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**Adaptations and Paradigm Shift: Recent
Developments of Commercial Dispute
Resolution Mechanism in China**

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Adaptations and Paradigm Shift: Recent Developments of Commercial Dispute Resolution Mechanism in China

Kun Fan*

Arbitration has evolved from a pragmatic, *de casu ad casum* applied mechanism, towards growing self-recognition as a transnational system to administer justice. The development of international arbitration towards an autonomous legal order constitutes remarkable institution building at the global level. The autonomous view sees arbitration as deriving its original legitimacy not from consent within a specific legal order or orders, but rather from a general, initial authorization offered by the community of States, later fulfilled by arbitral tribunals without further State intervention, and thus detached from a national order. In this context, how will an authoritarian state like China react to the trends of trans-nationalization and autonomization of arbitration? What role will China play in the development of international dispute resolution mechanisms? Is China showing signs of adapting to the current trend of transnational standards? This article highlights the recent developments of China's commercial dispute resolution mechanism and illustrates China's two-way adaptations towards transnational standards as a result of the constant interplay between the global formal regulation and local informal practice, predictable regulation and flexible practice, and the clashes between the increasingly cosmopolitan professional culture in the arbitration community and deeply rooted demands of national culture. These recent developments demonstrate China's efforts to balance the globalization and localization of its commercial arbitration and mediation practice, including both localized globalism and globalized localism—the "glocalization" process. Part II of this paper illustrates China's adaptations towards transnational standards through efforts of the courts, arbitration institutions and individual transnational elites. Part III analyzes China's role in shaping the norms and values in international economic order, exemplified by China's signature to the Singapore Convention on Mediation ("Singapore Convention") and the establishment of the China International Commercial Courts ("CICC"). Part IV concludes with predictions of the prospects of these adaptations.

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L'arbitrage a évolué à partir du principe qu'il s'agissait d'un mécanisme pragmatique, appliqué *de casu ad casum*, vers une reconnaissance grandissante en tant que système transnational d'administration de la justice. Cette évolution de l'arbitrage international vers un ordre juridique autonome témoigne d'un remarquable développement institutionnel à l'échelle mondiale. Le point de vue autonome considère que l'arbitrage tire sa légitimité originelle non pas d'un consentement au sein d'un ou de plusieurs ordres juridiques particuliers, mais plutôt d'une autorisation générale initiale offerte par la communauté des États, régularisée ensuite par les tribunaux d'arbitrage sans autre intervention étatique, et donc détachée d'un ordre national. Dans ce contexte, comment un État autoritaire comme la Chine réagira-t-il aux tendances de transnationalisation et d'autonomisation de l'arbitrage ? Quel rôle la Chine jouera-t-elle dans la conception de mécanismes de règlement des différends internationaux ? La Chine montre-t-elle des signes d'adaptation face à la tendance actuelle de normes transnationales ? Cet article décrit l'évolution récente du mécanisme chinois de résolution des litiges commerciaux et illustre les adaptations à double sens de la Chine vers des normes transnationales en raison de l'interaction constante entre la réglementation formelle mondiale et la pratique informelle locale, la réglementation prévisible et la pratique flexible, et les conflits entre la culture professionnelle de plus en plus cosmopolite de la communauté d'arbitrage et les exigences profondément enracinées de la culture nationale. Ces développements récents démontrent les efforts de la Chine pour équilibrer la globalisation et la localisation de sa pratique d'arbitrage commercial et de médiation, y compris le globalisme localisé et le localisme globalisé - un processus de "glocalisation". La partie II de ce travail illustre les adaptations de la Chine en matière de normes transnationales grâce aux efforts des tribunaux, des institutions d'arbitrage et des élites transnationales individuelles. La partie III analyse le rôle de la Chine dans l'élaboration de normes et de valeurs au sein de l'ordre économique international, illustré par la signature par la Chine de la Convention de Singapour sur la médiation ("Convention de Singapour") et la création de la Cour Internationale Commerciale de Chine ("CICC"). La partie IV se termine par des prédictions pour le futur de ces adaptations.

I. Introduction

Arbitration has evolved from a pragmatic, *de casu ad casum* applied mechanism, towards growing self-recognition as a transnational system to administer justice.¹ The development of international arbitration towards an *autonomous legal order* constitutes remarkable institution building at the global level.² The autonomous view sees arbitration as deriving its original legitimacy not from consent within a specific legal order or orders, but rather from a general, initial authorization offered by the community of States, later fulfilled by arbitral tribunals without further State intervention³, and thus detached from a national order. This conceptualization has been connected with general theories pointing to the development of “global legal order(s)”, free from traditional intervention and control exercised by the States. For instance, Gunther Teubner’s characterization of the new *lex mercatoria* as a model global law without a State was based on its formulation and application independent from domestic legal systems thanks to arbitral decision-making.⁴ In this context, how will an authoritarian state like China react to the trends of trans-nationalization and autonomization of arbitration? What role will China play in the development of international dispute resolution mechanisms? Is China showing signs of adapting to the current trend of transnational standards?

Users’ constant search for predictability has led to the increasing proceduralization, formalization⁵, judicialization of arbitration⁶, or the

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1 See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2010) at 65.

2 See Alec Stone Sweet & Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford, United Kingdom: Oxford University Press, 2017).

3 See Gaillard, *supra* note 1 at 15ff.

4 See Gunther Teubner, *Global Law Without a State* (Aldershot, United Kingdom: Dartmouth Publishing Company, 1997) at 9.

5 See Luke Nottage, “A Weather Map for International Arbitration: Mainly Sunny, Some Cloud, Possible Thunderstorms” in Stavros Brekoulakis, Juliam D M Lew & Loukas Mistelis, eds, *The Evolution and Future of International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016) at 479.

6 See Charles Nelson Brower, “Introduction” in Richard B Li & Charles N Brower, eds, *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?* (Irvington, NY: Transnational Publishers, 1994) at ix; Leon Trakman & Hugh Montgomery, “The ‘Judicialization’ of International Commercial Arbitration: Pitfall or Virtue?” (2017) 30:2 *Leiden J Intl L* 405.

colonization of arbitration by litigation.⁷ International commercial arbitration laws and procedures increasingly replicate national judicial procedures, national laws and their legal intricacies⁸, departing from arbitration's original purpose as an alternative resolution to court proceedings. This has resulted in an opposing trend to harmonization consisting of hybrid processes and mixed mode dispute resolution. Will Chinese legal culture and practice, characterized by informalism and flexibility, offer a counter-force to the judicialization of arbitration, and thus influence the future direction of transnational norms?

This article highlights the recent developments of China's commercial dispute resolution mechanism and illustrates China's two-way adaptations towards transnational standards as a result of the constant interplay between global formal regulation and local informal practice, predictable regulation and flexible practice, and the clashes between the increasingly cosmopolitan professional culture in the arbitration community and deeply rooted demands of national culture.

On the one hand, China is following the trend of harmonization, making adaptations to global norms. This move is essentially driven by the market force, when "economic actors seek more predictability through reliance on formalized processes for managing transactions, and also to seek more formal limits on state power."⁹ Arbitration is developed through practice within the community, rather than through top-down imposition from outside the community. While States need to endorse and embrace norms, the norms develop independently, based on the expectations of the users, rather than the specific requirements of the State. Despite legislated limitations on party autonomy¹⁰, other non-state actors (i.e., arbitration institutions and individuals such as judges, arbitrators, case managers and lawyers) also exert an essential influence on arbitration reforms in China. In order to make China a more appealing hub of dispute resolution to meet users' needs, various stakeholders have made a number of innovations and adaptations to bring the practice of arbitration more in line with transnational standards, as a result of the marketization of arbitration in China.

On the other hand, China is also taking an increasingly active role in shaping international norms. The Chinese view of the relationship between

7 See Fali S Nariman, "The Spirit of Arbitration: The Tenth Annual Goff Lecture" (2000) 16:3 Arb Intl 261 at 262.

8 See Trakman & Montgomery, *supra* note 6 at 405.

9 Pitman B Potter, "Legal Reform in China: Institutions, Culture and Selective Adaptation" (2004) 29:2 L & Soc Inquiry 465 at 480-82.

