

# China's Belt and Road Development and A New International Commercial Arbitration Initiative in Asia

Weixia Gu\*

## ABSTRACT

*The policy centerpiece of President Xi Jinping's foreign strategy, China's Belt and Road Initiative (BRI), ambitiously aspires towards expanding regional markets and facilitating regional cooperation. In context of a rising volume of cross-border transactions generated by the BRI, a robust legal framework on dispute resolution is required to forge investor confidence and enable BRI's integral goal of economic integration. In light of the substantial levels of harmonization among arbitration laws, arbitration is argued to constitute a primary vehicle of international commercial dispute resolution in an economically integrated Asia under the BRI. It is against this backdrop that the Article argues that the BRI provides a unique opportunity to contemplate the possibility of regional harmonization, as within the Asian economies along the BRI, of the public policy exception to arbitral enforcement. Such an arbitration initiative in Asia, in which China is anticipated to take a proactive role, holds a wealth of potential to project renewed momentum on China as an*

---

\* Associate Professor, Faculty of Law, The University of Hong Kong, email: guweixia@hku.hku. I wish to thank Anselmo Reyes, Luke Nottage, Leon Trakman, Michael Palmer, Omri Ben-Shahar, Gary Bell, David Tan, Dan Puchniak, Simon Young, Albert Chen, Yun Zhao, Kuan-Ling Shen, Chun-I Chen, Pasha Hsieh, Tzu-Yi Lin, Haitian Lu, Xin Nie, Xiao Song, Jingxia Shi, Liyu Han, Yan'an Shi, Jun Zhao, Qianhua Wang, Jaemin Lee, Yifeng Chen, and participants at the Big Data and Dispute Resolution Symposium at Hong Kong Polytechnic University (November 10, 2017), American Society of International Law Asia-Pacific Research Forum at Taipei (May 19–20, 2017), International Dispute Resolution on Belt and Road Forum at Renmin University, Beijing (November 26, 2016), Journal of Private International Law Asia Pacific Colloquium at University of Hong Kong (September 26, 2016), Society of Legal Scholars Conference at University of Oxford (September 6–9, 2016), International Governance and Rule of Law in China Conference at University of Hong Kong (June 3, 2016), and opportunities to present the draft ideas hosted by National University of Singapore, Tsinghua University, Nanjing University, National Taiwan University, and Academia Sinica. The generous support provided by the Hong Kong Government Research Grants Council General Research Fund (HKU 17617416 and HKU 17602218) and University of Hong Kong's Seed Funding for Basic Research (201611159184), as well as the capable research assistance of Emily Chan and Christy Chan, are acknowledged. All errors are my own.

*engine of not only economic power, but also soft power transformation in pioneering international legal norms.*

### TABLE OF CONTENTS

I.	INTRODUCTION .....	1307
II.	CHINA'S BELT AND ROAD INITIATIVE AND AN ECONOMICALLY INTEGRATED ASIA.....	1311
	A. <i>The Vision of the Belt and Road Initiative</i> .....	1311
	B. <i>Key Institutions of the Belt and Road Initiative</i> ...	1312
	1. Asian Infrastructure Investment Bank .....	1312
	2. Silk Road Fund.....	1313
	C. <i>An Economically Integrated Asia under the Belt and Road Initiative</i> .....	1315
III.	ARBITRATION AS A PRIMARY VEHICLE OF INTERNATIONAL DISPUTE RESOLUTION .....	1317
	A. <i>Disputes Relating to China</i> .....	1318
	1. Disputes Arising within China.....	1318
	2. Disputes Arising outside China.....	1319
	B. <i>Considerations in Selecting the Forum for International Commercial Arbitration</i> .....	1320
IV.	CONTEMPLATING REGIONAL HARMONIZATION OF THE PUBLIC POLICY EXCEPTION IN ASIA TO ARBITRAL ENFORCEMENT UNDER THE BELT AND ROAD INITIATIVE ...	1323
	A. <i>Theoretical Underpinnings of Harmonization</i> .....	1325
	1. Viral Propagation.....	1325
	2. Transplantation.....	1326
	3. Harmonization.....	1327
	B. <i>The Case for Harmonizing Arbitration Laws in the Asia Region</i> .....	1328
	C. <i>The Public Policy Exception under Article V(2)(b) of the New York Convention</i> .....	1330
	D. <i>Common Themes and Grounds Belying the Application of the Public Policy Exception</i> .....	1332
	E. <i>Grounds for Successful Invocation of the Public Policy Exception</i> .....	1333
	F. <i>Harmonizing the "Public Policy Exception" under Article V(2)(b) of the New York Convention</i> .....	1334
V.	DETAILS OF HARMONIZING THE PUBLIC POLICY EXCEPTION UNDER THE BELT AND ROAD INITIATIVE .....	1336
	A. <i>Competing Paradigms: Seat Theory versus Delocalization Theory</i> .....	1336
	1. Seat Theory.....	1336
	2. Delocalization Theory .....	1337
	3. The Relationship between "Delocalization" and "Harmonization" .....	1338
	B. <i>Drawing from the Experiences of the EU and OHADA</i> .....	1339
	1. "EU Public Policy" of EU Member States ...	1339

2.	A “Uniform” Public Policy Under OHADA.....	1341
C.	<i>Substantive Contents of a Harmonized Public Policy</i> .....	1343
1.	Procedural Contraventions of Public Policy.....	1343
2.	Substantive Contraventions of Public Policy.....	1344
D.	<i>Challenges and Other Aspects of Public Policy Harmonization</i> .....	1346
1.	Compatibility of Legal Systems and National Cultures along the Belt and Road	1346
2.	Creation of a “Transnational” Public Policy	1347
VI.	CHINA’S ECONOMIC RISE, SHIFTING POWER DYNAMICS: IMPLICATIONS OF THE BELT AND ROAD INITIATIVE ON REGIONAL AND INTERNATIONAL INFLUENCE .....	1349
A.	<i>Cementing China’s Regional Position as a Rising Economic Superpower</i> .....	1349
B.	<i>From Passive Adherent to Active Formulator of International Norms</i> .....	1350
C.	<i>Relevance with International Governance and Chinese Rule of Law</i> .....	1350
VII.	CONCLUSION.....	1351

## I. INTRODUCTION

The policy centerpiece of President Xi Jinping’s foreign strategy, China’s Belt and Road Initiative (BRI) (officially referred to by the Chinese government as 一带一路, *yidai yilu*), ambitiously aspires towards expanding regional markets, facilitating regional cooperation and economic integration amongst the nations of the anecdotal Belt and Road map.<sup>1</sup> The BRI presently spans and traverses sixty-five countries in Asia, Europe, and the Middle East.<sup>2</sup>

---

1. *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road*, NAT’L DEV. & REFORM COMM’N—PEOPLE’S REPUBLIC OF CHINA (Mar. 28, 2015), [http://en.ndrc.gov.cn/newsrelease/201503/t20150330\\_669367.html](http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html) [https://perma.cc/N2RT-U66E] (archived Aug. 23, 2018) [hereinafter *Visions and Actions*]. As announced by China’s National Development and Reform Commission (NDRC), the mechanisms and initiatives for regional cooperation under the BRI include the establishment of unified mechanisms for infrastructure building; standardizing and ensuring compatibility of transport rules; establishment of free trade areas; multilateral information exchange and inspection in trade cooperation; bolstering financial regulation cooperation; and promoting cultural exchange and friendship between the Belt and Road nations and their peoples. *Id.*

2. *Country Profiles*, BELT AND ROAD, <http://beltandroad.hktdc.com/en/country-profiles/country-profiles.aspx> (last visited Oct. 10, 2018) [https://perma.cc/V8G2-LFZR] (archived Aug. 23, 2018).

The formation of this economic bloc exhibits among its features the establishment and operation of cooperation zones, designated funds for infrastructural project financing and investment, as well as a gradual dismantling of trade barriers among the Belt and Road nations. Such an economic bloc has already yielded substantial increases in regional trade volume.<sup>3</sup> In 2015, China's trade within the Belt and Road region reportedly surpassed \$1 trillion USD, accounting for approximately a quarter of China's trade value that year.<sup>4</sup> The resulting potential for expanding cross-border commercial collaboration, trade, and investment yields among all the Belt and Road nations a common economic interest—an interest to capitalize on the manifold and multitudinous opportunities produced and stimulated by China's BRI. The strengthening of systems for regional economic cooperation among Belt and Road states and their investors thus promises collateral benefits for people and markets across all of the Belt and Road economies.

It is within this context of a steadily increasing volume of cross-border transactions and joint commercial enterprises that a robust legal framework is required to support and facilitate regional economic integration. The reasons are twofold. First, given a projected increase in numbers of multinational civil and contractual disputes arising out of the Belt and Road transactions, mechanisms and institutions for the fair and efficient resolution of cross-border disputes must be in place to resolve inter-party conflicts. In this context, three forms of contractual disputes may arise. These are, respectively, “state-state” disputes, “investor-state” disputes, and “investor-investor” disputes. In addition to facilitating the speedy resolution of disputes, such well-functioning mechanisms and institutions further serve to ensure foreign investor confidence in the BRI, whether such investments are made by state entities or private investors.<sup>5</sup> Second, a well-functioning dispute resolution system yields a secondary benefit of increasing transactional efficiency and reducing transactional costs for private investors and state parties to Belt and Road infrastructural projects. In particular, the minimization of transaction costs among Belt and Road nations operates to create a fertile environment for commerce and business, encouraging the same, and by extension, furthers the goal of economic integration within the Asian region.<sup>6</sup>

---

3. *China's trade with Belt and Road countries surpasses 1 trillion USD in 2015*, XINHUA NET (June 22, 2016), [http://news.xinhuanet.com/english/2016-06/22/c\\_135458107.htm](http://news.xinhuanet.com/english/2016-06/22/c_135458107.htm) [<https://perma.cc/YY3Z-W5HR>] (archived Aug. 23, 2018).

4. *Id.*

5. *See, e.g.*, Chen YongMei, *The Legal Climate for Foreign Investment in China after its WTO Accession*, 20 BOND L. REV. 30, 31 (2008) (discussing the fundamental importance to investors of an established legal system).

6. *See* Liu Xin, *One Belt One Road: The Transaction Cost Approach*, CHINESE UNIV. OF HONG KONG BUS. SCH. (Sept. 15, 2016), <https://cbk.bschoo.cuhk.edu.hk/one-belt-one-road-the-transaction-cost-approach/> [<https://perma.cc/ADP5-HKWP>] (archived Aug. 23, 2018) (discussing the transaction cost theory and the benefits of the One Belt One Road Initiative).

It is expected that international commercial arbitration will, under market forces, form a preferred, indeed optimal, primary vehicle for commercial dispute resolution under the BRI.<sup>7</sup> This is in consideration of the traditional distrust and reluctance of investors to utilize foreign courts—with which they may not be familiar—to resolve commercial disputes. Indeed, a further consideration lies due to international commercial arbitration’s potential for offering commercially flexible solutions and particular suitability for mitigating conflicts between different legal systems. In addition, taking into consideration the frequently transnational nature of commerce and infrastructural investment under the BRI, the existing system of highly harmonized arbitration laws among countries across the world provides a sturdy basis for utilizing a dispute resolution process untethered to the laws of a particular jurisdiction, and thus more likely to be amenable to all parties involved. In light of the wide reach of the BRI inclusive of the Asian, African, and European continents, investors may have regard to a plethora of indicators of development level, ranging from capacity-building to political and economic indicators, in determining the most appropriate neutral fora to resolve commercial disputes via arbitration, if and when they arise. This Article therefore provides a comprehensive comparative analysis of the Asia-Pacific nations along the Belt and Road for international commercial arbitration.

The prominent level of harmonization already existing among the international arbitration laws of many Belt and Road countries renders arbitration the ideal mechanism of dispute resolution. Moreover, arbitration as part of a harmonized legal framework is necessary to fulfill the collateral dispute-resolution needs of increased commercial trade and investment collaboration, and to further the goal of economic integration. It is against this backdrop that the author contends that the BRI provides a unique opportunity to contemplate the real possibility of a “geo-legal” harmonization of the public policy exception to arbitral enforcement within Belt and Road nations.

The public policy exception, which expresses fundamental policy considerations for non-enforcement of awards within and by national courts, is an exception to the generally harmonized system of arbitration laws.<sup>8</sup> Frequently characterized as an “unruly horse” due

---

7. Indeed, Hong Kong’s Secretary for Justice Rimsy Yuen envisioned that opportunities for outward expansion of the local legal and arbitration sectors lay in providing services to alleviating the “legal uncertainties” along “One Belt, One Road” countries. See *Secretary for Justice promotes Hong Kong’s legal and dispute resolution service in Beijing*, HONG KONG DEPT OF JUSTICE (Aug. 18, 2015), [http://www.doj.gov.hk/mobile/eng/public/pr/20150818\\_pr.html](http://www.doj.gov.hk/mobile/eng/public/pr/20150818_pr.html) [https://perma.cc/K9AT-RNNK] (archived Aug. 23, 2018) [hereinafter DEPARTMENT OF JUSTICE].

8. See Troy L. Harris, *The ‘Public Policy’ Exception to Enforcement of International Arbitration Awards under the New York Convention, with Particular Reference to Construction Disputes*, 24 J. INT’L ARB. 9, 10 (2007) (discussing the public policy exception).

to the indeterminacy of its ambit, it yields corresponding negative implications for commercial certainty, business efficacy, and investor confidence in light of the BRI.<sup>9</sup> This shortcoming may be regarded as *de facto* addressed by jurisdictions' pro-enforcement judicial approaches encompassing narrow interpretation and application of the public policy. Regardless, the high-stake commercial and investment concerns of the BRI, particularly within China herself, are expected to demand greater delineation and definition of concerns prescribed by the exception to enforcement.

In addition, while this Article focuses on harmonization of the public policy concept in the context of international commercial arbitration, its conceptual homogenization is also envisioned to retain relevance in the wider contexts of investment arbitration generally. One notes that from a practical perspective, the feasibility of such harmonization of the public policy exception will depend on receptiveness to embracing the new concept of a "regional" public policy of the Chinese government and judicial system. This may be answered with the submission that such developments, in relation to which China is anticipated to take a proactive role, hold great potential to serve as a positive regional example demonstrating both the feasibility of, and common economic benefits in the regional harmonization of legal norms. Additionally, the implications of the arbitration initiative proposed are themselves far-reaching. While conceived specifically in the context of the BRI, the conceptual harmonization of international commercial arbitration holds exciting potential significance for China's soft power rise from a passive norm adherent to an active norm formulator.

