austria, Denmark, Finland, France, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom.

Further, Malaysia is a signatory to 21 **treaties with investment provisions** (TIPs) that are currently in force. These include **bilateral TIPs** with Australia, Chile, India, Japan, New Zealand, Pakistan and the United States of America, respectively, and multilateral TIPs including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), OIC Investment Agreement (1981) and 12 Association of Southeast Asian Nations (ASEAN)-related TIPs. Malaysia, Indonesia, Philippines, Singapore and Thailand are founding members of **ASEAN**. With the inclusion of Brunei, Vietnam, Laos, Myanmar and Cambodia, there are altogether 10 **ASEAN member states**.

More recently, Malaysia signed the **RCEP agreement** on **15 November 2020**. Though not yet in force, the RCEP, whose members consist of ASEAN, China, Japan, South Korea, Australia and New Zealand, is touted to be the **world's largest free trade bloc**.

Malaysia generally enjoys good relations with countries in Europe and with the European Union. As a member state of ASEAN, Malaysia is a signatory to a TIP with the EU, i.e. the **ASEAN-EU Cooperation Agreement** that has been in force since 1980. **Malaysia** is the second-largest trade partner of the EU in South-East Asia whilst the EU is the third-largest trade partner of Malaysia. The delegation of the EU to Malaysia was established "***to promote closer ties with Malaysia by providing an efficient and***

reliable communication channel between the EU and Malaysian authorities, business, education institutions and civil society".

Malaysia is also a signatory to 19 **BITs** in force with countries that are member states of the EU, including the United Kingdom.

In terms of reciprocal arrangements for the recognition and enforcement of court judgments, Malaysia has very few of such arrangements. Under the Reciprocal Enforcement of Judgments Act 1958 (Act 99) (REJA), only monetary judgments from certain courts in Brunei, Hong Kong SAR of the People's Republic of China, India New Zealand, Singapore, Sri Lanka and the United Kingdom may be recognised upon an application to the High Court, provided the requirements under REJA are fulfilled. For foreign judgments that do not come within REJA, these may be enforced by filing a fresh action under common law.

3.5 Malaysia is a signatory to the New York Convention

Malaysia acceded to the **New York Convention** on 5 November 1985. Malaysia previously observed its treaty obligations by way of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, which has since been repealed and replaced by the Arbitration Act 2005 (see Section 51(1) of the Arbitration Act 2005). In practice, both domestic as well as foreign awards may be recognised as binding and be enforced as a judgment in terms of the award or by action on an application to the High Court under Section 38 of the Arbitration Act 2005. Section 38 provides for a summary process that requires production of the arbitration agreement and the arbitration award, and is similar to Article 35 of the Model Law. Section 39 of the Arbitration Act 2005 (similar to Article 36 of the Model Law) provides that the High Court may only refuse recognition or enforcement on limited grounds set out in Section 39.

Thus, foreign awards made in member states of the New York Convention can easily be recognised and enforced in Malaysia.

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Shook Lin & Bok is an award-winning full service civil and commercial law firm based in Kuala Lumpur, Malaysia. Established in 1918, it is the oldest law firm of local origin in the country. The firm currently has approximately 65 lawyers who regularly advise and represent local and foreign-based clients in a wide variety of contentious and non-contentious work.

Its Arbitration (International & Domestic) Department has extensive experience representing clients in *ad hoc* arbitrations and institutional arbitrations under various rules, including the AIAC Arbitration Rules, ICC Rules, LCIA Rules, PAM Arbitration Rules, SIAC Rules and UNCITRAL Rules, as well as arbitration-related court proceedings including the challenge and enforcement of domestic and foreign awards.

Its Building, Construction and Engineering Department has extensive experience in transactional work, including project advisory, negotiation and documentation, as well as dispute work, including court litigation, arbitration, and adjudication under the Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA).

shooklin.com.my

Lam Ko Luen is an advocate and solicitor of the High Court in Malaya and a senior partner of Shook Lin & Bok, Kuala Lumpur. He heads the firm's Building, Construction & Engineering and International & Domestic Arbitration Departments. He appears as counsel in court, arbitration and adjudication and sits as an arbitrator and an adjudicator. His work has been recognised by several leading legal publications over the years. He is ranked as a "*Litigation Star*" by Benchmark Litigation Asia-Pacific for the years 2020–2021. In 2019 and 2018, he was ranked as a "*Dispute Resolution Star*" and a "*Disputes Star*", respectively. He has been described as "*a resourceful, innovative, hands-on and experienced lawyer who is client-orientated*" and "*a very good listener and explains all very clearly to us*" (Asialaw Profiles 2020 Client Feedback). He holds fellowships of the Chartered Institute of Arbitrators (CIArb) and the Malaysian Institute of Arbitrators (MIArb).

koluen@shooklin.com.my

Victoria Loi is an advocate and solicitor of the High Court in Malaya and a dispute resolution partner of Shook Lin & Bok, Kuala Lumpur. She is experienced in arbitration, building, construction and engineering disputes, general and civil litigation, and adjudication under the Malaysian Construction Industry Payment and Adjudication Act 2012 (CIPAA). She is ranked as a "*Future Star*" by Benchmark Litigation Asia-Pacific for the years 2018–2021 and has been described as having "*good exposure and knowledge in construction disputes*" and "*able to provide good advice and strategy for minimising client exposure*" (Benchmark Litigation Asia-Pacific 2021 Client Feedback). She holds fellowships of the Chartered Institute of Arbitrators (CIArb) and the Malaysian Institute of Arbitrators (MIArb), and is on the panels of arbitrators and adjudicators of the Asian International Arbitration Centre (AIAC). She is the Deputy President of the MIArb (2021–2023). She is a member of the Society of Construction Law Malaysia.

victorialoi@shooklin.com.my

Nina Lai is an advocate and solicitor of the High Court in Malaya and a senior associate of Shook Lin & Bok, Kuala Lumpur. Her areas of practice include arbitration, building, construction & engineering, dispute resolution and privacy and data protection. She has a broad range of experience in advisory, drafting and counsel work on building, construction & engineering related disputes, construction-related joint venture disputes, debt recovery matters and other contractual disputes. She is a member of the Malaysian Institute of Arbitrators (MIArb) and is currently the Honorary Secretary of the MIArb (2021–2023).

ninajxlai@shooklin.com.my

Serbia

Teodora Vujošević
CMS Belgrade

Ivan Gazdić
CMS Belgrade

I Connection to Belt and Road projects

1.1 Anticipated role of Serbia within the Belt and Road scheme

The One Belt, One Road Initiative (the "BRI") tends to develop political and economic cooperation with European countries, especially those situated in the Balkans, and Serbia is no exception. In fact, as its potential has attracted many Chinese investors, Serbia may be deemed as a leading country in terms of prominent BRI investments that have occurred (and, consequently, one of China's key partners), most of which are in the infrastructure and energy sectors.

The main project within the BRI is the Budapest-Belgrade railway, which is worth USD 1.8 billion, while the Serbian section (from Novi Sad to the Hungarian border) is worth USD 1.1 billion. The Serbian Government has signed several agreements with China to fortify cooperation in the fields of innovation and infrastructure.

Although the projects are beneficial to both countries – Serbia and China, Chinese investments warmly welcomed by Serbia raise concerns in relation to environmental protection and several other issues (such as unsustainable debt). Moreover, the European Parliament has also expressed concerns about Chinese economic projects in Serbia.

It is estimated that in the period from 2010 to 2019, China invested EUR 1.6 billion (USD 1.9 billion) in Serbia, while Chinese infrastructure loans to Serbia are estimated to exceed EUR 7 billion.

Notable projects include the Belgrade-Montenegro Bar Port Motorway (expected in the future) as well as the purchase of a steel mill that used to be owned by U.S. Steel by China's state-owned HBIS Group . In 2018, China's Zijin Mining took a 63% share in the Bor mine, the country's only copper mining complex. Also, an upgrade to the Belgrade-Preševo railway with an estimated length of 930m is expected in the future. Lately, Chinese tyre manufacturer Shandong Linglong has commenced construction of a production plant in Zrenjanin – the plant is expected to produce 13 million tyres a year and employ 1,200 people.

II Country overview

2.1 Economy

Key economic data in Serbia includes the fact that GDP per capita was USD 7,392 and USD 7,652 in 2019 and 2020, respectively. Considering the

COVID-19 pandemic's influence on the global economy, it is safe to note that Serbian economy suffered somewhat less in comparison to many countries, as its GDP growth in 2020 was only -1% (compared to its GDP growth in 2019, which was 4.2%). On the World Bank Ease of Doing Business Index, Serbia ranked 44th (overall) out of 190 countries in 2020, while taking 8th position in Europe. Serbia's main industries include energy, the automotive industry, machinery, mining, and agriculture. Primary industrial exports are automobiles, base metals, furniture, food processing, machinery, chemicals, sugar, tyres, clothes, pharmaceuticals – trade plays a major role in Serbia's economic output.

2.2 Currency

The currency in use is Serbian dinars ("RSD"), with an average exchange rate for 2020 of RSD 117.59 = EUR 1. Regarding the stability of the Serbian dinar, it is important to note that in the first half of last year it had been claimed as "among the most stable currencies since the beginning of the year and is expected to stay so throughout 2020", according to analysts from Austrian Erste Group. The stability trend from recent years is a positive factor for the Serbian economy, as uncontrolled dinar exchange rate fluctuations would provide uncertainty, especially for those conducting business (who particularly should be aware in advance of what can be expected).

2.3 Government and stability/security

The incumbent Government of Serbia, the second one led by Prime Minister Ana Brnabić, was elected on 28 October 2020. The Government's top priorities include: caring for the health of citizens and strengthening the health system; digitisation of healthcare; preservation of vital interests of the Serbian people in Kosovo and Metohija; combatting organised crime; preservation of independence and independent decision-making of Serbia; security and defence of the country; the rule of law and the acceleration of reforms on the Serbian European path; further economic strengthening of Serbia; human capacity building innovations aimed at creating added value; incentives to entrepreneurship and the start-up ecosystem; linking science and economy; environmental protection and green transformation; energy transformation and sustainability; mining; smart, resilient and sustainable agriculture; artificial intelligence ("AI"); tourism; sport; and public administration efficiency, etc.

2.4 Political/cultural considerations

Although early elections are not uncommon in Serbian politics (which, at first glance, indicate a risk of instability), the political situation is relatively stable. Based on the latest polls (and, why not, on the latest elections) change of political leadership is, at this point, less likely, as the ruling party under the leadership of the President of the Republic has undisputed political power, being supported by many voters, while also being backed by most sections of the media. As for potential repercussions in an unlikely scenario that Serbia faces a change of its political leaders, these may include the slowing down of procedures before the relevant state bodies or taking a more ineffective approach by the authorities, due to the overall political uncertainty. What can be stated for sure, however, is that no political change is likely to jeopardise strategically important projects for Serbia, as their completion is of public interest for Serbia and would be beneficial for its citizens on multiple levels.

2.5 Natural resources

The natural resources available in Serbia include coal, iron ore, oil, gas, gold, silver, copper, zinc, antimony, chromite, magnesium, pyrite, limestone, and marble.

2.6 Infrastructure

Located in Southeast Europe, Serbia offers an extremely favourable geographical and strategic position – at the crossroads between Western and Eastern Europe, thanks to which many important

roads pass through Serbia. Roads and railways from Northern, Western, and Central Europe pass through Serbia on their way to Southeastern Europe and South-Western Asia. Also, the Danube, a river passing through Serbia, connects as many as 10 European countries. Therefore, a developed transport infrastructure is important for business development, market presence and necessary as a way of connecting with business associates and suppliers from all parts of Europe and the world. Its strategic position is particularly recognised by the BRI, which is why many transport infrastructure projects are taking place in Serbia.

2.7 Investment limitations

As part of its process to join the European Union ("EU"), while also aiming at becoming concurrent in the field of investments, Serbia has worked hard on improving the investment possibilities, including making relevant amendments to its regulations (both laws and bylaws). Foreign investors in Serbia enjoy the freedom to invest while being treated for their investments in the same way as Serbian citizens, implying that they have the same rights and obligations as Serbian investors unless otherwise provided by the law. The favourable tax regime (e.g., the 15% corporate income tax rate and tax relief intended for innovative start-ups established on 31 December 2021) motivates investors from around the world to start their businesses in Serbia. By providing tax benefits such as exempting VAT on income generated through business activities, free zones are suitable for doing business for both domestic and foreign legal entities. Also, the profit made in the free zone can be transferred to any country in the world, at no cost, with no taxes imposed, or permits being required.

The procedure for setting up a business in Serbia is simple and particularly attractive to foreign investors, as many company incorporation formalities can be performed without the physical presence of the shareholders (e.g., the certification of the Memorandum of Association).

In addition to incentives to which all legal entities in Serbia are entitled, there are special incentives for foreign investors. Serbia provides special non-refundable funds for Greenfield and Brownfield investments, as two types of foreign direct investment in Serbia. To support investments of national importance as well as the investments that improve domestic economic development, Serbia may sell construction land to an investor at a lower price than the market value. It also offers a tax credit for 10 years on corporate income tax for investors who employ more than 100 workers and invest more than EUR 8.5 million.

Under the condition of reciprocity, persons performing business activities in Serbia may acquire the right of ownership on real estate necessary for performing such activity, while a foreign natural person who does not perform activities in Serbia may acquire ownership of an apartment or a residential building in the same manner as Serbian citizens. A natural person who does not perform activities in the Republic of Serbia may not acquire ownership on other types of land unless on land where the apartment or residential building is located. With regard to agricultural land (fields, gardens, orchards, vineyards, etc.), the law envisages that a foreign natural or legal person cannot be the owner of agricultural land unless otherwise provided by law in accordance with the Negotiations on the Stabilization and Association Agreement ("SAA"). A court or other body (e.g., a real estate cadastre office) may request an explanation of reciprocity from the Ministry of Justice. In practice, it would suffice if the legislation of that state allows foreign persons to acquire real estate properties under conditions not significantly stricter than the conditions prescribed by Serbian law, and that authorities of that state in practice allow Serbian citizens to acquire real estate.

III International dispute settlement

3.1 Local courts and legal tradition

As part of the Roman legal tradition, Serbia identifies as a Civil Law country applying European

Continental Law. Most of the principles incorporated in its legal system align with the rules and legal institutions originating from Austria and Germany, whereas the influence of Anglo-Saxon law is minor (except for the recent novelties in company, criminal and bankruptcy law). The rule of law is a priority, declared so by the Serbian Constitution, as well as by numerous Government programmes and documents. In exercising their competencies, while acting as a state authority, judges are independent and impartial. Judicial power is divided between the courts of general and special jurisdiction, the latter being the Commercial Courts, Commercial Court of Appeals, Misdemeanour Courts, Misdemeanour Court of Appeals, and Administrative Court. Proceedings conducted before courts of special jurisdiction are often more efficient as the main pieces of evidence proposed therein are usually documents (and only as an exception witnesses and other evidence).

In Serbia, anti-corruption and bribery have been acknowledged as important topics, especially given the importance of the rule of law in the EU negotiation and integration process and the public perception of these issues. Consequently, numerous activities have been undertaken by the state authorities to fight corruption and bribery more efficiently.

On 21 May 2019, the Serbian Parliament adopted a set of criminal regulations as well as the Anti-Corruption Law. As lack of results in fighting corruption is one of the most serious obstacles to the economic, social, and political development of the country and joining the EU, the Government is constantly putting emphasis on this issue. Apart from enacting new regulations, the Government has also tried to fortify existing and establish new institutions for fighting corruption, such as the establishment of a special Department for the Fight against Corruption within the Public Prosecutor's Office. Additionally, the competence of the Prosecutor's Office for Organized Crime is extended to crimes of so-called "high corruption", where the defendant is an official or a responsible person performing a public function based on an election or appointment, as well as to so-called "serious corruption" – for corrupt criminal offences where the value of the obtained property gained exceeds the amount of RSD 200 million.

Regarding corruption in daily life, a negative experience is unlikely when working on important projects and foreign direct investments, which are, due to their nature, always coordinated with the Government and various competent authorities. In general, foreign persons are less likely to encounter corruption, due to the fact that, as a rule, the projects they are engaged in are strategically important for Serbia, leaving little to no room for personal aspirations.

Whether the proceedings would be administered and ruled in a satisfactory manner depends on each judge, some of which are very efficient in adjudicating, while others tend to avoid dealing with the issues in a duly manner, especially in complex matters. The practice has shown that the judges of the second and third instance courts are more reliable in terms of expertise and impartiality.

The length of proceedings depends on various factors, such as the complexity of the matter, evidentiary procedure, the need for expert assessments, possible counterclaims, number of legal remedies filed against the rendered judgment, etc. Despite the regulations providing for numerous mechanisms to increase the efficiency of proceedings, in practice, some proceedings still take too long, endangering thereby the widely accepted principle of the right to a trial in a reasonable period of time (although, as stated above, this information is more relevant for courts of the general jurisdiction rather than the special one). On average, commercial disputes can take up to two to three years if the parties fully use their rights to appeal against court decisions.

