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Framework for the Resolution of Disputes Under the Belt and Road Initiative

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(*)

This article proposes a decision-making framework for the selection of a dispute resolution mechanism within the context of Belt and Road Initiative (BRI) projects. While arbitration remains the default choice for the resolution of international disputes, there is increased appetite for other mechanisms. Bolstered by the Singapore Convention on Mediation, the use of mediation, including in hybrid procedures like Med-Arb, is increasing. Dispute boards, such as under the Singapore Infrastructure Dispute-Management Protocol, are also a valued option as they are well-suited for large-scale infrastructure projects, which are the backbone of the BRI. Among international commercial courts, the China International Commercial Courts is likely to become a favourable destination for Chinese parties to site BRI disputes due to its flexibility and status as part of the Supreme People's Court. Against the myriad of options available to parties, the decision-making framework aims to assist parties to choose an appropriate dispute resolution mechanism for their BRI contract.

1 INTRODUCTION

The Belt and Road Initiative ('BRI') consists of a land-based 'Silk Road Economic Belt' and a 'Maritime Silk Road'. Officials have stated that the BRI will be open to all nations and not limited by geography. (1) The undertaking is massive, ambitious, and complicated with parties and investors of disparate legal systems and expectations. (2) According to estimates, China will have initiated or completed ● BRI infrastructure projects worth a total of USD 1 trillion by 2025. (3) In its early stages, the BRI is being propelled by the continued upward development of the Chinese economy, but its consolidation and success in the future will hinge upon continued investor confidence. Such confidence will require a robust and well-established dispute resolution system that is capable of fairly, efficiently, and effectively solving cross-border commercial disputes. (4) Within the context of BRI projects, it is expected that three forms of disputes may arise: (1) state-state disputes; (2) investor-state disputes; and (3) investor-investor disputes. The focus of this article will be on investor-investor (i.e., commercial) disputes.

With the pandemic, the policy attention of many BRI participating countries has turned to combating the virus, putting economic cooperation and infrastructure development on the back burner. (5) With China's economy contracting in the first quarter of 2020 for the first time in decades, Chinese capital is likely to be mobilized to meet domestic needs in the short term, which could translate into reduced investment in the BRI's more peripheral markets over the next twelve to twenty-four months. Combined with the fact that many of the countries signed up to BRI projects face escalating foreign debt pressures, the stage may be set for a long-term reorientation towards more strategic and cost-efficient infrastructure projects, and reduced reliance on loans from Chinese policy banks. (6) BRI infrastructure projects are facing considerable challenges and increased financing risk. This sets the stage for a nuanced dispute resolution approach that caters to the unique context of BRI projects.

Arbitration will continue to play a central role in the resolution of BRI disputes due to its ability to offer parties a neutral venue, control over proceedings and confidentiality. At the same time, because of the perceived high cost and inefficiencies of arbitration, there is increased appetite among users for alternative mechanisms. In China, mediation is ingrained in its dispute resolution culture. In addition to its use as a standalone mechanism, hybrid procedures such as Med-Arb are also popular. Mediation is also boosted by the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention on Mediation') which facilitates the enforcement of international ● mediated settlement agreements. Specialized international commercial courts have also risen in prominence in recent years. Notably, the China International Commercial Courts ('CICC') is likely to be a significant venue to site BRI disputes. Finally, dispute boards are also an important option as they are well-suited for large-scale infrastructure projects, which form the backbone of the BRI. The various dispute resolution mechanisms available to parties will be analysed in Part II of this article. In Part III of this article, a decision-making framework is proposed to assist parties to choose the right dispute resolution mechanism for their BRI contract.

2 DISPUTE RESOLUTION MECHANISMS UNDER THE BRI

The BRI will generate everything from simple, one-off facility arrangements to large-scale, long-term infrastructure projects with highly complex financing requirements. The vast majority of BRI transactions (and disputes) will be cross-border and will typically involve at least one Chinese party. (7) While arbitration is expected to be the default

mechanism for such cross-border BRI disputes, other mechanisms are also gaining traction. Notably, mediation, both as a standalone mechanism and within hybrid mechanisms, international commercial courts, and dispute boards are alternatives increasingly favoured by parties.

2.1 Arbitration

According to the 2020 SIDRA International Dispute Resolution Survey ('**SIDRA Survey**'), arbitration was the most-used dispute resolution mechanism among survey respondents from 2016 to 2018. Enforceability, impartiality, and finality were the top three factors that influenced their choice of arbitration. (8) Arbitration proceedings offer a more neutral forum than national courts, are generally more confidential than judicial proceedings and arbitral awards are enforceable around the world through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('**New York Convention**'). (9) In China, international arbitration commissions are perceived to be more independent and less susceptible to corruption or protectionism than local courts. The ability to choose one's ● arbitrators, and generally to agree on the procedural conduct of the arbitration, gives the disputing parties greater control over the proceedings. (10) Given its multitude of advantages, arbitration is likely to remain the default option for resolving cross-border BRI disputes.