10 For detailed discussion on the unique practices of arbitration in China differing from transnational standards and the impact of top-down state control in arbitration practice, see Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, United Kingdom: Hart Publishing, 2013) [Fan, *Arbitration in China*].

law and development differs from the Western notion of the rule of law, challenging American notions of legal norms.¹¹ China has an alternative vision of numerous aspects of global and domestic governance including legal norms, values and contexts. For instance, the Chinese approach of dispute resolution is featured by informality, de-proceduralisation and flexibility, focusing more on the parties' interest rather than sending them home with a winner and a loser. Such informal norms and institutions often function as a means of dispute resolution alternative to state law and formal organizations in non-Western countries,¹² and challenges the "Americanization of international commercial arbitration".¹³

These recent developments demonstrate China's efforts to balance the globalization and localization of its commercial arbitration and mediation practice, including both localized globalism and globalized localism—the "glocalization" process.¹⁴

Part II of this paper illustrates China's adaptations towards transnational standards through efforts of the courts, arbitration institutions and individual transnational elites. Part III analyzes China's role in shaping the norms and values in international economic order, exemplified by China's signature to the Singapore Convention on Mediation ("Singapore Convention") and the establishment of the China International Commercial Courts ("CICC"). Part IV concludes with predictions of the prospects of these adaptations.

II. China's Adaptations Towards Transnational Standards

China has undergone significant reforms in the development of its commercial dispute resolution mechanism in recent years. Its growth in terms of cross-border commercial exchanges and foreign investments has resulted in a dynamic development of dispute resolution mechanisms. Since 2017, the Supreme People's Court ("SPC") successively promulgated a series of judicial interpretations and documents which, to some extent, made up for deficiencies in the Arbitration Law. In late 2017, the Beijing Arbitration Commission/Beijing International Arbitration Centre ("BAC/BIAC") accepted its first case applying emergency arbitrator proceedings in Mainland

11 See Matthew Erie, "Chinese Law and Development" (2021) 62:1 Harv Int L J 52.

12 See Tom Ginsburg, "Does Law Matter for Economic Development - Evidence from East Asia" (2020) 34:3 L & Soc Rev 829 at 834–36.

13 See e.g. William W Park, "Americanization of International Arbitration and Vice Versa" in *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press, 2006);

14 See Kun Fan, "Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China" (2013) 18:1 Harv Negot L Rev 175 [Fan, "Glocalization of Arbitration"]; Kun Fan, "'Glocalization' of International Arbitration – Rethinking Tradition: Modernity and East-West Binaries through Examples of China and Japan" (2015) 11:2 U Pa Asian L Rev 243.

China, following the global trend to provide parties with emergency interim relief before the arbitration tribunal is constituted.¹⁵ In 2018, the Shenzhen Court of International Arbitration (“SCIA”) affirmed in an arbitral award the property nature of Bitcoin.¹⁶ In 2018, an amendment to the Arbitration Law was formally listed in the legislative plan of the Standing Committee of the National People’s Congress (“NPC”). These developments have come at an important time, with China launching an ambitious program of economic expansion, the Belt and Road Initiative (“BRI”), and assuming a leading role in the world’s economy.

China’s transition towards a market-based economy may support the expansion of improved legal institutions and processes, particularly in the development of the dispute resolution regime. In the interplay of imported and local norms, the interplay between formal and predictable with informal and flexible, a dynamic of “selective adaptations” is emerging in China, as described by Potter.¹⁷ Driven by the competition of the “law market”, various stakeholders have taken significant efforts to modernize China’s commercial dispute resolution rules and practice, in order to make China a more attractive hub of arbitration. The Chinese courts, arbitration institutions and individual transnational elites all play a powerful role in promoting the adaptations towards transnational standards.

A. Legislative Restrictions and Ambiguities

The enactment of the Arbitration Law in 1994 was considered a milestone in China’s arbitration system, which incorporates many internationally accepted principles, including the principle of party autonomy. In reality, however, this principle is not fully implemented in substantive provisions of the law. The concept of party autonomy is traditionally foreign to Chinese minds. On the basis of international experience, the private nature of arbitration and its core principle of party autonomy have been much addressed by academics and other arbitration experts in China.¹⁸ However, legislation

15 For details of the case, see Terence Xu with the collaboration of Shen Yunqiu, “Emergency Arbitrator Proceedings and the GKML Case” (14 November 2018), online: *China Business Law Journal* <<https://law.asia/emergency-arbitrator-proceedings-gkml-case/>>.

16 For details of the case, see “Shenzhen Arbitration Court Rules Bitcoin Enjoys Legal Protection as Asset, Transaction Contracts Are Enforceable”, *China Banking News* (6 November 2018), online: <<http://www.chinabankingnews.com/2018/11/06/shenzhen-arbitration-court-rules-bitcoin-enjoys-legal-protection-asset-transaction-contracts-enforceable/>>.

17 For discussion on selective adaptation in China’s legal reforms, see Pitman B Potter, *Law, Policy, and Practice on China’s Periphery: Selective Adaptation and Institutional Capacity* (Hoboken: Taylor & Francis, 2010); Pitman B Potter, “Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices” (2003) 2:1 Wash U Global Study L Rev 119; Potter, *supra* note 9.

18 See, for instance, Fan, *supra* note 10; Weixia Gu, *Arbitration in China: Regulation of*

still lags behind academia. The specific provisions of the Arbitration Law contain a number of restrictions on party autonomy in arbitration, like a “bird in a cage”¹⁹, where the parties’ freedom to contract only extends to the boundaries established by the state.

For instance, according to Articles 16 and 18 of the Arbitration Law, the designation of an arbitration institution constitutes a compulsory requirement for the validity of an arbitration agreement under the Chinese law.²⁰ Such a requirement excludes ad hoc arbitration in China and has also caused uncertainty for foreign arbitration institutions conducting arbitration in China.²¹ Another deficiency in the legislation is the lack of recognition of the seat of arbitration. The seat of arbitration is an important legal concept and has important legal consequences in international arbitration.²² The New York Convention refers to the concept as “the law of the country where the arbitration took place”²³ and, synonymously, as “the law of the country where the award is made.”²⁴ It thus makes a clear territorial link between the seat of arbitration and the law governing that arbitration, the *lex arbitri*. The Model Law also attaches legal consequences to the seat of arbitration, which determines (i) the applicability of the Model Law²⁵, and (ii) the place of origin of the award for enforcement purposes.²⁶ However, in China, the

Arbitration Agreements and Practical Issues (Hong Kong: Sweet & Maxwell, 2012); Jingzhou Tao, *Arbitration Law and Practice in China*, 3rd ed, (Alphen aan den Rijn: Kluwer Law International, 2012); 宋连斌, 《国际商事仲裁管辖权研究》(法律出版社, 2000) (Lianbin Song, *Research on the Jurisdiction of International Commercial Arbitration*, Legal Press 2000); 乔欣, 《仲裁权研究—仲裁程序公正与权利保障》(法律出版社, 2001) (Xin Qiao, *The Research on Power of Arbitration – the Due Process of Arbitration and the Right Protection*, Legal Press 2001).

19 See Stanley B Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Palo Alto, Stanford University Press, 1999).

20 *Arbitration Law of the People’s Republic of China*, 1995, Zhonghua Renmin Gongheguo Falu Huibian at arts 16, 18 [Arbitration Law]. Article 16 of the Arbitration Law provides that “a valid arbitration agreement shall contain the following: (1) an expression of intention to apply for arbitration; (2) matters to be arbitrated; and (3) a designated arbitration commission”. Article 18 provides that if an arbitration agreement contains no or unclear provisions concerning the matters to be arbitrated or the designated arbitration commission, and if no supplementary agreement can be reached, then the arbitration agreement shall be null and void.

21 For discussion, see Kun Fan, “Prospects of Foreign Arbitration Institutions Administering Arbitration in China”, (2011) 28:4 *J Intl Arb* 343 at 343–53 [Fan, “Prospects of Foreign Arbitration Institutions”].

22 The legal consequences of the choice of the seat of arbitration include: (i) the seat may influence which law governs the arbitration; (ii) it has a bearing on the issue which courts can exercise supervisory and supportive powers in relation to the arbitration; and (iii) the seat of arbitration determines the nationality of the award which is relevant for the ultimate enforcement of the award.

23 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 at art V(1)(d) (entered into force 7 June 1959).

24 *Ibid* at arts V(1)(a), V(1)(e).

25 *UNCITRAL Model Law on International Commercial Awards*, United Nations Commission on International Trade Law, 21 June 1985 at art 1(2) (amended 7 July 2006) [Model Law].