This Article is structured as follows. Part II sets out the salient features and significant institutions constituting China's BRI. Part III proceeds to consider the necessity and attractiveness of harmonization of legal norms from the dual standpoints of a normative jurisprudential perspective, and the practical benefits of enhancing commercial efficiency under the BRI. International commercial arbitration and, in particular, the public policy exception, are identified as prime initial targets for harmonization efforts. Part IV then considers the practical mechanics of harmonizing the public policy exception. The possible substantive contents of a public policy exception, utilizing a "negative list" approach, are then considered, with reference to similar harmonization efforts of the European Union (EU) and the Organization for the Harmonization of Business Law in Africa (OHADA). In Part V, the far-reaching implications of China's BRI upon an evolving global landscape are considered. In particular, the changing power dynamics of the Asian region developing under the BRI will be analyzed as forming the catalyst for China's increased role in pioneering international legal norms. Finally, Part VI presents the conclusion.

---

9. *See id.*

## II. CHINA'S BELT AND ROAD INITIATIVE AND AN ECONOMICALLY INTEGRATED ASIA

The following Part seeks to provide a brief overview of the BRI first in terms of its vision of strengthening the regional economic cooperation and integration. The key financial institutions belying the BRI and their recent contributions are then examined. Finally, this Part discusses the increasing economic integration (and the corresponding need for a legal regulatory structure capable of encompassing such integration) and the benefits thereof, anticipated to be effected under the BRI.

### A. *The Vision of the Belt and Road Initiative*

The BRI endeavors to stimulate development, promote infrastructural growth, open up markets, and expand trade volume within Asia by connecting the resource-rich regions of west and central Asia to the emerging economies of south and southeast Asia.<sup>10</sup> The geographic spread of the Belt and Road connects Asia, eastern Europe, and northern Africa along five routes. Consisting of the “Silk Road Economic Belt” and the “21st Century Maritime Silk Road,” the land-based Silk Road Economic Belt (i) connects China with Europe, via central Asia and Russia; (ii) connects China with the Middle East, via central Asia; and (iii) bolsters greater unification between China and southeast Asia by the Indian Ocean.<sup>11</sup> In a similar vein, the ocean-based Maritime Silk Road seeks to improve connectivity over the South China Sea.<sup>12</sup> This is envisioned to be achieved via the linkage of China with (i) Europe via the Indian Ocean and South China Sea; and (ii) the South Pacific Ocean via the South China Sea.<sup>13</sup> Notably, the China-Pakistan Economic Corridor and the Bangladesh-China-India-Myanmar Economic Corridor are existing proposed initiatives encompassing target areas for the Belt and Road projects and transactions.<sup>14</sup>

In recognizing that countries along the Belt and Road have their own distinctive economic and resource advantages, the Belt and Road leadership emphasizes five different aspects of practical collaboration.<sup>15</sup>

---

10. Geethanjali Nataraj & Richa Sekhani, *China's One Belt One Road—An Indian Perspective*, 50 *ECON. & POL. WKLY.* 67, 67 (2015).

11. *The Belt and Road Initiative*, TRADE DEV. COUNCIL RES. (May 3, 2018), <http://china-trade-research.hktdc.com/business-news/article/One-Belt-One-Road/The-Belt-and-Road-Initiative/obor/en/1/1X000000/1X0A36B7.htm> [https://perma.cc/HR98-DHM8] (archived Aug. 23, 2018).

12. *Id.*

13. *Id.*

14. See Mohd Aminul Karim & Faria Islam, *Bangladesh-China-India-Myanmar (BCIM) Economic Corridor: Challenges and Prospects*, 30 *KOREAN J. DEF. ANALYSIS* 283, 285 (2018).

15. *Visions and Actions*, *supra* note 1.

First, the strengthening of policy communication, through the creation and enhancement of multi-level intergovernmental macro policy exchange and communication systems aimed at cross-border cooperation of economic development policies.<sup>16</sup> Second, the facilitation of connectivity toward the end of a connected network of passages spanning across Asia, Europe, and Africa.<sup>17</sup> Third, facilitation of trade, through the removal of investment and trade barriers and establishment of free trade areas to create a fertile regional commercial environment.<sup>18</sup> Fourth, financial integration, by encouraging multilateral financial cooperation through the establishment and operation of financing institutions.<sup>19</sup> Finally, the promotion of mutual understanding amongst peoples, through the promotion of cultural exchange, expansion of tourism industries, and increase of knowledge sharing.<sup>20</sup>

### *B. Key Institutions of the Belt and Road Initiative*

The wide-ranging visions of the BRI, gearing towards increased economic cooperation and common integration, have been realized through the Chinese government's creation of and leadership under a number of key institutions. The most significant institutions are the Asian Infrastructure Investment Bank (AIIB) and the Silk Road Fund.

#### 1. Asian Infrastructure Investment Bank

Infrastructural development projects under the Belt and Road have thus far been augmented by the establishment of the AIIB in October 2014, with the institution's Articles of Agreement entering into force in December 2015.<sup>21</sup> The AIIB cooperates with existing regional multilateral development banks to address infrastructural development needs in Asia, with a particular view to the development of productive sectors.<sup>22</sup>

In terms of corporate structure, the highest decision-making body in the AIIB is the board of governors, to which each member country is entitled to elect one governor and one alternative governor, and in which all authority and powers of the AIIB are vested.<sup>23</sup> A nonresident board of directors is responsible for the general day-to-day

---

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *About AIIB—Introduction*, ASIAN INFRASTRUCTURE INV. BANK, <https://www.aiib.org/en/about-aiib/index.html> (last visited June 6, 2018) [<https://perma.cc/GSP4-7Z94>] (archived Aug. 24, 2018).

22. *Id.*

23. *Governance Overview—AIIB*, ASIAN INFRASTRUCTURE INV. BANK, <https://www.aiib.org/en/about-aiib/governance/index.html> (last visited June 6, 2018) [<https://perma.cc/3E2M-WPJ4>] (archived Aug. 24, 2018).



management operations of the bank, spearheading policy formation and approving the AIIB's annual strategy and budget.<sup>24</sup> The AIIB is managed by a senior management team comprised of one president (Mr. Jin Liqun), five vice-presidents, and a general counsel for Policy and Strategy, Investments, Finance, Administration, and the Corporate Secretariat.<sup>25</sup> An international advisory panel provides strategy and policy guidance, as well as advice as to matters relating to general operations.<sup>26</sup> While the AIIB is a distinctly China-led initiative, professionals and representatives from a diverse range of AIIB member states participate in and wield influence at all levels of corporate governance.

In its first year of operations commencing on January 16, 2016, the AIIB undertook to finance a series of major infrastructural development projects and initiatives. Among its first operations in June 2016 were the approval of a \$165 million USD loan to enhance power distribution capacities and electricity consumption in Bangladesh's Distribution System Upgrade and Expansion Project; a \$216.5 million USD loan for the National Slum Upgrading Project in Indonesia; a \$100 million USD loan sponsoring the Shorkot-Khanewal Section of Pakistan's National Motorway M4; and a \$27.5 million USD loan for Tajikistan's Dushanbe-Uzbekistan Border Road Improvement Project.<sup>27</sup> In all except the Bangladesh Distribution System Upgrade and Expansion Project, the loans are being co-financed by multilateral institutions ranging from the World Bank and Asian Development Bank to the United Kingdom-based Department for International Development and the European Bank for Reconstruction and Development. More recently in December 2016, the AIIB approved a \$600 million USD loan, to be co-financed with a further \$800 million USD loan, by World Bank for the Trans-Anatolian Natural Gas Pipeline Project connecting Azerbaijan to Europe.<sup>28</sup>

## 2. Silk Road Fund

In a similar vein, a \$40 billion USD Silk Road Fund was established as a medium- to long-term development fund on December

---

24. *Id.*

25. *Id.*

26. *Id.*

27. *AIIB's Board of Directors Approves \$509 M Financing for its First 4 Projects: Power, Transport and Urban: Investments span South, Southeast and Central Asia*, ASIAN INFRASTRUCTURE INV. BANK (June 24, 2016), [https://www.aiib.org/en/news-events/news/2016/20160624\\_001.html](https://www.aiib.org/en/news-events/news/2016/20160624_001.html) [<https://perma.cc/SA5H-HXQR>] (archived Aug. 24, 2018).

28. *Trans-Anatolian Natural Gas Pipelines Project (TANAP)*, THE WORLD BANK (Dec. 20, 2016), <http://www.worldbank.org/en/news/loans-credits/2016/12/20/trans-anatolian-natural-gas-pipeline-project-tanap> [<https://perma.cc/FR44-6ZP2>] (archived Aug. 24, 2018).

29, 2014.<sup>29</sup> Established as a limited liability company, the Chinese fund sponsors infrastructural, resource, and energy development and cooperation between Belt and Road nations under the BRI, through the provision of investment and financing services.<sup>30</sup> In terms of corporate governance, the Silk Road Fund is headed by an eleven-strong board of directors, to which the Ministry of Foreign Affairs, the Ministry of Commerce, the Ministry of Finance, the National Development and Reform Commission, the State Administration of Foreign Exchange, the China Investment Corporation, the China Development Bank, and the Export-Import Bank of China are entitled to nominate one member, in addition to two directors representing a senior executive and an employee representative of the Silk Road Fund, respectively.<sup>31</sup> The corporate structure reflects the Silk Road Fund being the prerogative of, and remaining accountable to, the Chinese government in all matters relating to the BRI.

Since its inception, the Silk Road Fund has financed and invested in a plethora of both new and existing infrastructural projects relating to the BRI. The Silk Road Fund's first investment in April 2015 was in relation to a \$1.65 billion USD Karot hydropower project in Pakistan, forming part of the broader \$46 billion USD China–Pakistan Economic Corridor initiative, a central arrangement of the BRI aiming at bolstering connectivity and trade links between China's Xinjiang Uyghur autonomous region and Pakistan's southwestern Gwadar Port.<sup>32</sup> Another significant Silk Road Fund investment was its acquisition of a 9.9 percent equity stake in the \$27 billion USD Yamal LNG natural gas plant project situated in Sabetta, Russia, from Russian natural gas producing powerhouse, Novatek.<sup>33</sup> Most recently, the Silk Road Fund completed an acquisition of a 10 percent minority stake in Russian gas processing and petrochemicals company Public Joint-Stock Company SIBUR Holding.<sup>34</sup>

---

29. Silk Road Fund Co. Ltd. was established as a limited liability company and is initially financed by substantial investments from the State Administration of Foreign Exchange, the China Development Bank, the China Investment Corporation and Export-Import Bank. See *Overview*, SILK ROAD FUND, <http://www.silkroadfund.com.cn/enweb/23775/23767/index.html> (last visited Sept. 1, 2016) [https://perma.cc/65VR-8KW4] (archived Aug. 24, 2018).

30. *Id.*  
31. *Articles of Association*, SILK ROAD FUND, <http://www.silkroadfund.com.cn/enweb/23786/23796/index.html> (last visited Sept. 1, 2016) [https://perma.cc/37YX-C8EA] (archived Aug. 24, 2018).

32. *Silk Road Fund's 1st investment makes China's words into practice*, THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA (Apr. 21, 2015), [http://english.gov.cn/news/top\\_news/2015/04/21/content\\_281475093213830.htm](http://english.gov.cn/news/top_news/2015/04/21/content_281475093213830.htm) [https://perma.cc/7E2E-RPRH] (archived Aug. 24, 2018).

33. *Russia's Novatek completes deal to sell Yamal LNG stake to China's Silk Road*, REUTERS (Mar. 15, 2016), <http://af.reuters.com/article/commoditiesNews/idAFR4N0ZC01H> [https://perma.cc/LJ8Z-C3Y2] (archived Aug. 24, 2018).

34. *Silk Road Fund Concludes the Transaction of Acquiring 10% Stake in PJSC SIBUR HOLDING*, SILK ROAD FUND (Jan. 25, 2017),

*C. An Economically Integrated Asia under the Belt and Road Initiative*

The BRI as aided by the AIIB and the Silk Road Fund is envisaged to play an indispensable role in connecting markets and addressing infrastructural needs across central Asia and southeast Asia, in light of existing infrastructural deficits and untapped development potential across the region.<sup>35</sup> Infrastructural development has been confirmed by the literature to hold positive causal relationships with economic growth and poverty reduction.<sup>36</sup> The Asian Development Bank has recently estimated that developing Asia will require investments of \$26 trillion USD from 2016 to 2030, or \$1.7 trillion USD per annum, in order to eradicate poverty, to continue growth momentum, and to counter the effects of climate change.<sup>37</sup> In this regard, infrastructural investment holds the potential to bolster sustainable, long-term regional economic growth and productivity and to increase regional competitiveness by generating commercial activity and creating employment opportunities, which themselves lift communities out of poverty.<sup>38</sup>

The infrastructural projects generated by virtue of the BRI development are expected to widely increase commercial collaboration among states and their investors. By way of facilitation, market liberalization and reduction of trade barriers under the BRI are further expected to stimulate an abundance of commercial and trade opportunities within a region of increasing economic integration.<sup>39</sup> Economic integration itself yields, broadly, a multitude of benefits, including boosts of cross-border trade, movement of goods and services at lower costs, homogenization of national trade and fiscal policies, and creation of employment opportunities.<sup>40</sup> In economic literature, differing forms and degrees of economic integration are frequently categorized by reference to a spectrum characterized by increasing integration.<sup>41</sup> Such forms edging towards integration occurring over

---

<http://www.silkroadfund.com.cn/enweb/23809/23812/33134/index.html>  
[<https://perma.cc/S2NV-GM2P>] (archived Aug. 24, 2018).

35. See Gilberto M. Llanto et al., *Infrastructure Financing, Public-Private Partnerships and Development in the Asia-Pacific Region*, 22 ASIA-PACIFIC DEV. J. 27, 61–62 (2015).