Parties negotiating a choice-of-forum clause in a BRI contract are likely to opt for a well-known arbitral institution and seat. According to the 2018 Queen Mary University of London International Arbitration Survey ('**QMUL Survey**'), the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva and the five most preferred arbitral institutions are the International Chamber of Commerce ('**ICC**'), London Court of International Arbitration ('**LCIA**'), Singapore International Arbitration Centre ('**SIAC**'), Hong Kong International Arbitration Centre ('**HKICAC**') and Stockholm Chamber of Commerce ('**SCC**'). (11) As Chinese parties are likely to have leverage in BRI negotiations, this may lead to more Chinese-centric or Asia-centric choice of arbitration institution and seat in BRI disputes. (12) Established institutions in the region include SIAC, HKIAC and China International Economic and Trade Arbitration Commission ('**CIETAC**'). The HKIAC has also formed an industry-focused BRI Advisory Committee to support parties embarking on BRI projects. (13) Chinese parties to BRI contracts will undoubtedly feel more comfortable with institutions that are familiar with Chinese business practices and also accustomed to conducting proceedings in the Chinese language. (14)

In terms of seat, Hong Kong and Singapore are likely to be popular as they have well-established pro-arbitration legal regimes, excellent logistical facilities and Chinese language capacity, a potentially critical consideration for projects that involve Chinese parties. (15) Hong Kong has its advantages due to its reciprocal arrangements with Mainland China for enforcement of arbitration awards and interim measures. (16) 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 over USD 1.3 billion. The arrangement extends to arbitrations seated ● in Hong Kong before six arbitral institutions, including the HKIAC, CIETAC and ICC. The HKIAC reported that 70% of applications were made by parties from jurisdictions outside of Mainland China. Half of the applications concerned assets or evidence owned by Mainland Chinese parties, and the other half concerned assets in Mainland China owned by non-Mainland Chinese parties. As such, Hong Kong would be advantageous for parties intending to enforce arbitral awards against assets, or requiring evidence, located in Mainland China. (17)

2.2 Mediation

Construction and infrastructure projects are a core component of the BRI. Disputes in this sector can be particularly costly to litigate and arbitrate. (18) According to the 2019 Queen Mary International Arbitration Survey – Driving Efficiency in International Construction Disputes ('**Queen Mary International Construction Disputes Survey**'), the arbitral process was seen by a significant proportion of respondents as being a barrier to the fair resolution of lower value disputes (less than USD 10 million) due to the inefficiency and high cost of arbitration. (19) This sentiment is echoed in the 2020 SIDRA Survey, where respondents expressed greater dissatisfaction with the costs and speed of arbitration, as compared to mediation. (20)

Mediation is private, quick, and flexible, as well as generally inexpensive. Even if mediation does not generate a settlement, it can help the parties refine the dispute, making it ultimately less costly to resolve. (21) In the 2020 SIDRA Survey, more than 80% of respondents chose impartiality, speed, confidentiality, flexibility of processes, and cost as factors which influenced their choice to choose mediation. (22) According to the 2019 Queen Mary International Construction Disputes Survey, 32% of respondents used mediation to resolve international construction disputes, compared with 71% who had experience with arbitration, which was the most used procedure. 34% of users also used ● negotiation or the intervention of senior representatives. (23) Thus, while arbitration remains the default choice, conciliatory forms of dispute resolution such as negotiation and mediation can play an important role in the resolution of construction disputes.

Not only is mediation a good choice in terms of speed and cost, it is also well-suited to the BRI context. Mediation is strongly rooted in the legal and dispute resolution culture in Asia. (24) Under Confucian legal thought, mediation is encouraged to prevent societal contention and the collapse of social relations. (25) Mediation is a favoured option for Asian parties that prefer the non-adversarial, face-saving resolution of disputes. (26) By choosing a more conciliatory approach such as mediation, parties have also noted that the agreed outcome is easier to be voluntarily enforced than a decided outcome in an arbitral award. (27)

In view of these advantages, there has been a push to encourage the use of institutional mediation for BRI disputes. In January 2019, the Singapore International Mediation Centre ('SIMC') signed a Memorandum of Understanding ('MOU') with the China Council for the Promotion of International Trade ('CCPIT') and China Chamber of International Commerce ('CCOIC') Mediation Centre to offer mediation services and establish a BRI Mediator Panel. This MOU builds on the agreement signed between the same organizations in 2017 to promote international commercial mediation amongst businesses in China and Singapore. (28) In October 2019, the SIMC also signed a MOU with the Permanent Forum of China Construction Law ('PFCL') to promote mediation for infrastructure-related disputes. (29)

