

One Belt One Road Disputes: Does China Have Dispute Resolution Methods Fit for Purpose?

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INTRODUCTION

The One Belt One Road Initiative ('OBORI' or 'OBOR') is a top-level project primarily aimed at increasing infrastructure output and investment. It has been implemented in more than 60 countries across the world and has had a far-reaching impact on transnational trade. In order to respond to the increasing need for legal services to assist in the implementation process, China endeavours to provide a fair and trustworthy legal environment by establishing innovative international commercial courts in certain cities¹ and by reforming existing international arbitration rules.² Meanwhile, there remain many challenges to construct a collaborative legal system which covers a large range of jurisdictions, legal customs, and business approaches. This essay contends that the Chinese approach to arbitration and adjudication, since the launch of the OBORI, has undergone a paradigm shift from a domestic approach towards a dynamic and internationalised one. This is a result of the enhancement of the recognition and enforcement of foreign arbitral awards, the introduction of *ad hoc* arbitration, and the establishment of the China International Commercial Court ('CICC').

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¹ Freshfields Bruckhaus Deringer, 'China Establishes International Commercial Courts to Handle Belt and Road Initiative Disputes' (*Oxford Law Faculty*, 17 August 2018) <<https://www.law.ox.ac.uk/business-law-blog/blog/2018/08/china-establishes-international-commercial-courts-handle-belt-and>> accessed 17 August 2019.

² Weixia Gu, 'Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects' (*Social Science Research Network*, 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183549> accessed 10 August 2019.

However, to achieve China's ambitious plan of promoting its dispute resolution mechanism to an international level, it could further enhance the independence and efficiency of its dispute settlement institutions.

The essay begins with an overview of China's OBORI and the methods of dispute resolution available. In the second section, it discusses a recent Chinese arbitration case that signifies a revised approach by the Chinese courts: encouraging the recognition and enforcement of foreign arbitral awards. The second part of this section then analyses the newly promulgated rules regarding *ad hoc* arbitration, which are considered an influential reform of China's arbitration law. Thirdly, the essay comments on China's dispute resolution mechanism for OBOR disputes by further assessing the advantages and disadvantages of the establishment of the CICC. Finally, the essay concludes that further development of more open and independent dispute resolution institutions will encourage China's broader cooperation in OBOR projects.

I. OBORI AND THE CONCEPT OF DISPUTE RESOLUTION

Experimenting with a radically new approach towards international trade and investment,³ the OBORI is different from previous free trade agreements in that it provides an ambitious infrastructure-led economic integration plan.⁴ Historically, the Silk Road marked an epochal period in encouraging profound communication and intersection between East and West in terms of trade, culture, and civilisation.⁵ Analogously, the OBORI signifies a new stage in the development of the Chinese economy, with its economic expansion westward⁶

³ Davos World Economic Forum, 'Global Future Council on the Future of International Trade and Investment' (2017) <http://www3.weforum.org/docs/wef_davos_brief.pdf> accessed 17 August 2019.

⁴ Julan Du and Yifei Zhang, 'Does One Belt One Road Initiative Promote Chinese Overseas Direct Investment?' (2018) 47 *China Economic Review* 189, 191 <<http://www.sciencedirect.com/science/article/pii/S1043951X17300743>> accessed 13 August 2019.

⁵ Joshua J. Mark, 'Silk Road' (*Ancient History Encyclopedia*, 1 May 2018) <https://www.ancient.eu/Silk_Road/> accessed 1 March 2020.

⁶ Maya Jasanoff, 'The New Silk Roads by Peter Frankopan Review – the Present and Future of the World' (*The Guardian*, 11 May 2019) <<https://www.theguardian.com/books/2019/may/11/new-silk-roads-peter-frankopan-review>> accessed 17 August 2019.

and the export of its development model.⁷ This titanic infrastructure project provides significant opportunities for investors around the globe to increase their engagement with transnational commercial co-operation, including construction projects, resource production, energy exploitation,⁸ transportation, banking, manufacture, international capital markets, retail and consumer goods business fields.⁹ Meanwhile, it also benefits the national economies of the countries along the OBOR routes. According to a 2019 World Bank Report concerning the OBOR transportation corridors, the countries involved in this project, that have a comparative advantage in natural resources but were previously deficient in terms of infrastructure, “are expected to see a significant 7.6% increase in foreign direct investment due to the new transportation links.”¹⁰