36. *Id.* at 27. For an in-depth discussion of the causal link between infrastructure development and economic output growth in the context of China, see Pravakar Sahoo et al., *Infrastructure Development and Economic Growth in China* (Inst. of Developing Economies, Discussion Paper No. 261, 2010).

37. ASIAN DEV. BANK, MEETING ASIA'S INFRASTRUCTURE NEEDS vii (2017), <https://www.adb.org/publications/asia-infrastructure-needs> [<https://perma.cc/6UJ2-ZG26>] (archived Aug. 24, 2018).

38. Sahoo et al., *supra* note 36.

39. See Xin, *supra* note 6.

40. See Bela Balassa, *The Theory of Economic Integration: An Introduction*, in THE EUROPEAN UNION 173, 174 (Brent F. Nelson & Alexander C-G. Stubb eds., 1998) (discussing the concept of integration and its results).

41. *Id.*

the spectrum range from free trade areas, customs unions, common markets, and economic unions, to complete economic integration.<sup>42</sup>

The degree of economic integration to be facilitated by China's BRI development will naturally hinge upon the economic cooperation and national policies of governments in the Asia region. In any event, such integration is anticipated to mature and develop over time as the BRI becomes a cornerstone of regional economic relations and cross-border commercial transactions.<sup>43</sup> The potential development of a *de facto* zone of economic integration under the BRI, similar to the common market created by the European Economic Community (EEC), will further allow participant countries access to substantial markets to build export capacities and to strengthen national economic institutions, by creating much-needed trade opportunities within Belt and Road nations in Asia and beyond.<sup>44</sup> In addition, regional economic harmonization reduces transaction and commercial costs, yielding benefits for all parties involved.<sup>45</sup>

The proper and efficient functioning of such a system, regardless of the level of economic integration envisaged, requires an analogous level of legal harmonization. By way of analogy, one may consider the Uniform Commercial Code, which was published in the United States in the 1950s and aimed at harmonizing the law governing commercial transactions and sales among all American states and territories.<sup>46</sup> The Uniform Commercial Code was, like the present case with the BRI, conceived in the light of increasingly large volumes of interstate commercial transactions and need to harmonize and modernize contract laws.<sup>47</sup> The end of forging consistency between legal and regulatory norms among China and the Belt and Road nations is aimed at harmonization rather than creating uniformity. From a general perspective, such practices bolster the efficiency of trade and commercial transactions. This is in addition to providing a region-compatible framework for effective dispute resolution. Such an analysis may be summarized as targeting a "cost-savings" motivation of the harmonization of standards.<sup>48</sup>

---

42. *Id.*

43. Xin, *supra* note 6.

44. *Id.*

45. *Id.*

46. See Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 798–99 (1958).

47. *Id.*

48. Jonathan M. Miller identified four "types" of international legal norm transplants, based upon the motivation for their adoption. These are summarized as being (a) externally dictated, i.e., those brought about by external forces; (b) cost-savings, i.e., those geared at promoting economic efficiency; (c) entrepreneurial, i.e., those transplants motivated by expectation of advantage, whether material or political, to those who propose them; and (d) legitimacy-generating, i.e., those geared at reaping the perceived prestige of adopting foreign norms. While Miller discusses transplantation of norms rather than harmonization, it is contended that the same motivations apply here. Souichirou Kozuka & Luke Nottage, *Independent Directors in Asia: Theoretical Lessons and Practical Implications*, in *INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL,*

Two other reasons for an effective dispute resolution framework, arising out of the specific context of the BRI development, may be offered. First, considering an expected rise in multinational civil and contractual disputes arising out of the BRI transactions, mechanisms for the fair and efficient resolution of disputes must exist and be equipped to resolve inter-party conflicts fairly and efficiently. That such dispute resolution systems always be regarded as impartial and effective is imperative in securing confidence in the commercial opportunities brought by the BRI by all parties involved, and thus the continued success of a cross-border initiative. Second, the existence of a well-regarded and well-functioning dispute resolution system promises the additional benefits of transactional efficiency, which reduces costs for investors of and parties to infrastructural projects under the BRI. Efforts to minimize, as far as possible, transaction costs among parties across the Belt and Road economies creates an appealing, fertile environment for cross-border commerce and business, which furthers the aim of economic integration within the Asian region under the BRI development.

### III. ARBITRATION AS A PRIMARY VEHICLE OF INTERNATIONAL DISPUTE RESOLUTION

Within the context of increased commercial collaboration among Belt and Road nations and their investors in respect of Belt and Road projects, it is expected that three forms of contractual disputes may arise. They are, respectively, (i) state-state disputes; (ii) investor-state disputes; and (iii) investor-investor disputes. Such categorization, while more applicable as a distinction in theory, is chosen to illustrate the significant combination of public and private investment forces driving and funding the BRI development, and its common goals.

Regardless of the private/public nature of the Belt and Road investment, however, it is contended that the determinative considerations underlying the selection of dispute resolution mechanisms, when such disputes arise, are applicable to each class of dispute. Investors, whether in the capacity of private corporations or state governments, tend to harbor the propensity to distrust dispute resolution mechanisms offered by unfamiliar legal institutions. This is logical as a matter of course from an investor's perspective—lack of experience or familiarity with the logistics of a foreign judicial system may place a party at a strategic disadvantage, whether real or imagined, *vis-à-vis* the local “other” party to the dispute. Such concerns may be exacerbated by an investor's lack of confidence in the judicial independence of certain jurisdictions, or that the system will not otherwise “favor” a local party.

International commercial arbitration, as opposed to court litigation, is thus envisioned to act as a primary vehicle of cross-border dispute resolution in relation to disputes arising out of the Belt and Road transactions (defined broadly as all trade, provision of services, and investments under or in furtherance of the BRI development). As stated above, increased trade, investment, and commercial opportunities arising from the BRI are expected to harbor proportional increases in commercial disputes as among states and investors. Due to the transnational nature of commercial dealings promoted under the Belt and Road, such disputes among states and investors may be further classified into one of two classes. These are, respectively, disputes arising (i) within China and (ii) outside China, which may be further subcategorized depending on the involvement, or lack thereof, of Chinese parties. International commercial arbitration is expected to be a favored means of dispute resolution with respect to each of the two scenarios, for general reasons as given above and elaborated below.

### *A. Disputes Relating to China*

#### 1. Disputes Arising within China

The first scenario deals with BRI-related disputes arising within China, irrespective of whether either of the disputant parties are Chinese or China-based. In China, international commercial arbitration has developed alongside China's economic rise to become a favored mode of dispute resolution among the business community.<sup>49</sup> Two reasons help explain this.

First, as previously mentioned, the availability of international commercial arbitration as a form of dispute resolution saves foreign investors from having to traverse a judicial system with which they lack familiarity. In the context of China, the practical need in pursuing litigation processes to surmount linguistic differences, navigate Chinese procedural rules, and instruct legal representatives qualified to practice in China creates unnecessary complexity and costs in engaging legal assistance to assist with a convoluted, unfamiliar process.<sup>50</sup> Such cost implications, while not wholly dispensed with, may be significantly reduced by seeking recourse via international commercial arbitration.

Secondly, the services of established international commercial arbitration institutions, such as the China International Economic and Trade Arbitration Commission (CIETAC), are well-regarded and respected within China. In many cases, international arbitration

---

49. JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* xix–xx (3d ed. 2012).

50. For more details on the value of arbitration, see generally Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RESOL. 367 (1985).

commissions may be deemed more independent and less susceptible to corruption or protectionism than that perceived to exist in adjudication.<sup>51</sup> For instance, parties are free to select their arbitrator or arbitrators from a panel list provided by the arbitration institution, with regard to their nationality, language, or area of expertise as desired.<sup>52</sup> The ability to elect one's arbitrators, and generally to agree on the procedural conduct of the arbitration in advance, gives the disputing parties greater control over the arbitration and removes any unfair advantage, whether real or perceived, given to the Chinese party.

## 2. Disputes Arising outside China

Similar considerations, revolving around investor confidence in the relative autonomy of arbitral procedure as compared to litigation, apply to disputes in category (ii), disputes outside China.<sup>53</sup> This scenario is concerned with the Belt and Road disputes based outside of China, with and without the involvement of Chinese companies.<sup>54</sup> Again, investors are unlikely to pursue projects where they run the risk of incurring unwanted costs from lengthy, unfamiliar dispute resolution processes.<sup>55</sup> In addition, more generally, due to the autonomy of the parties in determining the length of the arbitral process, arbitration may be preferred as providing a time-effective mode of dispute resolution.<sup>56</sup> While judicial statistics indicate that administration and settlement of civil justice in China is relatively efficient,<sup>57</sup> the expected duration of completion of civil suits varies dramatically among the landscape of the Belt and Road nations. The international arbitral process may be relied upon, in contrast, as being generally much shorter as compared to litigation. In this regard, the parties determine the contents and extent of the discovery process, and the adducing of expert evidence may be avoided by appointment of an arbitrator with requisite expertise in the subject matter under dispute.

---

51. See Yuhua Wang, *Court Funding and Judicial Corruption in China*, THE CHINA J. 43, 44 (2013).

52. See, e.g., *Arbitrators*, CHINA INT'L ECON. & TRADE ARB. COMM'N, <http://www.cietac.org/index.php?g=User&m=Arbitrator&a=index&l=en> (last visited Sept. 14, 2016) [<https://perma.cc/NQ29-AF7N>] (archived Aug. 24, 2018) (displaying an arbitrator list).

53. See generally Cole, *supra* note 50.

54. See DEPARTMENT OF JUSTICE, *supra* note 7.

55. Cole, *supra* note 50, at 367.

56. *Id.*

57. In 2010, 95 percent of civil cases at first and second instances were concluded within the statutory time limit of six and three months respectively, with possible extensions under special circumstances of six and three months respectively. Wang Yaxin & Fu Yulin, *China: Mainland. Efficiency at the Expense of Quality*, in CIVIL LITIGATION IN CHINA AND EUROPE 11 (C.H. van Rhee & Fu Yulin eds., 2014).

It is also worth noting that arbitral decisions are generally not appealable except on procedural defects.<sup>58</sup>

Efficiency of procedure aside, a final consideration for a commercial preference for arbitration may include the interest of the parties in preserving business relationships and interests. Preservation and further continuation of amicable trade dealings are generally better served by the confidentiality of arbitral process, rather than the default open system of litigation.<sup>59</sup> Indeed, it has been commented that international arbitration eases the barriers of international trade, by augmenting the security of cross-border and international transactions.<sup>60</sup> The opening and expansion of markets through infrastructural development in the Asia region is precisely the goal of the BRI.

The suggestion that arbitration will form a primary vehicle for international commercial dispute resolution under BRI development has been echoed by scholars and policymakers, who have praised opportunities for development of arbitration commissions and institutions in the wake of the BRI.<sup>61</sup> It is for this reason, as well as those established previously, that the regional harmonization of arbitral enforcement norms would be an integral part of ensuring that commercial dispute resolution processes run seamlessly regardless of the nationality of the parties engaged in it.

#### *B. Considerations in Selecting the Forum for International Commercial Arbitration*

Upon selecting arbitration as the preferred mode of commercial dispute resolution, further consideration must be given by investors (whether private entities or state-directed ones) as to the jurisdiction in which arbitration is pursued. As international commercial arbitration, in addition to allowing parties greater autonomy in agreeing on the arbitral process in advance, distinguishes between the “seat” jurisdiction and the “enforcement” jurisdiction, investor concerns with regards to neutrality may be somewhat assuaged. However, it remains for investor parties to select an appropriate forum as the arbitral “seat” for the purpose of dispute resolution.

Such relevant indicators of a jurisdiction’s attractiveness as an arbitration destination for commercial investors may include, *inter alia*: (1) whether the jurisdiction adopts the United Nations Commission on International Trade Law (UNCITRAL) Model Law on

---

58. MARGARET L. MOSES, PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 4 (2d ed. 2012).

59. *Id.*

60. Cole, *supra* note 50, at 367.

61. DEPARTMENT OF JUSTICE, *supra* note 7.



International Commercial Arbitration (Model Law),<sup>62</sup> (i.e., is a Model Law jurisdiction) or its legislation has otherwise been influenced by the Model Law; (2) the reputation of designated arbitration institutions or centers in the jurisdiction; (3) the degree of judicial support for arbitration in the jurisdiction; (4) the degree to which capacity-building is being undertaken to promote use of arbitration in the jurisdiction; (5) the recentness of major arbitration legislation and legal developments in the jurisdiction; (6) the respective level of corruption and rule of law in the jurisdiction; and (7) the level of foreign direct investment or commercial activity in the jurisdiction.<sup>63</sup> In this regard, the table below summarizes the performance of key arbitral seats in Asia.

*Table 1: Key Arbitration Indicators of Belt and Road Nations in the Asia-Pacific Region*

Jurisdiction (1)	China	Hong Kong	Singapore	Malaysia	Philippines	Indonesia	Vietnam	India
Model law <sup>64</sup> (2)	No <sup>65</sup>	Yes	Yes	Yes	Yes	No	No	Yes
Institution/center (3)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No <sup>66</sup>
Judicial support (4)	Yes	Yes	Yes	Yes	Yes	No	Improving	Improving
Capacity building (5)	Yes	Yes	Yes	Yes	Improving <sup>67</sup>	No	Improving <sup>68</sup>	Improving <sup>69</sup>

62. For an introduction on the Model Law, please refer to the official UNCITRAL website, *UNCITRAL Model Law on International Commercial Arbitration (1985)*, U.N. COMM'N ON INT'L TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (last visited Oct. 10, 2018) [<https://perma.cc/N5GV-ZAXU>] (archived Aug. 24, 2018) [hereinafter UNCITRAL].

63. *Id.*

64. For a list of the Model Law adopting jurisdictions, see *Status*, U.N. COMM'N ON INT'L TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) (last visited Oct. 10, 2018) [<https://perma.cc/XV42-RA26>] (archived Sept. 9, 2018).

65. Although not adopted by China, the Model Law has provided a guiding reference for the modernization of its arbitration regime.

66. The number of arbitration institutions is miniscule, arbitration in India being predominantly *ad hoc*.

67. Public awareness of arbitration still needs to be substantially enhanced in addition to greater training of arbitration practitioners in order to counter a culture of litigiousness.