P 249 The Singapore Convention on Mediation, which entered into force in September 2020, further bolsters the rise of mediation by establishing an enforceability framework for settlement agreements. While China has signed the Singapore Convention, it has yet to ratify it. It will be interesting to see whether ● parties are able to use mediation effectively to resolve BRI disputes, especially as Chinese parties are more accustomed to an evaluative style of mediation, whilst Western parties favour a more facilitative approach. A Western facilitative mediation approach typically features a disinterested neutral whom the parties do not know and who is required to refrain from offering the parties substantive guidance. Whereas Chinese parties may select a high-status insider mediator known to them, who is prepared to offer her view on useful ways to resolve the dispute and who will likely make frequent use of private sessions to facilitate face-saving. (30) To cross this cultural chasm, the role of the mediator is particularly important. In this regard, SIMC-CCPIT/CCOIC's BRI Mediator Panel will come into handy for parties to select a neutral that is able to balance parties' expectations and their preferred style of mediation.

2.3 Mixed mode mechanisms (Med-Arb)

Mediation is not only used as a standalone mechanism but also routinely implemented during arbitration and litigation as part of mixed-mode procedures in China. (31) According to the 2020 SIDRA Survey, respondents chose Med-Arb over standalone arbitration, where the preservation of business relationship was important. (32) For Chinese parties, the overriding objective is generally to preserve the commercial relationship. Chinese judges and arbitrators routinely suggest mediating disputes that come before them, rather than pursuing the adversarial process to the end. (33) Med-Arb (defined broadly to include any combination of mediation and arbitration) has been reported to be present in nearly half of the arbitrations in China. (34) Where both sides are Chinese, parties are more likely to consent to Med-Arb than when foreign parties are involved. (35) As such, Med-Arb has become a prominent feature of the dispute resolution landscape in China. Thus, Med-Arb will be useful in BRI projects as the mediation aspect helps to preserve the business relationship, and any resultant settlement can be recorded as a consent award which is enforceable under the New York Convention.

P 250 ●

At the same time, one of the major criticisms of Med-Arb conducted in China is that it is the norm for the arbitrator to 'switch hats' and take on the role of mediator. (36) Issues of due process, confidentiality and conflict of interest may arise, as the information obtained during the mediation stage might, consciously or otherwise, be relied on by the arbitrator in the subsequent arbitration stage. (37) In other jurisdictions, for instance, under the SIAC-SIMC Arb-Med-Arb Protocol, separate arbitrators and mediators are appointed by the two institutions under their respective rules. Chinese arbitral institutions have taken steps to address this issue of 'double-hatting'. In 2014, CIETAC amended its rules to address the concerns of 'parties and arbitration professionals with western culture background [who] are concerned with or even sceptical of the process in which arbitrators act as mediators at the same time'. (38) Article 47 of the CIETAC Arbitration Rules (effective 1 January 2015) provides for traditional Med-Arb, whereby the arbitral tribunal may conciliate the dispute. However, where parties do not wish to have conciliation conducted by the tribunal, CIETAC may assist the parties to conciliate the dispute in a manner and procedure it considers appropriate. Similarly, the Beijing Arbitration Commission ('BAC') allows parties the option of having the tribunal conduct mediation, but also allows parties to opt for independent mediation at BAC's Mediation Centre. (39)

As China is expected to take the lead in shaping cross-border dispute resolution processes under the BRI, mixed-mode mechanisms with Chinese characteristics such as Med-Arb, are expected to increase in usage as well. For instance, in June 2020, the SIMC signed a MOU with the Shenzhen Court of International Arbitration ('SCIA') to support

business partnerships under the Singapore-China (Shenzhen) Smart City Initiative, by offering a Med-Arb service. (40) Where a mediation is administered by SIMC, any resulting mediated settlement agreement may be recorded by the SCIA as an arbitral award. Hence, parties who mediate with SIMC have the added advantage of being able to effectively enforce their mediated settlement agreement in China and elsewhere and obtain greater finality of outcomes. (41) ●

2.4 International commercial courts

Beyond Med-Arb, international commercial courts are also likely to feature prominently in BRI dispute resolution. 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 ('**Opinion**') which led to the establishment of the CICC, touted to be a 'one-stop' dispute resolution mechanism that integrates arbitration, litigation, and mediation. (42) The first CICC was established in Shenzhen and the second CICC was established in Xi'an.