On the other hand, these potential gains come with considerable risks.¹¹ These include those relating to operations, credit risks, government effectiveness, political stability, and legal and regulatory frameworks.¹² From China’s perspective, its overseas investments and workers may be directly exposed to regional political conflicts or security concerns.¹³ The OBORI project itself, in turn, faces inherent risks arising out of weak domestic institutions and poor economic circumstances in many participating economies, especially those with

⁷ Julien Chaisse and Mitsuo Matsushita, “China’s ‘Belt And Road’ Initiative: Mapping the World Trade Normative and Strategic Implications” (2018) 52 *Journal of World Trade* 163, 163

<<http://kluwerlawonline.com.gate3.library.lse.ac.uk/abstract.php?area=Journals&id=TRAD2018008#>> accessed 11 August 2019.

⁸ Erica Downs, ‘Mission Mostly Accomplished: China’s Energy Trade and Investment Along the Silk Road Economic Belt’ (2015) 15 *China Brief* 16

<<https://jamestown.org/program/mission-mostly-accomplished-chinas-energy-trade-and-investment-along-the-silk-road-economic-belt/>> accessed 17 August 2019.

⁹ Enoch Yiu, “One Belt, One Road? Infrastructure Seen as Catalyst for New Trade Growth” *South China Morning Post* (2 December 2016)

<<https://www.scmp.com/business/global-economy/article/2051138/one-belt-one-road-infrastructure-seen-catalyst-new-trade>> accessed 17 August 2019.

¹⁰ World Bank, ‘Belt and Road Economics: Opportunities and Risks of Transport Corridors’ (2019) Foreword xiii. <<https://www.worldbank.org/en/topic/regional-integration/publication/belt-and-road-economics-opportunities-and-risks-of-transport-corridors>> accessed 16 August 2019.

¹¹ *ibid.*

¹² Economic Intelligence Unit, “Prospects and Challenges on China’s ‘One Belt, One Road’: A Risk Assessment Report” (*The Economist*, 2015) 8.

¹³ Joel Wuthnow, “China Strategic Perspectives 12” (*Institute for National Strategic Studies*, 2012) 56.

high-debt vulnerabilities.¹⁴ To tackle these underlying risks in the OBORI, the Chinese government has introduced certain dispute resolution mechanisms that will be specifically elaborated on in the second and third sections of this essay. Before explaining those mechanisms, I will discuss the various dispute resolution methods in general terms.

There are four primary methods in the overall spectrum of dispute resolution mechanisms¹⁵ by which commercial parties can solve their business disputes:¹⁶ negotiation, mediation, arbitration, and litigation. Amongst them, negotiation and mediation can be seen as informal as they do not conclude in binding decisions and are generally conducted through reciprocal consultation, whilst the latter two are binding and enforceable.¹⁷ The enforcement of mediation, in contrast to arbitration and litigation, depends completely on the parties' voluntary implementation,¹⁸ and the process is critically dependent on the parties' negotiation skills. As for litigation, one of its disadvantages is that national courts may often be viewed as being politically partial.¹⁹ Comparatively, arbitration may have advantages in being more efficient in terms of speed and cost.²⁰ Moreover, arbitration reflects the autonomy of commercial bodies to a significant extent based on the parties' freedom of contract.²¹ For instance, they can select the applicable law and arbitrators of their preference, as well as elect to

¹⁴ Yiu (n 9) 97.

¹⁵ Martin Hunter, 'International Commercial Dispute Resolution: The Challenge of the Twenty-First Century' (2000) 16 *Arbitration International* 379, 381 <<https://academic.oup.com/arbitration/article-lookup/doi/10.1093/arbitration/16.4.379>> accessed 16 August 2019.

¹⁶ Chaisse and Matsushita (n 7) 172.

¹⁷ Hunter (n 15) 382.

¹⁸ Yang Shihong et al., 'The Part on Mediation and Arbitration of Contract Disputes The Economic Contract Law of the People's Republic of China' [1985] *Chinese Law and Government* 97, 98 <<https://heinonline.org/HOL/P?h=hein.journals/chinelgo18&i=99>> accessed 18 August 2019.

¹⁹ Wei Cai and Andrew Godwin, 'Challenges and Opportunities for the China International Commercial Court' (2019) *International & Comparative Law Quarterly* 869, 900.

²⁰ Richard A Posner, 'The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations' (1986) 53 *The University of Chicago Law Review* 366, 390 <<https://www.jstor.org/stable/1599644?origin=crossref>> accessed 17 August 2019.