68. More capacity-building and training among judges and lawyers is required.

69. Significantly more capacity-building among judges and lawyers is required.

Jurisdiction (1)	China	Hong Kong	Singapore	Malaysia	Philippines	Indonesia	Vietnam	India
Most recent major legislation (6)	1995	2017 <sup>70</sup>	2010	2005	2004 <sup>71</sup>	1999	2010	2015
Rule of law index 2016 <sup>72</sup> (7)	0.48/80 (44) <sup>73</sup>	0.77/16 (77)	0.82/9 (84)	0.54/56 (49)	0.51/70 (35)	0.52/61 (37)	0.51/6 (33)	0.51/66 (40)
FDI as percentage of GDP 2015 <sup>74</sup> (8)	2.27	58.48	22.29	3.70	2.00	2.33	6.10	2.10
FDI Kearney Index 2017 <sup>75</sup> (9)	1.83	NA	1.61	1.65 (2014)	NA	1.6 (2014)	1.38 (2012)	1.68/8
Ease of doing business 2017 <sup>76</sup> (10)	64.78/78	84.21/4	85.05/2	78.11/23	60.40/99	61.52/91	63.83/82	55.27/130

70. Arbitration and Mediation Legislation (Third Party Funding) Ordinance, No. 6 (Amendment), No. 6 (2017) 609 §§ 1–4.

71. Implementing Rules and Regulations issued by the Department of Justice in 2009.

72. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2016 at 5, [https://worldjusticeproject.org/sites/default/files/documents/RoLI\\_Final-Digital\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf) (last visited Sept. 9, 2018) [<https://perma.cc/5MCW-LY26>] (archived Sept. 9, 2018). The first number given is the jurisdiction's overall score, while the second number is its overall ranking. In arriving at an overall score, the Report takes account of nine factors and forty-seven sub-factors. *Id.*

73. See *Corruption Perceptions Index 2016*, TRANSPARENCY (Jan. 25, 2017), [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2016#table) [<https://perma.cc/6BMY-D3CF>] (archived Aug. 25, 2018) (showing a jurisdiction's score for 2016 under Transparency International's Corruption Perception Index in brackets; the higher the score, the less corrupt a country is perceived to be).

74. *Foreign Direct Investment*, THE GLOBAL ECON., [http://www.theglobaleconomy.com/rankings/Foreign\\_Direct\\_Investment/](http://www.theglobaleconomy.com/rankings/Foreign_Direct_Investment/) (last visited Sept. 9, 2018) [<https://perma.cc/B6BV-4A78>] (archived Sept. 9, 2018) [hereinafter *FDI*].

75. See A.T. KEARNEY, FOREIGN DIRECT INVESTMENT CONFIDENCE INDEX: GLASS HALF FULL 3 (2017), <https://www.atkearney.com/documents/10192/12116059/2017+FDI+Confidence+Index+-+Glass+Half+Full.pdf/5dced533-c150-4984-acc9-da561b4d96b4> [<https://perma.cc/DS8R-QP6A>] (archived Sept. 9, 2018); see also *FDI*, *supra* note 74 (relevant year indicated in brackets).

76. WORLD BANK GROUP, DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL 7 (2017) <http://www.doingbusiness.org/~media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Report.pdf> [<https://perma.cc/Z99L-B6FF>] (archived Sept. 9, 2018). The first number is a jurisdiction's DTF (Distance to Frontier) score, while the second number is its ranking overall. The DTF score is defined as "the aggregate score for getting credit and protecting minority investors as well as the regulatory quality

Jurisdiction (1)	China	Hong Kong	Singapore	Malaysia	Philippines	Indonesia	Vietnam	India
GDP per capita (USD) 2015 <sup>77</sup> (11)	8,069.21	42,432.84	52,888.75	9,768.33	2,904.20	3,346.49	2,110.92	1,593.26

Within Belt and Road Asia, it is indicated that Hong Kong, Singapore, and Malaysia are leading arbitral fora. In particular, Hong Kong and Singapore, two jurisdictions of similar economic and legal conditions, have both adopted the relevant internationally recognized legislative frameworks (Model Law and New York Convention) and implemented measures and facilities at the governmental and institutional levels to encourage the greatest possible use of arbitration services by all disputant parties, including those with little or no connection with either of the two respective jurisdictions.

As the BRI is not limited to Asia but also reaches Europe and Africa, it is imagined that similar factors will inform the decisions of investors in determining the destination for arbitration, although detailed analysis of the factors is beyond the scope of this Article.

In sum, the concern of investors in determining the seat of arbitration will depend much on the presumed effectiveness and repute of arbitration in the jurisdiction. The author foresees that China, having initiated and significantly funded the BRI, shall continue to play an indispensable role in leading the same. However, it is expected that other Belt and Road nations may legitimately become “preferred” destinations as seats of international arbitration with reference to the factors discussed above, assuming instrumental roles in furtherance of the initiative in providing commercial dispute resolution services. In this way, it is expected that international commercial arbitration institutions, driven primarily by investor preferences, on-the-ground factors, and market forces straddling the BRI, will thus fulfill the needs of increased trade and commercial cooperation among investors.

#### IV. CONTEMPLATING REGIONAL HARMONIZATION OF THE PUBLIC POLICY EXCEPTION IN ASIA TO ARBITRAL ENFORCEMENT UNDER THE BELT AND ROAD INITIATIVE

Increased volumes of commercial transactions and trade interactions arising out of BRI development thus present a convincing case, from a macro perspective, for ensuring that cross-border arbitral

---

indices from the indicator sets on dealing with construction permits, getting electricity, registering property, enforcing contracts and resolving insolvency.” *Id.* at 6.

77. See *GDP per capita, current dollars*, THE GLOBAL ECON., [http://www.theglobaleconomy.com/rankings/GDP\\_per\\_capita\\_current\\_dollars/](http://www.theglobaleconomy.com/rankings/GDP_per_capita_current_dollars/) (last visited Sept. 9, 2018) [<https://perma.cc/HM3K-N2DD>] (archived Sept. 9, 2018).

systems are procedurally consistent in providing fair, efficient, and enforceable resolutions of commercial disputes across the Belt and Road nations. These efforts tending towards procedural consistency between national arbitral laws hold regardless of the forum for dispute resolution ultimately favored by disputing parties, with reference to the factors discussed in the previous Part.

Such a result may be cultivated through two steps. First, through the harmonization of international arbitral laws making up the regulatory framework of the cross-border dispute resolution system under the BRI development. And second, through harmonization of the public policy exception—which remains, from the perspective of actual and prospective investors, the greatest threat to certainty and finality in arbitral enforcement.

The first step of harmonization of arbitral laws in Asia has largely already been realized by the adoption over the past decade of the Model Law and its amendments (see Table 1) and the New York Convention (the Convention) by many Belt and Road nations.<sup>78</sup> This presents a sound foundation upon which the second step may be pursued: harmonization of the most controversial barrier to arbitral enforcement—the “unruly horse” of the public policy exception to enforcement.

As the substantive content of public policy is ultimately a matter of national courts to decide, investors are inevitably left with a lack of guidance as to the conditions under which arbitral enforcement may be refused on the grounds of such public policy. It is contended that, given the Belt and Road nations’ common interests in economic integration and efficient dispute resolution systems, it is in the commercial interest of all Belt and Road participants to articulate, broadly, the public policy exception with similar considerations in order to promote a level of certainty and consistency. As the originating jurisdiction and propelling force behind the Belt and Road development, China’s approach to the public policy exception is arguably one facilitating enforcement and its associated benefits for commercial certainty within the nation’s borders and beyond.

This Part thus considers the conceptual requirements of “harmonization,” before evaluating the progress of arbitral law harmonization over Belt and Road countries in Asia and the theoretical underpinnings of prospective harmonization of the public policy exception. In the meantime, although the public policy exception here referred to is in the context of international commercial arbitration (investor-investor), the analysis casts similar light on the public policy concepts used in the field of investment treaty arbitration (investor-state).

---

78. UNCITRAL, *supra* note 62.

### A. Theoretical Underpinnings of Harmonization

First examining the specific definition to be ascribed to the “harmonization” of international arbitration law and the public policy exception, Roderick A. Macdonald’s “Three Metaphors of Norm Migration” provides a useful theoretical framework through which to understand how international legal norms may be developed, adopted, or standardized across jurisdictions.<sup>79</sup> In this regard, Macdonald refers to three analogies or levels of norm propagation: viral propagation, transplantation, and harmonization.

#### 1. Viral Propagation

At the shallowest level, “viral propagation” refers to the unplanned self-propagation and perpetuation of external norms within a system as distinct from the concept of “transplantation.”<sup>80</sup> While the latter presupposes the imposition of a set of norms upon a system, the former describes an “unplanned” mechanism whereby norms grow, spread, and establish themselves within legal systems of their own accord.<sup>81</sup> Applied to the goal of harmonizing the public policy exception, viral propagation describes the norm dissemination of award-enforcing jurisdictions that have come to apply and develop certain norms that have proliferated within their legal systems, but have not adopted wholesale the relevant international standards.<sup>82</sup> For instance, UNCITRAL legislative guides may be considered to have been “virally propagated” in that award-enforcing jurisdictions may apply some, or to some extent, UNCITRAL norms on public policy, but have not chosen to adopt the entirety of the relevant standards.<sup>83</sup> Viral propagation of norms is generally contrary to harmonization because

---

79. While Macdonald speaks in the particular context of international law reform and is overtly critical of proponents of “universalist” approaches to norm implementation, his deconstructive reflections on the suitability of three metaphors—viral propagation, transplantation and harmonization—to encapsulate modes of norm migration are helpful, in deepening our understanding of what harmonization requires. See Roderick A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34 *BROOK. J. INT’L L.* 603, 607 (2009).

80. *Id.* at 635–36.

81. *Id.* at 636. An example of viral propagation may be seen by the adoption of international arbitral norms into the Chinese arbitral regime. Arbitration Law of the People’s Republic of China did not adopt the Model Law, although along with the arbitral laws of other nations, formed a frame of reference during its drafting. Indeed, common elements to each suggest that the drafting of several clauses of the Arbitration Law was influenced by corresponding provisions of the Model Law, while the Arbitration Law maintained its own unique characteristics. Thus, while China has not adopted the Model Law, international arbitral norms have been established and developed within its legal system of their own accord.

82. *Id.*

83. See generally YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1998).

the norms in question are left to develop of their own accord, as opposed to bringing them in line with other norms or other external standards.

## 2. Transplantation

At the next level, “transplantation” points to the reform of legal norms via the wholesale importation of external legal norms to a local jurisdiction.<sup>84</sup> Such transplanted norms, while on their face applying internationally consistent standards, inevitably take on individual character in recognition of local conditions, practices, cultures, and standards. For this reason, they cannot be described as having a sufficient degree of uniformity to reach “harmonization” between different jurisdictions. Part of this is attributable to a “transplantation” effect, which has been noted in premature harmonization efforts, whereby superficially harmonized laws are interpreted—and so applied—differently by different jurisdictions due to different deep-rooted cultures and values.<sup>85</sup> The “transplant effect” manifests particularly in the case of Article V(2)(b)’s public policy exception under the New York Convention—an example illustrating that in spite of the adoption of common standards, the norms of different jurisdictions may still not be “harmonized” due to differing interpretations of “public policy” and the local circumstances that play a part in its conception.<sup>86</sup> A deficiency thus remains where transplanted standards are altered by internal conditions,

---

84. *Id.* at 624. Applied to the context of the international arbitration system, an example of “transplanted” norms may occur where the New York Convention is ratified by a jurisdiction and applied to the law of the land, but without realizing its legislative intent. A prime example is the adoption of the UNCITRAL Model Law via the new Arbitration Ordinance (Cap. 609) in 2011 in Hong Kong, which saw a wholesale incorporation of the Model Law into statute. The “transplant” nature of Hong Kong’s adoption of the Model Law, however, is marked by its “modifications and supplements” as included in the Arbitration Ordinance, to reflect specific features of the region’s existing arbitral system and commercial reality. For instance, Part 10 of the Arbitration Ordinance sets out differing enforcement provisions for “Convention awards” made in New York Convention states; “Mainland awards” rendered in Mainland China; and “Macao awards” made in Macau. Such provisions specifically recognize Hong Kong’s status as not a sovereign state, but as a special administrative region of China. Hong Kong’s broadly wholesale adoption and application of the UNCITRAL Model Law and its standards may be contrasted with the transplantation of the New York Convention in India, in which despite its wholesale adoption, did not see its underlying legislative intentions realized when tested judicially.

85. T. T. Arvind, *The ‘Transplant Effect’ In Harmonization*, 59 INT’L & COMP. L.Q. 65, 66 (2010).

86. Convention on the Recognition and Enforcement of Arbitral Awards, art. 5(2)(b), June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

inconsistencies in substantive content and application still remain so as to prevent “true” harmonization of legal norms.

### 3. Harmonization

At the highest level, true “harmonization” mandates the naturalization of transplanted standards, and is commonly described as reforming the law of jurisdictions by bringing a jurisdiction’s national laws into conformity with the equivalent norms of others.<sup>87</sup> Macdonald notes, and later critiques, the underlying assumption of global harmonization efforts, which implies that an “existing theme or melody may have to be changed in order to better accommodate the harmonic efforts of others.”<sup>88</sup> As to the author, within the context of international commercial arbitration, “harmonization” of the public policy exception would require actual synchronization, or the manufacturing of consistency between the various definitions ascribed to the public policy concept between different jurisdictions rather than wholesale transplantation.