The creation of the CICC rides on the wave of other international commercial courts established in recent years. The Singapore International Commercial Court ('**SICC**') opened its doors in 2015. Disputes are adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore and international judges. (43) The SICC also eases foreign attorney's registration requirements and affords them greater authority to appear and plead in any relevant proceedings once registered. (44) The Dubai International Financial Centre Courts ('**DIFC Courts**') deal with all cases arising out of the DIFC or where parties select the DIFC Courts' jurisdiction. (45) The DIFC Courts' bench consists of six international and three Emirati resident judge, and is led by Chief Justice Zaki Azmi. (46) The Astana International Financial Centre Court ('**AIFC Court**') led by the Rt. Hon. Lord Mance, offers a common law court system, a unique development in central Asia. The AIFC Court has exclusive jurisdiction over disputes arising out the AIFC and where parties agree to give the AIFC Court jurisdiction. (47) The AIFC aims to foster growth opportunities from the Eurasian Economic Union, Central Eurasia and the BRI. (48) In Europe, there is the established London Commercial Court ('**LCC**'), and also newer additions such as the International Commercial Courts of Paris ('**ICCP**'), Chamber for International Commercial Disputes of the District Court of Frankfurt/Main ('**Frankfurt ICC**'), the ● Netherlands Commercial Court ('**NCC**') and the Brussels International Business Court ('**BIBC**').

While parties are free to choose other international commercial courts, the CICC is likely to be the first port of call for Chinese parties to BRI contracts. Article 1 of the CICC Procedure Rules describes the CICC as an international commercial dispute resolution mechanism that integrates litigation, mediation, and arbitration for parties to resolve disputes fairly, efficiently, conveniently, and economically. (49) Article 3 states that the CICC protects the legitimate rights and interests of Chinese and foreign parties equally. The two CICC courts are permanent bodies within the Supreme People's Court ('**SPC**'). The judges are selected from senior judges familiar with international laws and norms and proficient in English and Chinese. (50) The CICC also has an Expert Committee comprised of Chinese and foreign experts invited by the SPC. The members may mediate cases entrusted by the CICC, provide advisory opinions on specific legal issues in international commercial dispute cases for the people's courts, and give advice and suggestions on relevant judicial interpretations and judicial policies formulated by the SPC. (51) Luo Dongchuan, Vice President of the SPC remarked that 'internationalization is the prominent characteristic of the CICC, which pioneered the system of international commercial expert committee composed of legal experts from all over the world who specialize in international law and their own domestic laws'. (52) Working rules for the Expert Committee were issued in November 2018. (53)

The CICC's jurisdiction is set out in Article 2 of the Provisions of the SPC on Several Issues Regarding the Establishment of the International Commercial Court ('**SPC Provisions**'). (54) The International Commercial Court accepts the following cases: (1) first instance international commercial cases in which the parties have chosen the jurisdiction of the SPC according to Article 34 of the ● Civil Procedure Law, with an amount in dispute of at least 300 million Chinese yuan (55); (2) first instance international commercial cases which are subject to the jurisdiction of the higher people's courts who nonetheless consider that the cases should be tried by the SPC for which permission has been obtained; (3) first instance international commercial cases that have a nationwide significant impact; (4) cases involving applications for preservation measures in arbitration, for setting aside or enforcement of international commercial arbitration awards; and (5) other international commercial cases that SPC considers appropriate. Dr Shi Jingxia, who is a member of the CICC Expert Committee, notes that the CICC's jurisdiction is essentially limited to parties having a substantial connection to China, which is not the case with other international commercial courts in the world. (56) For instance, the SICC in Singapore has jurisdiction over an international commercial claim so long as the parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement. (57) In this regard, the CICC may wish to consider expanding its jurisdictional requirements in order to attract more parties.

The CICC embodies a hybrid mechanism where mediation and arbitration are interwoven into the dispute resolution process. Article 12 of the SPC Provisions directs that, with the consent of the parties, the CICC may, within seven days of accepting a case, submit the case to mediation either with one or more Members of the Expert Committee or with a designated mediation institution. The SPC approved two commercial mediation institutions for this purpose, the Mediation Centre of CCPIT and the Shanghai Commercial Mediation Centre. (58) Mediation provides parties with an opportunity to avoid costly adversarial proceedings before Chinese judicial or arbitral institutions. If mediation is successful, the parties can turn their agreement into an enforceable SPC judgment. (59) As part of the 'one-stop' platform, parties may also refer their dispute to Chinese arbitration institutions. The SPC has named five domestic arbitration ● institutions for this purpose: CIETAC, SCIA, Shanghai International Economic and Trade Arbitration Commission ('SHIAC'), the BAC, and the China Maritime Arbitration Commission ('CMAC'). (60) The CICC is authorized to assist the arbitration institutions by issuing judicial orders for the preservation of property, evidence or conduct before or after an arbitration proceeding. (61)

Tao Jingzhou, managing partner at Dechert LLP China and member of the CICC Expert Committee, notes that the 'one-stop' mechanism provides parties with convenience and multiple choices which lower costs, and provides a 'direct train' to the SPC, bypassing traditional territorial and court level jurisdictional limits, thereby avoiding potential local protectionism issues. This helps to maintain the quality and consistency of international commercial dispute resolution. Additionally, consistent with Chinese traditional culture, the 'one-stop' dispute resolution mechanism encourages parties to first consider mediation to resolve their disputes before resorting to litigation or arbitration. (62)