3.2 Arbitration

As an alternative to litigation, arbitration has recently been recognised as a modern and faster mechanism of dispute resolution in Serbia, being in certain aspects even superior to the courts, with its decisions having the same legal effects as the courts' decisions (while being more easily recognised and enforced abroad). Being a one-instance procedure, arbitration is recommended as a more efficient means of dispute resolution, primarily considering the usual timeframe for obtaining a final and binding court judgment, with an average duration of six months up to a year. It is particularly popular in international disputes, where impartiality and neutrality must be preserved even more. That being said, in the cases where the courts have exclusive jurisdiction under Serbian law (such as disputes on real estate located in Serbia), arbitration is not admissible.

As a rule, under Serbian Arbitration Law, arbitration may be agreed upon as a proper dispute resolution mechanism in disputes over the rights that the parties can freely dispose of, and which do not fall under the exclusive jurisdiction of the Serbian courts. Matters relating to real estate situated in Serbia are not permitted to be adjudicated in a foreign forum/arbitration, but are

within the exclusive competence of the Serbian courts.

Additionally, the Law on Consumer Protection provides that an exclusion or restriction of a consumer's right to initiate a specific procedure or to use a specific legal remedy for the protection of his or her rights under the said law, especially the imposition of an obligation to resolve the dispute in arbitration, in a manner that is contrary to the provisions of the said law, would be deemed as an unfair contractual provision and as such considered null and void. Therefore, even if the parties agree on arbitration, if the Serbian Law on Consumer Protection is applied, there is a risk that certain dispute resolution mechanisms could not be excluded by the parties.

When it comes to local arbitral institutions, Permanent Arbitration at the Serbian Chamber of Commerce is a modern arbitration institution created by reorganising two institutions that previously existed: Foreign Trade Arbitration (competent for disputes with an international element); and the Permanent Court of Arbitration (competent for domestic disputes). The said institution is competent to settle all types of disputes arising out of business relationships, supposing the parties agree on its jurisdiction. In 2013, another arbitration institution called the Belgrade Arbitration Center (the "BAC") was established in Serbia, as a permanent arbitration institution that administers domestic and international disputes, assists in technical and administrative aspects of *ad hoc* arbitral proceedings, organises and conducts mediation, etc.

Concerning mediation, it is important to note that Serbia was among the first 46 countries to accede to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention") in August 2019. Despite the advantages of mediation as a voluntary, informal, faster, and cheaper procedure (compared to regular costs of court proceedings, mediation is approximately 35% to 60% cheaper), in 2019, there were 460,970 litigation cases in Serbia, while only 569 mediations were conducted in the same year.

3.3 International treaties

Serbia has signed bilateral investment treaties ("BIT") with the following BRI countries: China; Romania; the Slovak Republic; Bulgaria; Belarus; Poland; North Macedonia; Zimbabwe; Guinea; Greece; the Czech Republic; Croatia; Ghana; Cuba; Ukraine; Italy; Turkey; Hungary; Bosnia and Herzegovina; Slovenia; Albania; Iran; Kuwait; Libya; Lithuania; Egypt; Cyprus; Portugal; Montenegro; Malta; Kazakhstan; Azerbaijan; Indonesia; Algeria; the United Arab Emirates; Morocco; and Qatar. For some countries listed as having signed a BIT with Serbia, available information on being a BRI signatory is unclear. Such countries include Austria, Niger, and the Russian Federation. Other notable cross-border commercial agreements ratified by Serbia include, e.g., the United Nations Convention on Contracts for the International Sale of Goods (the "CISG").

The SAA between the EU and Serbia commenced in November 2005. The SAA, by virtue of which Serbia undertook the obliga-

tions to i) establish a free trade zone, as well as to ii) harmonise its legislation with EU law, was signed in April 2008 and entered into force on 1 September 2013. Due to its current process of joining the EU, Serbia faces strong legislative activity, aimed at harmonising its regulations with the tendencies existing in the EU. However, such "on paper" activity is not always and necessarily followed by progress in this regard, in terms of opening and closing new chapters in the negotiations with the EU. Quite to the contrary, the fact that the EU has opened 18 chapters for Serbia (with no chapters opened in 2020 or the first half of 2021), while only two out of 35 are preliminarily closed, might suggest a somewhat slower pace Serbia may be taking on its path to becoming an EU Member State.

With respect to recognition and enforcement of foreign judgments, it is important to note that a foreign court judgment produces the same legal effects as a judgment of a Serbian court only if recognised by a court of the Republic of Serbia. The procedure and conditions for the recognition of foreign court judgments are prescribed by the Law on Resolving Conflicts of Laws with the Regulations of Other Countries, as well as by the relevant bilateral agreements. BRI countries with whom Serbia has arrangements for the recognition and enforcement of judgments are Algeria, Bulgaria, Greece, Hungary, Romania, Austria (only for decisions of selected courts, no reciprocity in recognition of Commercial Court judgments), the Czech Republic, Iraq, North Macedonia, the Russian Federation, Italy (arbitral awards), the Slovak Republic, Mongolia, Ukraine, Bosnia and Herzegovina, Cyprus, Poland, and Montenegro. Although reciprocity is necessary for recognition of a foreign court judgment, no bilateral arrangement to that effect is required – factual reciprocity would be sufficient. Moreover, there is a presumption that such reciprocity exists, so the party claiming differently must prove so.

3.4 Is Serbia a signatory to the New York Convention? In practice, are foreign awards enforced?

For a foreign arbitral award (deemed as an award made by an arbitral tribunal seated outside of Serbia, as well as an award of a tribunal seated in Serbia, but a foreign law was applied to the arbitral proceedings) to be enforceable, i.e., to have an effect of a final judgment of the domestic court, it first needs to be recognised before a Serbian court. The legal framework for recognition and enforcement consists of the Arbitration Law and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, to which Serbia acceded in 2001. Serbia is also a signatory of the European Convention of International Commercial Arbitration of 1961.

The recognition and enforcement procedures may be conducted separately, one after another, or the competent court may decide on the recognition of a foreign arbitral award as a preliminary matter in the enforcement proceedings. The second option, from our experience, gives quicker results. In both cases, however, the court is not allowed to review the merits of the foreign arbitral award. This means that Serbian courts are generally obliged to recognise foreign arbitral awards, except where one of the following grounds for refusal applies:

(i) invalid arbitration agreement;
(ii) the party against whom the award had been rendered was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present their case;
(iii) the award decides on matters not contemplated by or exceeding the scope of the arbitration agreement (partial refusal of the recognition and enforcement of that award is possible here);
(iv) defective composition of the arbitration tribunal;
(v) the award has not yet become binding on the parties or has been set aside; or
(vi) the subject matter of the dispute is not eligible for settlement by arbitration under Serbian law or the award is incompatible with the Serbian public order.

The timeframe for the court to grant enforcement depends on the procedural path chosen by the applicant (recognition procedure as a separate proceeding or as a preliminary matter in enforcement proceedings) and the use of available legal remedies (ordinary, extraordinary legal remedies, constitutional complaint). In practice, it can take from a few months to a few years. It should be noted that no specific time limit for the recognition and enforcement of foreign arbitral award is provided under Serbian law. In that respect, a default provision of the Law on Obligations is applied, according to which a claim confirmed in an award is subject to a limitation period of 10 years from the date the award became final and binding. Moreover, numerous interim measures provided by the law are at the disposal of both domestic and foreign persons, securing the enforceability of their claims.

In 2000, **CMS Belgrade** was the first international law office to be set up in Serbia. Since then, we have gained extensive experience in advising on major transactions in the Serbian market, including the privatisation of a number of important Serbian companies. CMS Belgrade is one of the leading law firms in Serbia in the fields of corporate/M&A and privatisation law, real estate, banking and finance law, dispute resolution, employment, energy and competition law. The team currently comprises 25 lawyers (20 of which are admitted to the Serbian bar), and one international CMS partner, who is permanently on site. CMS Belgrade is regarded by independent legal directories such as *Chambers and Partners*, *The Legal 500* and *IFLR1000* as the premier international law firm in Serbia with Tier 1 rankings in numerous practice areas.

cms.law

Teodora Vujošević joined the CMS Belgrade team in April 2021, after graduating from the University of Belgrade, Faculty of Law. As an Associate, she assists our team and advises clients on a wide range of commercial law issues with a focus on Competition & EU and Corporate/M&A.

Teodora.Vujosevic@cms-rrh.com

Ivan Gazdić is a Partner at CMS Belgrade and heads Real Estate & Construction and Infrastructure & Projects practices in the CMS Belgrade Office. He has notable experience in advising on various real estate transactions in both development projects and acquisitions. He has, for instance, guided clients through specific regulations in the real estate area and accompanies them throughout the entire duration of a project, preparing legal due diligence reports, solving ownership-related issues, drafting transaction documentation, etc.

Ivan.Gazdic@cms-rrh.com

Singapore

Bazul Ashhab
Oon & Bazul LLP

Lionel Chan
Oon & Bazul LLP

Prakaash Silvam
Oon & Bazul LLP

Tanya Thomas Vadaketh
Oon & Bazul LLP

I Connection to Belt and Road projects

1.1 Anticipated role of Singapore within Belt and Road scheme

China's Belt and Road Initiative (the "**BRI**"), an ambitious plan to connect the world and promote regional connectivity and economic integration, is set to boost global GDP by over US$7 trillion *per annum* by 2040.

Singapore as a pragmatic, nimble, knowledge-based economy was one of the first countries to publicly express support for the BRI and has continued to be a strong proponent of the project. The support stems in part from Singapore's excellent and long-standing relationship with China.

Singapore recognises the multitude of benefits the BRI would bring to Singapore, the Association of Southeast Asian Nations ("**ASEAN**") and Asia at large, as the BRI drives and leads to greater regional economic integration through the promotion of greater trade and investment flows along the improved infrastructure envisioned by the BRI.

As set out by Singapore Prime Minister Lee Hsien Loong at the Second Belt and Road Forum for International Cooperation in 2019, Singapore's participation in the BRI focuses on four platforms, namely: (1) infrastructure connectivity; (2) financial connectivity; (3) third-party collaboration; and (4) professional and legal services.

1.1.1 Infrastructure connectivity

Singapore's participation in BRI infrastructure connectivity is best highlighted by the Chongqing Connectivity Initiative ("**CCI**"), the government-

to-government joint project between China and Singapore launched in November 2015. The CCI aims to drive the growth of China's western region through better transport, financing and data connectivity.

A major milestone in the progress of the CCI is the International Land-Sea Trade Corridor ("**ILSTC**"), which is made up broadly of three logistic networks.

a) The first is the international rail-sea intermodal transport, which provides for a railway trunk line from Chongqing to Guangxi and onward to ASEAN countries such as Singapore through the shipping route.
b) Next, a highway trunk line, which allows Chongqing to reach ASEAN countries such as Vietnam, Myanmar and Laos.
c) Finally, a railway network in Southwest China, which will connect to the Pan-Asian railway network, a planned network of railways which would connect China, Singapore and all the countries of mainland Southeast Asia.

Altogether, it is estimated that the ILSTC would reduce the time taken for goods to move between Western China and ASEAN by up to two-thirds. Despite the COVID-19 pandemic in 2020, the corridor saw a 30% year-on-year increase in cargo flows last year. In fact, the CCI-ILSTC has been extended to 234 ports and 92 countries and regions.

For Singapore, the trade corridor assists in cementing its position as a global maritime trade hub while for China, the trade corridor develops greater links between Western China and the global economy by giving China's western provinces convenient and direct access to sea routes which connects Western China with the world.

Singaporean companies have looked to make investments along the ILSTC. One such example is Public International Lines, which made an initial investment of 1 billion yuan in September 2017 toward the building of an integrated logistics park in Nanning, which is located in the southern part of Guangxi, China. This China-Singapore Nanning International Logistics Park is one of the key projects for Guangxi, which aims to capitalise on the ILSTC and promote construction of the land and sea channel in the west of China.

1.1.2 Financial connectivity

As a small nation with no natural resources, Singapore's strategy is to complement other nations by positioning itself as the region's leading financial, legal and professional services hub.

Notably, according to Chinese government statistics, 23% of all outward investments related to the BRI flowed through Singapore while 85% of inbound investments for the BRI made its way into China through Singapore. Singapore is also one of the largest offshore Renminbi trading hubs. Further, approximately 60% of infrastructure projects in Southeast Asia obtain their finance and advisory services from Singapore-based institutions. Singapore therefore has positioned itself well to act as the preferred hub for major regional infrastructure projects that will arise out of the BRI.

Singapore was also among the first countries to support the Asian Infrastructure Investment Bank ("**AIIB**"), a development bank dedicated to lending for infrastructure projects within Asia including the BRI. Singapore has contributed US$250 million toward the capital of the AIIB, which gives Singapore a stake and voting rights in the bank. The purpose of this investment is to support further economic development in the region and to build up AIIB as a first-class multilateral financial institution.

1.1.3 Third-party collaboration

Third-party market collaborations occur when parties from two different countries (e.g. Singapore and China) cooperate on projects in third-party countries and regions.

Recognising the benefits of third-party market collaborations, Singapore first signed a Memorandum of Understanding to Promote Greater Collaboration between Singapore and Chinese Companies in Third-Party Markets along the Belt and Road in April 2018 ("**MOU to Third-party Market Cooperation**"). Under the MOU to Third-party Market Cooperation, the Singapore Ministry of Trade and Industry, the National Development and Reform Commission of China, and Enterprise Singapore agreed to form a working group to identify sectors and markets of mutual interest, and organise matching activities and forums to facilitate third-party market cooperation between Singapore and Chinese companies along the Belt and Road.

This led to the signing of a second Memorandum of Understanding in April 2019 between Singapore and China on the Implementation Framework for Enhancing Singapore-China Third-Party Market Cooperation ("**Implementation Framework MOU**"). The Implementation Framework MOU highlighted sectors for collaboration in third-party markets under the BRI, including logistics, e-commerce, infrastructure and professional services such as financial and legal services.

Singapore companies have been actively collaborating in third-party countries in the areas of infrastructure, financing and professional services:

• In 2020, a consortium of banks including

Singapore's DBS Bank and Bank of China jointly financed a greenfield alumina refinery in Indonesia for over US$500 million. This was a landmark transaction to finance the construction of Phase 2 of the refinery project (which was Indonesia's only alumina refinery) to reach its target capacity.

- In 2020, Singapore's Top International Holdings and China's Yantai Port Co. Ltd began construction and operations of a river port terminal and its supporting 100-kilometre-long ore transport road along Fatala River in Boffa, Guinea.
- In April 2019, Surbana Jurong, a global urban and infrastructure consulting firm headquartered in Singapore, and Silk Road Fund, a medium- to long-term investment fund dedicated to support the BRI, entered into a Framework Agreement to implement the China-Singapore Co-Investment Platform. The co-investment platform focuses on funding greenfield infrastructure projects in Southeast Asia and parties have targeted an investment of approximately US$500 million.

1.1.4 Professional and legal services

Singapore offers a neutral third-party venue for Belt and Road countries and companies to resolve commercial disputes quickly and effectively.

In 2020, the World Bank's Doing Business 2020 Report found that Singapore had the shortest resolution time worldwide for standardised commercial disputes at 120 days. The Doing Business 2020 Report also ranked Singapore as the best country out of 190 countries on the ease of enforcing contracts.

BRI disputes can be resolved in Singapore either in the Singapore Courts via the Singapore International Commercial Court ("**SICC**"), via arbitration under the auspices of the Singapore International Arbitration Centre ("**SIAC**"), and also via mediation through the Singapore International Mediation Centre ("**SIMC**"). These institutions are well positioned to handle complex and high-value cross-border disputes.

1.1.4.1 SICC

The SICC was launched on 5 January 2015 and is designed to deal with transnational commercial disputes. The judges who hear cases in the SICC are world renowned and include, amongst others:

- Singapore Chief Justice Sundaresh Menon.
- International Judge Justice Robert French, former Chief Justice of Australia.
- International Judge Justice Lord Jonathan Hugh Mance, former Justice of the Supreme Court of the United Kingdom and Lord of Appeal.
- International Judge Justice Beverley McLachlin PC, former Chief Justice of Canada.
- International Judge Justice Lord Neuberger of Abbotsbury, former President of Supreme Court of the United Kingdom.
- International Judge Justice Arjan Kumar Sikri, former Judge of the Supreme Court of India.

1.1.4.2 SIAC

The SIAC was established on 1 July 1991 and Singapore has since grown from strength-to-strength to become the most preferred arbitration institution in the Asia-Pacific and one of the world's top choice for arbitration. In 2021, Singapore was also jointly ranked as the top seat of arbitration in the world, together with London, in the 2021 International Arbitration Survey by Queen Mary University of London and global law firm White & Case.

1.1.4.3 SIMC

The SIMC was launched in November 2014 and works across multiple jurisdictions covering both common law and civil law traditions. The SIMC's panel of mediators cover a wide-range of international mediators across 14 jurisdictions, including industry experts and specialist mediators, who have extensive experience resolving cross-border disputes and are highly regarded for delivering successful outcomes in complex, high-stakes commercial disputes.