As a form of norm propagation, harmonization of legal norms is closely related to transplantation of legislative standards. Indeed, in the context of the New York Convention and the Model Law, the “transplantation” of standards via adoption by state parties is aimed at homogenizing different arbitral systems.<sup>89</sup> The concept of harmonization, however, does not necessarily mandate that external standards be introduced into the arbitral systems to be harmonized. The purpose of harmonization is simply to bring the laws of states in conformity with each other, usually for the ends of consistency, coherence, and legal certainty.<sup>90</sup> Within the context of the public policy exception, the author contends that “harmonization” of the exception does not necessarily require externally-prescribed standards be adopted by state parties, but that the various considerations under the

---

87. Macdonald, *supra* note 79, at 612.

88. *Id.* An example of norm harmonization may be illustrated using the example of contract law in the European Union (EU). From 2003 to 2005, the European Commission adopted an action plan on the harmonization of contract law between EU member nations. *Communication from the Commission to the Council and the European Parliament on Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward*, COM (2003) 284 final (May 21, 2003). The goal of such harmonization was to create a “unified internal market” to facilitate trade and commercial processes within the EU, achieved via a Common Frame of Reference (CFR) outlining the fundamental tenets of a “European” contract law, definitions of legal terminology and model norms. *Id.* at 8. The adoption of such general guidance standards by all EU states represents harmonization in its establishment of legally consistent norms and standards across the European market, with the intended effect of uniform application regardless of location within the EU. It should be noted that the goal of such harmonization is to create consistent, but not necessarily identical, standards between EU states; variations to approaches to state-specific regulation is unproblematic so long as it is consistent with the general harmonized practice amongst the participant states.

89. New York Convention, *supra* note 86, at 1.

90. Macdonald, *supra* note 79, at 625.

workings of the exception be standardized and normalized. The focus of “harmonization,” then, is compatibility and consistency across jurisdictions.

*B. The Case for Harmonizing Arbitration Laws in the Asia Region*

It is contended that harmonization of arbitration laws yields greatest benefits in terms of commercial certainty, especially in the light of cross-border economic activity in an increasingly globalized world. The next subpart therefore seeks to make the case that harmonization of arbitration laws in the Asia region has largely been realized, such that a case may be made for pursuing the next step of harmonizing the public policy exception to arbitral enforcement under Article V(2)(b) of the New York Convention.

The author pre-emptively recognizes that the nations touched by the BRI are not limited to Asian nations, but include approximately sixty-five economies in Asia, Europe, and the Middle East.<sup>91</sup> In light of the vast differences in geo-economics, legal systems, cultural values, and traditions across these three regions, the contemplation of geo-legal harmonization of international arbitral enforcement and the public policy exception will initially be limited in the present Article to the Belt and Road nations in the Asian region. Specifically, the noted geo-legal harmonization efforts broadly include the economies making up China, Russia,<sup>92</sup> southeast Asia, south Asia, and central and western Asia; but geographically excluding economies in central Europe, eastern Europe, and the Middle East.<sup>93</sup> Table 2 illustrates the Belt and Road nations by region.

---

91. *Country Profiles*, *supra* note 2.

92. While Russia is categorized as being in central and eastern Europe rather than in Asia, Russia is included in this analysis as being an “Asian” Belt and Road nation due to its geographical spread over both European and Asian continents.

93. *Country Profiles*, *supra* note 2.



Table 2: The Belt and Road Nations Categorized by Region

Region	Belt and Road Nations	Number
China	China	1
Southeast Asia	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, Vietnam	11
South Asia	Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka	7
Central and Western Asia	Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Turkmenistan, Uzbekistan	11
<i>Total Belt and Road Nations in Asia:</i>		<i>30</i>
Middle East and Africa	Bahrain, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates, Yemen	15
Central and Eastern Europe	Albania, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, Ukraine	20
<i>Total Belt and Road Nations outside of Asia:</i>		<i>35</i>
<i>Total:</i>		<i>65</i>

As noted previously, arbitration laws within the Asian region have largely reached harmonization due to the adoption of the New York Convention and the Model Law by most Asian nations along the Belt and Road. As of April 2018, 159 and 109 jurisdictions worldwide have acceded to the New York Convention and the Model Law, respectively.<sup>94</sup> Tables 3 and 4 set out the Belt and Road nations that have acceded to the New York Convention and the Model Law, respectively. Table 3 shows that, twenty-eight out of thirty Belt and Road nations in Asia are New York Convention member states. Table 4 shows that twenty out of thirty Belt and Road nations in Asia have adopted the Model Law.

---

94. *Contracting States*, N.Y. CONVENTION, <http://www.newyorkconvention.org/> countries (last visited Nov. 3, 2018) [<https://perma.cc/S4W7-KMCW>] (archived Aug. 25, 2018) (member jurisdictions of the New York Convention); *Status*, *supra* note 64 (member jurisdictions of Model Law).

*Table 3: Adoption of the New York Convention by Belt and Road Nations*

Region	Belt and Road Nations Adopting the New York Convention	Number
China/Russia	China, Russia	2
Southeast Asia	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam	10
South Asia	Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka	6
Central and Western Asia	Afghanistan, Armenia, Azerbaijan, Georgia, Iran, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Uzbekistan	10
<i>Total Belt and Road Nations:</i>		28

*Table 4: Adoption of the Model Law by Belt and Road Nations*

Region	Belt and Road Nations Adopting the Model Law	Number
China/Russia	Russia	1
Southeast Asia	Brunei, Cambodia, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste	8
South Asia	Bangladesh, Bhutan, India, Maldives, Sri Lanka	5
Central and Western Asia	Armenia, Azerbaijan, Georgia, Iran, Mongolia, Turkmenistan	6
<i>Total Belt and Road Nations:</i>		20

The widespread adoption of common international commercial arbitration norms represents at least a positive starting point for further harmonization efforts of arbitral enforcement norms among the Belt and Road countries. In particular, the ratification of both the New York Convention and the Model Law by the Russian Federation makes it conceivable that central Asian economies, particularly those previously of the Soviet Union, will readily follow any further harmonization efforts.<sup>95</sup> As such, a foundation already exists upon which harmonization of the public policy exception to arbitral enforcement under Article V(2)(b) of the New York Convention may be contemplated.

*C. The Public Policy Exception under Article V(2)(b) of the New York Convention*

Under Article V(2)(b) of the New York Convention, recognition or enforcement of a foreign arbitral award may be declined, where such recognition or enforcement is considered by a court of the member state

---

95. These “post-Soviet” Belt and Road nations are located in Asia, and may include Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, in addition to the Russian Federation.

to the Convention to contravene its public policy.<sup>96</sup> As the peripheries of “public policy” are neither restricted nor defined under the Convention, member states are essentially free to determine the substantive contents and limits of their nation-specific, albeit “international” rather than “domestic,” conceptions of public policy.<sup>97</sup> In this regard, James Fry contends that such notion of public policy to be applied by states ought not to be obligatorily “supranational” or “truly international.” By this, Fry suggests that the public policy applied refers to those values considered “quasi-universal” amongst states, rather than simply those values of the individual states themselves. These “quasi-universal” values, however, are still determined by the state—albeit that they may legitimately reflect regional or international norms and concerns at its discretion.<sup>98</sup>

The controversy of the “free-for-all” public policy exception in the private international law jurisprudence is rooted in the fact that it bestows upon national judicial systems ultimate control over recognition and enforcement of perhaps otherwise valid foreign arbitral awards, with all the potentials of unpredictability and irregularity in its application. It has been noted that the power of refusal to recognize or enforce arbitral awards goes “to the heart” of the Convention.<sup>99</sup> The significance lies in that the primary objective of the New York Convention was to advance collective legislative standards for the enhanced recognition and enforcement of cross-border arbitral awards.<sup>100</sup> A broad interpretation of the public policy exception would thus frustrate the functioning and effectiveness of the Convention, and by extension, efficient operation of the international arbitration system.<sup>101</sup> Even within national boundaries, the vagueness of Article V(2)(b)’s exception is encapsulated in the general dearth of statutory definitions for public policy.<sup>102</sup> In this regard, Fry astutely argues that a uniform approach of enforcing arbitral awards may compromise the strength of the system in attractive negative implications for ease of enforcement (for instance, where refusal was based on a procedural defect applicable not only to one, but suddenly all states) and the

---

96. New York Convention, *supra* note 86, art. 5(2)(b).

97. While national courts do not always draw a clear distinction between “domestic” and “international” concepts of public policy, a wider-ranging “international” public policy was endorsed by the International Law Association (ILA) in 2003. See Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 *ARB. INT’L* 249, 251 (2003).

98. James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 *CHINESE J. INT’L L.* 81, 82 (2009).

99. Cole, *supra* note 50, at 372.

100. New York Convention, *supra* note 86, at 1.

101. *Id.*

102. A recent report from the International Bar Association (IBA) Subcommittee on Recognition and Enforcement of Arbitration found that of over forty jurisdictions surveyed, just two jurisdictions (Australia and the United Arab Emirates) had developed explicit statutory definitions for the concept of “public policy.” See IBA SUBCOMM. ON RECOGNITION AND ENF’T OF ARBITRAL AWARDS, REPORT ON THE PUBLIC POLICY EXCEPTION IN THE NEW YORK CONVENTION 2 (2015) [hereinafter IBA SUBCOMMITTEE].

ability of states to regulate events and transactions within their jurisdiction (as a marker of their sovereignty).<sup>103</sup> Nonetheless, the dearth of a common standard for what is considered by states to be sufficiently fundamental to constitute national “public policy” means that stakeholders presumably have little guidance as to whether their awards will be enforced.

*D. Common Themes and Grounds Belying the Application of the Public Policy Exception*

In this regard, in 2015, the International Bar Association (IBA),<sup>104</sup> following a survey of country reports on the public policy exception, recently observed that while different jurisdictions differ in their formulations of international public policy, three subcategories of norms are generally included.<sup>105</sup> These are: first, fundamental principles relating to justice and morality; second, rules serving fundamental political, social, and economic interests of the nation; and third, international obligations of nations towards other nations or international organizations.<sup>106</sup> As such, the “minimum” content of a state party’s public policy would lie in the fundamental principles or values underscoring its legal order and social fabric—whatever these normative standards and values are determined to be. It is thus clear that judicial systems do not generally allow the “public policy” exception to be trotted out as a mere excuse, where all other lines of attack fail—as suggested cynically in *Richardson v. Mellish*, in which it was commented that “[public policy] is never argued at all but when other points fail” but whose issue must at least reach a minimum standard of fundamentality.<sup>107</sup>

However, in this respect, Judith Gill and David Baker, in referring to the IBA report to identify common themes belying public policy decisions in national courts, note that even beyond an unspoken consensus that public policy issues must be sufficiently fundamental to a nation’s normative values, there exists a divergence as among different legal systems and cultures in such expression of the degree of violation of “public policy” required to mandate intervention.<sup>108</sup> For instance, whereas civil law systems couch public policy considerations in terms of “the basic principles or basic ideas of the *legal system* of our

---

103. Fry, *supra* note 98, at 124.

104. Not to be confused with the International Law Association (ILA), references to which will be made in subsequent paragraphs. As both reports of the IBA and ILA engage in comparative research as to the application of the public policy exception among different jurisdiction, the merits of the conclusions of both will be used as appropriate in this article.

105. Mayer & Sheppard, *supra* note 97, at 255.

106. *Id.*

107. Judith Gill QC & David Baker, *The Public Policy Exception Under Article V.2(b) of the New York Convention: Lessons from Around the World*, ASIAN DISP. REV. 74, 75 (2006).

108. *Id.*

country” and going to “the very fundamentals of *public and economic life*,” common law systems tend to refer to specific core values such as considerations going to the “fundamental norms of *justice and fairness*.”<sup>109</sup> While Gill and Baker categorize such definitions as simply creating the “overall impression that the values concerned have to be ‘fundamental’ to the particular State,”<sup>110</sup> it is worth noting the discrepancies between the example formulations of common law and civil law jurisdictions—with possibilities for further alternative formulations under different legal systems themselves posing a source of indeterminacy as to the definition of “public policy.”

#### E. *Grounds for Successful Invocation of the Public Policy Exception*

The IBA recommends that indeterminacy of the definition of “public policy” can be mitigated by dividing it into two dimensions: the procedural and the substantive.<sup>111</sup>

“Procedural” public policy is concerned with upholding formal justice between two arbitrating parties—for instance, relating to the right of due process, or refusing the enforcement of awards obtained by fraud or falsification.<sup>112</sup> In this regard, Gill and Baker note that the content of procedural violations engaging the public policy exception to arbitral enforcement are wide-ranging. Such content may range from virtually universally accepted grounds (such as fraud or falsification of documents) to grounds adopted by the “majority” of jurisdictions (such as contravention of the *res judicata* norm), and indeed to those grounds accepted only by a “minority” of states (such as contravention of the common law *lis pendens* doctrine).<sup>113</sup> In any event, it is noted by the IBA report that “procedural” public policy grounds are more likely to succeed as compared to “substantive grounds.”

In contrast, “substantive” public policy involves value-laden norms, which inform the interests of public policy.<sup>114</sup> In this regard, the IBA report separates substantive public policy into five main categories: (a) antitrust and competition law; (b) *pacta sunt servanda*, or the principle that “agreements must be kept”; (c) equality of creditors in insolvency situations; (d) state immunity and prohibition of punitive damages; and (e) prohibition of excessive interest.<sup>115</sup> Gill and Baker further note that in relation to the “substantive” categories,

---

109. *Id.* In addition, Gill QC and Baker identify a third combined approach enunciated by the Supreme Court of India, which stipulated that enforcement of a foreign arbitral award may be refused on public policy grounds where it was inconsistent with the “fundamental policy” of Indian law, Indian national interests (civil law concept) or “justice or morality” (a common law concept). *Id.*

110. *Id.* at 76.

111. IBA SUBCOMMITTEE, *supra* note 102, at 15–17.

112. *Id.* at 15.

113. Gill QC & Baker, *supra* note 107, at 78.

114. IBA SUBCOMMITTEE, *supra* note 102, at 17.

115. Gill QC & Baker, *supra* note 107, at 78.

however they be defined, public policy may be judicially influenced by constitutional and political issues, as well as by legal systems.<sup>116</sup> It may be observed that there is a greater divergence between states as to agreed grounds of “substantive” public policy.

It is noted by some authors that “public policy” under Article V(2)(b) would in practice not necessarily encapsulate all procedural public policy concerns, most already specifically accounted for in Article V(1).<sup>117</sup> It is however noted that the stipulated bars to arbitral enforcement in Article V(1) cover far from all possible procedural defects in arbitral procedure, such that Article V(2)(b) may be considered a “catch-all” for other procedural considerations, in addition to substantive norms.<sup>118</sup>

In any event, as will be discussed later, “procedural” public policy based on securing fair procedure is often viewed as less contentious than “substantive” public policy, which is concerned with certain norms based on state-specific priorities or other value judgments.