26 See *ibid* at art 31(3) (provides that the award shall state the place of arbitration and shall be

concept of the seat of arbitration is not defined in the Arbitration Law, though the Arbitration Law does deal explicitly with arbitral awards issued in China pursuant to an arbitration administered by a foreign arbitration institution. Nor is the concept addressed in the Civil Procedure Law. According to the Civil Procedure Law 2017, the awards were classified based on the nature of the arbitration institution; i.e., foreign-related arbitration institutions in China²⁷ or foreign arbitration institutions²⁸, rather than the seat of arbitration. The Law Applicable to Foreign-Related Civil Relations in China 2011 recognizes the concept of the seat of arbitration, but kept a link with “the place where arbitration institution locates.”²⁹

Another major gap in Chinese legislation is the absence of the widely adopted principle of competence-competence, which allows the arbitral tribunal to choose its own jurisdiction. Article 20 of the Arbitration Law grants the power to decide on jurisdiction with the courts and the arbitration institutions, instead of the arbitral tribunals.³⁰ Furthermore, the parties’ choice of arbitrators is limited to a closed panel system created by Article 13 of the Arbitration law, including only individuals with strict statutory qualifications.³¹

According to the *2018 International Arbitration Survey: The Evolution of International Arbitration*, the main considerations influencing a user’s choice of the seat of arbitration include the seat’s “general reputation and recognition”; the users’ perception of its “formal legal infrastructure”; the neutrality and impartiality of its legal system; the national arbitration law; and its track record in enforcing agreements to arbitrate and grant arbitral

deemed to have been made at that place).

²⁷ *Civil Procedure Law of the People’s Republic of China*, 1991, Zhonghua Renmin Gongheguo Falu Huibian at art 274 (revised in 2017) [Civil Procedure Law].

²⁸ See *ibid* at art 283.

²⁹ *Law of the People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations*, 2011, Zhonghua Renmin Gongheguo Falu Huibian at art 18 [Law Applicable to Foreign-Related Civil Relations] (provides that “the parties may by agreement choose the law applicable to their arbitration agreement. Absent any choice by the parties, the law of the place where the arbitration institution locates or the law of the seat of arbitration shall be applied”).

³⁰ Arbitration Law, *supra* note 20 at art 20. Article 20 of the Arbitration law provides that “If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or apply to the people’s court for a ruling. If one party requests the arbitration commission to make a decision and the other party applies to the people’s court for a ruling, the people’s court shall give a ruling”.

³¹ *Ibid*. Article 13 of the Arbitration Law provides that an arbitrator shall meet one of the conditions set forth below: (1) to have been engaged in arbitration work for at least eight years; (2) to have worked as a lawyer for at least eight years; (3) to have served as a judge for at least eight years; (4) to have been engaged in legal research or legal education, possessing a senior professional title; or (5) to have acquired the knowledge of law, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional level. It further provides that an arbitration commission shall have a panel of arbitrators in different specializations.

awards.³² The restrictions created by the Arbitration Law may negatively impact China's reputation and recognition as a seat as well as the users' perception of its formal legal infrastructure. Some ambiguities in the legislation have also resulted in inconsistent application by the courts in enforcing the arbitral awards.³³

The legislative restrictions reflect a collective mindset, rooted in the Chinese people's trust in institutions, rather than individuals. Some Chinese legal experts explain the legislative reluctance to recognise *ad hoc* arbitration in China as being due to the concern that, if arbitration is allowed to be conducted without the supervision of any established administrative bodies, it would be difficult to control the behaviour of arbitrators and ensure the quality of arbitration. Chinese authorities would not even be aware of the existence of *ad hoc* arbitration, unless the awards came to the Chinese courts for enforcement.³⁴ Additionally, the drafters of the Arbitration Law in 1995 did not envisage the possibility of foreign arbitration institutions administering arbitration. There was also a fear of competition to domestic arbitration institutions if the market was open to foreign institutions.

B. Gap Filling by the Chinese courts

The Chinese courts perform an influential role in filling gaps in the ambiguities of the law through the SPC's judicial interpretations and judicial decisions.

According to the Provisions of the SPC on the Judicial Interpretation Work, the power to make judicial interpretations on the specific issues concerning the application of law in the trial work of the people's courts shall remain with the SPC.³⁵ The judicial interpretations issued by the SPC shall also have full legal force.³⁶ The SPC judicial interpretations not only interpret or clarify, but also supplement national laws; particularly where an area of

³² See White & Case International Arbitration Group & School of International Arbitration, Queen Mary University of London, "2018 International Arbitration Survey: The Evolution of International Arbitration" at 11 online (pdf): *Queen Mary University of London* <<http://www.arbitration.qmul.ac.uk/research/2018/>>.

³³ See Kun Fan, *Arbitration in China: A Legal and Cultural Analysis* (Oxford, United Kingdom: Hart Publishing, 2013) at 95–113.

³⁴ This view is expressed by a few Chinese arbitration experts in 2007 during the interviews the author conducted together with Professor Gabrielle Kaufmann-Kohler on a research project on international arbitration in China. The research project was directed by Professor Gabrielle Kaufmann-Kohler, and funded by the Swiss National Science Foundation. The author notes that this mentality starts to change through her own observations and informal talks with some Chinese arbitration experts, and also reflected in the discussions on the amendment of Arbitration Law since 2018.

³⁵ *Provisions of the Supreme People's Court on the Judicial Interpretation Work*, 2007, Zuigao Renmin Fayuan Gongbao at art 2.

³⁶ See *ibid* at art 5.

law is changing rapidly and the national law is not equipped to deal with new issues that have emerged. Through the extensive practice of adopting judicial interpretations, the SPC has acquired a powerful quasi-legislative function.

After the Arbitration Law came into force, the SPC issued a number of judicial interpretations concerning the application of relevant laws and treaties by Chinese courts. In practice, the SPC's judicial interpretations provide important guidance for lower courts on the application of the Arbitration Law, and also fill interpretative gaps not addressed by the Arbitration Law.

The SPC Interpretation on the Application of the Arbitration Law (2006, amended in 2018) was the first comprehensive interpretation issued by the SPC in relation to arbitration. It addresses a number of important issues relating to the interpretation and validity of the arbitration agreement, as well as the setting-aside and enforcement of arbitral awards.³⁷

In 2017 and 2018, the SPC successively promulgated a series of judicial interpretations and documents, marking another major milestone in the development of arbitration in China, including the Notice of the Supreme People's Court on Clarifying Relevant Matters Concerning the Standards for Hierarchical Jurisdiction over and Centralized Handling of Foreign-related Civil and Commercial Cases of First Instance (hereinafter referred to as "SPC Notice on Centralized Handling"), effective as of 1 January 2018³⁸; Provisions of the Supreme People's Court on Certain Issues Related to the Report and Review System of Arbitral Cases (hereinafter referred to as "SPC Provisions on the Report and Approval System"), effective as of 1 January 2018³⁹; and Provisions of the SPC on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review (hereinafter referred to as "SPC Provisions on Judicial Review"), effective as of 1 January 2018⁴⁰; Provisions of the Supreme People's Court on Several Issues Concerning the Handling of Cases of Enforcement of Arbitration Awards by People's Courts (hereinafter referred to as "SPC Provisions on the Handling of Cases of Enforcement"), effective as of 1 March 2018⁴¹; Reply of the SPC to the Application of Laws to Case Filing and Enforcement of "Pre-dispute Arbitration" Awards or Conciliation statements Rendered by Arbitration Institutions (hereinafter

³⁷ See *Interpretation of the Supreme People's Court Concerning Several Matters on Application of the Arbitration Law of the People's Republic of China*, 2006 (amended in 2018), *Zuigao Renmin Fayuan Gongbao*.

³⁸ 2018, *Zuigao Renmin Fayuan Gongbao* [SPC Notice on Centralized Handling].

³⁹ 2018, *Zuigao Renmin Fayuan Gongbao* [SPC Provisions on the Report and Approval System].

⁴⁰ 2018, *Zuigao Renmin Fayuan Gongbao*.

⁴¹ 2018, *Zuigao Renmin Fayuan Gongbao* [SPC Provisions on the Handling of Cases of Enforcement].

referred to as the “SPC Reply of Pre-dispute Arbitration”) effective as of 12 June 2018.⁴²

Through SPC Provisions on the Report and Approval System, the Internal Reporting System, which originally applied only to foreign-related judicial review cases, has been upgraded to become the Report and Approval System. Under this Report and Approval System judicial review for domestic and foreign-related arbitration is harmonized to a certain extent, while maintaining some differences in order to balance the considerations of supporting arbitration with not imposing unrealistic burdens on the SPC for judicial review.⁴³ In practice, the Reporting System has a positive effect in bolstering the confidence of investors. The harmonized approach now also allows domestic arbitration to enjoy some degree of quality control. In theory, however, the Reporting System is not consistent with the Civil Procedure Law and Chinese constitutional law. It can only be used as a temporary measure to enhance the quality of arbitration, due to the unbalanced development of courts in various regions and at different levels in China. The final liberalisation of arbitration depends on improving the quality of judges at all levels.