²¹ Yang Shihong (n 18) 91.

have the proceedings be confidential. According to studies by both Queen Mary University of London and PricewaterhouseCoopers,²² arbitration has become the most popular tool for international commercial disputes.²³ In the context of OBORI projects, whichever method of dispute resolution is chosen, owing to its long-term and multinational nature, it is essential for both clients and their lawyers to pay close attention to early risk management and divergent understanding of dispute resolution strategies.²⁴

II. A SIGNIFICANT ARBITRATION CASE AND *AD HOC* ARBITRATION IN CHINA

In order to fulfil the need for a highly efficient and secure settlement of international disputes, the Supreme People's Court of China ("SPC") has released a series of opinions regarding the interpretation of arbitral awards and typical OBOR cases since the start of the OBORI. The opinions are aimed at encouraging a reform towards an international and foreign-friendly dispute resolution system in China.²⁵ Although China's legal system, which is generally modified from the civil law system, does not recognise the enforcement or binding effect of Court's Opinions, the SPC's guiding opinions are considered highly persuasive²⁶ and "in particular certain decisions can be read as generating legal norms with a binding effect on lower courts."²⁷ In *Siemens Co Ltd v Shanghai Golden Landmark Co Ltd*,²⁸ the SPC has endorsed a more welcoming attitude

²² F. Peter Phillips, "The Challenges of International Commercial Dispute Resolution" 1.

²³ Dr Stephan Wilske, "International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse?" (2018) 11 Contemporary Asia Arbitration Journal 40, 155. citing Queen Mary University of London & White & Case [2018] "International Arbitration Survey (9 May 2018): The Evolution of International Arbitration" 2.

²⁴ Hunter (n 15) 388.

²⁵ Gu (n 2) 8.

²⁶ China & Hong Kong Legal Research Guide: Case Law, the University of Melbourne, China's Supreme Court by Ronald C. Keith, Zhiqiu Lin & Shumei Hou, Taylor & Francis, 2013.

²⁷ Wei Luo, *Chinese law and legal research* (Hein 2005) 105.

²⁸ Stanford Law School China Guiding Cases Project, B&R Cases TM, Typical Case 12 (TC12), 2018 Edition "Siemens International Trading (Shanghai) Co., Ltd. vs. Shanghai Golden Landmark Company Limited, A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award" <<http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-12>>. For the original version of this case, see "Second Batch of Typical Cases Involving the 'Belt and Road' Construction" <<http://www.court.gov.cn/zixun-xiangqing-44722.html>> (15 May 2017).

towards the recognition and enforcement of foreign arbitral awards, which allows Chinese foreign-related enterprises to more freely adopt international arbitration as their preferred method of dispute resolution.

In this case, a dispute arose between two Chinese companies during the performance of a sale and purchase contract. Under the agreement, the dispute was heard by an arbitration tribunal seated in Singapore and the award was in favour of the seller. Subsequently, the buyer paid a portion of the damages awarded, but still owed an outstanding payment to the seller. The seller, therefore, applied to the No. 1 Intermediate People's Court of Shanghai²⁹ for recognition and enforcement of the award under the New York Convention.³⁰ The buyer argued that since all aspects of the dispute – including the subject-matter, the companies' personalities, and the performance of the contract – were based within China rather than overseas, the foreign arbitral award was unenforceable as Chinese arbitration law prohibits non-'foreign-related' disputes to be arbitrated outside its jurisdiction. However, the court concluded that the contractual relationship was 'foreign-related', and as a result, the arbitral award should be recognised and enforced in accordance with the New York Convention. The SPC took two factors into account. Firstly, both parties are wholly foreign-owned enterprises registered in the China (Shanghai) Pilot Free Trade Zone (the 'FTZs' or 'Shanghai FTZ'), an area that enjoys "preferential policies to safeguard foreign investors' legitimate rights and interests" with its special legal and regulatory framework.³¹ Secondly, the transaction had close relationships with foreign investors located outside Chinese territory. This was shown from the performance of the contract, which bore certain features of a 'foreign-related' matter in two aspects. First, the goods were transported from outside of Chinese territory to the Shanghai FTZ where authorities carried out supervision of the bonded goods; second, the importation process into Chinese territory was not completed until the goods were transferred from inside the FTZ to outside the FTZ after customs clearance.

²⁹ According to the Organic Law of the People's Courts of the People's Republic of China, an Intermediate People's Court is the second lowest local people's court in China.

³⁰ "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" Art. 3.