*F. Harmonizing the “Public Policy Exception” under Article V(2)(b) of the New York Convention*

It is noted in the IBA's report that fears over the “indeterminacy” of the public policy exception under Article V(2)(b) may be more academic than factually based.<sup>119</sup> Due to the narrow construction given to the public policy exception by the courts of most member states, coupled with a pro-enforcement approach of many jurisdictions, even where the exception is raised, it is far more often rejected than not.<sup>120</sup> This trend of practice is in line with the International Law Association's (ILA) 2003 general recommendation that “international commercial arbitration should be respected save in exceptional circumstances”<sup>121</sup> as contained in the ILA's Interim and Final Reports on Public Policy as a Bar to Enforcement of International Arbitral Awards, which are increasingly considered guidelines of best international practice.<sup>122</sup> As of 2017, George Bermann's most recent wide-ranging survey of the interpretation and application of the New York Convention by the courts of forty-four jurisdictions likewise identifies the trend of violations of public policy being construed

---

116. *Id.* at 79. In particular, Gill QC and Baker note that the principles of Muslim Sharia Law impact upon such jurisdictions' view of public policy. *Id.*

117. Fry, *supra* note 98, at 92–93.

118. *Id.*

119. IBA SUBCOMMITTEE, *supra* note 102, at 12.

120. *Id.*

121. Mayer & Sheppard, *supra* note 97.

122. INT'L COUNCIL FOR COMMERCIAL ARBITRATION (ICCA), ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 107 (2011).

narrowly, much being limited to the violations of the “most fundamental notions of morality and justice.”<sup>123</sup>

Still, from the commercial perspective, the potential of enforcement uncertainties which arise with respect to public policy cases are sufficient to compromise commercial certainty and investor confidence, with adverse effects on the commission of commercial transactions and business in foreign jurisdictions. It is noted that a pro-enforcement approach to arbitral enforcement, as aforementioned, appears to be the judicial practice in China.<sup>124</sup> There, in the timeframe spanning from 2000 to 2012, of twelve cases concerning or including public policy issues, just one succeeded on the basis of contravention of public policy under Article V(2)(b) of the New York Convention.<sup>125</sup> As the anticipated primary economic force driving the BRI development, China’s partiality approach towards facilitating commercial endeavors, except in cases involving elements significantly affecting fundamental national concerns, is expected to set the tone for any harmonization of the public policy exception.

In this regard, it is interesting to note David Adam Friedman’s conclusions in relation to the public policy defense in the context of American contract law. He analyzed a sample of public policy defense cases which show that public policy cases invoking a specific statute or regulation (48 percent of the cases sampled) have a 59 percent success rate, in contrast to public policy cases which either (i) refer to case law (15 percent) or (ii) make a “broad, general appeal” to public policy as a defense (33 percent)—which succeed just 31 percent of the time.<sup>126</sup> The takeaway from this appears to be that specific public policy concerns (i.e., those which are clearly defined or based in precedent) have a higher rate of success in public policy defense, as compared to those that refer to a vaguer notion of public policy. This would be illustrative of an appropriate balance of judicial oversight over arbitral enforcement in the context of public policy—to be applied where clearly defined so as to give reassurance to legislative and commercial certainty.

In light of international commercial arbitration being utilized as the primary mode of commercial dispute resolution for the Belt and Road transactions, and an existing high level of harmonization of international arbitration norms among the Belt and Road nations in Asia, coupled with the commercial cost-reducing interest in plugging any real or imagined uncertainties relating to the public policy

---

123. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 60 (George A. Bermann ed., 2017) [hereinafter RECOGNITION AND ENFORCEMENT].

124. See generally He Qisheng, *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People’s Court of China*, 43 HONG KONG L.J. 1037 (2013).

125. See *id.* at 1037 (evidencing a “pro-enforcement” approach generally taken by the Chinese judiciary).

126. David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 567 (2012).

exception, the conditions are ripe for taming the “unruly horse” of public policy.

#### V. DETAILS OF HARMONIZING THE PUBLIC POLICY EXCEPTION UNDER THE BELT AND ROAD INITIATIVE

The following Part provides substantive details as to how to harmonize the public policy exception under the BRI. First, harmonization of the public policy exception is contextualized within the theoretical debate as to its normative foundations. Second, the experiences of the EU and OHADA are drawn upon in, respectively, harmonizing and uniformizing the public policy exception, before a “negative list” approach is taken in fleshing out its substantive contents in the particular context of the BRI. Finally, the challenges of taming the public policy exception are evaluated.

##### A. *Competing Paradigms: Seat Theory versus Delocalization Theory*

An appeal for harmonization of the public policy exception invites scrutiny of the two main contending theories underpinning the normative foundations upon which international commercial arbitration ought to develop. Known respectively as “seat theory” and “delocalization theory,” each paradigm addresses the issue of whether the fact that parties have opted for a particular jurisdictional “seat” for their arbitral proceedings means that the applicable national procedural laws, or *lex arbitri*, of the jurisdiction ought to govern the arbitral process.<sup>127</sup> On a more abstract level, each theory may be considered to be concerned with the source of legal validity of arbitral awards.<sup>128</sup> While orthodox state practice has thus far tended towards the adoption of the seat theory,<sup>129</sup> it is argued that delocalization of arbitral norms is preferred in light of homogenization of the international arbitration system.

##### 1. Seat Theory

Seat theory advances the primacy of the territorial “seat” of international commercial arbitration proceedings, whereby relevant national procedural laws of the “seat” are considered to hold an automatic and legitimate mandate to supervise arbitral proceedings.<sup>130</sup> The arbitral process is thus shaped by legal standards specific to the location of the arbitration. This forms the normative

---

127. Masood Ahmed, *The Influence of the Delocalization and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration*, 77 ARB. 406, 407 (2011).

128. Matthew Barry, *The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts*, 32 J. INT'L ARB. 289, 295 (2015).

129. Ahmed, *supra* note 127, at 412–17.

130. *Id.* at 412–13.



backdrop, against which the parties determine the procedure of their arbitral proceedings. Enforcement courts must defer to decisions of the seat, unless to do so would be repugnant to the public policy of the enforcement jurisdiction under Article V(2)(b) of the New York Convention.

Given the traditional Westphalian focus on national sovereignty, a substantial number of states and their judicial systems have both explicitly and implicitly adopted the seat theory, conferring on their courts a mandate to supervise arbitral proceedings via state-specific *lex arbitri*.<sup>131</sup> Under this paradigm, a party seeking to enforce a cross-border arbitral award is subjected to two sets of controls. Arbitration proceedings are first governed by the *lex arbitri* of the seat—in addition to the arbitral rules and procedures chosen by the parties.<sup>132</sup> Afterwards, a second set of controls is enforced by an alternate jurisdiction in that its courts exercise the jurisdiction's own public policy considerations as to recognition and enforcement.<sup>133</sup> It is contended by this author that this “dual” system is inefficient and uncertain, in that it creates a superfluous hurdle for parties who have obtained an arbitral award in one jurisdiction, but seek to enforce it in another. “Delocalization theory” provides a potential solution for this particular predicament.

## 2. Delocalization Theory

Delocalization theory envisions an international commercial arbitration system liberated from the influence of the *lex arbitri* of the arbitral seat.<sup>134</sup> In other words, parties are free to determine the form and procedure of their arbitral proceedings without regard to adherence to the law of arbitration within their “seat” jurisdiction. This has been couched in the language of the existence of a “universal” *lex arbitri*, such that all laws regulating arbitral process are the same.<sup>135</sup> Under the delocalization paradigm, the only national legal consideration that legitimately plays a role in the arbitration process is the public policy of the enforcement court.<sup>136</sup> In contrast to the dual control imposed first by the *lex arbitri* and then the enforcement court, the sole point of control—with its public policy considerations—is the enforcement jurisdiction.<sup>137</sup>

---

131. *Id.*

132. See Alastair Henderson, *Lex Arbitri, Procedural Law and the Seat of Arbitration*, SING. ACAD. L. J. 886, 887 (2014).

133. See Andrew Barraclough & Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration*, 6 MELBOURNE J. INT'L L. 205, 206 (2005).

134. Ahmed, *supra* note 127, at 408–410.

135. Alan Redfern & Martin Hunter, *The Law Governing the Arbitration*, in LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 89 (2004).

136. *Id.* at 90.

137. *Id.*

The arbitral process, to use the terminology of proponent Jan Paulsson, unlike under the seat theory, is not thus “anchored” within the national norms of an arbitral seat, but both “floats” and “drifts” in its capability of being recognized by arbitral systems in other jurisdictions.<sup>138</sup> Delocalization theories thus naturally promote party autonomy, allowing greater leeway for parties to determine the resolution of their dispute free of the constraints of national public policy.<sup>139</sup> It is noted that the delocalization theory can also be applied not only to the arbitral process, but to the arbitral award itself.<sup>140</sup> Concerned with the recognition of arbitral awards, a “delocalized” system entails one where a declaration of invalidity of an award in one jurisdiction’s court is limited and unenforceable in other jurisdictions.<sup>141</sup>

### 3. The Relationship between “Delocalization” and “Harmonization”

“Delocalization theory” in international commercial arbitration thus precludes the operation of the *lex arbitri*, or national procedural law.<sup>142</sup> Essentially, the spirit of “delocalization” is to reduce, as far as possible, the role of national laws on international arbitration—whether on the arbitral process or at the enforcement stage. The underlying rationale of delocalization is thus twofold. First, to increase party autonomy over the arbitral process by precluding the automatic application of the seat’s *lex arbitri*;<sup>143</sup> and second, to limit enforcement challenges by ensuring that the only relevant considerations for enforcement are those of the enforcement jurisdiction.<sup>144</sup> This increases certainty for users of the arbitral system.

“Harmonization” refers to a different legal concept, a phenomenon whereby the norms of different jurisdictions are made consistent with each other.<sup>145</sup> In the context of international commercial arbitration, harmonization of different jurisdictional norms relating to the enforcement process refers to the homogenization of enforcement standards in the international commercial arbitration system.<sup>146</sup> It is contended that harmonization of the public policy exception, as discussed below, is facilitated by a “delocalized” system whereby the considerations for non-enforcement taken account of by enforcement

---

138. Ahmed, *supra* note 127, at 408; see also generally Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT’L & COMP. L.Q. 358 (1981).

139. Ahmed, *supra* note 127, at 409.

140. Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INT’L ARB. 177, 186–87 (1999).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 199.

146. *Id.*

courts are reduced due to delocalization.<sup>147</sup> Although “delocalization” and “harmonization” are distinct concepts arising in two different contexts,<sup>148</sup> they are connected in the context of arbitration in that both concepts work towards greater certainty in the recognition and enforcement of international awards.<sup>149</sup> Where enforcement courts no longer have to be concerned with breaches of state-specific *lex arbitri* in the seat even prior to considerations of procedural and substantive fairness of the chosen arbitral procedure itself, “harmonization” of the public policy exception will be made easier.

### B. *Drawing from the Experiences of the EU and OHADA*

The substantial levels of harmonization of arbitral regulations existing in the Asia region pave the way for the practical viability of harmonization of the public policy, for reasons discussed above. In this respect, different approaches of the EU and OHADA to incorporating regional interests into their respective understandings of public policy provide valuable precedent and reference for public policy harmonization in context of the BRI in Asia, as considered below.

It is noted that the countries under the BRI are not yet economically integrated, although it cherishes the good wishes of being so connected. As such, the EU and OHADA are not for these purposes perfect comparators. The EU, despite its useful enunciation of a “regional public policy” and unlike OHADA and the Belt and Road region, exists not solely for the purpose of trade, but acts further as a political bloc dealing with matters as diverse as human rights and regional security.<sup>150</sup> It is, however, considered that the lengthy experience of the EU in matters of economic integration is unparalleled by any other strategic international alliance in the world. In the same vein, the approach of OHADA of absolute uniformity of business laws—and by extension, public policy—as opposed to harmonization across a host of countries with different national laws and economic considerations is not identical to the Belt and Road region. Nonetheless, their single focus on economic integration—as under the BRI—makes them an eligible comparator.

#### 1. “EU Public Policy” of EU Member States

A key implication of sovereignty, accounted for under Article V(2)(b) of the Convention, is that EU member states are judicially free to determine the substantive considerations constituting their

---

147. *Id.*

148. “Harmonization” of arbitral norms does not preclude the operation of *lex arbitri*, simply that grounds for non-enforcement of awards such as those based on *lex arbitri* are made consistent. In contrast, “delocalization” argues for the complete removal of *lex arbitri* as irrelevant considerations.

149. Read, *supra* note 140, at 199.

jurisdiction's "[international] public policy."<sup>151</sup> However, due to the supranational nature of EU laws and directives *vis-à-vis* EU member states, individual member states are further required to take EU law into consideration when determining the substantive content of public policy.<sup>152</sup> Notably, in *Eco Swiss China Time Ltd. v. Benetton International NV*, the Court of Justice of the European Union (CJEU) specifically ruled that where an EU member state's refusal to recognize and/or enforce an arbitral award occurs on public policy grounds, violation of "EU public policy" must also be treated as a valid ground for annulment.<sup>153</sup> The European Parliament itself affirms the existence of an "EU public policy" as considered in a number of cases by the CJEU.<sup>154</sup>

The EU's experience indicates that the adoption and inclusion of "regional" public policy considerations by member states is compatible with the free determination of sovereign states of the contents of their jurisdiction-specific conception of public policy. It is thus conceivable that an "Asian public policy" similarly encapsulating core Asian interests may be agreed and adopted as part of the national conception of public policy by individual nations within the Belt and Road network. Conceivably, a distinction may be made on the basis that the relationship of member states to the EU is akin to a politically-integrated federal union.<sup>155</sup> In contrast, there is no political affiliation among the Belt and Road nations notwithstanding their geographical proximity and shared economic goals. Nonetheless, political integration ought not to constitute a prerequisite for inclusion of a regional public policy; the presence of common goals or interests should be sufficient.