Certain procedural requirements for foreign-related disputes under the Chinese civil procedural rules have been alleviated for CICC proceedings. For example, evidence that is created outside the PRC may be admissible for examination during CICC proceedings, even if it is not notarized or certified according to legalization procedures. A document in English without a certified Chinese translation copy can be directly submitted to CICC if the other party so agrees. (63) Despite the internationalization of the CICC, and the inclusion of the Expert Committee, reception of the court has been mixed. Some practitioners and scholars are concerned that the court's foundational documents prevent negotiation of substantive and procedural rules, and others are concerned about the qualifications of presiding judges and lawyers. (64) There is scepticism on whether the CICC can gain international legitimacy. (65)

Chungang Dong, a partner at Jingtian & Gongcheng in Beijing, accepted that the CICC has a number of limitations that affect its competitiveness – for example that it does not admit foreign counsel to appear or hear cases in English. However, Dong said if a Chinese party is using its negotiating power to insist on the jurisdiction of the Chinese courts, the CICC is a good option for international ● parties, given its use of technology and its international rules on evidence. More importantly, the CICC is a branch of the SPC, which in Dong's opinion is the most neutral in China, far more so than lower courts which tend to have relationships with local governments. Dong also noted that the CICC could potentially provide more efficient and cost-effective dispute resolution than either standalone arbitration or the Chinese courts. (66)

The BRI is an ambitious project, and the CICC is an equally aspirational step forward. (67) China's attempts to site many of the BRI disputes before Chinese institutions and legal procedures is not surprising. Chinese parties will feel more comfortable dealing with disputes on their home turf, and the dispute resolution mechanisms and laws of other countries may be unfamiliar. (68) By establishing an internationalized 'one-stop' institution through the CICC, China may be hoping to induce parties to BRI projects to accept a broader, more diffused Chinese jurisdiction over potential disputes. (69) A party is not just accepting the jurisdiction of a Chinese court or a Chinese arbitration institution, it is rather, accepting a more flexible, more general process that emphasizes mediation at the outset and provides a range of litigation and arbitration options. (70) Especially with its enforcement advantages because of its linkages to the SPC, the CICC is set up to be a very attractive choice of forum for BRI disputes. The CICC can also serve as a means of two-way socialization, to increase foreign parties' awareness of and appreciation for Chinese legal institutions and experts, and also increase Chinese legal and judicial experts' exposure to international best practices. (71) This will enable foreign parties to be more receptive to submitting their disputes before Chinese institutions and courts in the long-term.

2.5 Dispute boards

Large-scale infrastructure projects are the backbone of the BRI. As with most construction projects, BRI infrastructure projects are exposed to an extremely ● large spectrum of risks during the project life cycle. The success of a project is linked to the management of such risks. (72) A McKinsey report notes that while big infrastructure projects can be economically transformative, the risks of overrunning budget and time are also well-documented. Bent Flyvbjerg, an expert in project management at Oxford's business school, estimated that nine out of ten infrastructure megaprojects go over budget. (73) To

ameliorate such risks, many construction contracts provide for multi-tiered settlement of disputes, to promote early identification and resolution of issues. (74) Multi-tiered settlement of disputes can take the form of Med-Arb (discussed above), and also the incorporation of dispute boards. Particularly for large-scale infrastructure projects, dispute boards have become an increasingly popular mechanism to assist in dispute avoidance and risk management.

Modern dispute boards were first developed in the United States in the 1970s as a replacement for an engineer's adjudication. The 1999 editions of the Federation Internationale des Ingenieurs-Conseil (FIDIC) conditions of contract for Construction (the Red Book), Plant & Design and Build (the Yellow Book) and EPC/Turnkey (the Silver Book) all provide for dispute boards in one form or another. (75) According to the 2019 Queen Mary International Construction Disputes Survey, 36% of respondents used dispute boards (both standing and ad hoc) to resolve international construction disputes. (76) The ICC Dispute Board Rules (in force as of 1 October 2015) ('**ICC Dispute Board Rules**') is an established dispute board process used by parties in construction projects. The ICC Dispute Board Rules give parties a choice between three types of dispute board (Dispute Adjudication Boards, Dispute Review Boards and Combined Dispute Boards) —each of which are distinguished by the type of conclusion it issues upon a formal referral. (77) ●

An innovative dispute board hybrid process was launched in October 2018 by the Singapore Ministry of Law. The Singapore Infrastructure Dispute-Management Protocol ('**SIDP**') is designed and recommended for construction or infrastructure projects of more than SGD 500 million in value. The SIDP is a comprehensive dispute avoidance and management process that begins much further upstream in a project's life cycle. The protocol builds on international best practices and introduces novel features to address the challenges complex infrastructure projects face. First, it takes a proactive dispute prevention approach. The Dispute Board is appointed from the start of the project and helps anticipate issues and prevent differences from escalating into full-blown disputes which become difficult and expensive to resolve. Should disputes arise, a wide range of methods (mediation, opinion, and determination) are available to help address the disputes at hand. (78)