³¹ Dellei Peng & Xiuyan Fei "China's Free Trade Zones: Regulatory Innovation, Legal Assessment and Economic Implication" (2017) *The Chinese Economy* 238.

The significance of this case is that it has reinforced China's fundamental commitment to abide by its obligations under international treaties such as the New York Convention. In line with the arbitral award, the SPC in 2015 published several Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road," emphasising the importance of effective judicial remedies for Chinese and foreign market players.³² In the same vein, the SPC issued an opinion in 2017 regarding support for the construction of FTZs,³³ which constitutes an authoritative legal interpretation on the validity of foreign arbitrations in China. The court's broader interpretation of "foreign elements" displays Chinese courts' increasingly enforcement friendly approach to foreign awards.³⁴ Pursuing commercial arbitration in line with international standards is crucial to bolster the confidence of investors.³⁵ Upholding the validity of international arbitral awards made under foreign arbitral institutional rules

³² SPC, "No. 9 [2015] Opinions of the Supreme People's Court on People's Courts Providing Judicial Services and Guarantees for the Construction of the Belt and Road Initiative" (20 February 2017) Article 4

<http://encmt.court.gov.cn/ChinaForeignRelatedCommercialTrial/2017-02/20/c_59482.htm> accessed 25 August 2019.

³³ "China International Commercial Court | CICC - Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones" [Article 9 of] which provides:

"[I]f a party opposes the recognition or enforcement of an arbitration award rendered in a foreign-seated arbitration merely on the ground that there is no foreign-related element, the courts shall not uphold the objection if

- (a) at least one of the parties to the arbitration dispute is a foreign-invested company registered within a pilot free trade zone;
- (b) the parties entered into an arbitration agreement submitting disputes to arbitration seated outside mainland China;
- (c) the opposing party was the claimant who initiated the foreign-seated arbitration in the first place, or the opposing party was the respondent who participated in the foreign-seated arbitration without challenging the validity of the arbitration clause throughout the arbitration."

³⁴ Richard Bell, Ik Wei Chong and Samuel Sharp, Clyde & Co. "The Golden Landmark case – A new dawn for enforcement of foreign arbitral awards in China?"

<<http://csj.hkics.org.hk/site/2016/08/11/the-golden-landmark-case-a-new-dawn-for-enforcement-of-foreign-arbitral-awards-in-china/>> accessed 23 February 2020.

³⁵ Weixia Gu, "The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, *Ad Hoc*, and Foreign Institutions Seated in Mainland China" (*Social Science Research Network*, 2017)

<<https://papers.ssrn.com/abstract=3085568>> accessed 10 August 2019.

promotes the internationalisation of arbitration.³⁶ It further strengthens the international credibility of rule of law in China and promotes a stable and predictable legal environment for businesses operating in the OBORI.³⁷

Nonetheless, the scope and concept of ‘foreign-related’ disputes are still matters of concern in Chinese arbitration and adjudication practice. While the SPC in this decision construed the term ‘foreign-related’ relatively flexibly and broadly, there is no specific legislation in this regard.³⁸ Since the parties in this case were both registered in Shanghai, and the FTZs enjoy a strategic legal status, it would be over-simplistic to suggest that this will remain as an invariable and settled interpretation in future Chinese judgments.

Another notable development in Chinese arbitration reform that exemplifies the arbitration-friendly trend of Chinese courts is the introduction of *ad hoc* arbitration in the FTZs. Before, it was legally void for two parties to conclude an arbitration agreement without specifying an arbitration commission. Nevertheless, under the Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones, the courts are permitted to take a friendly approach to validating *ad hoc* arbitration agreements, if concluded between parties who are registered in FTZs.³⁹ Compared to the previous strict rules of unitary institutional arbitration, *ad hoc* arbitration permits parties to choose freely amongst different institutional rules, rather than merely choosing the institutions that will administer the arbitration.⁴⁰ This improves procedural autonomy and flexibility in OBORI dispute resolution.⁴¹

However, there are two principal defects in the limited reform launched in China’s FTZs. Firstly, the inconsistency with China’s Arbitration Law causes uncertainty in the implementation of *ad hoc* arbitration. According to China’s Arbitration Law, promulgated in 1994, an arbitration agreement must contain a

³⁶ *ibid.*

³⁷ “Stanford Law School China Guiding Cases Project , B&R Cases ‘TM, TC12” (n 21) 5.

³⁸ Gu (n 2) 23.

³⁹ “CICC - Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones” (2016) para 9
<<http://cicc.court.gov.cn/html/1/219/199/201/807.html>> accessed 18 August 2019.