The substantive contents of "EU public policy" remain indeterminate. While the CJEU has indicated that individual EU laws and regulations may constitute "EU public policy" in the specific case, it has yet to enunciate exactly which provisions, or which classes of provisions, are likely to form part of regional public policy.<sup>156</sup> It is noted that while the EU promotes incorporation of an "EU public policy" into "national" public policy, a regionally "harmonized" public policy is not advanced by the EU as a whole.<sup>157</sup> The rationale behind the approach of the CJEU is to ensure that civil claims based upon EU

---

151. George A. Bermann, *Reconciling European Union Law Demands with the Demands of International Arbitration*, 34 *FORDHAM INT'L L.J.* 1193, 1201 (2011).

152. *Id.*

153. *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, 1999 E.C.R. I-3055, ¶ 37.

154. TONY COLE ET AL., *LEGAL INSTRUMENTS AND PRACTICE OF ARBITRATION IN THE EU 15* (2014), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL\\_STU%282015%29509988\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU%282015%29509988_EN.pdf) [<https://perma.cc/8TF3-XB35>] (archived Sept. 11, 2018).

155. Sergio Fabbrini, *Comparing Democratic Models, in WHICH EUROPEAN UNION?* 187 (2015).

156. COLE ET AL., *supra* note 154.

157. *Id.*

laws in individual member states would be treated no less favorably as compared to claims based upon domestic laws.<sup>158</sup> As such, there is no implication that the substantive contents of public policy considerations of individual EU nations must be consistent among the common market.

As discussed above, the enunciation of a “harmonized” public policy exception within the Asia region serves a different purpose in light of the BRI. Mitigating the indeterminacy of jurisdiction-specific public policies through harmonization of their substantive contents promotes the certainty needed to allow the BRI to flourish.

## 2. A “Uniform” Public Policy Under OHADA

Next considered is the analogous experience of OHADA, which has taken a different approach from the EU in instituting a “uniform” public policy as part of their regional implementation of uniform business laws. It should be noted at the outset that the application of uniform public policy under OHADA regime is unrelated to Article V(2)(b) of the Convention.<sup>159</sup>

Formed under the 1993 OHADA Treaty, OHADA is an alliance of seventeen western and central African countries, which aims to implement a modernized cross-border regime of uniform business laws and institutions across the participating countries.<sup>160</sup> As the vast majority of OHADA nations are connected as historical French colonies, the OHADA laws similarly derive from French law.<sup>161</sup> Akin to the infrastructural and economic development motives belying the BRI, the purpose of the unified OHADA laws is to bolster much-needed economic development via the greater attraction of foreign investment in the sub-Saharan African region.<sup>162</sup> Unification of regional commercial laws, supported by OHADA’s supranational court,<sup>163</sup> strengthens regional rule of law and is geared at increasing investor confidence by cultivating certainty and bolstering easy accessibility to OHADA’s shared business environment.

OHADA’s 1999 Uniform Act on Arbitration (Uniform Act) provided an updated, unified set of arbitration laws for the seventeen OHADA nations.<sup>164</sup> Articles 26 and 31 deal respectively with “international public policy” as one of the six grounds for invalidity of,

---

158. Bermann, *supra* note 151.

159. Article V2(b) will only apply to those OHADA member states that have ratified the New York Convention.

160. Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT’L L. 17, 19 (2005).

161. *Id.* at 21.

162. *Id.* at 19–20.

163. The OHADA laws are judicially enforced and interpreted by the supranational Cour Commune de Justice et d’Arbitrage (CCJA).

164. Francis Ulrich Ndinga, *The Features of the Arbitration Proceedings Under the OHADA Uniform Act on Arbitration Law*, 1 GLOBAL SCHOLARS J. L. & CONFLICT RESOL. 1, 1–2 (2014).

and the sole ground for refusal to recognize and/or enforce, an arbitral award.<sup>165</sup> As “public policy” refers to OHADA’s “collective” public policy of the member states as a unit, and the Uniform Act applies to all OHADA jurisdictions, the substantive contents of public policy are not simply harmonized, but actually identical in the seventeen OHADA nations.<sup>166</sup> The significance of Articles 26 and 31 of the Uniform Act is that as long as an award rendered in an OHADA seat jurisdiction is not void due to contravention of OHADA’s public policy,<sup>167</sup> it is recognized and enforceable in any other OHADA jurisdiction.<sup>168</sup>

OHADA’s uniform regime under the Uniform Act is aimed at maximizing efficiency and commercial certainty for the rendering and enforcement of arbitral awards in the region.<sup>169</sup> However, as with the EU public policy, little legislative guidance is provided as to the substantive content of OHADA public policy and is decided on a case-by-case basis. To further the ends of uniformity, enforcement courts will generally have to accept the conclusions on validity and subsequent order for recognition in the seat jurisdiction, with appeals to OHADA’s supranational court, the Common Court of Justice and Arbitration.<sup>170</sup>

It must be emphasized that OHADA’s uniform “international public policy” implies identical considerations amongst all OHADA member states. A “uniform” public policy is more stringent than a “harmonized” public policy in that while the former demands complete uniformity in substantive content, the latter requires only that they be mutually consistent. A “harmonized” public policy allows individual nations leeway to tailor their public policy to the particular jurisdictional circumstances, provided that its application does not conflict with the nation-specific public policy of other jurisdictions. OHADA’s uniform “public policy” regime is facilitated, aside from a common interest in regional economic development, by their shared historical experience and French law-based legal systems of many OHADA nations.<sup>171</sup> However, a lack of similar homogeneity among the Belt and Road nations would create virtually insurmountable difficulties in establishing a unified conception of public policy. As such, a “harmonized” rather than a “uniform” approach in Asian public policy may be more appropriate as a starting point.

---

165. Organization for the Harmonization of Business Law in Africa [OHADA], Uniform Act on Arbitration, art. 26 & 31, (Mar. 11, 1999) [hereinafter OHADA].

166. Emilia Onyema, *Enforcement of Arbitral Awards in Sub-Saharan Africa*, 26 ARB. INT’L 115, 121 (2010).

167. OHADA, *supra* note 165.

168. *Id.* Indeed, an order of recognition and enforcement granted by the court of an OHADA member state only has to be registered with the courts of the second OHADA member state in which enforcement is sought. *See* Onyema, *supra* note 166, at 115.

169. *See generally* Onyema, *supra* note 166 (examining “the issues surrounding the enforcement of arbitral awards by national courts in various countries within the Sub-Saharan region”).

170. *Id.*

171. Dickerson, *supra* note 160, at 19.

### C. Substantive Contents of a Harmonized Public Policy

Having shown that a region-specific “harmonized” public policy may be adopted across the Belt and Road nations to further the common economic interests of the Asian region, the next step is to consider its substantive contents. As noted in the IBA report, there are certain violations of public policy that appear common to most nations, regardless of variation in legal culture, political framework, and level of economic development.<sup>172</sup> For instance, procedural irregularities in the arbitral process amounting to the violation of the right of a party to be heard or to present the case are virtually universally considered contrary to agreed standards of fairness, and thus, public policy.<sup>173</sup> Some substantive matters, such as corruption and fraud, are similarly regarded by most nations to contravene public policy.<sup>174</sup> It would thus be possible for the Belt and Road nations to agree upon a non-exhaustive, but harmonized set of commonly agreed public policy considerations. By way of illustration, the discussion below sets out common examples of procedural and substantive matters suggested by the ILA to contravene public policy, which may be incorporated into a shared Asian public policy framework in international arbitration.

#### 1. Procedural Contraventions of Public Policy

Procedural public policy contraventions involve defects in the arbitral procedure which adversely impact the availability of due process. Non-contentious matters constituting such contravention may include: evidence of fraud or corruption in the arbitral process;<sup>175</sup> as well as violations, generally, of due process.<sup>176</sup> Subject to agreement amongst the Belt and Road nations, other grounds of procedural contravention of public policy may include, for example, specific procedural issues such as: evidence of arbitrator partiality;<sup>177</sup> irrational dissonance between the facts and award;<sup>178</sup> or decisions made in the absence of reasons.<sup>179</sup>

It is noted here that Article V(1) of the New York Convention already deals with the refusal of recognition and enforcement of arbitral awards on a number of due process and procedural grounds; *inter alia*, notice of arbitral proceedings and compliance of arbitral process with pre-existing arbitral agreement or laws of the seat

---

172. IBA SUBCOMMITTEE, *supra* note 102, at 14.

173. *Id.* at 15.

174. *Id.* at 16.

175. Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 217, 238 (2010).

176. *Id.* at 239.

177. *Id.* at 240.

178. *Id.*

179. *Id.*

jurisdiction.<sup>180</sup> In the same vein as public policy harmonization, it should be possible to develop standards of due process and consistency in the way procedural issues are approached in Belt and Road jurisdictions, as there is already significant overlap in those categories of procedural irregularities considered under individual judicial systems to constitute public policy contraventions.<sup>181</sup>

## 2. Substantive Contraventions of Public Policy

Substantive public policy contraventions concern the subject matter of the arbitration, protection of which may be considered contrary to public policy. Such “proscribed” matters frequently differ amongst different jurisdictions without common ground, due to variations in policy concerns underlying societal values.<sup>182</sup> The general exception concerns awards which allow the commission of activities universally considered to be illegal or morally objectionable,<sup>183</sup> such as those relating to drug trafficking, corruption, or fraud.<sup>184</sup>

However, as discussed in the context of “EU public policy,” while substantive prohibitions may vary depending on the governance policies of individual states, it is submitted that fundamental norms, values, and interests shared over an alliance of nations may form part of an individual jurisdiction’s public policy. For instance, Article 81 of the Treaty Establishing the European Community, which prohibits practices restricting competition among member states, was ruled by the CJEU contrary to regional “EU public policy.”<sup>185</sup> As fair competition laws are integral to the facilitation of trade and the proper functioning of the free markets, their protection is considered a matter of EU public policy.<sup>186</sup> Such a consideration protects both the economic interests of individual EU member states, as well the European Community as a regional entity.

It is ventured that similar norms and considerations may be applied to the Asian region in regard of the promotion of the economic goals of the BRI. The fundamental interest of the BRI, aside from the development of regional infrastructure, is the bolstering of cross-border commercial and trade cooperation amongst the Belt and Road nations.<sup>187</sup> Regional prosperity, envisaged as an interest of all jurisdictions in the Belt and Road Asian region, may be facilitated through the application of harmonized public policy. Such substantive norms in the harmonized public policy may include, for example,

---

180. New York Convention, *supra* note 86, at V(1).

181. IBA SUBCOMMITTEE, *supra* note 102, at 14.

182. *Id.* at 16.

183. *Id.*

184. *Id.*

185. Mayer & Sheppard, *supra* note 97, at 233.

186. *Id.*

187. *See supra* Part II.A.



relatively non-contentious rules such as those against anti-competition agreements, the formation of *de facto* regional monopolies, and corruption.<sup>188</sup> Other substantive norms, relating to the protection of diplomatic relations amongst nations, may similarly be part of an Asian public policy, considering the objectives of the BRI to increase transnational cooperation. The general approach to be taken as a first step, from a practical perspective, could be to draft a negative list including some of the matters above, such as anti-competition provisions or procedural impropriety, under which awards are likely to be turned down.

Harmonization of the public policy exception requires not absolute uniformity, but consistency among the Belt and Road nations. This would imply that while this geo-legal public policy forms just one part of the nation-specific public policy under Article V(2)(b) of the New York Convention, remaining nation-specific public policy must be congruent with “Asian public policy.” It is noted, as above, that judicial custom emphasizes the narrow construction of Article V(2)(b) of the New York Convention.<sup>189</sup> This pro-enforcement approach works in tandem with harmonization efforts to tame the “unruly horse” of public policy.

While there is no existing institution dealing with the coordination of cross-border arbitral enforcement rules *per se*, it is suggested that in the interim, the AIIB could take a proactive role in coordinating the harmonization of national laws, whether in the specific context of public policy harmonization or more broadly with regard to trade- and investment-related regulations, which form an integral part of the broad goal of trade facilitation under the BRI.<sup>190</sup> Although the AIIB’s primary function is currently to provide loans for infrastructural projects under the BRI development, the semi-governmental constitution of the AIIB’s corporate governance would readily allow adaptation or creation of a new office or sub-organization to discuss harmonization of legal norms and regulations, in which all the Belt and Road nations would have a stake, necessary to the efficient functioning of trade and commerce.

Whereas in the EU, the public policy exception has largely been defined at the highest level of the CJEU where the CJEU is competent only to make judgments of issues being litigated. Such an approach is not recommended, since there is no supranational court under the BRI so far (pretty much because the BRI aims to create an economically, rather than a politically integrated zone). Whereas courts may pronounce what public policy “is” or “is not” constituted in a particular case, queries as to its concrete and substantive contents are left unanswered in the lack of guidelines defined. From the perspective of efficiency, and to ensure participation of all the Belt and Road nations in determining certain shared matters under the BRI that are against

---

188. *Id.*

189. IBA SUBCOMMITTEE, *supra* note 102, at 6.

190. *Id.*

a “regional” public policy, it would be more desirable to designate a coordination institution such as the AIIB for this purpose.

#### D. *Challenges and Other Aspects of Public Policy Harmonization*

While the above discussion indicates that certain categories of considerations may be incorporated into an Asian public policy, challenges remain as to both the theory and implementation of harmonization efforts.

##### 1. Compatibility of Legal Systems and National Cultures along the Belt and Road

A substantial difficulty which arises is to reconcile the approach of different legal systems to public policy conceptions under Article V(2)(b) of the New York Convention. As the Belt and Road’s metaphorical “silk road” moves the wide geographical spread of the east Asia, south Asia, and central Asian regions, it simultaneously navigates common law, civil law, and Islamic law systems; as well as a wealth of nations divided along social, cultural, ethnic, and religious lines.<sup>191</sup> Even where the substantive contents of the public policy exception are harmonized, differences in legal system and cultures have a substantial impact on how the contents are to be interpreted.

First, the definition and span of the public policy concept itself fall to different interpretations as amongst legal systems. The civil law conception of public policy, or *order public*, is frequently viewed as being wider in application as compared to the traditionally restrictive interpretations to public policy under common law systems.<sup>192</sup> This is compounded by the interaction of jurisdiction-specific social and cultural features. Such social characteristics belie the integral values and interests of a nation, which goes to the root of national conceptions of public policy. For instance, the Islamic concept of public policy revolves around the spirit of Sharia law and its sources.<sup>193</sup> The wide divergences in culture amongst legal systems and values suggest an inherent difficulty in achieving harmonization of the public policy exception, of which contents are informed by the same.