Notably, in January 2019 at the China-Singapore International Commercial Dispute Resolution Conference in Beijing, a Memorandum of Understanding was signed between the SIMC and the China Council for the Promotion of International Trade to set up an international panel of mediators, comprising of skilled and experienced dispute resolution professionals from China, Singapore and other Belt and Road countries, to better handle disputes that may arise from the multi-billion dollar projects under the BRI.

1.2 Expected types of investments in Belt and Road project

Given Singapore's focus on the CCI-ILSTC, it is likely that Singapore will continue to look for further opportunities along the corridor.

Based on the projects set out in the previous section, Singapore companies will likely continue to look for investment opportunities in the construction and operation of ports and mines together with Chinese firms in third-party countries.

Another potential opportunity for investment is the Pan-Asia Railway Network, which is a network of railways which would connect Kunming, China to the rest of mainland Southeast Asia, ending in Singapore.

II Country overview

Singapore's focus on the four areas of the BRI detailed above is ideal given the country's reputation for stability and its unique economic, political and geographic position in Asia. Together with the ease of doing business in Singapore, the country is confident in its ability to maintain and increase its relevance among the various Belt and Road countries and projects.

2.1 Economy

According to the World Bank, Singapore is a high-income economy with one of the world's most business-friendly regulatory environments and is also ranked among the world's most competitive economies.

Singapore's largest industry is the manufacturing industry, which forms approximately 21.5% of the country's nominal GDP. Singapore has a world-class manufacturing ecosystem occupying leadership positions in sectors such as aerospace, semiconductor, chemicals and biomedical sciences. Singapore is the world's 6th largest exporter of high-tech products and the 5th largest producer of refined oil.

In relation to the BRI, Singapore was the largest foreign investment destination for China along the Belt and Road in 2018 as it captured close to 23% of the total investment outflow from China to Belt and Road countries. Singapore anticipates that it will continue to reap economic benefits from the trade and business opportunities that would arise out of the various BRI projects.

2.2 Currency

The Singapore currency is the Singapore Dollar and since 1981, monetary policy in Singapore has been centred on the management of the exchange rate and the primary objective has been to promote price stability as a sound basis for sustainable economic growth.

The approach adopted by the Monetary Authority of Singapore has resulted in notable success as the Singapore Dollar has been one of the best-performing currencies after the Global Financial Crisis.

Further, despite the small size of Singapore, the Singapore Dollar is the 13th most traded currency in the world and the third most in Asia behind the Chinese Renminbi and the Japanese Yen.

2.3 Government and stability/security

In 2019, the World Bank ranked Singapore's government as the most effective government in the world and one of the most politically stable countries.

The ruling People's Action Party has maintained its dominance since Singapore's independence and currently holds 83 of the 93 elected seats in Parliament.

Singapore has also been ranked as the 3rd least corrupt country in the world out of 180 countries in 2020 in the Transparency International's Corruption Perception Index and the overall 2nd safest city in the world by The Economist Intelligence Unit, with Singapore topping the charts in areas of personal security and infrastructure security.

2.4 Political/cultural considerations

Singapore is a diverse, multiracial and multicultural society consisting mainly of ethnic Chinese, Malays, Indians, and Eurasians. There are four official languages in Singapore: Malay; English; Mandarin; and Tamil, and English is the main working language.

Singapore adopts a meritocratic approach and such approach has been fundamental to attracting the best and the brightest candidates to work in Singapore's public administration.

Singapore has also been open to foreign talent and immigration. Immigrants made up approximately 38% of Singapore's total population of 5.7 million in 2019. Singapore offers a variety of work passes for foreigners who intend to work in Singapore. The most common offerings are Employment Passes for foreign professionals, managers and executives, S Passes for mid-level skilled staff, and Work Permits for semi-skilled foreign workers.

2.5 Natural resources

Singapore is a country occupying a tiny area of 728.6 square kilometres. To put that into perspective, despite being a country, Singapore is smaller than New York City, less than half the size of London and approximately a third of the size of Melbourne.

Singapore lacks natural resources and therefore relies heavily on foreign capital and direct investments to sustain its growth.

In 2020, Singapore attracted approximately $17.2 billion in fixed asset investments, a 12-year high, despite the COVID-19 pandemic. These investments have been committed to key industries in Singapore, including electronics, chemicals, R&D, transport engineering, infocommunications, logistics and biomedical manufacturing. When the projects from the investments are fully implemented, it is expected that they will create over 19,000 new jobs over the next five years with a projected contribution of $31.2 billion in value added *per annum*.

In this respect, and despite its lack of natural resources, Singapore's was the 10th largest exporter and the 11th largest importer in the world by leveraging on its manufacturing industry. Singapore's major commodities sector includes machinery and transport equipment, chemicals and chemical products, and miscellaneous manufactured articles.

Given its lack of natural resources, Singapore also been working hard to establish trading relationships with major regional and global economies. Its largest trading partners include China, Malaysia, the United States, the EU, Hong Kong, Japan, Indonesia, the Republic of Korea and Thailand.

2.6 Infrastructure

Singapore has one of the best urban infrastructure among the world's top cities when considering measures such as electricity, water availability, infocommunications network, public transport system, traffic congestion and airport effectiveness.

Singapore is also a global logistics hub, with the Port Authority of Singapore handling about one-fifth of the world's trans-shipped containers. The prime location of Singapore gives shippers a choice of over 200 shipping lines and access to over 600 ports in 123 countries. At any one time, there may be as many as 1,000 ships docked at the Singapore port, making it the number one bunkering port and the second busiest container port in the world.

Singapore's Changi International Airport has been rated the best airport in the world for eight consecutive years.

2.7 Investment limitations

2.7.1 Restrictions and burdens on starting a foreign business

Singapore ranked as the 2nd easiest economy to conduct business in by the World Bank's Doing Business 2020 Report.

Therefore, and unsurprisingly, there are not very many restrictions on starting a business here and there are no restrictions on foreign ownership of businesses. In general, foreigners and

businesses may own most commercial and industrial properties, as well as residential properties, save for landed residential properties and public housing.

It is easy for a foreign business to be set up in Singapore. A foreign business or individual setting up in Singapore has four options available:

2.7.1.1 Incorporating a subsidiary/local company

A foreign company can choose to incorporate a subsidiary (i.e. a local company) and shares of the subsidiary can be held by the foreign company as the sole shareholder. As a local Singapore company, the subsidiary has to comply with the requirements of the Singapore Companies Act.

Registering a Singapore company costs S$300.00 (US$221.51) (exchange rate of S$1.3543/US$1.00 as at 29 July 2021) and the process of registering a company can be completed as quickly as in one day. There are otherwise minimal restrictions for the incorporation of a local company. These include:

- there has to be a minimum of one shareholder;
- the minimum paid-up capital is S$1.00;
- there must be a local resident director; and
- a physical Singapore registered office address.

Singapore offers attractive tax rates, with the corporate tax rate being capped at 17%.

Certain sectors, such as financial, maritime and global trading companies, enjoy further preferential tax rates and tax exemptions when qualifying condition are met. Such benefits generally only applies when a subsidiary/local company is incorporated.

2.7.1.2 Singapore branch office

A foreign company can choose to set up a branch in Singapore. This branch office is considered an extension of the parent company and not as a separate legal entity. As they are not regarded as resident entities in Singapore, they will not be entitled to the various tax exemptions available to resident companies. There is also a requirement for the branch to have a locally resident authorised representative and for the foreign branch to comply with the statutory and disclosure requirements of the Companies Act.

Registration of a branch office can be done online.

2.7.1.3 Setting up a Representative Office

A Representative Office allows foreign entities from the manufacturing, international trading, wholesale, trade and trade-related business sectors to assess the business environment in Singapore before deciding to set up a permanent establishment for up to a maximum of three years.

A Representative Office is merely an extension of their parent company and has no legal persona on its own. The Representative Office is also unable to enter into contracts, engage in trading or any other profit-making activities.

In order to qualify, the foreign commercial entity must:

- have turnover of over US$250,000;
- be established for at least three years; and
- have less than five proposed staff within the Representative Office.

An application for a Representative Office can be made online and the foreign entity must provide a copy of its Certification of Incorporation and its latest Audited Accounts.

2.7.1.4 Transfer of registration (re-domicillation)

A foreign corporate entity may choose to transfer its registration to Singapore. In doing so, the foreign entity will become a Singapore company and will therefore be required to comply with the Singapore Companies Act.

To apply for transfer of registration, a foreign corporate entity must complete an application form providing information such as details of the foreign corporate entity, the proposed date of first financial year end and financial year period, the registered address in Singapore, particulars of proposed company officers/directors/shareholders, share capital details and details of share-

holders.

The foreign corporate entity will also be required to provide supporting documents such as a certified copy of the company's constitution (or equivalent) and various declarations by the proposed director or officer of the company.

It may take up to two months from the date of submission to process the registration application.

Upon approval, the entity will be registered as a company limited by shares in Singapore and documents must be lodged evidencing deregistration of the foreign corporate entity within 60 days.

2.7.2 Sector-specific restrictions

Singapore does not impose particular sector-specific restrictions on foreign businesses. However, in order to operate in sectors such as media and telecoms, companies will have to obtain a licence from the relevant governing bodies.

III International dispute settlement

3.1 Local courts and legal tradition

Singapore's legal system is based on the English common law. Since its independence, Singapore has developed its own jurisprudence, but Singapore law still retains many of the same traits that makes English law business friendly.

Locally, the courts are made up of State Courts of Singapore and the Supreme Court.

The Supreme Court of Singapore is made up of the High Court and the Court of Appeal which hears both civil and criminal matters.

The High Court comprises the General Division, which hears both criminal and civil cases as a court of first instance, and the Appellate Division, which hears all civil appeals that are not allocated to the Court of Appeal (which is the highest appellate court in Singapore).

The High Court has developed various specialised lists which have been set up in the General Division in response to the increasing complexity of commercial cases. These specialist lists are managed by specialist judges who have considerable experience and expertise in the specialist areas of law. The specialised lists in the General Division comprise of:

a. Building and Construction, Shipbuilding, Complex and Technical Cases.
b. Finance, Securities, Banking, Complex Commercial Cases.
c. Company, Insolvency, Trusts.
d. Arbitration.
e. Shipping and Insurance.
f. Tort Claims.
g. Intellectual Property/Information Technology.
h. Revenue Law.
i. Public Law and Judicial Review.

The SICC, which is designed to deal with transnational commercial disputes, is part of the General Division of the Supreme Court of Singapore. As described above, the SICC comprises of world-renowned judges across several jurisdictions. Generally, the SICC has the jurisdiction to hear and try an action if:

a. The claim in the action is of an international and commercial nature.
b. The parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement.
c. The parties to the action do not seek any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention).

3.2 Arbitration

Singapore's arbitration regime is based on the UNCITRAL Model Law and disputes are generally arbitrable unless the subject matter of the dispute is of a nature as to make it contrary to public policy for the dispute to be resolved by arbitration. Areas that are widely regarded as non-arbitrable in Singapore include family disputes, estate and succession, and the liquidation of an insolvent company due to the potential third-party interests concerns that may arise.

Singapore is a signatory to the New York Convention, which has been enacted into Singapore law through the Singapore International Arbitration Act ("**IAA**"). This means that arbitral awards made in Singapore can easily enforced in other Contracting States of the New York Convention. Similarly, Singapore is widely recognised as an arbitration-friendly jurisdiction and, in practice, foreign awards are regularly enforced.

As a testament to this, Singapore was ranked as the top seat of arbitration in the world, together with London, in the 2021 International Arbitration Survey by Queen Mary University of London and global law firm White & Case.

This recognition by the international community is reflected by the record number of arbitrations filed in 2020 with the number of new cases handled by the SIAC more than doubling to 1,080 in 2020. The total sum in dispute for new case filings in 2020 amounted to US$8.49 billion. This meant that the average value of cases heard in 2020 was US$19.26 million.

The SIAC's diversity is also highlighted by the different parties which engaged the SIAC, the wide range of sectors the disputes involved as well as the diverse arbitrator appointments. The SIAC heard parties from 60 jurisdictions with the top users being India (690 users), the United States (545 users), ASEAN (303 users) and China (195 users). The SIAC also heard claims across a wide range of sectors, including, among others, international trade, maritime/shipping, construction/engineering, agriculture, arts/entertainment, aviation, banking/financial services, commodities, education, employment, energy, healthcare/pharmaceuticals, hospitality/travel, insurance/reinsurance, IP/IT, media/broadcasting, mining, real estate, regulatory, sports, technology/science, telecommunications and treaty interpretation/rights. In total, 288 arbitrators were appointed by the SIAC in 2020 from 27 different jurisdictions.

The SIAC Rules are a modern set of arbitral rules which has been constantly updated to keep up with the ever-changing commercial landscape. In 2016, only three years after previous round of updates, the SIAC Rules were updated following an extensive public consultation exercise introducing, among others, a novel procedure for the early dismissal of claims and defences. This allowed parties faced with unmeritorious or vexatious claims to save time and costs and the procedure was a first amongst major arbitral centres around the world. One can expect the SIAC to continue taking steps to improve on its position by making its rules even more accessible as it began reviewing the 2016 Rules last year.

Third-party funding for international arbitration in Singapore is permitted. Singapore has also recently passed law permitting third-party funding to, among others, domestic arbitration proceedings and proceedings commenced in the SICC.

Finally, in addition to the SIAC, Singapore also has a specialist arbitration institution for maritime disputes in the Singapore Chamber of Maritime Arbitration ("**SCMA**"), which registered 43 case references with a total claim sum of US$49.37 million in 2020. Notably, over half the disputants were based in Asia.

3.3 Mediation

Singapore is a regional mediation hub which leverages on its neutrality. Singapore is often viewed as a neutral venue and jurisdiction both to Asian parties as well as users in the West.

Mediation in Singapore is actively promoted by the Singapore's judiciary and by the Singapore government.

The Singapore Courts have greatly encouraged the use of mediation to resolve disputes filed with the Court and parties who unreasonably refuse to mediate a dispute can even have cost sanctions ordered against them.

A number of reputable and professional institutional mediation centres have been established in Singapore such as the SIMC (referred to above), the Singapore Mediation Centre, and the WIPO Mediation and Arbitration Centre.

These centres handle high-value disputes and boast an impressive success rate. For example,

between 2015 and November 2020, the SIMC heard a total of 133 cases, for a total dispute value of US$3 billion, and with a settlement rate of approximately 75%.

Mediation as a dispute-resolution process is also set to grow exponentially following the entry into force of the Singapore Convention on Mediation on 12 September 2020. The Singapore Convention has 53 signatories, including the United States, China and India. Six countries have also since ratified the Singapore Convention. The Singapore Convention is a notable step forward as it enables enforcement of mediated settlement agreements among its signatories.

With the Singapore Convention, and with many more countries set to ratify the Singapore Convention, businesses can better rely on mediation as another viable dispute resolution option for their cross-border transactions as there would be even greater certainty and assurance that their mediated outcomes would be enforceable abroad.

3.4 International treaties

3.4.1 Bilateral investment treaties with Belt and Road countries

Singapore has bilateral investment treaties with 43 countries including the following Belt and Road countries: Bahrain; Bangladesh; Belarus; Bulgaria; Cambodia; China; Czech Republic; Egypt; Hungary; Iran; Kuwait; Laos; Latvia; Libya; Myanmar; Oman; Pakistan; Poland; Qatar; Russia; Rwanda; Saudi Arabia; Slovak Republic; Slovenia; Ukraine; Uzbekistan; the United Arab Emirates; and Vietnam.

Outside of the Belt and Road countries, Singapore also has bilateral investment treaties with, among others, the United Kingdom, Germany, France, United States, the Russian Federation, Rwanda, Mexico, United Arab Emirates and Qatar.

3.4.2 Other cross-border/regional treaties

As a member state of ASEAN, Singapore is part of the ASEAN Comprehensive Investment Agreement. Consequently, Singapore is also part of the ASEAN-China Framework Agreement, the ASEAN-Korea Investment Agreement and the ASEAN-Korean Framework Agreement.

ASEAN also has investment agreements with the EU, Japan, the United States and India.

3.4.3 Relationship with the EU

The European Union-Singapore Free Trade Agreement ("**EUSFTA**") is the first FTA between the EU and an ASEAN country. This led to further negotiations involving investment protection elements, which became the EU-Singapore Investment Protection Agreement ("**EUSIPA**"). The EUSFTA and EUSIPA were signed on October 2018 and approved by the European Parliament in February 2019. The EUSFTA entered into force on 21 November 2019 and the EUSIPA is undergoing ratification by the regional and national parliaments of the EU Member States.

Singapore is the EU's 16th largest trading partner and in 2020 the bilateral foreign direct investment stock between the EU and Singapore was approximately €348 billion.

3.4.4 Reciprocal arrangements for the recognition and enforcement of court judgments

Foreign judgments can be recognised and enforced in Singapore by the common law rules or pursuant to one of three statutes. While enforcement under the statues tends to be quicker and more streamlined, the relevant statutes only apply to limited countries.