According to the Notice on Centralized Handling, judicial review of foreign-related commercial arbitration cases shall be handled by the specialized trial division that is responsible for handling foreign-related commercial cases.⁴⁴ With the promulgation of the SPC Provisions on Judicial Review, the system of arbitration-related judicial review is formalized. The SPC Provisions on the Handling of Cases of Enforcement clarified several issues on the enforcement of arbitral awards not addressed in previous laws and judicial interpretations, but existed in arbitral practice.⁴⁵ For instance, the Provisions clarify jurisdictional issues of enforcement (articles 2), allow a non-party to apply for the non-enforcement of arbitral awards (Articles 9 and 18), provide the connection between the setting aside cases and non-enforcement procedures (Articles 7, 8, 20 and 22), and clarify the review criterion for non-enforcement cases (Articles 13-16).

While the delegates of the NPC may not be familiar with the latest trends of international arbitration practice, the SPC judges deal with these issues on a daily basis and are constantly updated with the latest developments in the international arbitration community. The SPC’s interpretations and documents, to some extent, make up for deficiencies in the Arbitration Law, and have played an important role in supporting the arbitration practice in China, taking into account the generally accepted practice in international

42 2018, Zuigao Renmin Fayuan Gongbao.

43 See SPC Provisions on the Report and Approval System, *supra* note 39.

44 See SPC Notice on Centralized Handling, *supra* note 38.

45 See SPC Provisions on the Handling of Cases of Enforcement, *supra* note 41.

arbitration.

Apart from these interpretations, the SPC and courts at all levels also played an active role in clarifying ambiguities in the legislation through its judicial decisions. For instance, the lack of recognition of the seat of arbitration raises difficulties for the enforcement of an award rendered in China within the auspices of a foreign arbitration institution. In the notorious case of *Züblin*, the SPC ruled on 8 July 2004 that an arbitration clause providing for “Arbitration: ICC Rules, Shanghai shall apply” to be invalid on the grounds that it failed to designate an arbitration institution in accordance with article 16 of the Arbitration Law.⁴⁶ Subsequently, there have been a number of inconsistent court decisions causing uncertainty as to whether the seat of arbitration can be in China when foreign arbitration institutions administer a case.⁴⁷ In March 2013, the SPC held in *Anhui Longlide Packaging* that an arbitration agreement providing “ICC arbitration in Shanghai” is valid under the Arbitration Law, contrary to its prior position in *Züblin*.⁴⁸

In the recent *Praxair* decision, the Shanghai First Intermediate People’s Court (“Shanghai IPC”), applying Chinese law, cited the SPC’s opinion in *Longlide* to confirm the validity of the arbitration agreement providing for Singapore International Arbitration Center (SIAC) arbitration in Shanghai. The Shanghai IPC also expressly stated that there was no restriction under Chinese law such that a foreign arbitration institution may not administer arbitration seated in China.⁴⁹ Subsequently, the Guangzhou Intermediate People’s Court (“Guangzhou IPC”) expressly recognized the concept of the seat of arbitration. In the case of *Brentwood*, the Guangzhou IPC held that an arbitral award rendered in an ICC arbitration seated in China shall be deemed as a PRC award with such award being enforceable in China pursuant to the Civil Procedure Law.⁵⁰

46 *Züblin International GmbH v Wuxi Woco-Tongyong Rubber Engineering Co Ltd*, Min Si Ta Zi No 23, Zuigao Renmin Fayuan (8 July 2004), reproduced in Wan Exiang, ed, *Guide on Foreign-Related Commercial and Maritime Trial*, vol 9 (Beijing, China: People’s Court Press, 2004) at 36-40.

47 For detailed discussion, see Fan, “Prospects of Foreign Arbitration Institutions”, *supra* note 21.

48 *Anhui Longlide Packaging and Printing Co Ltd v BP Agnati SRL*, Min Si Ta Zi No 13, 2013, Zuigao Renmin Fayuan (25 March 2013). For further comment, see Arthur Dong & Li Meng, “Does Supreme People’s Court’s Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?” (15 July 2014), online (blog): *Kluwer Arbitration Blog* <<http://arbitrationblog.kluwerarbitration.com/2014/07/15/does-supreme-peoples-courts-decision-open-the-door-for-foreign-arbitration-institutions-to-explore-the-chinese-market/>>.

49 *Daesung Industrial Gases Co, Ltd, Daesung (Guangzhou) Gases Co, Ltd v Praxair (China) Investment Co, Ltd*, Hu 01 Min Te No. 83, 2020, Shanghai Zongji Renmin Fayuan (29 June 2020). The Chinese version of the decision is available at China Judgments Online, online: *China Judgments Online* <<https://wenshu.court.gov.cn/website/wenshu/181107ANFZoBXSKA/index.html?docId=976800d25e574ea99dc4ac0c00f60022>>.

50 *Brentwood Industries, Inc v Guangdong Fa’anlong Machinery Equipment Engineering Co, Ltd, Guangdong Zhengqi Trading Co, Ltd and Guangdong Environmental Engineerings*

After a decade of uncertainty, the Chinese courts have finally provided clarifications on market access of foreign arbitration institutions administering arbitration in China. The Chinese courts have come to realize that a restrictive interpretation of the Arbitration Law would negatively impact the development of arbitration in China. For instance, considering the legislative ambiguities regarding the nature of ICC awards rendered in China, when the ICC Court of Arbitration is invited to fix the seat of arbitration in the absence of parties' choice, the ICC Court rarely chooses a seat of arbitration in the territory of China. This will, in turn, limit the appointment of Chinese arbitrators, because the seat of arbitration is an important element to consider for the ICC to decide which national committee to invite to appoint arbitrators. Disputing parties may also react in ways that demonstrate their own autonomy from the intentions of the State. If parties want to have ad hoc arbitration or institutional arbitration by foreign arbitration institutions, they will still choose to do so despite the legislative restrictions, but they will choose to do so in a jurisdiction outside China. As a result, Hong Kong and Singapore have become alternative places of arbitration for Sino-foreign cross border disputes.⁵¹

The change in attitudes of the Chinese courts on this issue also reflect a policy dilemma between protecting Chinese arbitration institutions on the one hand, and attracting foreign investment on the other. Opening the door to foreign arbitration institutions will certainly increase competition for Chinese arbitration institutions, but the nature of the competition will be a strong incentive to improve the arbitration services rendered by domestic arbitration institutions.

C. Counter-Measures from Arbitration Institutions

According to the Chinese saying, "when a policy is issued from top-down, a counter-measure is being developed from bottom-up" (Shangyouzhengce, Xiayoudui). In light of the legislative restrictions, arbitration institutions have developed some counter-measures to bring its practice more in line with transnational standards, some of which push the boundaries of the Chinese law.

For instance, even though the Arbitration Law imposes a compulsory panel list to control the appointment of arbitrators, the Chinese International

Equipment Corporation, Hui Zhong Min Si Chu Zi No. 62, 2015, Guangdong Zongji Renmin Rayuan (6 August 2020). The Chinese version of the decision is available at China Judgments Online, online: *China Judgments Online* <<https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBOXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4>>.

⁵¹ See White & Case, *supra* note 32 at 9, 10 (Singapore and Hong Kong were on the top five most preferred seats in the world (Chart 6), and ranked in the second and third place for the Asia-Pacific region).

Economic and Trade Arbitration (“CIETAC”) Rules have, since 2005, allowed the parties to choose arbitrators outside its panel list, subject to the approval of the Chairman of CIETAC.⁵² CIETAC has also made great efforts to grant arbitral tribunals the power to determine their own jurisdiction, despite the principle of competence-competence not being recognized under the Arbitration Law. The latest version of the CIETAC Rules gives CIETAC the authority to delegate the power to determine the existence and validity of an arbitration agreement and its jurisdiction over the arbitration case to the arbitral tribunal.⁵³ In practice, if the jurisdictional objection raises complex issues, CIETAC will often consult with the arbitral tribunal before it renders a preliminary ruling, and will generally respect the tribunal’s opinion on the jurisdictional issue.⁵⁴ CIETAC’s Investment Arbitration Rules (for trial implementation) 2017 went a step further to fully recognize the arbitral tribunal’s power to rule on its own jurisdiction; this power not being dependent on CIETAC’s delegation.⁵⁵ Such developments are institutional efforts to provide a higher degree of both party and arbitral autonomy, although they may conflict with the Arbitration Law. The CIETAC Rules 2015 also expressly recognize the concept of the seat of arbitration. Though the Law Applicable to Foreign-Related Civil Relations in China maintains a link with the domicile of the arbitration institution,⁵⁶ the CIETAC rules recognize that the parties’ choice on the place of arbitration shall prevail and confirm that “the arbitral award shall be deemed as having been made at the place of arbitration”.⁵⁷

The BAC Rules 2019 also allow the BAC or the Arbitral Tribunal, as authorized by the BAC to determine any jurisdictional objection⁵⁸ – a step towards recognizing the competence-competence principle. Following the global trend to provide parties with emergency interim relief before the arbitration tribunal is constituted, the BAC’s latest Arbitration Rules also incorporated detailed provisions on the appointment of an emergency

52 See *China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules*, 2005 at art 21(2); *China International Economic and Trade Arbitration Commission International Investment Arbitration Rules (For Trial Implementation)*, 2017 at art 11(1) [CIETAC Rules 2017].