Cost and risk can increase exponentially when a dispute crosses the line from a situation where the parties resolve the dispute themselves, to determination by a judge or arbitrator. (79) In this regard, a wide range of conciliatory tools are incorporated in both the ICC Dispute Board Rules and the SIDP, so that parties are able to de-escalate issues early on. Clause 2.3 of the SIDP notes that the dispute board shall have the power to encourage the parties to cooperate as fully as possible to ensure the timely and proper completion of the works to which the contract relates, assist the parties in avoiding or resolving differences through informal discussion and negotiation to prevent these from developing into disputes, facilitate the resolution of a dispute through mediation, facilitate the resolution of a dispute by issuing an opinion and/or determine a dispute by issuing a determination. If a party duly objects to any part of the determination, the dispute shall be finally resolved by arbitration or the courts. Unless and until an arbitral tribunal or court decides otherwise, the parties remain bound to comply with any determination rendered by the dispute board. (80) Explaining the rationale behind the SIDP, Indranee Rajah, Minister in the Prime Minister's Office, noted that infrastructure disputes are usually a mixture of legal, factual, and technical issues. It would thus be helpful to have neutral third parties with technical, financial, and legal expertise looking at the disputed ● issues early on. The board can suggest solutions, including non-binding suggestions or advice, and parties can also agree for them to give binding rulings. The process is very flexible and the end goal is to eliminate issues that can be settled early and upfront, and leave only those things that really need to be contested to arbitration or litigation. (81)

In the 2019 Queen Mary International Construction Disputes Survey, interviewees noted that a decision rendered by a standing dispute board was more likely to be complied with than that of an ad hoc dispute board, especially if the standing dispute board had been appointed at the outset. (82) Under the SIDP, dispute boards are envisaged to be appointed at the outset and will play an active role in managing the project. According to the SIDP, a dispute board follows the project ideally from start to finish, proactively helping parties manage issues that arise. Under Clause 4 of the SIDP, the dispute board is required to establish a schedule of meetings and site visits, with a minimum of three meetings and three site visits to take place over the span of every twelve months, unless otherwise agreed.

According to a McKinsey report, distressed infrastructure projects have one thing in common: they lack adequate controls. Specifically, they do not have robust risk-analysis or risk-management protocols and do not provide timely reporting on progress relative to budgets and timelines. (83) Identifying and setting up systems to manage potential problems as soon as possible helps parties achieve common objectives and enhances the chances for the success of the project. (84) The key advantage of dispute boards is their ability to adopt proactive risk management and dispute avoidance within the dispute resolution process. A report from the UK All-Party Parliamentary Group for Alternative Dispute Resolution recommends that policymakers work to embed conflict avoidance across their public procurement contracts for major projects, so that costly and time-

P 259

3 DISPUTE RESOLUTION FRAMEWORK FOR BRI DISPUTES

3.1 Overview of mechanisms

Figure 1

P 260 ●



Figure 1 and 2 above provide an illustrative overview of the dispute resolution mechanisms with respect to adversarial/conciliatory nature, control over proceedings, enforcement, and cost.

P 261

7

In terms of enforceability, arbitration and Med-Arb enjoy the benefit of the enforcement framework under the New York Convention with 168 state parties. International commercial courts are also an attractive option because their decisions will be equivalent to court judgments, albeit cross-border enforcement will have to depend on reciprocal agreements between jurisdictions. Dispute boards' enforceability lies in its contractual nature whereby parties agree to be bound by their decisions. Under the SIDP, there is also a step-up process whereby non-compliance with dispute boards' binding recommendations may result in a referral to arbitration or court. Finally, mediated settlement agreements enjoy a high rate of voluntary compliance and are contractually binding. The Singapore Convention on Mediation also offers an expedited framework for enforcement of international mediated settlement agreements.

In terms of cost, mediation is generally lower in costs compared to other mechanisms as it tends to have a shorter duration and can be completed without the assistance of counsel. On the other hand, arbitration is often seen as expensive. According to the 2018 QMUL International Arbitration Survey, 'cost' continues to be seen as arbitration's worst feature. (89) International commercial courts may be lower in costs compared to arbitration because of the fixed nature of court fees. At the same time, litigation would generally require the use of lawyers and proceedings can be of a significant length. Med-Arb has the potential to be lower cost than arbitration. By allowing parties to mediate first, this may result in an early resolution of disputes or the narrowing of issues, which will save parties time and costs. Dispute boards are generally higher cost because

P 262

3.2 Decision-Making Framework

Given the myriad of options available to parties, this article proposes a decision-making framework to assist parties with their choice of dispute resolution mechanism within the context of BRI projects.