3.4.4.1 Reciprocal Enforcement of Commonwealth Judgments Act

The first statute is the Reciprocal Enforcement of Commonwealth Judgments Act which applies to judgments obtained in a superior court of the United Kingdom, Hong Kong (for judgments obtained on or before 30 June 1997), New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea, India (except the State of Jammu and Kashmir) and Australia (limited to certain courts).

A judgment creditor from these jurisdictions may bring such a judgment to have it registered in the Singapore High Court by making an *ex parte* application with a supporting affidavit exhibiting the judgment within 12 months of the obtaining the judgment. Once the judgment is registered, it would have the same force and effect as from the date of registration if it had been a judgment originally obtained or entered upon in the registering court.

3.4.4.2 Reciprocal Enforcement of Foreign Judgment Act

The second statute is the Reciprocal Enforcement of Foreign Judgment Act ("**REFJA**"), which presently only applies to Hong Kong SAR. The REFJA applies to a wide range of orders including any interlocutory or final judgment as well as both money judgments and non-money judgments.

The process of registration of a judgment is similar; however, the period for applications under the REFJA extends to six years after the date of judgment.

3.4.4.3 Choice of Court Agreements Act

The third statute is the Choice of Court Agree-

ments Act ("**CCAA**"), which brings into effect the Hague Convention on Choice of Court Agreements (the "**Hague Convention**"). The CCAA allows Singapore to enforce foreign judgments obtained from the courts of Contracting States of the Hague Convention if the foreign judgment:

a. Is an international case (i.e., the case involves the recognition and/or enforcement of a foreign judgment).
b. Is subject to an exclusive choice of court agreement, which designates one of the courts of one of the Contracting States to the Hague Convention for the purpose of deciding any dispute, excluding the jurisdiction of any other court.
c. Involves a civil or commercial matter.

Notable Contracting States to the Hague Convention include the entire European Union and the United Kingdom.

An application for the recognition or enforcement under the CCAA is made by way of an *ex parte* originating summons with a supporting affidavit exhibiting a complete and certified copy of the foreign judgment and the applicable exclusive choice of court agreement.

Under the CCAA, a foreign judgment, once recognised, has the legal effect of a judgment issued by a Singapore Court.

3.4.4.4 Common law

A foreign judgment may be recognised and enforced in Singapore pursuant to the common law rules through the commencement of an action for judgment debt on the basis that the foreign judgment is treated as an implied obligation on the part of the judgment debtor to pay a debt (i.e., the sum awarded by the foreign court).

In order for such a foreign judgment to be enforceable, the foreign judgment must be:

a. From a court of competent jurisdiction in the foreign country.
b. Final and conclusive on the merits of the law under the law of that country.
c. For a fixed or ascertainable sum of money.

3.4.4.5 Memoranda of Guidance on the Enforcement of Money Judgments

Singapore has also signed seven Memoranda of Guidance on the Enforcement of Money Judgments with Myanmar, China, Bermuda, Qatar, Rwanda, Abu Dhabi and Dubai as well as an Exchange of Letters with Victoria, Australia.

These documents set out how a money judgment issued by the courts of Singapore may be recognised and enforced in the respective foreign courts, and *vice versa*.

3.5 Conclusion

Overall, Singapore is well positioned to seize the opportunities that may arise from the BRI. Singapore's political and economic stability offers potential investors a comfortable environment for their investments. Singapore, as a neutral third party, also possesses the necessary alternative dispute resolution platforms in the event that such disputes become reality. As such, the BRI offers Singapore a lot to look forward to.

Oon & Bazul is one of Singapore's Best Law Firms 2021 as ranked by *The Straits Times*. The firm advises clients globally and understand that each client matter is unique. Our lawyers provide customised legal solutions, deliver high-quality work and commit to help clients achieve the best possible outcomes. The firm is a leading commercial practice and has also been recognised as one of Singapore's fastest growing law firms by *Asian Legal Business*.

Our clientele includes sovereign states, Fortune Global 500 corporations, large multinational corporations, financial institutions, and high-net-worth individuals. The firm's highly experienced sterling international law practice has led our lawyers to be particularly adept at coordinating matters involving multiple jurisdictions. This has resulted in us developing an extensive informal network of law firms whom we have worked with over the years. In Malaysia, the firm has its own Associate office in Kuala Lumpur, TS Oon & Partners.

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Bazul Ashhab is the firm's Managing Partner and Head of Dispute Resolution. He is also Ambassador to the Singapore International Mediation Centre panel. He has been involved in several trials in the High Court of Singapore, and has acted for clients from various jurisdictions in their disputes in the Asia Pacific region. This has given him the ability to combine his legal expertise with cultural considerations to provide effective and practical solutions to resolve complex disputes. Bazul is also highly experienced in fraud and asset recovery claims and is a specialist in securing freezing and disclosure orders to trace, preserve, and recover assets. He was ranked "Singapore Managing Partner of the Year" by *Asian Legal Business* and is featured as one of Singapore's top 100 lawyers by *Asia Business Law Journal*. Leading legal publications such as *Chambers Asia Pacific* and *The Legal 500 Asia Pacific* have recognised him as an exceptional lawyer in dispute resolution.

bazul@oonbazul.com

Lionel Chan is a Partner in the firm's Litigation & Dispute Resolution Practice. He specialises in complex commercial dispute resolution matters and has extensive experience representing institutional and high-net-worth clients in contentious matters. He has appeared as counsel before all levels of the Singapore Courts, including the High Court and Court of Appeal, and has acted for clients in both institutional and *ad hoc* arbitrations. He has also been involved in numerous cases concerning novel legal issues and facts. He is highly experienced in fraud and asset recovery claims and is a specialist in securing freezing and disclosure orders to trace, preserve, and recover assets. Lionel was recognised as one of Singapore's top 20 most influential lawyers aged 40 and under by *Singapore Business Review*; *The Legal 500 Asia Pacific* highlighted Lionel as a name to note for his work in Dispute Resolution; and *Asialaw Profiles* commended him for displaying outstanding client service.

lionel.chan@oonbazul.com

Prakaash Silvam is a Partner in the firm's Litigation & Dispute Resolution Practice. He specialises in commercial litigation and arbitration with a focus on international commodity trade, trade finance, marine insurance and "dry" shipping. He has substantial experience handling disputes involving misdelivery claims and also the knock-on indemnity claims under letters of indemnity which are issued for the delivery of cargo without presentation of the original bills of lading. He has advised trade financing banks and commodity trading houses on trade finance litigation, regularly represents banks and financiers in multi-jurisdictional enforcements, and also frequently acts for marine insurers and insurance claimants. He also has in-depth experience advising on sanctions related matters, including the impact of the US, EU and UN sanctions on businesses based in the region. He has acted as counsel in both *ad hoc* and institutional international arbitrations. Prakaash is a member of the Grain and Feed Trade Association.

prakaash@oonbazul.com

Tanya Thomas Vadaketh is a Partner in the firm's Litigation & Dispute Resolution Practice. Her work routinely involves cross-border elements and she focuses on assisting institutional and high-net-worth clients in the coordination, management and overall strategy in high-value complex disputes spanning concurrent proceedings in different jurisdictions. Her areas of expertise span a wide range of industries, including corporate disputes, international trade, the diamond and precious stone industry and commodities. She has worked extensively with clients from the United States of America, Canada, Malaysia, Vietnam, India and Singapore. She has appeared at all levels of the Singapore Court and has also acted for clients in mediation and arbitration hearings. Notable matters she has handled comprises having acted for one of India's largest manufacturers and suppliers of diamonds and diamond jewellery in the Singapore High Court, and also for the director of a Singapore commodities trading company who faced serious allegations of fraud.

tanya.thomas@oonbazul.com

Thailand

Kanpimon Naksinn
JTJB International Lawyers Co., Ltd.

Tanyalak Chaisorn
JTJB International Lawyers Co., Ltd.

Warinbhorn Benjasak
JTJB International Lawyers Co., Ltd.

I Connection to Belt and Road projects

1.1 Anticipated role of Thailand within the Belt and Road scheme

The Belt and Road Initiative (BRI), or formerly known as One Belt One Road (OBOR), is the global infrastructure development strategy initiated by the Chinese government. This initiative aims to promote connectivity between the Asian, African and European continents via land and maritime networks to improve regional integration, increase trade and stimulate economic growth.

As a member country of ASEAN, Thailand plays an extremely important role in the construction of the BRI due to its infrastructure network and strategic location. Thailand is located in the heart of mainland Southeast Asia, surrounded by Laos, Myanmar, Cambodia, and adjacent to the Andaman Sea and the Gulf of Thailand, which makes it an interconnection between China and other countries in ASEAN. For this reason, Thailand is positioning itself for the BRI and incorporating its significance into the cooperation with China, at present and for the future, in order to facilitate trade and investment among all participating countries.

1.2 Expected types of investments in BRI projects

The BRI consists of the Silk Road Economic Belt and the Maritime Silk Road. Southeast Asia is the junction for two routes of the Maritime Silk Road, one leading south and east to the South Pacific, and the other heading west, connecting to the Indian Ocean, the Middle

East and Europe. It also connects two routes in the Silk Road Economic Belt, namely the China-Indochina Peninsula Economic Corridor (CICPEC) and the Bangladesh-China-India-Myanmar Economic Corridor (BCIMEC).

As Thailand is one of the central nodes in the BRI plans, it has participated in the central route of the pan-Asia Railway Network emerging as part of the BRI vision. Once the whole project is completed, the railroad will eventually provide a physical link to the China-Laos railway in Laos and further connect to a line under construction in Malaysia and extend down to Singapore on the southern tip of the Malay peninsula. Apart from participating in the pan-Asia Railway Network, with the aim to improve cross-countries connectivity, the Thai government has invested 2 billion baht to construct a new highway linking Thailand to Cambodia. This project is currently 70% completed and expected to be fully completed in February 2022. Additionally, 8.2 billion baht will be invested in the construction of two more Thai-Lao Friendship Bridges across the Mekong River.

1.3 Known ongoing or anticipated BRI projects

The China-Thailand high-speed railway is a flagship project in promoting the BRI. This high-speed railway is planned for the development of regional connectivity. It will link Bangkok to Nong Khai in northeast Thailand, a north-eastern border province adjacent to Laos, and subsequently connect to the China-Laos railway in Laos. Eventually, this line will provide a connection from Bangkok to Vientiane, and onwards to Kunming in China.

The 1st phase of this high-speed railway construction runs from Bangkok to the centre of Nakhon Ratchasima, covering a 251-kilometre section. This new railway is a double-track standard-gauge line that follows the same route as the current northeastern line, and it is set to be completed and operational in 2026. Once the 1st phase is completed, the 2nd phase will be constructed to link Nakhon Ratchasima to Nong Khai, covering an 11-kilometre section. Further to the development of regional connectivity, the Thai government has approved the action plan to develop infrastructure projects to facilitate the logistics in the Eastern Economic Corridor (EEC) and link the EEC with the BRI.

II Country overview

2.1 Economy

Thailand has a mixed economic system: the principles of capitalism and socialism are partially adopted. In 2020, Thailand was categorised as a newly industrialised country, with the 26th largest GDP in US dollars in the world and the 2nd-largest in ASEAN. The manufacturing industry contributed to 25.2% of the GDP; the retail industry contributed to 16.8% of the GDP; and other service sectors (including the agricultural, financial, logistics, and hotel and restaurant sectors) contributed to the rest of the GDP (58%).

Exports accounted for about 70–75% of Thailand's GDP. Due to the 2020 COVID-19 pandemic, Thailand's exports shrunk by 6.01%. Thailand is the world's 13th-largest food exporter, accounting for 28% of Thailand's GDP, and the world's largest rubber manufacturer and exporter.

In April 2021, Thailand held US$281.042 billion in foreign exchange reserves, being the world's 12th-largest and Southeast Asia's 2nd-largest (after Singapore) foreign exchange reserves holder. However, Thailand's public debt has increased by 54.91% of GDP and its household debt ratio to GDP has risen to 90.5%, which is the biggest in the last 18 years reported in the first quarter of 2021.

2.2 Currency

Thailand has implemented a managed floating exchange rate system since July 1997, which is also consistent with the inflation targeting system

implemented since 2000. Within the framework of the inflation targeting system and managed floating exchange rate system, the value of the Thai baht can be determined by market forces, reflecting the supply and demand relationship of the Thai baht in the foreign exchange market.

Under the managed floating exchange rate system, the Bank of Thailand: (1) does not target a fixed exchange rate; and (2) is prepared to intervene in a consistent manner in the event of excessive volatility, especially due to speculative capital flows and the bank's inflation targeting system.

However, under certain circumstances, supply and demand may become unbalanced, causing excessive fluctuations in the value of the Thai baht.

The Bank of Thailand aims to ensure that the value of the Thai baht will fluctuate under the following circumstances:

(1) The Bank of Thailand is prepared to intervene in the foreign exchange market to keep exchange rate fluctuations at an economically acceptable level.
(2) National competitiveness is maintained through nominal exchange rate cash (NEER), which includes the currencies of major trading partners, not just the US dollar.
(3) Any intervention will not violate economic fundamentals, otherwise it will lead to further imbalances.

2.3 Government and stability/security

Thailand, or officially the government of the Kingdom of Thailand, is a one-party state. The Thai government has transformed from an absolute monarchy to a democracy, and its sovereignty is divided into three branches: legislative; executive; and judicial. Currently, the civilian government in Thailand imitates the Westminster system of the United Kingdom.

Thailand Political Stability Index (2.5 weak; 2.5 strong), 1996–2019: For this indicator, we provide Thailand's data from 1996–2019. The average value in Thailand during this period was 0.7 points, the lowest in 2010 was 1.44 points and the highest in 1998 was 0.64 points. The latest value for 2019 is 0.54 points.

In comparison, the 2019 world average based on 194 countries is -0.06 points.

2.3.1 Security of Thailand

Before the political reform in the 1980s, Thailand was largely under the control of elites who gained power from the military. Every Thai male citizen at the age of 18 is required to enlist to the inactive military personnel list. From the age of 21, only a few of those listed will be selected for the two-year compulsory military service. Most people entering the military come from rural communities.

Since the beginning of the 21st century, Thailand's largest military unit, the Royal Thai Army, has been carrying out violent rebellions in the southern provinces, where the people are mainly Malay-speaking Muslims. The Army also continues to face incursions on the western and northern borders from insurgents fighting against the Burmese government and the Burmese Army, and sometimes crosses the border to hunt down these insurgents.

2.4 Political/cultural considerations

There is not much difference between Thai politics of the past and Thai politics of the present. Thailand has always been governed in a way that ignores the rights of the people and freedom of expression is suppressed. The Prime Minister is decided by the military rather than by the civilian population through coup d'états, which has been the case since 1932. At the same time, the rights and liberties of the people are often put forward to conform to the democratic model in the form of a Constitution, which is, in fact, a ruse of the politicians, who focus on their own goals and overlook the people who elect them as their representatives, ignoring the problem of inequality, both in education and society. It can be easily seen that the morality of the politicians has not changed, and people cannot monitor or examine their

exercise of power.

Therefore, it can be concluded that, currently, Thai politics is in a difficult situation. The division between the old and the young generation can be seen, along with the government's inability to make a decisive decision on the COVID-19 pandemic, which has caused the increasing number of infections and deaths, and has affected the people's trust in the government.

2.5 Natural resources

Thailand is a country rich in natural resources, which plays an important role in supporting local livelihoods and driving economic growth. Forests, watersheds, marine environments, and mineral resources are important tools to support Thailand's manufacturing industry, exports, and tourism industry. However, the rapid rise of economic development in recent decades has, in large part, been caused by the unsustainable use of these natural resources. Certainly, economic priorities are often more important than the conservation of the environment; however, Thailand faces environmental degradation in many regions, including loss of biodiversity and declining wildlife populations, deforestation, desertification, water shortage, climate change and air and water pollution.

To tackle these issues, it is expected that Thailand will enact a green growth policy. Enacting this policy, to balance economic and environmental conservation aims, could be worth US$2.06 billion to the national economy, in terms of the potential to increase the current value of ecosystem services provided by forests, wetland areas, mangroves and coral reefs, which represents a 7.8% increase in economic growth compared to the current situation. (Opendevelopment thailand, "Natural resources and environment" (*OpenDevelopment Thailand*, 19 December 2017) <https://thailand.opendevelopmentmekong.net/th/topics/environment-and-natural-resources/> accessed 3 August 2021.)

2.6 Infrastructure

In Thailand, there is an investment opportunity to develop and upgrade infrastructure as well as increase the country's competitiveness on the world stage. However, the COVID-19 pandemic is still ongoing and results in delays to the development of some infrastructure investment projects, and some projects require a review of their necessity according to the economic conditions affected by the COVID-19 pandemic. The EEC development policy has become an important infrastructure investment project that drives the Thai economy. At present, the development of infrastructure investment projects has seen some progression. The government has signed a joint investment agreement with the private sector totalling three projects out of six main projects. (Thaipublica, "PwC The possibility to invest in Thailand Infrastructure 2021" (*THAIPUBLICA*, 10 March 2021) <https://thaipublica.org/2021/03/pwc-thailand-infrastructure-market-update/> accessed 3 August 2021.)