⁴⁰ Tietie Zhang, “Enforceability of *Ad Hoc* Arbitration Agreements in China: China’s Incomplete *Ad Hoc* Arbitration System” (2013) 46 *Cornell International Law* 40, 380.

⁴¹ Gu (n 35) 276.

designated arbitration institution; otherwise, it is invalid.⁴² Article 15 further requires arbitral institutions to be organised by the PRC government and be subjected to China Arbitration Association. These rigid legislative stipulations on arbitration defeat the autonomy of parties.⁴³ Yet, they have not been abrogated. The legal framework of arbitration in China has fallen far behind international arbitration practice as well as the expectation and needs of foreign investors.

Secondly, a general lack of independence in the administrative processes⁴⁴ inhibits parties from applying proper arbitration procedures.⁴⁵ As arbitration commissions in China have the obligations of administrative registration and are supervised by governments during establishment,⁴⁶ the independence and integrity of Chinese arbitration commissions are questionable, concerning the local governments' organisational and supervisory roles. Consequently, Chinese parties and even legal practitioners tend to rely more on courts than arbitrators.⁴⁷ Although the SPC's Opinion has relaxed the parties' choices of *ad hoc* arbitration, there is no explicit clarification with regards to the requirements of certainty in the regulation; nor have any specific *ad hoc* arbitration rules been clarified.

Thus, with the wave of pro-arbitration reform in the practice and opinions of the Chinese judiciary,⁴⁸ the characteristics rooted in the Chinese legal system and legislative restrictions cast doubts on the efficiency of the *ad hoc* arbitration development. Chinese law does not provide for the legal status of *ad hoc* arbitration and there is uncertainty in its implementation owing to the lack of

⁴² Arbitration Law 1994, arts. 16, 18.

⁴³ Tony Zhang and Grace Zheng, "Limited Application of *Ad Hoc* Arbitration in China" (*Vantage Asia*, 19 April 2018) <<https://www.vantageasia.com/limited-application-of-ad-hoc-arbitration-in-china/>> accessed 21 August 2019.

⁴⁴ Silk Road Briefing, "China Passes Belt and Road Trade Dispute Mechanism, But Who Will Have Final Say?" (*Silk Road Briefing*, 24 January 2018) <<https://www.silkroadbriefing.com/news/2018/01/24/china-passes-belt-road-trade-dispute-mechanism-will-final-say/>> accessed 23 August 2019.

⁴⁵ *ibid* (n 27).

⁴⁶ Tao, Jingzhou. "Salient Issues in Arbitration in China Center" (2012) American University International Law Review 27 no. 4 807, 812.

⁴⁷ Wei S, 'Recent Development of Ad Hoc Arbitration in China: SPC Guidance and Hengqin Rules' (*Kluwer Arbitration Blog*, 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/19/recent-development-ad-hoc-arbitration-china-spc-guidance-hengqin-rules/>> accessed 2 March 2020.

⁴⁸ Gu (n 2).

independence. To tackle these defects, a more open and liberalised reform⁴⁹ has to be accelerated by either China's arbitration institutions or the legislature. This is critical in enhancing the competitiveness of China's dispute resolution mechanism and to better suit the need for dispute resolution of parties in OBORI projects.

III. INNOVATIONS AND PITFALLS OF THE ESTABLISHMENT OF THE CICC

Apart from promoting the development of arbitration, the SPC consistently strives to strengthen its judicial assistance for OBORI and to improve international governance and the development of the rule of law in China. Modelled on the examples of international commercial courts in England and Singapore, China established its first international commercial court ("CICC") in 2018.⁵⁰ The CICC is a mini-circuit court, which is subordinate to the SPC. With the mission of handling international commercial and investment disputes and especially OBORI cases,⁵¹ the CICC has set up three separate tribunals in Beijing, Shenzhen, and Xi'an respectively.⁵² Established in these three significant pivots on the OBOR connecting the main economic development regions, the CICC strategically creates an international and fair dispute resolution environment.⁵³ It indicates significant strides on the part of China in the construction of a mature system of dispute resolution in the OBORI. These advantages are, in particular, an innovative dispute resolution structure, high-quality judges, and a more efficient and convenient procedure.

Regarding its innovative structure, the CICC synthesises arbitration, mediation, and adjudication as a 'one-stop-shop' service.⁵⁴ This means that the

⁴⁹ Weixia Gu, "The Developing Nature of Arbitration in Mainland China and Its Correlation with the Market: Institutional, Ad Hoc, and Foreign Institutions Seated in Mainland China" (*Social Science Research Network*, 2017)

<<https://papers.ssrn.com/abstract=3085568>> accessed 2 March 2020.