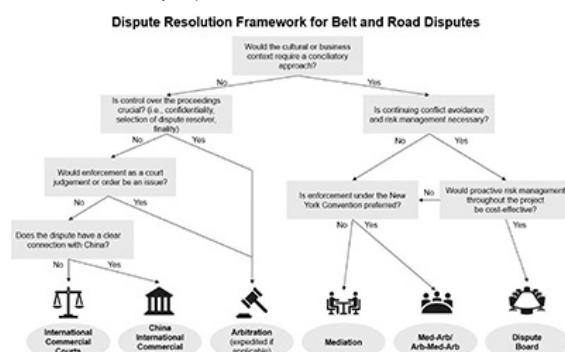


Figure 3

Dispute Resolution Framework for BRI Disputes

At the time of drafting the dispute resolution clause, it would be difficult to predict how a dispute will unfold. Through targeted questions, the framework (see Figure 3) assists parties to think through the relevant issues on a pre-emptive basis in order to select a dispute resolution mechanism best-suited for their contract. The framework aims to benefit practitioners in the drafting of dispute resolution clauses in BRI contracts and can also assist parties in the choice of forum post-dispute. ●

P 263

3.3 Rationale behind the framework

The first question under the framework is whether the cultural or business context requires a conciliatory approach. With regards to the cultural context, mediation is deeply rooted in the Asian culture, and parties are usually receptive to mediation. Some studies have shown that where both sides are Chinese, parties are more likely to consent to Med-Arb than when foreign parties are involved. (90) Whereas in other cultures/jurisdictions, including mandatory pre-arbitral steps in a contract (such as negotiations or mediation) is seen as simply imposing an unnecessary step. (91) In the business context, preservation of relationships may be particularly important in respect of long-term or ongoing projects. In these contexts, it may be advisable to consider dispute resolution mechanisms that adopt a conciliatory approach (e.g., Mediation or Med-Arb).

The next question is whether continuing conflict avoidance and risk management is necessary. If yes, whether proactive risk management throughout the dispute would be cost effective. If so, the framework ends with dispute boards. For instance, the SIDP is designed for use in infrastructure projects of SGD 500 million and above such that the appointment of the dispute board will be cost-effective. It is estimated that the costs of maintaining the SIDP will be well below 1% of the project cost. (92) Dispute boards are able to effect proactive risk management as they are usually appointed from the start of the project. Additionally, dispute boards employ a wide range of conciliatory tools to

facilitate conflict avoidance. For instance, Article 17 of the ICC Dispute Board Rules provides that dispute boards may provide informal assistance with disagreements. Such informal assistance may take the form of a conversation, informal views given by the dispute board or any other form of assistance that may help the parties resolve the disagreement.

If continuing conflict avoidance and risk management is not necessary, the framework directs parties to consider whether enforcement under the New York Convention is preferred. If yes, the framework directs parties to Med-Arb or Arb-Med-Arb. Settlement agreements reached under Med-Arb or Arb-Med-Arb can be recorded as a consent award which is enforceable under the New York Convention. Under SIMC-SCIA's Med-Arb service, any resulting mediated settlement agreement may be recorded by the SCIA as an arbitral award. (93) If enforcement under the New York Convention is not critical, the framework directs parties to mediation. Mediated settlement agreements are contractually ●
P 264 binding and enjoy a high rate of voluntary compliance. Parties in states which have ratified the Singapore Convention on Mediation, can benefit from its expedited enforcement framework.

Taking it back to the first question under the framework, where a conciliatory approach is not necessary, the framework then asks parties if control over the proceedings is crucial. If control over proceedings is crucial, arbitration will generally be preferred over courts. Parties are able to nominate their own arbitrators and select procedures suitable for their dispute (e.g., expedited procedure). For instance, CIETAC's summary procedure applies to cases where the amount in dispute does not exceed RMB 5 million or where both parties agree, and the award will be rendered in three months. (94) Additionally, in circumstances where confidentiality is crucial, arbitration may be preferred over international commercial courts. For instance, SICC proceedings will generally take place in open court, albeit parties have the option to apply for the proceedings to be confidential. In deciding to make a confidentiality order, the SICC will take into account whether the case is an offshore case and whether there is agreement between the parties. (95) At the same time, there is also a trend of increased transparency with regards to the publication of arbitral awards. From 1 January 2019, the ICC adopts an opt-out approach to the publication of awards. If a party objects or requires that the award be anonymized or pseudonymized, the award will not be published, or be published in a restricted format. (96)