In the long term, infrastructure development will play a key role in revitalising the economy from the impact of the COVID-19 pandemic. The public and private sectors have initiated various projects and policies to help support the restoration of an environmentally friendly economy and developments towards a digital economy society, such as the development of areas around mass transit stations (Transit Oriented Development), electric vehicles, smart cities (Smart Cities), renewable energy, power trading and 5G systems.

2.7 Investment limitations

Foreign direct investment is strictly regulated by the Thai government, with the Foreign Business Act B.E 2542 (FBA) playing a major role in the regulation. The FBA reserves certain business activities to Thai nationals and limits the ability of foreigners to engage in such business activities. The FBA separates business activities into three different categories, as follows:

- List 1 – Business activities that are strictly prohibited for foreigners for special reasons, such as the press, radio broadcasting station, or radio and television station business, and land trading.

- List 2 – Business activities relating to national safety or security or having impacts on arts, culture, traditions, customs and folklore handicrafts, or natural resources and the environment, such as the production, distribution, and maintenance of firearms, ammunition, gunpowder and explosives, domestic transportation, and mining. Businesses in this category are not permitted for foreigners unless they obtain permission from the Minister with the approval of the Cabinet.
- List 3 – Business activities in which Thai nationals are not ready to compete with foreigners. Foreigners are not permitted to operate businesses in this category unless they obtain permission granted by the Director-General of the Department of Business Development with the approval of the Foreign Business Board. The business activities in this category are, for instance, the provision of accounting, legal, architectural, and engineering services, construction (except for the construction of structures for the delivery of public infrastructure services in the sphere of public utilities or transportation requiring the use of special apparatuses, machines, technology or expertise, with the minimum capital of 500 million baht or upwards from foreigners), advertising business, wholesale (with the minimum capital of each store in the amount lower than one hundred million baht) or retail sale of goods (with the total minimum capital in the amount lower than 100 million baht or with the minimum capital of each store in the amount lower than 20 million).

Apart from the limitations mentioned above, foreigners are also restricted by other specific laws from engaging in certain business activities, such as business concerning land ownership, financial business, or land transport business. Nonetheless, despite all the restrictions, entities such as the Board of Investment (BOI) and the Industrial Estate Authority of Thailand (IEAT) provide several investment incentives for various types of business activities in relation to foreign direct investment; for example, both tax and non-tax incentives for foreign investors.

III International dispute settlement

3.1 Local courts and legal tradition

3.1.1 Scope of jurisdiction

The Court of Justice is the Court which has jurisdiction over most types of disputes in Thailand except any cases which specify, by the Thai Constitutional Law or other acts, that its jurisdiction shall be under a different type of Court, i.e., the Administrative Court or the Constitutional Court. The Court of Justice in Thailand has three stages: the Court of First Instance; the Appeal Court; and the Supreme Court. Therefore, once a dispute regarding a business matter occurs, the parties shall bring the case to the Court of Justice to commence court proceedings. In Thailand, the Court of Justice has been established throughout the country. Each Court will have a specific area of jurisdiction (e.g., civil matters, criminal matters, consumer matters, etc.) as to provide the most efficient support for people in the country to process their legal dispute. Furthermore, Thailand has established specialised Courts (e.g. the Central Taxation Court, the Central Bankruptcy Court, the Labour Court, the Juvenile and Family Court, and the Intellectual Property and International Trade Court) which have specific jurisdiction to consider certain matters.

3.1.2 Reliability of judiciary/corruption

Corruption at the Court level rarely occurs. If a party finds that the judge, or another individual, is corrupt, the party can either directly file a criminal claim against such judge/individual, or file the claim to the board of the judiciary committee.

3.1.3 Speed

Each of the three stages of the Court of Justice has different time periods. In the Court of First

Instance, it may take from 6–18 months to reach a decision, depending on the circumstances of the dispute. After the Court of First Instance has made its decision and there is a party that is not satisfied with the decision, such party has the right to appeal the Court of First Instance's decision to the Appeal Court, and the Court may take from 9–12 months to reach its decision. Lastly, if the Appeal Court decision does not satisfy any of the parties, such parties are entitled to request to appeal the Appeal Court's judgment to the Supreme Court. The Supreme Court has sole discretion under the condition of law to affix the appeal for consideration. In case the Supreme Court affixes the appeal for consideration, it takes approximately 2–3 years until the final judgment is made.

To proceed with Court proceedings, for any cases with an amount claimed, there will be Court fees at the rate of 2% of the amount of the claim but not more than 200,000 baht for an amount claimed not over 50 million baht. For a claim exceeding 50 million baht, the rate of 0.1% of the exceeding amount shall be applied. However, in consumer cases, the Court has sole discretion to waive Court fees for the consumer as the plaintiff.

3.1.4 Efficiency

In Thailand, it cannot be denied that the Court procedure is very delayed in some cases, especially in cases where the dispute is very complicated and requires more time to process the witness examination hearing. However, the Court of Justice is trying to find a way to increase the efficiency of the Court by allowing for faster prosecution but at the same time still giving justice to all parties. (Thanapat Chartnakrob, "Increasing the efficiency of the Thai Court procedure by e-Court" (*Bangkokbiznews*, 19 November 2015) <https://www.bangkokbiznews.com/blog/detail/636156> accessed 5 August 2021.)

Many Courts in Thailand have adopted an electronic court system (e-Court) to increase operational efficiency for the parties. Unfortunately, such a system is not yet available to all types of Courts due to the rules and regulations, and Court officers still lack knowledge and understanding of the system.

The e-Court system in Thailand was first introduced in 2010 to support the development of Court management and to handle the parties in keeping with the policy of the Court management team. The basic idea is to: use the least amount of budget without affecting the work of judges; be aware of the impact of the law; and maintain the secrecy of the parties' secrets.

There are three types of prominent e-Court systems used in some Courts in Thailand now: (1) e-Filing, which facilitates communication between the parties, and between the parties and the Court; (2) carrying out witness examinations through a videoconferencing system, which eliminates the need for witnesses to come to Court; and (3) carrying out other hearings via electronic means, such as mediation. Therefore, it can be concluded that the e-Court system is now being developed and will be more efficient for all parties and officers in the future.

3.2 Arbitration

Since Thailand is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), by way of enabling the New York Convention at national level, the Arbitration Act B.E. 2545 (the Act) was put into force. Thailand decided to put the Act into force, thereby enabling the New York Convention, to promote itself as the regional hub of international arbitration and attract more foreign arbitrators to Thailand. The Act enables Thai Courts to enforce foreign arbitral awards made in other member states of the New York Convention.

The Act covers all areas of commercial disputes, with the bottom line that the parties shall agree to refer their dispute to arbitration in the form of a written agreement – either in a contract or in the form of a separate agreement.

In terms of the local arbitral institutions, there is the Thai Arbitration Institute (TAI) and the

Thailand Arbitration Center (THAC). TAI was established in 1990 under the Ministry of Justice and has a very flexible mechanism. It also offers free-of-charge service, i.e., only the actual expenses incurred during the arbitral proceeding are required to be paid. THAC was established years later and aims to advance the arbitration practice in Thailand to meet the standard level and attract more cross-border parties. This aim does not seem impossible since the statistics of the cases at THAC between the fiscal years 2019 and 2020 show an upward trend of arbitration cases – from 17 cases in 2019 to 23 cases in 2020. (THAC, "The Annual Report on Arbitration" <https://thac.or.th/wp-content/uploads/2020/11/The-Annual-Repot-on-Arbitration-was-Estrablished-in-2019.pdf> accessed on 1 August 2021.)

During the COVID-19 pandemic, both institutions have adopted videoconferencing for arbitration hearings, which is game-changing due to its time-efficiency, reduced costs and the fact it limits travelling.

3.3 Mediation

Mediation in Thailand is carried out via the Court procedure or by alternative dispute resolution. Previously, most Thai parties only trusted mediation carried out by the Court, in which the disputed parties can seek a settlement through the Court system at any time before the case becomes final. However for seeking a commercial settlement, mediation via the Court system is not effective. Even though the government has tried to find an alternative way by enacting the Mediation Act B.E.2562, this mediation method is carried out by the government sector and is limited only to matters relating to the mediation of civil disputes such as disputes on land, disputes between heirs over inheritance, and other disputes with capital not exceeding 5 million baht – therefore many institutions and organisations try to establish and promote the neutral way of alternative dispute resolution, including mediation by a professional or commercial body/person specialised in such sector, e.g. THAC, Thai Chamber of Commerce, etc., which can be seen in the significant increase in the number of mediations being conducted out of the Court system via alternative dispute resolution.

3.4 International treaties

Thailand signed a Free Trade Agreement (FTA) with China in 2009, incorporating the protection of investors chapter. In addition, Thailand as a member of ASEAN benefits from the treaties negotiated by ASEAN with other BRI countries; for example, ASEAN member states signed a FTA with Hong Kong in 2018. This FTA protects Chinese and Hong Kong investors and grants their preferred tariff.

In 2020, Thailand became one of the contracting states, among other ASEAN member states, China, Japan, South Korea, Australia, and New Zealand, which signed the Regional Comprehensive Economic Partnership (RCEP). Its aim is to link economic corporation among the members to enhance economic liberalisation and trade in services and investment. RCEP also allows Thai investors to have a 70–80% share in construction overseas and a lesser tariff in relation to raw materials, semi-finished products and finished products trade (KPMG, "Regional Comprehensive Economic Partnership", *Insights* <https://home.kpmg/th/en/home/insights/2021/01/regional-comprehensive-economic-partnership-rcep.html> accessed on 4 August 2021); for example, South Korea promises to reduce the tariff on fresh, dried and frozen fruits, especially mangosteen and durian, from 8–45% to 0% within 10–15 years, pineapple juice from 50% to 0% in 10 years, and fishery products from 10–35% to 0% within 15 years. (Phusadee Arunmas, "Thai agencies close in on RCEP approval", *Bangkok Post*, 17 May 2021 <https://www.bangkokpost.com/business/2116783/thai-agencies-close-in-on-rcep-approval> accessed on 4 August 2021.)

Apart from this, the government of Thailand is under consideration to join the Comprehensive

and Progressive Agreement for Trans-Pacific Partnership (CPTPP), with a promise to grant a decision in early September of this year (2021) after looking into the pros and cons of joining CPTPP.

Lastly, with regard to its relationship with the European Union (EU), Thailand does not currently have a FTA with EU. However, as of early August 2021, Thailand and the EU agreed to resume negotiations on a FTA after seven years since the first discussion was set aside, partly due to the military government. If this deal actually moving forwards, it will be the EU's third FTA with ASEAN countries following the FTAs with Singapore and Vietnam. (Alexander Chipman Koty, "Thailand and the EU Resume Free Trade Agreement Negotiations", *ASEAN Briefing*, 4 August 2021 <https://www.aseanbriefing.com/news/thailand-and-the-eu-resume-free-trade-agreement-negotiations> accessed on 5 August 2021.)

3.5 Is Thailand a signatory to the New York Convention? In practice, are foreign awards enforced?

Thailand became a party to the New York Convention on 19 December 1959. As a consequence of becoming a party to this Convention, arbitration awards made in foreign countries can be enforced in Thailand, as provided by the Act under Sections 41–44. The party who would like to enforce the award must request the Court to enforce the award. (Thawatchai Suvanpanich, "Law Applied to the Arbitration Agreement under the Thai Arbitration Act BE 2545, Article 14" [2016] 9(17) *Ubon Ratchathani Law Journal* <http://202.28.49.72/LAW-journal/catagorie/9-17/9-17-6.pdf> accessed 3 August 2021.)

The Courts will not necessitate consideration of the validity and content of the award. The Court will only consider, before providing the judgment to enforce the award, whether the award has been decided by lawful proceedings and the award does not violate the public order and good morals. The person requesting to enforce the award is not required to prove the completeness of the award. It is the duty of the objector or the other party to prove that the award is incomplete.

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Kanpimon Naksinn's main practice area is corporate M&A. She has supported a number of local and international clients in the establishment of a legal entity and applications related to business licences, including – amongst others – the BOI Promotion Certificate. She also handles commercial contracts and legal due diligence reports on various legal matters.

Kanpimon graduated with a LL.B. in Law from Chulalongkorn University, and further achieved an LL.M. in International Banking Law and Finance with Merit from the University of Edinburgh.

kanpimon@jtjb.com

Tanyalak Chaisorn focuses on, as her main practice area, dispute resolution and civil litigation, in relation to breach of contract, wrongful acts, real estate and labour as well as family matters. She also has experience in execution of judgments and enforcement of arbitration awards in Thailand.

Tanyalak graduated with a LL.B. in Law from Thammasat University and is now a LL.M. candidate in Business Law at Thammasat University.

tanyalak@jtjb.com

Warinbhorn Benjasak focuses on, as her main practice area, shipping and maritime laws in both contentious and non-contentious matters along with handling commercial litigations and general commercial contracts. She also handles arbitration matters in Thailand and international arbitration.

Warinbhorn graduated with a LL.B. in Law from Chulalongkorn University, and further achieved an LL.M. in Maritime Law with Merit from the University of Southampton.

warinporn@jtjb.com

in·sight

/ˈin,sīt/

noun

noun: **insight**

• **the capacity to gain an accurate and deep intuitive understanding of a person or thing.**

synonyms: intuition, discernment, perception, awareness, understanding, comprehension, apprehension, appreciation, penetration, acumen, perspicacity, judgment, acuity; vision, wisdom, prescience

• **a deep understanding of a person or thing.**

plural noun: **insights**

synonyms: understanding of, appreciation of, revelation about; introduction to

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Paula Boast
Charles Russell Speechlys LLP

Glenn Bull
Charles Russell Speechlys LLP

Sarah Alaiwat
Charles Russell Speechlys LLP

Anna Hackworth
Charles Russell Speechlys LLP

Connection to Belt and Road projects

Situated geographically at the crossroads of Europe and Asia, the Gulf region is expected to play a vital role in the Belt and Road Initiative ("**BRI**"). Of the BRI nations situated within the Gulf, the UAE stands poised to be a leader and consolidate itself as the trade hub of the Middle East and the gateway to Africa.

Prior to joining the BRI, China was already the UAE's second-largest trading partner, with bilateral trade between the two nations exceeding USD 50 billion in 2019.

Despite competitive growth within the Gulf region, the UAE has a head start on its neighbouring countries and appears focused on securing this advantage as part of the BRI. The UAE has capitalised on import, export and re-export opportunities more than any other nation within the Gulf. Substantial investments into its infrastructure have resulted in the UAE having the busiest seaports and airports of the region, as well as the most established and diverse free zones. All of this is supported by a strong legal and regulatory system where both traditional civil courts of the region are in place, as well as common law jurisdictions in the "offshore" jurisdictions of the Dubai International Financial Centre ("**DIFC**") and the Abu Dhabi Global Market ("**ADGM**"), where some of the most pre-eminent common law judges from around the world preside.

Not only is Dubai's Airport the busiest of the region since 2014 when it overtook Heathrow, Dubai's DXB Airport has been the busiest

airport in the world by international passenger count. This is not to mention the Al Maktoum Airport, which focuses on cargo flights into Dubai (including China Airlines Cargo and Emirates Sky Cargo), and the Abu Dhabi Airport, which is the home base of Etihad Airways.

Notwithstanding the number of aircraft connecting the UAE to the rest of the world on a daily basis, 78.1% of the UAE's imports, 92.7% of its exports and 86% of its re-exports occur by sea. Currently, the Port of Jebel Ali is the 11th busiest container port in the world (by container traffic) handling more than 14 million TEUs in 2019. This makes the port the third-busiest port outside of China, and by a considerable margin, the busiest of the Gulf region.

In addition to the Port of Jebal Ali, the Khalifa Port in Abu Dhabi is one of the largest deep-water harbours in the world. The Port is operational although its six planned phases of construction are targeted for completion by 2030. Part of the port includes China's COSCO Shipping Ports Abu Dhabi Terminal. The CSP terminal covers an area of 275,000 square metres and is the CSP's regional hub of its network of 36 ports across the globe. The CSP terminal has a design capacity of 2.5 million TEUs annually and the ability to accommodate mega vessels carrying in excess of 20,000 TEUs.

The Khalifa Port is part of the wider Khalifa Industrial Zone Abu Dhabi ("**KIZAD**"), an area that serves the Emirates of both Dubai and Abu Dhabi and stretches out to sea on a reclaimed island covering an area of over 400 square kilometres.

As such, whilst the UAE connects the world by air, the infrastructure for the movement of goods through its seaports, along with its industrial and commercial free zones, provides a solid foundation upon which the UAE will look to expand its role in international business and trade and be a key member of the BRI.

Supporting the physical infrastructure for trade, the UAE's involvement in the BRI is likely to go beyond the movement of goods. It has a number of shared interests with China in the areas of education, science, technology, culture, tourism, space and artificial intelligence. The UAE is on the forefront of such endeavours and the Emirates of both Abu Dhabi and Dubai provide a regional hub for Fintech business. This role is only expected to expand as the UAE seeks to benefit from the digital aspects of the BRI and its closer ties with China.