53 See *China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules*, 2015 at art 6(1) [CIETAC Rules 2015] (providing that “The CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over the arbitration case. The CIETAC may, if necessary, delegate such power to the arbitral tribunal”). Similar provisions existed in *China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules*, 2012 at art 6(1).

54 See Fan, “Glocalization of Arbitration”, *supra* note 14 at 210.

55 See CIETAC Rules 2017, *supra* note 52 at art 25(1) (providing that “the arbitral tribunal shall have the power to rule on its own jurisdiction, including the existence or validity of the arbitration agreement, or the applicability of these Rules”).

56 See Law Applicable to Foreign-Related Civil Relations, *supra* note 29 at art 18.

57 CIETAC Rules 2015, *supra* note 57 at art 7.

58 See *Beijing Arbitration Commission Arbitration Rules*, 2019 at art 6 [BAC Rules].

arbitrator.⁵⁹ In 2017, the BAC accepted its first case applying emergency arbitrator proceedings in China.⁶⁰ While recognizing the widely adopted practice of mediation conducted by the arbitral tribunal in China,⁶¹ the BAC Rules also allow the parties to choose independent mediation by the mediators of the Mediation Center in accordance with the BAC Mediation Rules if they are concerned with the same person acting as both a mediator and an arbitrator.⁶²

D. The Role of Transnational Legal Elites

Beneath the institutional roof, the role of individuals, such as judges, officials, case managers, arbitrators and counsel, who are actively engaged in international arbitration and familiar with transnational norms (“transnational legal elites”)⁶³, should also not be neglected in the development of China’s arbitration reforms.

For instance, a judge of Fourth Civil Division of the SPC, is often praised by international arbitration experts as “a leader in judicial reform”.⁶⁴ She has a Ph.D. degree, overseas educational experience, is familiar with international arbitration practice, and is actively involved in drafting several SPC interpretations related to arbitration. Transnational legal elites like her are “connecting dispute resolution in China with circles outside of China and facilitating the internationalization of Chinese legal practices.”⁶⁵

Other transnational legal elites include the officials and case managers of arbitration institutions, corporate counsel, arbitrators and scholars. Many of them obtained a master’s or Ph.D. degree from reputable universities in China and/or a degree in specialized master’s programs in international arbitration overseas, received arbitration trainings by professional organizations (such as the Chartered Institute of Arbitrators), have worked in the arbitration practice group of multinational law firms, have extensive experience with international arbitration, and are familiar with the transnational rules of the game. Hundreds of members in WeChat groups (such as “Beijing International Arbitration Forum”, “Greater China International Arbitration Forum” and “Arbitration in English”) regularly

⁵⁹ See *ibid* at art 63.

⁶⁰ See Xu, *supra* note 15.

⁶¹ See BAC Rules, *supra* note 58 at art 43. For detailed discussions of the arb-med practice, see Kun Fan, “An Empirical Study of Arbitrators Acting as Mediators in China” (2014) 15:3 *Cardozo J of Conflict Resolution* 777; Gabrielle Kaufmann-Kohler & Kun Fan, “Integrating Mediation into Arbitration: Why it Works in China” (2008) 25:4 *J Intl Arb* 479.

⁶² See BAC Rules, *supra* note 58 at art 44.

⁶³ See Matthew S. Erie, “The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution” (2020) 60:2 *Va J Intl L* 225 at 240.

⁶⁴ *Ibid* at 282.

⁶⁵ *Ibid*.

exchange the latest developments of international arbitration and attend trainings to stay updated on the international arbitration practice. CIETAC also organizes its annual CIETAC Cup International Commercial Arbitration Moot to train future generations of transnational legal elites in China. The 18th CIETAC Cup was held virtually in November 2020. Nearly 700 students from 69 competing teams participated in the competition, with 145 hearings held over five days.⁶⁶ These moot participants will become future drivers of the internationalization of arbitration in China.

These transnational legal elites have been calling for amendments to the Arbitration Law for two decades⁶⁷, because legislative restrictions have caused a loss of arbitration business for China, affecting the businesses of various stakeholders, including arbitration counsel, arbitrators and arbitration institutions. Since the amendment to the Arbitration Law was included in the second category of legislative planning in 2018⁶⁸, scholars, arbitration practitioners, institutions and policymakers have gathered to discuss the direction of amending the Arbitration Law. The majority view supports the amendment of the Arbitration Law modelled on the Model Law, while preserving some Chinese characteristics based on the arbitration status quo in China. The Model Law is designed to “assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.”⁶⁹ The Model Law is a result of compromise between the common and civil law systems and “reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.”⁷⁰ Legislation based on

66 See China International Economic and Trade Commission, “18th CIETAC Cup International Commercial Arbitration Moot”, online: *China International Economic and Trade Commission* <<http://moot.cietac.org>>.

67 See, for instance, “修改仲裁法形成中国仲裁完整体系”, 中国贸易新闻网, 2018年11月22日 (“Amending the Arbitration Law and Establishing Comprehensive Arbitration Framework in China”, China Trade News Website, 22 November 2018), online: <www.ccpit.org/Contents/Channel_4131/2018/1122/1090875/content_1090875.htm>; “费宗祯先生谈仲裁法的修改”, 2015年5月20日 (“Interview with Mr. Zongyi Fei on the Amendment of the Arbitration Law”, 20 May 2015), online: <www.gvac.org.cn/ArticleDetail.aspx?ID=58>; 宋连斌, 《理念走向规则: 仲裁法修订应注意的几个问题》, 《北京仲裁》第52辑, 2004年 (Lianbin Song, “From Concept to Rules: Several Issues That Should be Paid Attention to in the Amendment of the Arbitration Law”, 52 *Beijing Arbitration* (2004); 王红松, 《〈仲裁法〉存在的问题及修改建议》, 《北京仲裁》第52辑, 2004年 (Hongsong Wang, “Problems and Suggestions for Amendment of the Arbitration Law”, 52 *Beijing Arbitration* (2004)).

68 See China Council for the Promotion of International Trade, online: *China Council for the Promotion of International Trade* <www.ccpit.org/Contents/Channel_4131/2018/1122/1090875/content_1090875.htm>.

69 United Nations Commission on International Trade Law, “UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006”, online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

70 *Ibid.*

the Model Law has been adopted in 80 States in a total of 111 jurisdictions, including Canada, a few states in the USA, Germany, Australia, Singapore, Japan, Hong Kong and Macao, among others.⁷¹ Revising China's Arbitration Law based on the Model Law will reflect China's willingness to play by the rules of the game, rendering China's arbitration framework more in line with transnational standards.

With respect to the specific content of the amendments, proposals have included strengthening the application of party autonomy, recognizing the nature and status of "non-profit legal persons" arbitration institutions, establishing the doctrine of competence-competence, setting clear rules and definitions regarding the seat of arbitration, loosening requirements regarding the validity of arbitration agreements, empowering arbitrators to issue interim measures, allowing for ad hoc arbitration, and revisiting the qualifications of arbitrators and the criteria for their nomination and appointment, among others. These proposals, if adopted, will lift restrictions on party autonomy, improve users' perception of China's legal infrastructure, enhance China's general reputation, and eventually make China a more appealing place of arbitration for international users.

III. China's Role in Norms Shaping ("Globalised localism")

China is not just a rule follower or taker, but exerts an increasingly important influence on the world economy and shaping of transnational norms—a rule shaper in the international legal order.⁷² Despite a dramatic fall in global foreign direct investment ("FDI") in 2020 and a weak underlying trend as a result of the COVID-19 pandemic, China remains the world's second-largest FDI recipient (141Bn USD in 2019)⁷³, with the fourth-largest FDI outflow (117Bn USD in 2019, down from the second-largest FDI outflow in 2018).⁷⁴ UNCTAD's survey of investment promotion agencies rank the United States and China, tied at first place, as the most likely sources of foreign investment to their countries.⁷⁵ Three Chinese State-owned multinational enterprises ("MNEs") entered the list of the top 100 MNEs in 2018.⁷⁶ This rise in outward

71 See United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission on International Trade Law* <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

72 See Heng Wang, "Selective Reshaping: China's Paradigm Shift in International Economic Governance" (2020) 23:3 *J Intl Econ L* 583.