⁵⁰ "CICC - Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court"

<<http://cicc.court.gov.cn/html/1/219/199/201/817.html>> accessed 21 August 2019.

⁵¹ *ibid* (n 18).

⁵² "CICC - A Brief Introduction of China International Commercial Court"

<<http://cicc.court.gov.cn/html/1/219/193/195/index.html>> accessed 21 August 2019.

⁵³ *ibid*.

⁵⁴ CICC (n 39) Art 11.

alternative dispute resolution methods are all integrated “organically”.⁵⁵ With regards to the CICC’s coordination with mediation procedure, based on parties’ consent, the court can entrust a member of international commercial mediation institutions to mediate the case.⁵⁶ Alternatively, under the consent of both parties, the court may conduct the mediation by one judge, a collegial bench, or a member of the Expert Committee (discussed below).⁵⁷ Thereby, parties who reach a mediation agreement can request the CICC to make a statement that renders the agreement enforceable. Regarding integrating arbitration into the CICC, to strengthen the parties’ autonomy, it empowers the parties to gain access to alternative dispute resolution directly through its dispute resolution partner institutions.⁵⁸ This ‘one-stop-shop’ service platform can efficiently utilise China’s existing resources of international arbitration and mediation institutions,⁵⁹ including five international commercial arbitration institutions and two mediation centres.⁶⁰

Secondly, its capacity to deal with international commercial disputes is evidenced by the profiles of the CICC judges. Until now, the SPC has appointed 15 judges to the CICC. A reading of their resumes attests to their professional knowledge and experience in dispute settlement in international investment and

⁵⁵ Matthew S Erie, “The China International Commercial Court: Prospects for Dispute Resolution for the “Belt and Road Initiative” (2018) 22 *The American Society of International Law Insights*.

⁵⁶ *ibid* (n 18) 24.

⁵⁷ Art 94 and 95 of 2017 CPL. See also art 3 of the Supreme People’s Court’s Provisions on Several Issues Concerning the Civil Mediation of the People’s Court effective as of 1 November 2004.

⁵⁸ “SPC’s Notification on the International Commercial Arbitration and Mediation Institutions Included in the ‘One-stop-shop’ International Commercial ADR Mechanism (*Shenzhen International Arbitration Institute*, 5 December 2018) <<http://cicc.court.gov.cn/html/1/218/62/164/1536.html>> accessed 6 March 2020.

⁵⁹ Jamie P Horsley, “Challenging China to Make Good Project Governance a Centerpiece of the Belt and Road Initiative” (*Yale Law School*, 2018) 10.

⁶⁰ The five international commercial arbitration institutions are namely: China International Economic and Trade Arbitration Commission (CIETAC), Shanghai International Economic and Trade Arbitration Commission (SHIAC), Shenzhen Court of International Arbitration (SCIA), Beijing Arbitration Commission (BAC), China Maritime Arbitration Commission (CMAC), China Council for the Promotion of International Trade Mediation Center, and Shanghai Commercial Mediation Center (SCMC).

trade law.⁶¹ As required by the CICC Provisions, these 15 judges have all worked in the SPC for an average of six years, have extensive experience in trials, and possess thorough understandings of international law and Chinese law.⁶² Among them, 12 judges hold PhDs in Law conferred by leading Chinese universities such as Tsinghua University and Peking University,⁶³ and most of them have studied abroad in different jurisdictions, such as the UK, USA, and Canada.⁶⁴ In the meantime, a comprehensive integrated judicial reform⁶⁵ has been implemented following the 19th Communist Party Congress report, which encourages the development of a multi-faceted dispute resolution mechanism and cultivation of more qualified judges. To cope with the growing number of foreign-related disputes and increasingly complex legal issues,⁶⁶ an International Commercial Expert Committee has been established.⁶⁷ Comprised of 12 Chinese and 20 non-Chinese legal professionals⁶⁸ who provide expert knowledge on foreign law,⁶⁹ the Expert Committee is able to make decisions indirectly via the mediation procedure,⁷⁰ and to deliver advisory and strategic opinion to the CICC.

In addition to the innovative court structure and high-quality judges, the CICC has pioneered the adoption of modern procedures for the submission of

⁶¹ Huiqin Jiang, “China’s International Commercial Court: A Dispute Settlement Mechanism for the Belt and Road Initiative” 18.