On this front, the DIFC signed a memorandum of understanding ("**MoU**") with China's Jiaozi Fintech Dreamworks ("**Jiaozi**") in July 2020. This MoU explicitly focused on the advancement of the BRI through Fintech collaboration in the areas of blockchain, artificial intelligence, big data and cloud computing. The DIFC has created the largest Fintech ecosystem of the region and such agreement with Jiaozi is aimed at providing reciprocal benefits to the respective jurisdictions of both nations, with a focus on providing reciprocal access to markets.

Overall, the UAE stands to be the leader of the region in terms of the BRI both with the physical transportation of goods, and on the digital and technology front. As a consequence, the more than 4,000 Chinese businesses already in the UAE stand to strengthen the important platform from which the UAE provides a gateway to the vast emerging markets of the entire Gulf region, which includes close to 100 million residents.

Known or anticipated BRI projects

One of the initial core projects announced in the wake of the UAE joining the BRI is the Dubai Traders Market ("**Market**").

The Market will be situated opposite the location of the Dubai Expo 2020, which, due to the COVID-19 pandemic, will take place from October 2021 to March 2022. The Market will span approximately 800,000 square metres and will form part of the Jebal Ali Free Zone ("**JAFZA**"). As such, the Market will have the benefit of the JAFZA regulatory environment, which permits 100% foreign ownership, and various free-zone benefits for the re-export of goods.

In 2019 it was announced that the Dubai port operator DP World had entered a 70/30 joint venture partnership with Zhejiang China Commodity City Group ("**CCC Group**") to develop the first phase of the project. This phase will be the construction of a "Yiwu Market", a model based off CCC Group's Yiwu China Commodities City. The Chinese investment in the project is estimated at USD 2.4 billion.

The Yiwu Market UAE will span over 200,000 square metres and when completed is expected to have over 1,600 showrooms and 324 bonded warehouses. It is aimed at providing traders and businesses from across the globe access to wholesale discounts with minimised supply chain costs and clearly plays a key role in the UAE's contribution to and alignment with the objectives of the BRI.

DP World, a Dubai-based logistics group, also signed an agreement with China for a USD 1 billion project in Dubai to import, process, pack and export agricultural, marine and animal products, to be known as the "Vegetable Basket".

At the same time as announcing the Market, the two countries signed a deal for a further USD

1 billion investment for the "Vegetable Basket" project. This facility will enable the mass importation, processing and re-exporting of agricultural, marine and animal products, a project ideally positioned to both enhance and capitalise on the BRI. Details of this project remain scarce at this time.

Furthermore, there is the construction of the China-UAE Industrial Capacity Cooperation Demonstartion Zone in KIZAD, in conjunction with Jiangsu Provincial Overseas Cooperation and Investment Company ("**JOCIC**"). The project covers an area of 220,000 square metres and will include approximately 80,000 square metres of buildings. The project has attracted investment from more than 20 Chinese companies totalling approximately USD 1.6 billion since it was officially launched in 2019. Such investment in KIZAD comes in addition to CSP establishing the Khalifa Port as its regional hub.

II Country Overview

Economy

The UAE has made great strides to diversify away from its position as an oil-dependent economy. The progress is guided by the UAE Vision 2021 ("**Vision 2021**") being the core of its national economic agenda.

An integral aspect of Vision 2021 is to create and maintain a sustainable and diversified economy. As noted in Vision 2021, this is targeted through a commitment to the "development of a competitive knowledge-based economy, promoting innovation, research and development, strengthening the regulatory framework for key sectors, and encouraging high value-adding sectors".

In order to achieve this, the UAE government has set out the following 12 Key Performance Indicators ("**KPIs**"):

1. Non-oil real GDP growth.
2. Gross National Income ("**GNI**") per capita.
3. Net Inflow of Foreign Direct Investment as a percentage of GDP.
4. Global Competitiveness Index.
5. Share of UAE nationals in the workforce.
6. Ease of Doing Business Index.
7. Emiratisation Rate in the private sector.
8. SME's contribution to non-oil GDP.
9. Global Entrepreneurship and Development Index ("**GEDI**").
10. Global Innovation Index.
11. Share of "knowledge workers" in the labour force.
12. Research and development expenditure as a part of GDP.

Crucially, and in line with its economic agenda, the UAE introduced two significant pieces of legislation in the second half of 2018. Firstly, it enacted a new Foreign Direct Investment Law (Federal Decree Law No.19/2018) (the "**FDI Law**") and then a new long-term visa system (Cabinet Decision No.56/2018), seeking to attract investors, entrepreneurs and people with specialised talents.

Together, these laws are aimed at attracting foreign investment, promoting the UAE's

emerging status as a trading hub and continuing to transform it into a regional and global centre for excellence in various fields.

Currency

The United Arab Emirates dirham ("**AED**") is the currency of the UAE. Since November of 1997, the AED has been pegged to the US dollar at a rate of USD 1 to AED 3.6725.

Government and stability/security

The UAE is a confederation of seven Emirates comprising of Abu Dhabi, Dubai, Sharjah, Ajman, Ras Al Khaimah, Umm Al Quwain and Fujairah. Formed in 1971, the UAE's federal authority, the Federal Supreme Council, consists of the hereditary rulers of each Emirate who further elect a President and Vice President from the existing members. The capital is the Emirate of Abu Dhabi, which is also the largest Emirate occupying 87% of the UAE's total landmass. The most populated Emirate is, however, Dubai with almost twice as many residents as the capital.

The legal system in the UAE is based on both civil code principles (mostly heavily influenced by Egyptian law) and Islamic Shari'ah Law. The primary sources of law include:

- The UAE Federal Constitution.
- Federal laws and regulations.
- Emirati laws and regulations.
- Islamic Shari'ah principles.
- Free zone regulations.

The UAE Federal Constitution provides the basis of all legislation communicated at the federal and national level whereby the federal laws take precedence over any local laws. The federal government has exclusive jurisdiction over various substantive matters, whereas each Emirate maintains its own jurisdiction over matters not assigned to the federal government.

According to the Fragile States Index ("**FSI**"), released by the Fund for Peace, the UAE was ranked as the most stable Arab nation in 2019. The FSI measures each country based on social, economic and political indicators.

Political/cultural considerations

The UAE is home to a large expat community from citizens of nations all over the world. In fact, expats make up about 88% of the country's population of approximately 10 million people. With the recent introduction of the new remote work visa scheme, this is likely to continue to grow.

The intersection of various cultures has fostered a tolerant and cosmopolitan environment. Notwithstanding this, the UAE is an Islamic country and so a basic understanding

of Islamic cultural norms are essential when conducting business in the UAE. Family values and a deference to authority are extremely important values to espouse and uphold.

As such, considerations as to behaviour and conduct when living and conducting business in the UAE need to be taken into account.

Natural resources

The UAE possesses nearly 10% of the world's total hydrocarbon reserves. The two primary natural resources are petroleum and natural gas, 90% of which come from the Emirate of Abu Dhabi.

The UAE also accounts for 3.4% of the world's aluminium smelter production.

Approximately 80% of the UAE's landmass classifies as desert, while a further 2.6% is mountainous. Such a topography causes significant difficulty on the nation's ability to develop agriculture. Furthermore, it relies heavily on desalination plants for the production of water.

In keeping with its strong commitment to adopt a green economy and to reduce carbon emissions, the UAE has taken serious steps in recent years to address environmental concerns in launching the national Energy Strategy 2050 in January 2017. The UAE allocated over USD 163 billion in order to meet its target to increase the contribution of clean energy sources in the total capacity mix to 50% by 2050.

Infrastructure

The UAE has the most advanced and developed infrastructure in the Gulf region. In addition to the airports and seaports noted above, the country has placed a large emphasis on real-estate development, telecommunication infrastructure, and constructing an extensive road network (both within the UAE and within neighbouring countries), as well as establishing itself as a hub for maritime activity and transportation.

Creating and maintaining a sustainable environment and infrastructure is a key tenet of Vision 2021. This provides that the UAE government aims to develop "quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all".

The KPIs set by the UAE government in Vision 2021, as they relate to infrastructure, include improving the UAE's standing on the Networked Readiness Index (telecommunication and IT sectors) and Online Services Index.

Investment limitations

Foreign investors or businesses wishing to establish a presence in the UAE may generally avail of one of two avenues:

1. establish a presence in the UAE mainland (i.e. in one of the Emirates); or
2. establish a presence in one of the many (over 40) UAE free zones which are designated areas within the UAE where 100% foreign ownership is permitted, together with import duty and VAT exemptions.

On 21 June 2021, amendments were made to the UAE Commercial Companies Law which, subject to some restrictions, permits 100% foreign ownership of companies. Prior to these amendments, UAE companies which are not located in free zones faced restrictions to foreign ownership whereby UAE nationals must own at least 51% of the shareholding in commercial companies based outside of free zones.

The amendments also removed the requirement for branches of foreign companies in the UAE to appoint a UAE national agent for most activities.

As a consequence, there is an increasing appeal for entities to perhaps establish themselves in mainland UAE and also for entities not particularly suited to the structure or regulations of the particular free zones, to also establish themselves in Dubai.

The Department of Economic Development ("**DED**") in certain Emirates have now started to issue their respective lists of approved activities and requirements for foreign shareholders. The Abu Dhabi and Dubai DED, for instance, have issued "positive lists" of 1,105 and 100 activities, respectively – both lists being heavily focused on commercial and industrial activities.

The recent amendments to foreign ownership requirements in the UAE do not apply to "strategic activities", which include banking, insurance and re-insurance, and telecommunication sectors.

Construction-related activities, however, are now eligible for 100% foreign ownership together with maritime activities, subject to various conditions such as minimum capital requirements or the use of new technology.

III International dispute settlement

The legal structure in onshore UAE runs in a dichotomous system, with the Federal Judiciary presided by the Federal Supreme Court as the highest judicial authority in the UAE and the local judicial departments at the local government level.

In addition to the onshore UAE legal system, the "offshore"/"free zone" companies are governed by their relevant free zone's laws and regulations. One of the most sophisticated and robust regulatory frameworks in this regard is situated within the DIFC free zone. This free

zone is regulated by the Dubai Financial Services Authority, an independent regulator of financial services conducted in or from the DIFC, and has further established its own DIFC Court.

The courts of the DIFC Court include a Small Claims Tribunal ("**SCT**"), the Court of First Instance, and the Court of Appeal. The SCT deals with disputes valued up to AED 500,000 and prohibits the appearance by lawyers within the court. As such, it has sought to implement a simplified and cost-effective procedure for dispute resolution.

Both the SCT and Court of First Instance can be nominated as the forum for dispute resolution in all commercial contracts. This not only includes entities that operate outside of the DIFC, or Dubai, but also extends beyond the borders of the UAE. All that is required is the agreement of both parties, which can be done prior to entering into the contract, or at the time of the dispute arising.

The DIFC Courts' jurisdiction only deals with civil and commercial disputes. Criminal proceedings (such as crimes committed within the DIFC zone) do not fall under the remit of these courts. Any criminal issues that may arise within the DIFC are referred to the appropriate external channels.

The existence of a provision for parties to opt in to the jurisdiction of DIFC Courts further highlights the increasing prominence of the DIFC Courts in the international disputes arena. The DIFC Courts have become known for offering several advantages over other courts in the region.

Such advantages include an international judiciary of outstanding calibre. Their significant experience in sophisticated commercial disputes in the most prestigious and established common law courts from around the world make the DIFC Courts excellent fora for justice. The availability of an immediate/summary judgment and the opportunity to recover most of a successful party's legal costs are also factors that distinguish the common law jurisdiction to many other civil courts within the region.

As such, the DIFC Court of First Instance recorded a 41% increase in cases in 2020, with the total value of claims across all divisions rising by 72% to AED 9.95 billion. As such, the court is being recognised as a preferred forum by more people and trusted as a forum for higher value disputes.

The DIFC Courts have also been active specifically in relation to enhance judicial cooperation between Dubai and China. In 2016, the DIFC Courts and Shanghai High People's Court entered into an MoU on Judicial Cooperation.

The ADGM is an international financial centre situated in the Emirate of Abu Dhabi. It has also gained notable recognition for developing a business-friendly environment, largely following the success and format of the DIFC, its Dubai counterpart.

Similar to the existing regulatory framework in the DIFC, the ADGM Courts and its judiciary are largely modelled on the English judicial system, thereby creating an internationally recognised and accepted legal framework. English common law, including the rules and principles of equity, are directly applicable in the ADGM.

Moreover, similar opt-in provisions are in place whereby parties, without any connection to the ADGM, can opt in to the jurisdiction of the ADGM to determine their disputes. However, unlike the DIFC Courts, recent amendments to the ADGM's Founding Law provide that the ADGM Courts cannot be used as a conduit jurisdiction for the enforcement of non-ADGM judgments and arbitral awards made in other jurisdictions.

As a part of the UAE government's commitment to effectively employ advanced technologies and digital platforms to improve public services, measures were introduced in the UAE in 2017 at the federal level in relation to the use of remote communication technologies (i.e. e-trials) into civil proceedings in the UAE.

Such measures of incorporating advanced technological platforms have helped the courts deliver more efficient and cost-effective solutions in the handling of proceedings.

Bolstered by increasing demand resulting from COVID-19 restrictions, the DIFC Court leveraged its existing digital infrastructure to stay connected with court users during this period. Videoconferencing and teleconferencing facilities for applications and hearings were extended, as well as the issuing of digital orders and judgments, and court users were able to access all extensive eServices remotely and effectively manage their case and access all relevant filing from the eRegistry portal.

In 2020, the DIFC Court further established its Arbitration Division, which was required in order to accommodate the increasing number of arbitration disputes. The Arbitration Division maintains the advantage of dedicated judicial and registry oversight and case management expertise of the DIFC Court. This has led to increased efficiency of the process arising directly from the ability to expeditiously review applications for interim measures and injunctive relief mechanisms.

Federal Law No. 6 of 2018 ("**the Arbitration Law**") was introduced in May 2018 and was a major development in the field of international arbitration for the UAE. The legislation is closely aligned with the UNCITRAL Model Law on International Commercial Arbitration and best international practice.

The Arbitration Law is applicable in arbitrations seated "onshore" in any of the seven Emirates of the UAE. It does not, however, apply to the DIFC and ADGM. Notwithstanding this, both the DIFC and ADGM have their own arbitration law.

The DIFC Arbitration Law No. 1 of 2008 ("**DIFC Arbitration Law**") is also based upon the UNCITRAL Model Law on International Commercial Arbitration. It applies to arbitrations seated within the DIFC; however, like the court, parties are free to adopt the DIFC as the seat of the arbitration, irrespective of whether there is any connection between the DIFC and the parties and/or the matter in dispute.

Similarly, the ADGM has an arbitration-specific legal framework in the form of the Arbitration Regulations 2015.

Notwithstanding the alternative arbitration jurisdictions operating within the UAE, the vast majority of international arbitrations conducted across the Emirates are subject to the Arbitration Law.

Mediation

Mediation is not a common or promoted form of alternative dispute resolution within the UAE. That said, the prevalence of barristers and Queen's Counsel practising regularly in the UAE for arbitrations and proceedings in the DIFC and ADGM Courts, as well as the prevalence of top international law firms, means that there is certainly no shortage of persons extremely capable and duly qualified to provide mediation services. Therefore, should the parties feel that mediation might be effective in resolving a dispute, it is certainly available to them.

Whilst it is has not been determined precisely as to why mediations are rare in the UAE (and across the Gulf region more widely), by experience it is perhaps explained by cultural influences of an organisation. Parties facing a situation where they have liability for a substantial sum that was unexpected or arisen due to fault or mistake are often unable to consent to paying (to a certain degree) such amount, without the direction of an authority such as a court or arbitrator.

Despite this generalised statement, negotiations with due consideration of all commercial factors involved are very important and common practice. As such, negotiations are an effective way to resolve disputes in the UAE. However, general experience shows that parties within the UAE are more likely to have a hard limit in their negotiations and the addition of a third party to help such negotiations is not particularly effective in changing that.

Often, it appears that the fear of being perceived as being too lenient or perhaps agreeing to an outcome that might not be less advantageous of what a court may ultimately

order can override commercial decisions as to the risk and costs of litigation. As such, placing the decision in the hands of an authority such as a court or arbitrator is perceived as safer and easier to justify if queried. This is particularly the case where the entity is receiving state funds and subject to state audits.

International treaties

As the Arab world's second-largest economy, the UAE has signed a significant number of Bilateral Investment Treaties ("**BITs**") with Belt and Road Countries ("**BRCs**") since joining the BRI in 2018. Over 50% of the BITs that the UAE has signed since 2018 have been with BRCs, a recent example being the BIT that was signed with North Macedonia in February of 2021. This follows earlier BITs with BRCs such as Gambia, Zimbabwe and Kazakhstan. The stated purposes of these treaties are to create favourable conditions for cross-border economic cooperation and to encourage investment and reciprocal protection of foreign nationals' investments.