This concern may be met with reiteration of the extent of Asian harmonization applicable by the BRI. A universal prescription of public policy considerations applicable wholesale to the entire Asia region is not the goal of harmonization. A proposed “Asian public policy” includes defined categories of matters which contravene public policy. This does not preclude nations from retaining other nation-specific public policy considerations provided that they do not come into conflict with the “regional” policy. Further, given that the substantive grounds of the “Asian public policy” proposed largely revolve around the

---

191. *Id.*

192. Mayer & Sheppard, *supra* note 97, at 223–24.

193. *Id.* at 219.

facilitation of economic growth and commercial interactions amongst the Belt and Road nations, there is less likely wide room for contradiction.

A secondary concern of the influence of legal cultures on the public policy exception is the existence of diverging standards of due process amongst legal systems. Common law jurisdictions may hold parties to arbitration to different standards of procedural fairness, as compared to civil law systems, based on the idea that due process is connected to natural justice.<sup>194</sup> For instance, while the concept of “fraud” is well established under common law, there may be definitional variation when the same term is applied in non-common law legal systems.<sup>195</sup> This creates issues insofar as even where a substantive ground for invoking the public policy exception is regionally harmonized, enforcement courts may still be applying diverging standards in determining its application. While it may be theoretically possible to apply a “universal” standard with respect to specific public policy grounds, to do so would be problematic in that inconsistencies would be created with respect to judicial standards between international arbitral enforcement and the remainder of the legal system. Such a concern is more difficult to resolve. However, it is ventured that as a matter of a judicial preference for upholding enforcement, enforcement would be denied only on clear grounds of breach of public policy considerations.

## 2. Creation of a “Transnational” Public Policy

A conceptual concern of a proposed harmonized “Asian public policy” is the creation of a “transnational” public policy. A “transnational” public policy has been defined by the ILA to refer to a “truly international public policy . . . of universal application, comprising fundamental rules of national law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as ‘civilized nations.’”<sup>196</sup> An “Asian public policy” would appear to fit into the category of a transnational public policy in that it contains considerations that straddle borders and apply to a region of states. This is problematic in that the public policy exception under Article V(2)(b) of the New York Convention intends public policy considerations to be nation-specific, albeit “international” rather than “domestic” in nature.<sup>197</sup> Further, this is the understanding

---

194. *Id.* at 233.

195. Such is the case of fraud as a ground of refusing reciprocal enforcement of judgments between Hong Kong, a common law jurisdiction, and China, whose system is based upon civil law. *See generally* JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS (2014).

196. Mayer & Sheppard, *supra* note 97, at 220.

197. In other words, a national conception of “international public policy”, rather than “domestic public policy”. The expression “international public policy” has been

recommended by the ILA, although such an issue has yet to be conclusively litigated by national courts.<sup>198</sup> In other words, when drafted, Article V2(b) of the New York Convention intended that enforcing states apply their own respective notions of public policy. Nonetheless, as reiterated, the conception of a “regional public policy” adopted by a group of nations is not inconsistent with nation-specific nature of public policy envisioned under Article V(2)(b) of the New York Convention.<sup>199</sup> As stated above, the application of an “Asian public policy” operates such that it constitutes just one category of public policy considerations—itsself, as explored above, a negative list, applied by a jurisdiction. The existence of this region-specific public policy impacts national public policy considerations only insofar as there are inconsistencies, which would in any case need to be resolved to ensure the cooperation of the nations with the region. As such, harmonization does not limit the ability of a country to define its own public policy. It simply aims to bring harmony to the application of the public policy exception.

An additional practical concern may arise with respect to the receptiveness of Belt and Road countries in adopting aspects of a “regional” or “transnational” public policy as part of their nation-specific public policy. In particular, it revisits the willingness of the Chinese judiciary—and by necessary extension, the Chinese government—to broaden the existing narrow definition of its nation-specific “public policy,” which is largely limited to fundamental principles such as the safeguarding of China’s national sovereignty, public security, and the integrity of the legal system.<sup>200</sup> To include commercial concerns encapsulated and mandated by an “Asian public policy” under the BRI, it is necessary to ensure the success of the endeavor of China as the proposer and leader of the BRI. While there has yet to be any governmental inclination in this proposal, it is contended that the tangible commercial benefits associated with harmonization, and the illustrations of the EU and OHADA experiences, may lessen the skepticism of adopting a wider take on public policy than currently prevails.

---

defined by the ILA not to refer to a public policy shared by a number of states, but the part of a public policy belonging to a state, the contravention of which would prevent a party from enforcing a foreign award. *Id.* at 251.

198. Bermann notes that while some jurisdictions, for instance, France and Switzerland, make a distinction between domestic and international conceptions of public policy, the position of most national courts is uncertain. See RECOGNITION AND ENFORCEMENT, *supra* note 123, at 100.

199. New York Convention, *supra* note 86, at V(2)(b).

200. Qisheng He, *Public Policy in Enforcement of Foreign Arbitral Awards in the Supreme People’s Court of China*, 43 HONG KONG L.J. 1037, 1044 (2013).

VI. CHINA'S ECONOMIC RISE, SHIFTING POWER DYNAMICS:  
IMPLICATIONS OF THE BELT AND ROAD INITIATIVE ON REGIONAL AND  
INTERNATIONAL INFLUENCE

“China is a sleeping dragon. Let her sleep; for once she wakes, she will shake the world.”<sup>201</sup> Sitting at the cusp of rapid economic development, China now boasts the second largest economy in the world and is poised to exert a greater influence on international affairs.<sup>202</sup>

In addition to projected growth of commercial and trade opportunities, the BRI and its impact on the Asian region is witnessing a shift in regional power dynamics. As the founding nation of the BRI and its facilitating institutions, China's increasing regional presence and initiative offers a host of exciting possibilities for strengthening international influence.

A. Cementing China's Regional Position as a Rising Economic  
Superpower

As discussed previously, the BRI promises the creation of commercial and trade opportunities across Asia through cross-border cooperation on infrastructural development.<sup>203</sup> China's own interest in promoting the BRI is said to derive not only from a need to export domestic overcapacity, but also to seek new overseas markets and investment opportunities for the growth of domestic companies, as part of its transition from an investment-based economy to one with greater consumption.<sup>204</sup> This transition into a “new normal” (新常态, *xin changtai*) of slower, stable economic growth further allows for increased financial integration and strengthening of the Chinese currency, Yuan.<sup>205</sup> Export of China's developmental model through the BRI establishes China's position as a regional powerhouse, catalyzed by China's prominent role in spearheading the BRI.<sup>206</sup> China's significant contributions to the BRI development through the establishment of the AIIB and Silk Road Fund exert China as a central commercial hub for investors and businesses within the region.<sup>207</sup> This holds the twofold benefits of increasing China's hard and soft

---

201. See *China's Fitful Sleep*, THE ECONOMIST (July 17, 1997) <http://www.economist.com/node/151617> [<https://perma.cc/GZ9P-8B7K>] (archived Sept. 11, 2018).

202. *China Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last visited June 6, 2018) [<https://perma.cc/M3T6-5HGD>] (archived June 6, 2018).

203. Peter Ferdinand, *Westward Ho—the China Dream and ‘One Belt, One Road’: Chinese Foreign Policy Under Xi Jinping*, 92 INT'L AFF. 941, 950 (2016).

204. *Id.* at 951.

205. Nataraj & Sekhani, *supra* note 10, at 67.

206. *Id.*

207. *Id.*

power within the region, particularly where China's initiative is credited with raising much-needed infrastructural development within the region. It further poises China to hold greater influence on the international stage and raises its ability to compete with "traditional" global powers predominantly situated in the West by extending its influence across the Asian, European, and African continents.<sup>208</sup>

### B. *From Passive Adherent to Active Formulator of International Norms*

The BRI presents another overlooked opportunity for China. That is the opportunity to contribute to the formulation of international legal norms, an area traditionally monopolized by Western nations such as the formation of the entire international arbitration system. The BRI development provides a valuable opportunity not only to premier and implement, but to demonstrate the benefits of a "harmonized" Asian public policy. The success of such harmonization yields not only economic benefits arising from increased investor confidence and trade investment, but in terms of elevating China's status from a mere adherent of international norms to an active contributor of the same. This is significant in terms of the international arbitration system, which due to the public policy exception is still fragmented and disorganized in grounds of enforcement. While the returns—both economic and power-based—of China's infrastructural investment in the Belt and Road countries have yet to be seen, the vast opportunities for development and construction of infrastructure indicate a vast market for international arbitration within the region, and in turn, the opportunity to square the circle and harmonize the regulatory domains such as the public policy exception.

### C. *Relevance with International Governance and Chinese Rule of Law*

In October 2017, the 19th Congress of the Communist Party of China (CPC), took advancement of rule of law as one of its dominant themes.<sup>209</sup> Affirming the Constitution as forming the crux of the legal system and promoting wide-ranging judicial reforms to tackle institutionalized corruption, the CPC has lauded a "new era" in committing to a "Chinese" rule of law suited to existing "national conditions."<sup>210</sup> Advancement of the rule of law has been viewed as being crucial to the development of the Chinese market economy, bolstering investor confidence and encouraging continued economic growth.<sup>211</sup> Indeed, another integral aspect of the development of a

---

208. Ferdinand, *supra* note 203, at 953.

209. Zhi Zhenfeng, *19<sup>th</sup> CPC Congress to Lead New Era of Rule of Law in China* (十九大大引依法治国新时代 *Shijiuda Yinling Yifazhiguo Xinshidai*), PEOPLE'S DAILY (Dec. 13, 2017), <http://opinion.people.com.cn/n1/2017/1213/c1003-29702448.html> [https://perma.cc/3R76-T5Q5] (archived Sept. 11, 2018).

210. *Id.*

211. *Id.*

Chinese rule of law is to bring China in line with first-world nations that have traditionally dominated the realm of international governance. As discussed above, the opportunities presented by the Belt and Road place China in a prime position to pioneer and promote harmonization of the public policy exception, through the active formulation of widely agreed “public policy” norms. In addition to permitting China to take on a more proactive role in writing norms within the traditional global order, this further yields positive implications in terms of China’s demonstrated commitment to promoting and adhering to the rule of law—not only within her national borders, but across the Asia region. As China assumes a helm of economic leadership within the Asian region, she may demonstrate a further capacity to lead in the formulation of legal norms, inspiring greater confidence in the international diplomatic community in its ability to not simply partake in, but also lead aspects of international governance.

## VII. CONCLUSION

In the light of China’s continued economic rise, the BRI provides a unique opportunity for increased economic cooperation and integration through the cross-border development of infrastructural projects in the Asian region. Against the backdrop, international commercial arbitration, due to its advantages, has been identified as a primary vehicle in international dispute resolution within the BRI Asia.

In looking forward, this Article has sought to demonstrate the distinct advantages and benefits of increased harmonization of arbitration regulatory landscape in the Asian region as a means to bolster and further the multitudinous goals of strengthening cross-border relationships, both commercial and as a matter of geopolitics. The fundamental issue at stake in this context is how to harmonize cross-border arbitral enforcement so as to ensure the requisite legal and commercial certainty necessary to secure investor confidence.

While the BRI in the early stages is being propelled by states under the continued upward development of the Chinese economy, its consolidation and substantial successes in the future will hinge upon continued investor confidence. In order to forge such confidence, a strong and well-established dispute resolution system that is capable of fairly, efficiently, and effectively solving transnational commercial disputes is integral. This reduces commercial transactional costs and will be critical in evaluating the success of China’s Belt and Road development policy and economic diplomacy strategy.

The BRI provides a golden opportunity for China to take the lead in considering the possibility of harmonizing the public policy exception in international commercial arbitration within the Asian Belt and Road nations. There is a bright future in light of the existing harmonization efforts of arbitration enforcement norms by the Asian economies through the substantial adoption of the New York

Convention and the Model Law. The remaining “unruly horse” of the public policy may create issues of incompatibility in arbitral enforcement, which is against the BRI’s goal of economic integration and commercial certainty. As the above analysis reveals, the reconciliation of national public policies within the Asian region of the BRI promises to yield significant benefits. Over time, this consolidates and makes inroads towards the goal of enhanced economic integration in the Belt and Road Asian region, and gradually, extend to all the sixty-five countries involved in the BRI.

With these principles in mind, and drawing upon experiences of the EU and OHADA, this Article suggests that public policy in context of arbitral enforcement in the BRI Asia could be introduced at the approach of a “negative list.” It is further advocated that the creation of a “transnational” public policy, as framed around the common economic interests of the BRI and drawing on existing procedural and substantive common grounds among the BRI Asia, may not be compatible with the requirement of “national” public policy considerations under Article V(2)(b) of the New York Convention. However, as discussed, the practical implementation of this suggestion depends much on the receptivity of the Chinese government in widening the current narrow understanding of her nation-specific public policy.

Being able to harmonize the public policy in international arbitration within the BRI Asian context to achieve a predictable system of investor confidence would set valuable precedent, projecting renewed focus on China and Asia as an engine of not only economic power, but also legal initiative in the transformation of China from a passive norm-adherent to a norm-formulator. If China is successful in even taking the first step towards leading the norm harmonization, pending expansion, other regions may follow suit in regional harmonization in the same vein. For this reason, the implications of the arbitration initiative advocated by this Article are expansive and reach beyond the boundaries of Asia and the Belt and Road roadmap, holding potentials and progress for other economically integrated regions that would benefit from consistency of norms and standards delivered by dispute resolution processes across different jurisdictions.

Finally, as the world has harmonized much of the international arbitration system based on the New York Convention, Model Law, and UNCITRAL Rules, to complete the picture and minimize dispute resolution costs, global harmonization of the public policy exception—or getting as close to it as possible—holds a wealth of benefits to enhance commercial certainty and investor confidence. As “true harmonization” of the international arbitral system is the ideal goal in an increasingly interdependent and globalized world, the opportunities brought by China’s Belt and Road development in the Asian context is truly exciting.