73 See UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic*, UNCTAD (2020) at fig I.7.

74 See *ibid* at fig I.9.

75 See UNCTAD, *World Investment Report 2019: Global Investment Trends and Prospects*, UNCTAD (2019) at 16.

76 See *ibid* at 19.

investment is expanding Chinese influence to other parts of the world.

China's influence abroad extends beyond impacts to the global economy; it also gives rise to increasingly important legal and regulatory implications. China's ascension to the global economic arena challenges the conventional wisdom that a rigid application of the rule of law principle is the key to economic development. Could China serve as an attractive "alternative Asian model" of development with respect to domestic and global governance? To what extent is China reshaping international economic order?

In terms of domestic governance, while China remains ideologically non-invasive⁷⁷, the Chinese government seeks to increase its "soft power". One aspect of this soft power consists of globally influential initiatives such as China's various legal capacity-building programs for foreign lawyers from numerous jurisdictions, which aims to introduce Chinese law to foreign lawyers, and persuade them to consider alternatives to Western notions regarding law and development.⁷⁸ According to publicly available information, "hundreds of foreign lawyers, judges and government officials have attended legal training courses in China."⁷⁹ Even if the participants in these legal forums, seminars and training courses may not find the Chinese approach to the rule of law ideologically appealing, they may accept it as a "legitimate alternative."⁸⁰

In terms of global governance, signs of China's rule-shaping can be found in its role in reshaping existing institutions (e.g., China's role in UNCITRAL Working Group III on investor-state dispute settlement), and building new institutions (e.g. China's lead in the creation of the Asian Infrastructure Development Bank, and China's unilateral institutional building such as the creation of the CICC's). China's proactive role in global governance is also reflected in its efforts to reshape hard and soft law at multilateral venues (e.g., World Customs Organization, G20), the regional level (e.g. a possible China-centered Free Trade Agreement network), and the domestic level (e.g. free trade zones).⁸¹ Wang argues that China is increasingly concerned with reshaping institutions and incrementally uploading rules to transnational law—"selective reshaping."⁸² He also contends that the selective reshaping "will likely enable China to translate its economic power into governance power if obstacles can be properly managed."⁸³

77 See Samuli Seppanen, "Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?" (2018) 51:1 Vand J Transnat'l L 101 at 158.

78 See *ibid* at 157.

79 *Ibid* at 104.

80 *Ibid* at 148.

81 See Heng Wang, *supra* note 72.

82 *Ibid*.

83 *Ibid* at 594.

China's ambitious Belt Road Initiative ("BRI"), the multi-trillion-dollar project established by President Xi Jinping in October 2013 to promote economic integration across – and beyond – Eurasia, has the potential to trigger a paradigm shift.⁸⁴ It spans around 120 countries, covering more than 60% of world's population and implementing more than 6000 projects with a value exceeding \$1 trillion.⁸⁵ It constitutes an important component of China's long-term strategic plan to regain its influence in Asia and the world. With the potential of disputes arising from thousands of cross-border commercial disputes among the BRI countries in the coming years, China stands to develop substantial case law in dispute resolution.⁸⁶

China appears to be taking a more proactive approach towards dispute resolution under BRI, not only by furthering its participation in established dispute resolution mechanisms, but also by building its own institutions such as the CICC for BRI related disputes, and by leading the establishment of the multilateral dispute resolution forum—International Commercial Dispute Prevention and Settlement Organization ("ICDPASO"). China was amongst the initial signatures of the Singapore Convention despite some initial hesitation. These institutions and rules may serve as "a powerful transmitter of China's alternative vision"⁸⁷, which could challenge the U.S.-led Western model of dispute resolution, and be "a game changer by introducing an Asian way of resolving disputes."⁸⁸ Over the long term, Chinese preferred legal norms, values and institutions could be directly exported onto the global arena and ultimately be viewed as a real alternative to the American paradigm – a phenomenon I have described as "globalized localism."⁸⁹

The following section of this article discusses China's potential impact on shaping global norms of dispute resolution through examples of its signature to the Singapore Convention (A), and its establishment of the one-stop diversified international commercial dispute settlement mechanism under

84 See Shamshad Akhtar, "Belt and Road Will Trigger Paradigm Shift", *China Daily*, 22 March 2017, online: < www.chinadaily.com.cn/opinion/2017-03/22/content_28634010.htm>.

85 See UNCTAD, "International Conference on the Belt and Road Initiative: Sharing of Policy Experiences (28 April 2019), online: *UNCTAD* <unctad.org/meeting/international-conference-belt-and-road-initiative-sharing-policy-experiences>.

86 See *ibid.*

87 Joel Slawotsky, "The Long-Term Ramifications of China's BRI Jurisprudence" (15 April 2019), online (blog): *Law at the End of the Day* <<http://lcbackerblog.blogspot.com/2019/04/joel-slawotsky-longer-term.html>>.

88 Guiguo Wang & Rajesh Sharma, "The International Commercial Dispute Prevention and Settlement Organization: A Global Laboratory of Dispute Resolution with an Asian Flavor" (2021) 115 *AJIL Unbound* 22 at 22.

89 See Fan, "Glocalization of Arbitration", *supra* note 14.

the auspices of the CICC (B).

A. China's Signature to the Singapore Convention

Apart from arbitration, China also plays an active role in other forms of alternative dispute resolution (“ADR”), such as mediation. It actively participated in the drafting of the Singapore Convention. Despite initial hesitation, China was among the first nations to sign the Singapore Convention when it was first opened for signature in August 2019.⁹⁰

Mediation is not a new concept to China. Indeed, influenced by Chinese philosophy seeking harmony and avoiding conflicts, traditional Chinese legal culture was characterized by the non-adversary method of dispute resolution, with the result that disputants often resorted to informal means of dispute settlement.⁹¹ To some extent, mediation was not an alternative, but an essential and integral part of the dispute resolution system in traditional Chinese society.

However, the notion of mediation – often used interchangeably with conciliation – in China is different from mediation as defined in the West. Mediation traditionally was limited to family, civil and property disputes in China and was featured by informalism and a lack of systematic regulations. As Zeng pointed out, “instead of referring to mediation as a ‘system’ of regulations, perhaps it is more appropriate to think of mediation as a set of socially accepted customary laws. These customary laws had gained not only popular acceptance but support from the State.”⁹²

At present, the regulatory rules on mediation remain underdeveloped. The first mediation legislation only came into force on 1 January 2011⁹³, and its scope of application is limited to the people's mediation activities; i.e., activities of the people's mediation committee in facilitating the parties concerned to reach a mediation agreement voluntarily through persuasion; giving guidance and other methods on the basis of equality in negotiation; and resolving the disputes among the people.⁹⁴ To date, there are no regulations on commercial mediation in China. As a result, the practice of commercial mediation is also underdeveloped. The formalization and increased legalization introduced by the Singapore Convention seems to contrast with the Chinese values of mediation.

90 See Singapore Convention on Mediation, “46 States signed new international treaty on mediation” (7 August 2019), online: [Singapore Convention on Mediation <www.singaporeconvention.org/media/media-release/states-signed-international-treaty>](http://singaporeconvention.org/media/media-release/states-signed-international-treaty).

91 For further discussion, see Fan, *Arbitration in China*, *supra* note 10 at 194–203.

92 Xianyi Zeng, “Mediation in China – Past and Present” (2009) 17 *Asia Pac L Rev* 1 at 5.

93 See *People's Mediation Law of the People's Republic of China*, 2011, *Zhonghua Renmin Gongheguo Falu Huibian*.

94 See *ibid* at arts 1–2 (2011).

This cultural gap has led to several debates by various authoritative bodies in China as to whether China should accede to the Singapore Convention. A few practical and legal concerns were raised during the debates; including (i) the lack of a specialized law on commercial mediation in China, which led to the incompatibility between the current legal system in China and the Singapore Convention; (ii) the risk that the people's courts may be inundated with cases on the enforcement of settlement agreements, which may lead to a shortage of judicial resources; (iii) the risk that fraudulent mediation may emerge if there is no regulation in place; (iv) the possible risk of opening the gate to seize the assets of Chinese companies (e.g., to pay off debt pursuant to the settlement agreements), which could jeopardize their interests; and (v) the fear that Chinese mediation institutions may lack a competitive advantage in the market for international mediation services due to the unsophisticated regulatory rules on mediation and inadequate practices of commercial mediation in China.⁹⁵