Other cross-border/regional treaties

Regionally, the UAE is also party to several multilateral and bilateral trade agreements including with partner countries in the Gulf Cooperation Council ("**GCC**"). As a member of the GCC, the UAE has strong economic ties with Saudi Arabia, Kuwait, Bahrain, Qatar and Oman as well as a common market and customs union with these nations.

Similarly, under the Greater Arab Free Trade Area Agreement, the UAE has free trade access to 18 of the 22 Arab League states. This agreement provides a series of privileges, the most significant being the complete exemption of commodities produced by participating member states from customs duties.

Another noteworthy cross-border treaty that the UAE is party to as a member of the GCC is the GCC agreement with the countries of the European Free Trade Area ("**EFTA**"). The GCC-EFTA Free Trade Agreement ("**EFTA Agreement**") covers a broad range of areas including trade in goods and services, government procurement and intellectual property rights. The Joint Committee established by the Agreement supervises the application of the EFTA Agreement, which provides for dispute settlement through arbitration.

The UAE has also signed trade agreements with Singapore (through the GCC's agreement with the nation) and New Zealand, and has engaged in talks regarding the establishment of similar arrangements with Argentina, Brazil, China, the European Union ("**EU**"), India, Japan and Pakistan, among others.

Relationship with the EU

Bilateral relations between the EU and the UAE have increased through trade, development and humanitarian cooperation, energy cooperation and cultural and educational exchanges.

In 2018, the UAE and EU signed a Cooperation Arrangement with the aim of boosting collaboration in a number of policy areas such as economy, agriculture, trade, advanced sciences and renewable energy. The UAE and the EU maintain a solid trading relationship and the UAE imports more EU products than any other Gulf country. Yet, compared to nations such as China, Russia or South Korea, the EU has limited involvement in the UAE's economic goals. On the other hand, the EU retains some influence in the UAE through soft power initiatives, including projects such as the Louvre Abu Dhabi, Sorbonne University Abu Dhabi and the EU's participation in UAE Expo 2020.

Overall, progress continues to be made between the UAE and EU with plans for further collaboration in areas such as intellectual property protection and sustainability already well underway.

Reciprocal arrangements for the recognition and enforcement of court judgments with BRI countries

Projects carried out under the BRI mainly take the form of large-scale infrastructure ventures and, as a result, disputes can arise in a number of forms. At present, there are no set terms of BRI global engagement nor a set mechanism to resolve disputes that arise out of such engagement.

The UAE generally relies on bilateral civil and commercial judicial assistance treaties with a number of BRCs for the enforcement of judgments. In particular, the UAE has treaties with neighbouring Gulf countries and fellow BRCs by way of the 1996 GCC Convention. The Convention provides for the recognition and execution of final judgments issued by the courts of any GCC member state in civil, commercial and administrative cases. Further, the 1983 Riyadh Arab Agreement for Judicial Cooperation ("**the Riyadh Convention**") remains in force and is largely similar to the GCC Convention, the primary difference being that judgments under the Riyadh Convention require ratification by a UAE First Instance Court prior to execution.

Outside the GCC, there are a small number of judicial treaties in place with other BRCs. This includes the Agreement on Judicial Cooperation, Execution of Judgments and Extradition of Criminals between the UAE and the Tunisian Republic of 1975 ("**the Tunisian Agreement**"),

which provides for the enforceability of final judgments granting civil or commercial rights, or deciding compensation from the criminal or personal status courts. Additionally, the Legal and Judicial Cooperation Agreement between the UAE and the Arab Republic of Egypt of 2000, and the Agreement between the Republic of Kazakhstan and the UAE on Judicial Assistance in Civil and Commercial Matters of 2009 provide for the same parameters of enforceability as the Tunisian Agreement.

New York Convention

There is often a reluctance for parties to submit their disputes to BRC national courts, leading to a preference for arbitration.

Among the 140 participating members of the BRI, approximately 60 are contracting parties of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**"). This includes the UAE, who acceded to the New York Convention in 2006 without making any declarations or reservations.

The DIFC and the ADGM are also bound by the New York Convention by virtue of the fact that they are part of the UAE.

Article 52 of the Arbitration Law confirms that an arbitral award issued by a validly constituted arbitral tribunal in accordance with the requirements of the Arbitration Law is binding on the parties, shall constitute *res judicata* and is enforceable as a judicial ruling. Ratification may be achieved by means of an application to the Chief Justice, in accordance with the requirements set out under Article 55 thereof.

The court shall however, on its own initiative, be able to set aside the award if it finds that:

a) the subject matter of the dispute is not capable of settlement by arbitration; or
b) the arbitral award is in conflict with the public order and morality of the UAE.

As such, the court's ability to set aside an award is quite limited. Therefore, arbitration is a common form of dispute resolution within the UAE and arbitration awards are, for the most part, enforceable.

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With 15 years' experience on the ground, **Paula Boast** is an award-winning Middle East Partner specialising in construction, engineering and projects throughout the region including Qatar.

Her extensive experience includes real estate, master planned developments and regeneration, major social and logistical infrastructure such as roads, railways, ports, airports housing, sewage and waste, utilities including oil and gas, power and water, green energy and renewables, hotels and hospitality, leisure and tourism, industrial and commercial, education and healthcare. She advises both the private and public sectors, acting on behalf of government and regulatory clients, project employers and developers, lenders and investors, contractors, subcontractors, consultants and specialist procurement and supply chain.

Paula has worked on key Qatar projects including Duqm Road East, Energy City, Hamad Hospital, Doha Convention Center, Marriott West Bay, Education City, Hamad International Airport, Abraj Quartier Tower at The Pearl, and the Lusail and Halul Island Gas Farms.

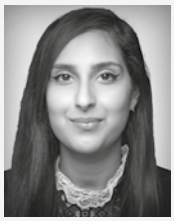
Paula.Boast@crsblaw.com

Glenn Bull is a Senior Associate at Charles Russell Speechlys LLP (Dubai). He is a member of the Construction, Engineering and Projects team and head of the Real Estate team in the Dubai office.

Glenn is an Australian lawyer who has been based in the region for the past six years, working on major projects situated in Qatar, the UAE, Oman and Bahrain. His broad experience in these fields includes acting for clients in large real estate transactions as well as acting in both contentious and non-contentious construction matters. This includes working on a variety of residential and commercial developments, infrastructure, hospitality and other large-scale projects in the public and private sectors.

Glenn's expertise in construction law includes having undertaken various construction management subjects at Master's level, including Project Management, Project Evaluation, Time Scope & Cost and Risk Evaluation & Assessment as well obtaining substantial "hands-on" experience through extended periods on secondment. This practical knowledge, along with regional experience and expertise in the law, gives Glenn the unique ability to focus on finding practical outcomes and commercial solutions for his clients.

Glenn.Bull@crsblaw.com



Sarah Alaiwat and **Anna Hackworth** are trainee lawyers who contributed to the research for this chapter.

Both are undertaking their two-year training contract with the firm. During this period, they will have the opportunity to experience a range of different practice areas before qualification.

Anna is currently seated in the Corporate department, whilst Sarah is working with the Arbitration and Disputes Resolution team. Both are situated in the firm's Dubai office.

Sarah.Alaiwat@crsblaw.com / Anna.Hackworth@crsblaw.com

Vietnam

Dang Viet Anh
ANHISA LLC

Nguyen Le Quynh Chi
ANHISA LLC

I Connection to Belt and Road projects

1.1 Anticipated role of Vietnam within Belt and Road scheme

From the geographic perspective, Vietnam has a strategic location, being in the centre of the Association of Southeast Asian Nations (ASEAN), and can be considered one of the most dynamic markets in the world. The Vietnamese Government has established open and market-oriented trade policies with the purpose of attracting foreign investments to strengthen the economic growth of the country. In 2018, the World Bank stated that the development of Vietnam's economy has been remarkable, as the nation has gone from being one of the world's poorest countries to a lower middle-income economy.

Since the economic reforms, the development of Vietnam has never stopped. Currently, the country is experiencing rapid changes in demographic profile and social culture. Vietnam is now being listed as an attractive destination for foreign investments. Investing in Vietnam opens and widens the door for other countries to expand their influence on the ASEAN region.

Vietnam is also the home to a population of more than 97 million people, in which the working population is over 74 million (as recorded in 2021). This is considered an advantage of Vietnam for attracting investment.

1.2 Expected types of investments in Belt and Road projects

Firstly, as a country considered rich in minerals, Vietnam has lots of potential to develop mining projects to an internationally accepted standard. The country may also use investment in the mining industry to bring foreign direct investment (FDI) that can generate more employment opportunities, infrastructural development or services, and economic stability to many less-developed mountainous provinces in the country.

Secondly, being involved in the Belt and Road Initiative (BRI), Vietnam might receive numerous benefits from the promotion of capital and technological investment into ports, transport routes, and other infrastructures. With improving roads, railways, airports and seaports, manufacturers can get their goods in and out of Vietnam more easily, which then allows Vietnam to conduct a better facilitation of trade and investment with

other foreign countries. From the advantages perspective, new opportunities for multinationals investing in Vietnam can be expected, as when the Vietnamese infrastructure is improved, it will increase trade flow and volume, which ultimately give further impetus to economic integration between Vietnam and other countries.

1.3 Known ongoing or anticipated BRI projects

In July 2021, a freight train left Hanoi, Vietnam for Belgium for the first time, carrying containers of garments, textiles and leather shoes. Each train has 23 40-foot containers and will be connected to the Asia-Europe train bound for Belgium through Russia and Central Asian countries. Cargo transport by train has grown significantly in recent times even though passenger transport has declined due to the COVID-19 pandemic in Vietnam and worldwide.

In addition, Vietnam is one of the countries receiving the most investments from China in respect of BRI projects. Vietnam is ranked 2nd and only after Pakistan. The remarkable BRI projects in Vietnam include: (i) the Dau Tieng Solar Power Project invested by Power China, with a total investment capital of USD 310 million; and (ii) the Nam Dinh 1 Coal Power Project, with a total investment capital of USD 2.16 billion.

II Country overview

2.1 Economy

From being one of the world's poorest countries, Vietnam has achieved significant and historic accomplishments after 35 years of economic reforms and is now in the position of being a middle-income economy. Since the early 1990s, Vietnam's economic development has been among the world's quickest. The growth of Vietnam's GDP since 1990 has been among the fastest in the world, surpassed only by China. By contrast, the poverty proportion fell from nearly 60% to 20.7% in 2010.

In the past 10 years, the country has encountered numerous difficulties and challenges, especially the complicated and rapid developments of the world political situation and the global economy. Despite all those difficulties, the country has managed to thrive. Recently, in spite of the COVID-19 pandemic, Vietnam continued to achieve numerous significant and comprehensive achievements in most fields. Vietnam is considered one of the few economies that grew during the pandemic. Vietnam's GDP reached 6.7% in the first half of this year. Generally, in the first half of 2021, total import-export turnover was estimated at USD 316.73 billion (an increase of 32.2% over the same period last year), of which export turnover reached USD 157.63 billion (an increase of 28.4%), and import turnover reached USD 159.1 billion (an increase of 36.1%). In the first half of 2021, the GDP rate of Vietnam remained the highest in Southeast Asia.

Regarding the implementation of the Socio-Economic Development Strategy 2021–2030, Vietnam has made itself more attractive to foreign investment by changing the way to approach the market access of foreign investors. Domestically, due to the prompt and timely awareness of domestic business, the Government of Vietnam has actively supported the private sector, especially SMEs, through a deferral of tax payments, tax preferences, assistance on access to credit and so on.

2.2 Currency

The Dong is the official currency of Vietnam, and the State Bank of Vietnam is the sole issuer of this currency. The State Bank of Vietnam performs the state management of monetary, banking and foreign exchange (referred to below as monetary and banking) operations.

In terms of the exchange rate, the Vietnam Dong is determined on the basis of the foreign currency supply and demand in the state-regulated market. The State Bank of Vietnam

announces the exchange rate and decides the exchange rate regime as well as the management mechanisms. The exchange rate continues to be considered on the principle of flexibility (i.e. is not fixed), but the exchange rate stabilises upon the balance of the supply and demand of foreign currency.

Regarding the exchange rates, the policies have been changed in line with the market mechanisms. Prior to 26 February 2009, the exchange rate was announced on a daily basis by the State Bank and all banks and credit institutions were permitted to buy and sell foreign currencies at a fixed margin. After 26 February 2009, the average transaction exchange rates on the interbank foreign exchange market of Vietnam Dong to the US Dollar were announced instead of notifying the official exchange rates and the average rate on actual buying and selling in such market in order to match the relations between the supply and demand in the market and international practices. As from the beginning of 2016, the official exchange rate, which is known as the interbank average exchange rate between Vietnam Dong and US Dollar, has been determined with reference to any fluctuation in the weighted average rate occurring on the interbank or international forex market for several currencies of countries that have established major commercial, lending or borrowing, or debt repayment, or investment relationship with Vietnam, macroeconomic and currency balances, and in line with the monetary policy goals.

Apart from the determination of exchange rates, the State Bank of Vietnam has applied many measures to ensure that the exchange rates are under the fixed margin. In 2021, the USD/VND exchange rate is the most stable in the world, fluctuating around the 23,300VND/USD to 23,350VND/USD level at the end of the second quarter of 2021. During the same period, while the Vietnam Dong appreciated up to 0.4%, other currencies fluctuated to USD, e.g.: JPY fell by 7.26%; EUR fell by 4.12%; and THB fell by 4.5%, etc.

2.3 Government and stability/security

The administrative body in Vietnam is divided into two levels. The Government of Vietnam is the highest executive authority of Vietnam. As the executive branch of the Government, the main mission of the Vietnam Government is to: organise the implementation of Vietnamese law; propose, formulate and decide policies under its competence; protect the rights and interests of the state and society, human rights, and citizens' rights; and ensure social order and safety, etc. At local level, the People's Committees organise the implementation of Vietnamese law in their localities. At present, there are 63 provincial-level administrative units, comprising 58 provinces and five centrally run cities (Ho Chi Minh, Ha Noi, Da Nang, Hai Phong, and Can Tho). In Vietnam, democratic centralism governs all organisations and activities of state organs, including the local administrations.

Moreover, Vietnam is a single-party state, which is ruled by the Communist Party of Vietnam (CPV). With a prominent aim to develop the economy, the CPV directly provides strategic direction and decides all major policy issues which the Government and its bodies then implement. Regarding the political environment, Vietnam is considered the most politically stable country in Southeast Asia.

Vietnam has promoted transparency and has improved the people's trust in the Government by many methods, including the establishment of its official website, national service portal and the improvement of the national e-services portal of the Ministries. On 15 June 2021, the Prime Minister issued Decision No. 942/QD-TTg approving the e-Government development strategy in relation to the Digital Government for the 2021–2025 period, with a vision to 2030.

2.4 Political/cultural considerations

Doing business in a foreign country requires good awareness, consideration and assessment of risks relating to the economic environment of

the country. This involves knowledge of politics, economics, legislation, as well as the social and cultural traits of the inhabitants.

In terms of economic development, Vietnam aims to develop rapidly and sustainably, mainly in relation to science and technology, innovation and digital transformation, with an additional focus on the development of the private sector and improving the efficiency of foreign investment.

Furthermore, the Government of Vietnam also pays attention to integration into the world economy by actively considering the ratification of bilateral or mutual agreements with other countries, especially developed economies. In addition, the Government has given the approval for a scheme to develop the sharing economy, with the aim of encouraging innovation, the development of digital technology applications and the digital economy.

Vietnam has a long-standing culture. Vietnamese people are considered hospitable, kind, sincere, trustworthy, industrious and creative, with a respect for morality. The cooperation between the 54 ethnic groups in Vietnam has contributed to the significant achievements in the development of the economy.

As Vietnam remains politically stable and in the process of promoting transparency between the Government and the people, who move in and out of the territory of Vietnam, it can be considered the ideal place for foreign investors.

2.5 Natural resources

With a coastline of more than 3,000 km stretching from North to South, Vietnam's marine resources are still unexploited. There is huge potential for socio-economic development and garnering the benefits of such development in relation to transportation, ports, tourism and services, marine fisheries, industrial development, etc. Market economic activities are developing very strongly in the region, creating a huge demand for linkages and trade between different countries and regions.

Vietnam is rich with natural resources, including: fuel minerals (petroleum, coal); iron minerals and iron alloys (iron, chromite, titanium, manganese); non-ferrous metal minerals (bauxite, tin, copper, lead-zinc, antimony, molybdenum); precious minerals (gold, precious stones); industrial chemical minerals (apatite, kaolin, glass sand); and building materials minerals (limestone, construction stone, paving stone), with large reserves and quantities.

In the context of Vietnam's participation in the BRI, as a result of Vietnam's geographical advantage due to its proximity to the backbone of the regional economy, especially in the South and Central regions, Vietnam's sea route is an important link in the BRI framework. Vietnam has many busy trading ports connecting the trade of goods from the North to the South.

2.6 Infrastructure

The infrastructure, especially transport infrastructure, that has been invested in so far has partly met Vietnam's current socio-economic development needs. Most of the transport infrastructure system in Vietnam is still small in scale. Vietnam's transport infrastructure system is only average when compared to the transport infrastructure systems of some of the advanced countries in the region. Currently, with the view of "infrastructure one step ahead", over the years, the Government of Vietnam has spent a high level of investment on infrastructure development.