⁶² SPC, “Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court” [2018] Fa Shi 11, 27.

⁶³ Jiang (n 61).

⁶⁴ See the CICC judges’ resumes: “Eight Judges of China International Commercial Court Were Appointed” (CICC, 3 July 2018) <<http://cicc.court.gov.cn/html/1/219/208/210/821.html>> accessed 12 November 2019; “The Second Group of Judges of the China International Commercial Court Were Appointed by the Supreme People’s Court” (CICC, 7 December 2018) <<http://cicc.court.gov.cn/html/1/219/208/210/1134.html>> accessed 2 March 2020.

⁶⁵ Supreme People’s Court Monitor, “Judicial Reform Post-19th Party Congress” (*Supreme People’s Court Monitor*, 22 December 2017) <<https://supremepeoplescourtmonitor.com/2017/12/22/judicial-reform-post-19th-party-congress/>> accessed 24 August 2019.

⁶⁶ Liu Tingmei, “The China International Commercial Court (CICC) in 2018” <<http://cicc.court.gov.cn/html/1/219/208/209/1316.html>> accessed 23 February 2020.

⁶⁷ CICC (n 39) Art 12.

⁶⁸ Eric (n 55).

⁶⁹ Jiang (n 61).

⁷⁰ Cai and Godwin (n 19).

evidence⁷¹ in designing an electronic filing and transmission system via audio-visual facilities.⁷² It also simplified its notarial process, by removing requirements for all overseas evidence to be notarised. Instead, it places greater emphasis on examinations at hearings. English evidence, based on both parties' understanding and affirmation, can be submitted directly to the court without translation. These measures, to a large extent, have facilitated procedural efficiency and provided convenience for far-flung foreign litigants.⁷³

However, it should not be neglected that the CICC, as a Chinese court, also faces its own institutional constraints.⁷⁴ It cannot be detached from the social settings and political restrictions in China that every Chinese court has to confront. These potential pitfalls include the perceived political function that the court plays, the limitations placed on judges, and the enforcement of awards.

Firstly, there are concerns that the political requirements imposed on the CICC and its subservient status to the SPC⁷⁵ influence the impartiality and independence of the CICC.⁷⁶ The political requirements imposed on the CICC, according to the Supreme People's Court Monitor, are at least two-fold. First, the establishment of the CICC must be in line with China's Central Committee's Fourth Plenum Decision,⁷⁷ which emphasises the need to protect China's

⁷¹ Gu, 'China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia' (n 31) 174.

⁷² "Baker McKenzie FenXun Insight" <https://www.bakermckenzie.com/-/media/files/insight/publications/2018/07/al_china_splaunchesinternationalcommercialcourts_july2018.pdf?la=en> accessed 25 August 2019.

⁷³ Gu Weixia, "China's Belt and Road Development and a New International Commercial Arbitration Initiative in Asia" (2018) 51(5) *Vanderbilt Journal of Transnational Law*, University of Hong Kong Faculty of Law Research Paper No. 2019/012 <<https://ssrn.com/abstract=3346924>> assessed 2 March 2020.

⁷⁴ Cai and Godwin (n 19).

⁷⁵ Supreme People's Court Monitor, "Update on China's International Commercial Court" (*Supreme People's Court Monitor*, 11 March 2018) <<https://supremepeoplescourtmonitor.com/2018/03/11/update-on-chinas-international-commercial-court/>> accessed 20 August 2019.

⁷⁶ Siyi Lin, "China's International Commercial Court under the Belt and Road Initiative" (2018) 29 *International Company and Commercial Law Review* 4, 669.

⁷⁷ Willy Wo-Lap Lam, "The Central Committee Fourth Plenum Gives Further Powers to the CCP Leadership 'Core'" (*The Jamestown Foundation*, 19 November 2019) <<https://jamestown.org/program/the-central-committee-fourth-plenum-gives-further-powers-to-the-ccp-leadership-core/>> accessed 23 February 2020.

sovereignty, security, and development interests.⁷⁸ Second, courts must support important government strategies,⁷⁹ particularly the major economic development policies that promote foreign trade and investment (such as the OBORI itself), as asserted by SPC President Zhou Qiang's 2018 report to the National People's Congress.⁸⁰ This articulation of the CICC's political functions has given rise to stakeholders' concern about Chinese governmental control over its processes and greater uncertainty of the outcomes in OBORI-related disputes.⁸¹