Despite these challenges, the Singapore Convention also presents an opportunity for China to follow the international ADR trend and develop its commercial mediation practice. The Singapore Convention was adopted in response to an often-cited challenge to the use of mediation—the lack of an efficient and harmonised framework for cross-border enforcement of settlement agreements resulting from mediation.⁹⁶ It was hoped that the ability to give effect to a mediated settlement quickly and efficiently, if the need ever arose, would incentivize the use of mediation.⁹⁷

Signing the Singapore Convention may be an opportunity for China to incentivize the use of mediation to resolve cross-border commercial disputes and push the legislature to put the enactment of commercial mediation law

95 See Wei Sun, “Singapore Convention Series—Why China Should Sign the Singapore Mediation Convention: Response to Concerns (Part I)” (19 July 2019), online (blog): *Kluwer Mediation Blog* <mediationblog.kluwerarbitration.com/2019/07/19/singapore-convention-series-why-china-should-sign-the-singapore-mediation-convention-response-to-concerns-part-i/> Wei Sun, “Singapore Convention Series—Why China Should Sign the Singapore Mediation Convention: Response to Concerns (Part II)” (20 July 2019), online (blog): *Kluwer Mediation Blog* <mediationblog.kluwerarbitration.com/2019/07/20/singapore-convention-series-why-china-should-sign-the-singapore-mediation-convention-response-to-concerns-part-ii/> Peter Corne and Matthew Erie, “China’s Mediation Revolution? Opportunities and Challenges of the Singapore Mediation Convention” (28 August 2019), online (blog): *OpinioJuris* <www.opiniojuris.org/2019/08/28/chinas-media-revolution-opportunities-and-challenges-of-the-singapore-mediation-convention/>; Susan Finder, “Rooting the Singapore Mediation Convention in Chinese Soil” (1 September 2019), online (blog): *Supreme People’s Court Monitor* <www.supremepeoplescourtmonitor.com/2019/09/01/rooting-the-singapore-mediation-convention-in-china-se-soil/>.

96 See Singapore Convention on Mediation, “Introduction to the Singapore Convention”, online: *Singapore Convention* <www.singaporeconvention.org/convention/about-convention/>.

97 See Corrine Montineri, Address (delivered at the Lunch-time Panel on the Negotiation of the Convention on Mediation, 7 August 2019) [unpublished].

on its agenda,⁹⁸ paving the way for the development of commercial mediation in China.

Indeed, the Chinese government has actively participated in the drafting of the Singapore Convention text. According to Mr. Schnabel, the United States negotiator, China has vigorously participated in the formulation of international norms, and the views of Chinese delegates had a positive impact on the final text of the Singapore Convention.⁹⁹ After much internal debate, Li Chenggang, Assistant Minister of Commerce of China, signed the Singapore Convention, together with 45 other States, at the Singapore Convention Signing Ceremony and Conference held in Singapore on 7 August 2019.¹⁰⁰ The Singapore Convention entered into force on 12 September 2020, marking a significant development in international commercial dispute resolution. Businesses around the world will now have greater certainty in resolving cross-border disputes through mediation, as the Convention provides a more effective means for enforcing mediated outcomes.¹⁰¹

China's signature to the Singapore Convention indicates its determination to lead the development of international rules of mediation, perform a vital role in shaping the norms of international dispute resolution globally, formalize its mediation practice, and develop its commercial mediation system. Being a contracting state to the Singapore Convention will help improve the business environment of China, and contribute to the construction of a diversified dispute resolution mechanism supporting the BRI. Commentators have predicted that international mediation will be placed "at the very centre of BRI dispute resolution strategy."¹⁰²

B. CICC

Another example of China's efforts to exert greater influence in the global economic order is the creation of the CICC, which aims to provide a forum for international dispute resolution in China. Having BRI-related commercial disputes resolved under the auspices of CICC, China will develop a rich case-

⁹⁸ There was no mention of mediation-related laws in the legislative plan of the 13th Standing Committee of NPC issued in September 2018.

⁹⁹ See Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements" (2019) 19:1 Pepp Disp Resol LJ 1. See also Susan Finder, "Singapore Mediation Convention and China" (27 March 2019), online (blog): *Supreme People's Court Monitor* <www.supremepeoplescourtmonitor.com/2019/03/27/singapore-mediation-convention-and-china/>.

¹⁰⁰ As of 1 September 2020, the Convention has 53 signatories. For a list of signatory countries, see Singapore Convention on Mediation, Media Release, "Singapore Convention on Mediation Enters into Force" (12 September 2020), online: *Singapore Convention on Mediation* <www.singaporeconvention.org/media-release/2020-09-12-singapore-convention-on-mediation-enters-into-force>.

¹⁰¹ See *ibid.*

¹⁰² Corne & Erie, *supra* note 95.

law on BRI related disputes. Globalized localism will occur when Chinese legal norms, values and practices are incorporated into BRI decisions and possibly exported into other systems.

1. Background

The BRI intends to develop two major trade routes connecting Europe, Africa, and the Asia-Pacific region: the Silk Road Economic Belt, an overland trade route that broadly traces China's historic Silk Road through central and west Asia and Europe (the "Belt"); and the 21st Century Maritime Silk Road, a maritime trade route running through Southeast Asia, Oceania and North Africa (the "Road"). Over the past few years, "the joint construction of the "Belt and Road" has gradually changed from initiative to action, from concept to practice, has already had a positive effect on over 140 countries and regions, and has forcefully promoted the facilitation and liberalization of world trade and investment."¹⁰³ One core feature of the BRI is its emphasis on stability, fairness, transparency and predictability, including the efforts to develop an effective dispute resolution mechanism which suits the needs of the Belt and Road projects.

Against this background, in the first half of 2017, the SPC drafted the first draft of the *Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions* ("the Opinion").¹⁰⁴ After repeated consultations from central and local departments and several revisions, the draft was submitted to the Leading Group for Deepening Overall Reform of the 19th CPC Central Committee for examination and approval by the CPC Political Legal Committee. On 23 January 2018, the Leading Group for Deepening Overall Reform considered and adopted the Opinion. Subsequently, the Opinion was officially released by the General Office of the Communist Party Central Committee and the General Office of the State Council of the PRC. The Opinion is the first important document for the reform and innovation of International Commercial Dispute Settlement Mechanism and Institutions. It establishes the basic principle, concrete scheme and organizational guarantee for establishing the Belt and Road International Commercial Dispute Settlement Mechanism and Institutions.¹⁰⁵ On 25 June 2018, the "Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court" ("the SPC Provisions Regarding the

¹⁰³ China International Commercial Court, Official Release, "The State Council Information Office Held a Press Conference on the 'Opinion on the Establishment of 'The Belt and Road' International Commercial Dispute Settlement Mechanism and Institutions'" (28 June 2018), online: *CICC* <www.cicc.court.gov.cn/html/1/219/208/210/769.html> [*CICC* Release].

¹⁰⁴ 2018, Zuigao Renmin Fayuan Gongbao.

¹⁰⁵ See *CICC* Release, *supra* note 103.

Establishment of the CICC”) was adopted and became effective from 1 July 2018.¹⁰⁶

On 29 June 2018, two international commercial courts were established in accordance with the Opinion—the First China International Commercial Court in Shenzhen Municipality, Guangdong Province and the Second China International Commercial Court in Xi’an Municipality, Shaanxi Province—to address cross-border commercial disputes, under the coordination and supervision of the Fourth Civil Division of the Supreme People’s Court.¹⁰⁷

In July and December 2018, two groups of 14 judges were formally appointed to the CICCs. These 14 judges “possess more than 10 years of experience in civil and commercial trials and over 90% of them have obtained a doctorate in law. They are familiar with international treaties, international customs and international trade and investment practices, and are proficient in using Chinese and English as working languages”.¹⁰⁸ On 24 August 2018, the SPC issued the Decision on the Establishment of International Commercial Expert Committee.

On 5 December 2018, the SPC convened a symposium on the “Diversified Resolution Mechanism for International Commercial Disputes”, and officially promulgated three regulatory documents; namely, the Notice of the General Office of the Supreme People’s Court on the Determination of the First Batch of International Commercial Arbitration and Mediation Institutions Included in the “One-stop” Mechanism for the Diversified Resolution of International Commercial Disputes (“Notice on the Determination of Arbitration and Mediation Institutions”)¹⁰⁹, the Rules of the Supreme People’s Court for the Procedure of International Commercial Courts (Trial) (“Procedure Rules”)¹¹⁰ and the Work Rules of the International Commercial Expert Committee of the Supreme People’s Court (Trial) (“Work Rules”).¹¹¹ The above documents set out the working procedures for the acceptance, service, pre-trial mediation, trial, enforcement and support for arbitration and dispute resolution of international commercial courts. They also refined the functions, duties and composition of the International Commercial Expert Committee, and published the first batch of arbitration and mediation institutions incorporated into the *one-stop* diversified settlement mechanism of the international commercial dispute resolution platform.