Since 2016, investment in the transport infrastructure system of Vietnam has achieved many important accomplishments. Many large and modern transport projects have gradually been invested and built, contributing to the development and modernisation of the country, creating connections between regions in the country and all around the world.

In particular, the road sector has had many breakthroughs, having completed the construction of about 1,074 km of highways between 2011 and 2020, bringing the total length of the national expressways in operation to 1,163 km. The total length of the national highway network is 24,598 km, major national highways have been put into technical grade, replacing weak bridges and enabling synchronous loading; the ratio of asphalt concrete pavement was raised to 64%.

Regarding the airport network, as of 2020, Vietnam operated a network of 23 airports including 13 domestic airports and 10 international airports, of which four airports, namely Noi Bai, Da Nang, Tan Son Nhat, Cam Ranh, act as international gateways. By 2030, it is expected that there will be 28 airports, including 15 domestic airports and 13 international airports.

2.7 Investment limitations

2.7.1 Restrictions and burdens on starting a foreign business

According to Vietnamese law, investors have the autonomy to carry out investment and business activities, except in relation to the industries and trades banned from investment including trading of all kinds of plants and wild animals on the prohibited list, trading in narcotic substances, trading in people and human body parts, prostitution, firecrackers, and business activities related to human cloning.

In addition to the abovementioned restrictions on the business lines that can be invested in, it is important to take note of the legal limita-

tion on the capital ownership ratio. Accordingly, the current Investment Law of Vietnam allows foreign investors to own unlimited charter capital in companies in Vietnam, with some exceptions.

2.7.2 Sector-specific restrictions

Vietnam has gradually opened up, according to the schedule of WTO commitments, and has attempted at improving the investment environment with policies and legal documents, and now attracts a large amount of investment capital in the region with many advantages in terms of stability and labour. For example, the Vietnamese Government has also created favourable conditions for foreign enterprises to invest in industrial parks in Vietnam; for example, it has introduced the import tax exemption for imported goods, raw materials, supplies and components for the implementation of investment projects, the exemption and reduction of land rent and land use tax, etc.

III International dispute settlement

3.1 Local courts and legal tradition

3.1.1 Scope of jurisdiction

In general, Vietnamese jurisdiction can be provisionally divided into three main categories: criminal law; civil law; and administration law. For the purpose of this chapter, the jurisdiction of Vietnamese courts under discussion shall cover civil disputes only.

In accordance with Vietnamese legislation, civil disputes can be categorised into many different sectors. Subject to the nature of the dispute, it can be classified as a case related to labour, family and marriage, commerce, or a general civil matter, regardless of the existence of a foreign element or not.

For some limited cases, Vietnamese courts have exclusive jurisdiction over disputes which must be resolved by the competent courts of Vietnam. Awards or judgments that resolve such cases which have been processed by tribunals or foreign forums rather than Vietnamese courts shall neither be recognised nor enforced in Vietnam; for example, disputes in connection with real estate located within the territory of Vietnam.

Conversely, Vietnamese law also stipulates circumstances under which the jurisdictions of other forums like arbitral tribunals or foreign courts are acknowledged. Specifically, Vietnamese courts have to return the statement of claim or dismiss the case due to lack of legal competence in some cases, such as when the case does not fall within the exclusive jurisdiction of the Vietnamese court and there is a choice for arbitration or foreign court.

3.1.2 Sophistication

On 1 June 2015, the 2014 Law on Organization of People's Courts came into effect. This promulgation marked a significant change in the structure of the Vietnamese judicial agencies.

According to prevailing regulations of law, the system of the People's Courts of Vietnam is structured as follows: *(*)*

(i) The Supreme People's Court.

(ii) The High People's Courts in Hanoi, Da

Nang, and Ho Chi Minh City for supervising the court practice of the Northern, Central, and Southern regions of Vietnam.

(iii) Provincial courts.

(iv) District-level courts.

(*) There are also military courts. However, as this chapter mainly focuses on civil disputes only, the military courts shall not be discussed herein.

In respect of judges practising in courts, Vietnamese law sets forth specific qualifications for a person to become a judge. These qualifications include a person's capabilities, academic qualifications, work experience as well as other essential requirements.

3.1.3 Reliability of judiciary/corruption

The Vietnamese Government and the CPV have been stepping up their attempts to tackle corruption in many public sectors, including in the judicial system. The Supreme People's Court has also collaborated with other judicial agencies to strictly supervise and enforce anti-corruption and anti-bribery policies. As a result of this, in recent years, numerous large-scale corruption cases have been brought to light. Conferences are also held periodically for reviewing the exercise of anti-corruption and anti-bribery regulations in practice. The legal framework in this regard has been improved considerably – the 2015 Penal Code and the 2018 Law on Anti-Corruption were both passed, enhancing the anti-corruption and anti-bribery legal framework in all fields and matters. On 30 December 2020, the Council of Justices of the Supreme People's Court also issued a resolution on the implementation of regulations on anti-corruption and other position-related crimes.

3.1.4 Speed

In theory, Vietnam has a two-tier trial system in which the first instance courts may take around one year and the appellate courts may take another year to finally resolve a case. In practice, it usually takes up to three or four years for the parties to obtain a final judgment from this "two-tier trial system". The length of legal proceedings mostly depends on the complexity of the case, which is dependent on many factors such as, but not limited to: the number of parties; the number of legal relationships to be examined; and/or the involvement of foreign parties, etc. Moreover, the workload of a particular court at a specific time may also affect the speed of settlement.

3.1.5 Efficiency

Since courts are public agencies to resolve claims, court fees are much lower than arbitration fees. With a wide scope of jurisdiction, courts are allowed to trial almost all disputes related to various subject matters. In addition, unlike other forms of alternative dispute resolution such as arbitration, court-handled disputes are deemed traditional dispute resolutions. Thus, some parties, agencies and authorities have a tendency to consider a judgment issued by a court more reliable and enforceable than an award rendered by a tribunal.

Notwithstanding the above, the efficiency of resolving a case by court may also depend on the knowledge and expertise of the handling judges. According to regulations of law, the handling judges shall be assigned by the Chief Judge without intervention or appointment of the parties. For some cases in connection with specialised subject matter, such as shipping or intellectual property, it is possible for the handling judges to not have a plethora of knowledge on the matter or previous experience with similar cases. Thus, for relevant legal issues or concepts which are not familiar to the courts, it may be difficult for the parties to prove or demonstrate the same with the hearing panel – which would obviously have an impact on the efficiency of the final order.

3.2 Arbitration

3.2.1 Arbitrability

Vietnam is a Contracting State of the 1958 New York Convention on the Recognition and

Enforcement of Foreign Arbitral Awards (New York Convention). Vietnam has also adopted many regulations of the UNCITRAL Model Law on International Commercial Arbitration into the 2010 Law on Commercial Arbitration, which came into effect on 1 January 2011. Accordingly, subject to an arbitration agreement by the parties, a commercial dispute can be referred to arbitration. Vietnamese civil procedure law also requires the local courts to return all statements of claim and dismiss the case at the request of the other parties if there is a valid and operable arbitration agreement.

3.2.2 Local arbitral institutions, regional centres for arbitration

Vietnamese commercial arbitration law allows the establishment and operation of local arbitration institutions with branches and representative offices. From recent statistics and lists made by departments of justice in 2020, there are 27 local arbitration institutions, of which 19 institutions are based in Ho Chi Minh City, seven institutions in Hanoi, and one in Can Tho. Among these arbitral institutions, the Vietnam International Arbitration Centre (VIAC), with its headquarters in Hanoi and a branch office in Ho Chi Minh City, appears to be the most popular one.

Vietnamese law also sets forth a specific legal framework for the establishment and operation of foreign arbitration centres in Vietnam. However, no branch of a foreign or regional centre has been established in Vietnam so far.

3.3 Mediation

In comparison with arbitration, mediation appears to be a less popular form of alternative dispute resolution. However, mediation seems to have attracted more attention recently. In 2017, the Vietnamese Government issued Decree No. 22/2017/ND-CP (effective as from 15 April 2017), setting forth a legal framework for the mediation process, qualifications for a mediator, the registration of a mediation centre/institution, etc.

In 2020, there were 12 mediation centres/institutions established and operating in Ho Chi Minh City and Hanoi with hundreds of mediators named in their lists. Hundreds of qualified mediators have been registered with departments of justice to act as *ad hoc* mediators.

3.4 International treaties

3.4.1 Bilateral investment treaties with BRI countries

Vietnam has signed bilateral investment treaties with 45 out of the 133 BRI countries, including:

(i) 11 countries in East Asia and the Pacific;
(ii) 19 countries in Europe and Central Asia;
(iii) four countries in Latin America and the Caribbean;
(iv) seven countries in the Middle East and North Africa;
(v) two countries in South Asia; and
(vi) two countries in Sub-Saharan Africa.

Currently, 33 out of the 45 bilateral investment treaties signed with BRI countries are in force. The bilateral investment treaty between Vietnam and Indonesia was terminated, and the remaining 11 signed bilateral investment treaties have yet to take effect.

In addition to 45 BRI countries, Vietnam signed bilateral investment treaties with 17 non-BRI countries in different regions, including:

(i) two countries in East Asia and the Pacific;
(ii) 12 countries in Europe and Central Asia;
(iii) one country in Oceania; and
(iv) two countries in South Asia.

Currently, among the remaining 17 bilateral investment treaties signed with non-BRI countries, 13 treaties have been in effect and the remaining four have not yet come into force.

Besides the bilateral investment treaties, Vietnam has entered into many regional treaties covering investment, notably treaties with ASEAN and the European Union (EU).

Since officially joining ASEAN on 28 July 1995, Vietnam has signed many treaties

with ASEAN countries, including, amongst others, the ASEAN Framework Agreement on Services – AFAS (15 December 1995) and ASEAN Comprehensive Investment Agreement – ACIA (26 February 2009), which have come into force and are significant in promoting and strengthening cooperation in the region, creating a favourable investment environment, and attracting foreign investment to ASEAN.

As a member of ASEAN, Vietnam is a party to more than 10 investment and free trade agreements (FTAs) signed between ASEAN and other countries and associations, including China, India, Japan, Korea, Hong Kong, the USA, Australia, New Zealand, and the EU. Amongst these agreements, the Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation with India and the Regional Comprehensive Economic Partnership with the six states with which ASEAN has existing FTAs (including China, Korea, Japan, India, Australia, and New Zealand) have not yet come into force.

Vietnam has also promoted investment cooperation itself with other regions. For example, from 1995 to 2019, five agreements were signed between Vietnam and the EU on investment, service and trade. Two of them, namely the EU-Vietnam Free Trade Agreement (EVFTA) and the EU-Vietnam Investment Protection Agreement (EVIPA), were ratified by the European Parliament on 12 February 2020 and approved by the Vietnamese National Assembly on 8 June 2020. After ratification, EVFTA came into force on 1 August 2020. EVIPA will need to be further ratified by the European Parliament of all 27 EU Member States (after the UK completes her Brexit procedures) to take effect.

After the USA's withdrawal in January 2017, the 11 member countries of the Trans-Pacific Partnership (TPP), including Vietnam, agreed on the core elements of the pact, including renaming it to Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). In March 2018, CPTPP was officially signed by 11 member countries (excluding the USA). This Agreement was approved by seven member countries, namely Australia, Canada, Japan, Mexico, Singapore, New Zealand, and Vietnam, and officially came into force on 30 December 2018. CPTPP came into force in Vietnam on 14 January 2019.

3.4.2 Relationship with the EU

Since 1990, Vietnam and the EU have established diplomatic relations, which marked the beginning of Vietnam's escape from the embargo of Western countries. After that, Vietnam and the EU promoted a very deep relationship through established cooperation-partnership frameworks concerning trade and investment as mentioned above.

The relationship between Vietnam and the EU extends to defence security and the environment. This is shown through the enforcement of the Voluntary Partnership Agreement on Forest Law, Forest Governance and Trade (VPA-FLEGT), and Framework Agreement on Defence-Security Cooperation (FPA).

In addition, the EU has actively supported Vietnam in policymaking and institutional capacity building. This can be seen in many different programmes and projects, including the Program to Support the Transition to a Market Economy in Vietnam (EuroTAPViet) from 1994 to 1999 and the Multilateral Trade Policy Support Program (MUTRAP) from 1998 to 2017.

In November 2021, Vietnam and the EU will celebrate their 31st anniversary of establishing diplomatic relations (28 November 1990 to 28 November 2021).

3.4.3 Reciprocal arrangements for the recognition and enforcement of court judgments with BRI countries

For the judgments of foreign courts to be enforced in Vietnam, according to Vietnamese law, such judgments must first be recognised by the Vietnamese court. Under the Civil Procedure Code 2015 (CPC 2015), a foreign court judgment would be recognised by Vietnamese courts when either:

(i) there is a treaty between Vietnam and the rendering state governing the recognition of the foreign court judgment/decision; or
(ii) upon a reciprocity basis.

Vietnam is currently not a member of any convention on the recognition and enforcement of foreign judgments. Therefore, in the case that there is an Agreement on Judicial Assistance in Civil Matters, which would facilitate the enforcement of a judgment of a court of another country in Vietnam, that judgment of the court of the foreign country might be recognised and enforced in Vietnam following the signing of the Agreement.

Vietnam has 17 mutual legal assistance agreements on civil matters signed with 17 countries, in which 14 are BRI countries and three are non-BRI countries, namely Russia, France and Taiwan.

3.5 Is Vietnam a signatory to the New York Convention? In practice, are foreign awards enforced?

Vietnam acceded to the New York Convention in 1995. The regulations of the New York Convention have been adopted into national law.

In comparison with the New York Convention, the procedure of recognition and enforcement of judgments of foreign arbitrations within the current CPC 2015 is more specifically regulated. For example, the CPC 2015 provides a time bar for requesting enforcement in Vietnam or listing the necessary documents for the application of recognition and enforcement.

In practice, many foreign arbitral awards were recognised and enforced in Vietnam. On 25 September 2020, the Ministry of Justice in collaboration with UNDP Vietnam and the British Embassy held a workshop to announce the database for the recognition and enforcement of foreign arbitral awards/court judgments in Vietnam. However, it seems that this database is still not yet accessible at the time of writing this chapter due to troubles caused by the COVID-19 pandemic.

ANHISA LLC is a boutique law firm specialised in Dispute Resolution, Shipping and Aviation. Being the leading lawyers in various fields of law, our qualified, experienced, and supportive team of lawyers know how to best proceed with a case against or in relation to Vietnamese parties and are well-equipped to provide clients with cost-effective and innovative solutions to their problems.

Our firm is a pioneer in mediation. Our lawyers are well-equipped to offer services on a wide range of disputes and conflicts, whether cross-border or purely domestic.

The firm has extensively supported both foreign and domestic clients in cases conducted by the leading arbitration institutions, including ICC, LCIA, SIAC, HKIAC, VIAC, etc., and thus gained first-hand experience in how to proceed with dispute resolutions involving local parties. Additionally, our lawyers have been instructed to provide legal opinions and affidavits on matters relating to Vietnamese law to be submitted to arbitral tribunals where disputes involve Vietnamese parties. Our practice focuses on commercial disputes, shipping disputes, construction disputes, and disputes in the oil & gas sector.

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Dang Viet Anh is a Vietnamese qualified lawyer with extensive experience of more than 21 years. He has handled cases in a variety of sectors such as commercial, construction, shipping and aviation, insurance, reinsurance, marine and international trade and all forms of dispute resolutions from the court to ADR methods. Anh has been praised as having "a flexible and realistic approach" and is very often recommended and/or appointed by parties to complicated cross-border deals who have disputes and need commercial and practical solutions for their troubles. He has been recognised as the leading shipping lawyer of Vietnam by *The Legal 500 2020* and has handled all kinds of dispute resolution, aviation and ship finance matters, namely shipbuilding, sale & purchase and management agreements, as well as charterparties, bills of lading and disputes arising therefrom. He has frequently represented sellers, buyers as well as their banks, and mortgagees in S&P deals, who have praised his diligence and described him as "quick, efficient and proactive".

anh@anhisa.com

Nguyen Le Quynh Chi is a qualified lawyer and Head of the Shipping and ADR team of Anhisa with more than 10 years of experience in commercial law and all aspects of aviation and shipping law, such as aviation, admiralty, charterparty and bill of lading disputes, insurance, and especially ship finance. She has assisted many shipowners, aircraft buyers, international banks, foreign investors, leading P&I Clubs, well-known H&M underwriters, as well as their counsels around the world with prompt action and comprehensive advice. She has also participated in negotiations to resolve commercial, aviation and maritime disputes and acted as the authorised representative and protection lawyer for Vietnamese and foreign clients before local courts and international arbitral tribunals in various disputes related to collisions, contracts of carriage of goods by sea, insurance, sale of goods contracts, lease agreements, construction contracts, ship sales and shipbuilding, and winding-up procedures.

chi@anhisa.com

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