Secondly, as SPC Judge Gao Xiaoli argued, the prohibition of the engagement of foreign judges or international legal counsel under China's current judicial system will become the primary obstacle in upgrading the CICC into a trustworthy and high-quality international court.⁸² It is clear that the CICC operates as a platform to further internationalise China's dispute resolution institutions.⁸³ However, Art. 9 of the PRC Law on Judges stipulates that judges of Chinese courts must be Chinese nationals, making it impossible for foreign nationals to serve on the bench.⁸⁴ Compared with the international courts in Dubai and Singapore, where a significant characteristic is the presence of international judges, the CICC's Expert Committee is only able to provide advice

⁷⁸ CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (Passed on 23 October at the 4th Plenary Session of the 18th Central Committee of the Chinese Communist Party) <<https://www.chinalawtranslate.com/en/fourth-plenum-decision/>> accessed 23 February 2020.

⁷⁹ Supreme People's Court Monitor (n 65).

⁸⁰ 'Report on the Work of the Supreme People's Court' (*Xinhua Net*, 10 March 2018) <http://www.xinhuanet.com/politics/2018-03/10/c_1122514997.htm> accessed 23 February 2020.

⁸¹ Huo Zhengxin & Yip Man, "Comparing the International Commercial Courts of China with the Singapore International Commercial Court" (2019) 68(4) *International and Comparative Law Quarterly*, 903.

⁸² Supreme People's Court Monitor (n 65).

⁸³ *ibid* (n 78).

⁸⁴ Sun Wei, "International Commercial Court in China: Innovations, Misunderstandings and Clarifications - Kluwer Arbitration Blog" (2018) <<http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications/>> accessed 23 February 2020.

opinions and serve mainly as mediators.⁸⁵ Ultimately, the Expert Committee is insufficient to render the court internationally credible.

Furthermore, the absence of bilateral treaties for the enforcement of civil judgments and the limited number of reciprocity partners for the enforcement of foreign court judgments undermine the enforceability and effectiveness of CICC judgments. As of November 2019, China concluded only 39 judicial assistance treaties related to civil matters with other states among the whole 78 OBORI partners.⁸⁶ Without a treaty or prior judicial authority from that jurisdiction confirming a relationship of reciprocity,⁸⁷ parties in the OBORI will meet increasingly unpredictable commercial risks in an uncertain legal environment. Given the sub-optimal legal environment CICC faces, there seems to be ample room for China to improve its international commercial court⁸⁸ as a centre for settlement of OBOR disputes.

CONCLUSION

In light of increasing demand for transnational dispute resolution arising from the OBOR project, China is committed to providing a well-suited legal environment by accelerating the reform of its legal services. In this essay, I have argued that China's dispute resolution mechanisms have witnessed rapid development, but there is still room for substantial improvement in terms of its level of internationalisation and independence. In support of the varied transactions and co-operation between OBOR states and regions, China has established the CICC, promoted the recognition and enforcement of foreign

⁸⁵ (Trial) Notice of the General Office of the SPC's Working Rules for the International Commercial Expert Committee: "[T]he members of the International Commercial Expert Committee serve a four-year term, are appointed by the SPC, and are serving mainly a mediation function." Erie (n 55).

⁸⁶ Sheng Zhang, "China's International Commercial Court: Background, Obstacles and the Road Ahead" (2020) *Journal of International Dispute Settlement*, 150. Further data about China's judicial assistance treaties can be found in: Ministry of Foreign Affairs, 'List of Judicial Assistance Treaty Concluded by China' (2019) <http://new.fmprc.gov.cn/web/ziliao_674904/tytj_674911/tyfg_674913/t1215630.shtml> accessed 23 February 2020.

⁸⁷ Zihao Zhou, Nathan Harpainter and Yuan Emily Cao, 'Survey Results: Rules on China's International Commercial Courts' (2018) 3 *China Law Connect* <<https://cgc.law.stanford.edu/commentaries/clc-3-201812-26-zhou-harpainter-cao/>> accessed 23 February 2020.

⁸⁸ Wilske (n 23) 180.

arbitration awards, and introduced *ad hoc* arbitration in the FTZs. However, the practicability of *ad hoc* arbitration, the enforcement of judgements by the CICC, and its functional limitations have aroused heated controversy. In order to safeguard the confidence of investors and co-operating parties in OBORI projects, an in-depth reform of independence of arbitral and judicial institutions would be welcomed. Ultimately, a successful implementation of the OBORI dispute resolution mechanism would encourage multinational companies to engage in transnational business with China.