Arbitration generally offers more finality than courts. In the 2020 SIDRA Survey, 80% of users ranked 'finality' as a crucial or important factor in choosing arbitration. (97) Under Article V of the New York Convention, the grounds for refusal to enforce an arbitral award are restricted to a narrow list of serious procedural defects such as invalidity of the arbitration agreement, a lack of due process or violation of public policy of the enforcement state. (98) Whereas, some international commercial courts offer parties the right to appeal. A right to appeal allows a party to have a 'second chance' to right its wrongs. At the same time, it takes away from finality. For instance, SICC decisions at the first instance are generally appealable to the Court of Appeal, subject to any written agreement ● between the parties to waive, limit, or vary the right to appeal. (99)
P 265 Similarly, LCC, NCC, ICCP and Frankfurt ICC decisions are appealable to the Court of Appeal within their respective court structures. (100) However, not all international commercial courts offer the right to appeal. For the BIBC, appeal is only allowed in limited circumstances. (101) Further, being part of China's SPC, CICC judgments cannot be appealed, although a 'retrial' might be possible under the civil procedure code. (102)

In any case, it may be difficult for parties to make a judgment call on whether a right to appeal is critical. While a losing party would value the right to appeal, it would not be possible to anticipate the outcome of the dispute at the time of choosing a mechanism. A practitioner may also need to advise his clients that having a right to appeal may increase the total amount of anticipated costs. As such, having a right to appeal, in and of itself, is unlikely to be decisive in choosing a dispute mechanism. Interestingly, amendments to Singapore's International Arbitration Act ('IAA') are being tabled in parliament to allow for a right to appeal for arbitral awards. The opt-in mechanism allows parties to appeal to the Singapore High Court on questions of law arising out of an award. (103) Earlier, we noted ICC's opt-out mechanism for publication of awards. We see a pattern of convergence between arbitration and litigation as each mechanism seeks to offer greater flexibility to parties through opt-in and opt-out mechanisms.

Where control of the proceedings is not crucial, the framework then asks parties whether enforcement as a court judgment or order would pose an issue. This is because enforcement of judgments of international commercial courts is dependent on the court's jurisdiction and the reciprocal treaties in place. For instance, SICC judgments may be enforced in different jurisdictions depending ● on these four modes: (1) enforcement under the 2005 Hague Convention on Choice of Court Agreements; (2) enforcement by way of registration (such as under the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265); (3) enforcement under the common law cause of action on a debt; and (4) enforcement under a civil law procedure. (104) As the SICC's jurisdiction is primarily consensual, parties who have voluntarily chosen to have their disputes adjudicated by the SICC are not expected to need to resort to enforcement measures. (105) Nevertheless, when choosing courts, parties should be mindful of potential enforcement difficulties,

and in particular to be mindful of where assets of the responding party are located. If enforcement as a court judgment or order is not an issue, the framework then asks parties whether the dispute has a clear connection to China. This is because the CICC's jurisdiction is limited in scope (see Article 2 of the SPC Provisions, discussed earlier in the paper). For the purposes of the framework, this is simplified as having a 'clear connection to China'. Within the context of the BRI, it is likely that large-scale BRI projects involving a Chinese party will qualify for jurisdiction under the CICC. If the prerequisite jurisdictional requirements for the CICC is not met, the framework directs parties to other international commercial courts instead.

Ultimately, the parties' desire to resolve the dispute will determine the efficacy of any dispute resolution mechanism selected. In interviews conducted as part of the 2019 Queen Mary International Construction Disputes Survey, respondents remarked that the usefulness of any process depends on the parties, their desire to resolve the dispute and the cultural context of the project. (106) A party with a recalcitrant attitude would render any mechanism selected difficult to manoeuvre. The cultural context of the project will also influence parties' dispute resolution approach. Finally, the relative bargaining power of each party will also greatly influence the negotiation process and choice of mechanism. In this regard, this framework has incorporated mechanisms which are familiar and likely to be receptive to Chinese parties, including Med-Arb and the CICC.

4 CONCLUSION

P 267 This article proposes a decision-making framework to assist parties in their choice of forum for BRI projects. Through targeted questions, the framework allows ● parties to think through key issues to select an appropriate dispute resolution mechanism. Chinese parties will have leverage in BRI contracts such that many BRI disputes will eventually be resolved before Chinese or Asia-centric institutions and venues. As such, dispute resolution processes with Chinese characteristics such as Med-Arb, and Chinese-pioneered institutions like the CICC, are likely to be prominent in BRI dispute resolution.

While arbitration is likely to remain the primary choice for the resolution of cross-border BRI disputes, the framework encompasses a wide range of dispute resolution mechanisms that differ in terms of cost, flexibility, and enforceability of outcome. Instead of opting for arbitration as default, parties are encouraged to properly evaluate their choices, consider the cultural and business context, and imbue conflict avoidance and risk management into the process. The principle underlying the Chinese government's development of the BRI is 'extensive consultation, joint contribution and shared benefits'. (107) The nuanced use of dispute resolution mechanisms to avoid, minimize and resolve conflicts whilst maintaining a harmonious working relationship perfectly embodies this spirit of joint consultation, contribution, and benefits. ●

P 267

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