106 2018, Zhonghua Renming Gongheguo Falu Heibian [SPC Provisions Regarding the Establishment of the CICC].

107 See *ibid.*

108 Tao Jingzhou, News Release, ““One-stop” Dispute Resolution Mechanism Is the CICC’s Main Characteristic” (22 July 2019), online: CICC <www.cicc.court.gov.cn/html/1/219/208/209/1316.html>.

109 2018, Zhonghua Renmin Gongheguo Falu Huibian.

110 2018, Zhonghua Renmin Gongheguo Falu Huibian.

111 2018, Zhonghua Renmin Gongheguo Falu Huibian [Work Rules].

“We’d like to see some litigants from countries involved in the initiative solve commercial disputes in the two courts, and we promise they will receive fair and efficient legal services here,” said Luo Dongchuan, vice-president of the SPC.¹¹²

2. Chinese Characteristics and Innovation

The establishment of the CICC follows an interesting trend worldwide: the emergence of “international” commercial courts created within a domestic legal system, to resolve cross-border commercial matters, using English as the default language. Inspired in part by the London Commercial Court, the first commercial court meeting the needs of the international commercial community, a number of international commercial courts have been established in various countries and regions over the past two decades. Prominent examples include the Dubai International Financial Centre (“DIFC”) Courts established in 2006, the Qatar International Court and Dispute Resolution Centre (“QICDRC”) established in 2009, the Singapore International Commercial Court (“SICC”) established in January 2015 and the Abu Dhabi Global Market Courts (“ADGFC”) in 2015. A more recent trend is also starting to emerge; namely, the creation of similar courts or chambers within existing court structures in Europe, such as Netherlands Commercial Courts (“NCC”) established in July 2017, the Brussels International Business Court (“BIBC”) established in October 2017, and the International Chamber of the Court of Appeal of Paris (*the Chambre Internationale de la Cour d’appel de Paris*, “CICAP”) created on 7 February 2018. Erie describes the emergence of these cross-border commercial dispute resolution centres as “New Legal Hubs” (“NLHs”), promoted as an official policy by nondemocratic or hybrid states.¹¹³ NLHs, he argues, “interact continually with each other through dynamics of both competition and collaboration in a decentralized system that supports transnational law.”¹¹⁴

While the establishment of the CICC is drawn from international experience, the CICC also distinguishes itself from other international commercial courts in the following aspects:¹¹⁵

112 “International Commercial Courts Eye Expanded Role”, *China Daily* (30 January 2019) online: <www.china.org.cn/china/2019-01/30/content_74423850.htm> [“ICCS Eye Expanded Role”].

113 See Erie, *supra* note 63.

114 See *ibid* at 233.

115 For a comparison between the CICC and Singapore International Commercial Court, see Lance Ang, “International Commercial Courts and the Interplay Between Realism and Institutionalism – A Look at China and Singapore” (Paper delivered at the Dispute Settlement in the Belt and Road Initiative (BRI), 14 November 2019), Harv Intl LJ Online Scholarship Essays, online: *Harvard International Law Journal* <harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/>.

1) Language

While the use of the English language in proceedings is a common feature in other international commercial courts, the default language is Chinese in the CICC due to a legislative stipulation. The PRC Civil Procedure Law requires that “in trying civil cases involving foreign parties, a people’s court shall use the written and spoken language commonly used in the People’s Republic of China (Chinese).”¹¹⁶

2) Appointment of Judges

Furthermore, while foreign judges are often appointed in international commercial courts such as the SICC and the DIFC, there are regulatory restrictions on appointing foreign judges in China. For instance, the PRC Law on Judges requires that judges be of Chinese nationality.¹¹⁷ As a result, the 16 judges appointed to the CICC are all of Chinese nationality; although they are all familiar with international practice and are proficient in using both Chinese and English as working languages.¹¹⁸ Judge Gao Xiaoli, Vice President of the Fourth Civil Division of the SPC, acknowledged these legislative obstacles in an interview and highlighted that if foreign professional talents are not introduced to participate in the construction of international commercial courts, it may limit the internationalization and scope of impact of the CICC.¹¹⁹

To offset the legislative obstacles on appointment of foreign judges and to increase its international competitiveness, the CICC established an International Commercial Expert Committee, as stated in Article 11 of the SPC Provisions Regarding the Establishment of the CICC.¹²⁰ On 26 August 2018, the International Commercial Expert Committee of the SPC was established, and 31 experts from 14 countries including China, Russia, the United States, the United Kingdom, France, Germany, South Korea, Australia and regions including Hong Kong, Macao and Taiwan were entrusted by the CICC. The Work Rules (Trial) set out the qualifications, duties, and functions of the International Commercial Expert Committee members. An expert committee member may preside over mediations of international commercial cases, provide advisory opinions on specialized

116 See Civil Procedure Law, *supra* note 27 at art 262.

117 See *Judges Law of the People’s Republic of China*, 1995 (revised 23 April 2019), Zhonghua Renmin Gongheguo Falu Huibian at art 12(1) [Judges Law].

118 See China International Commercial Court, “About CICC, Judges”, online: *China International Commercial Court* <cicc.court.gov.cn>.

119 See China International Commercial Court, News Release, “Building the Judicial Guarantee of International Commercial Court “Belt and Road” Construction An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People’s Court, PRC” (19 March 2018), online: *CICC* <www.cicc.court.gov.cn/html/1/219/208/209/774.html>.

120 See SPC Provisions Regarding the Establishment of the CICC, *supra* note 106 at art 11.

legal issues concerning international treaties and international commercial rules, finding and applying foreign laws involved in cases heard by the International Commercial Court and the People's Courts at all levels, provide advice and suggestions on the development of the International Commercial Court, and provide advice and suggestions on the formulation of judicial interpretations and judicial policies of the SPC.¹²¹ The Work Rules also include a catch-all provision, allowing the expert committee members to participate with "other matters entrusted by the International Commercial Court."¹²²

The establishment of the Expert Committee is an institutional innovation of the CICC, which demonstrates China's openness towards internationalism, driven by the competition with other international commercial courts. The professional knowledge, international reputation and diversified background of the committee members can provide advice and assist the CICC judges in ascertaining the content of foreign laws and preside over mediation. CICC judges will be given additional training to learn how to search for and adopt foreign laws from the Expert Committee.¹²³ The involvement of foreign legal experts and professionals may enhance the credibility of the CICC and mitigate concerns about the CCP's influence on the CICC rulings.¹²⁴

3) *One-Stop* Dispute Resolution Platform

One major institutional innovation is the creation of a *one-stop* dispute resolution platform, which integrates litigation, mediation and arbitration to provide Chinese and foreign parties with just, efficient, convenient, quick, and cost-effective dispute resolution services. The diversified dispute resolution mechanism provides a platform by which parties may choose the most appropriate means to settle their international commercial disputes: through mediation, arbitration or litigation.

Where the parties select mediation, they may choose a mediation institution included in the *one-stop* international commercial dispute diversified resolution mechanism in which to conduct mediation (i.e., the Mediation Center of China Council for the Promotion of International Trade and the Shanghai Commercial Mediation Center).¹²⁵ The parties could also

¹²¹ See Work Rules, *supra* note 111 at art 3.

¹²² *Ibid* at art 3(5).

¹²³ See "ICCs Eye Expanded Role", *supra* note 112.

¹²⁴ See Alyssa Wall, "Designing a New Normal: Dispute Resolution Developments Along the Belt and Road" (2019) 52 NYU J Intl L & Pol 279 at 306.

¹²⁵ See Supreme People's Court, Official Release, "Notice of the Supreme People's Court on Inclusion of the First Group of International Commercial Arbitration and

turn to the Expert Committee, consisting of 32 experts from 15 countries and regions, to mediate their disputes.¹²⁶ Where the parties opt for arbitration, they may choose among the five arbitration institutions included in the one-stop international commercial dispute diversified resolution mechanism (i.e., the China International Economic and Trade Arbitration Commission, the Shanghai International Economic and Trade Arbitration Commission, the Shenzhen Court of International Arbitration, the Beijing Arbitration Commission, and the China Maritime Arbitration Commission).¹²⁷ If the parties decide to pursue lawsuits, “15 senior judges, all with more than a decade of experience in handling commercial disputes, will supply legal services and ensure the quality of case hearings,” said SPC vice-president Luo Dongchuan.¹²⁸ If litigants are unsatisfied with the findings of the CICC, they can appeal to the SPC’s No. 4 Civil Division for a retrial.

Articles 11 to 17 of the SPC Provisions Regarding the Establishment of the CICC provided detailed rules as to how to coordinate mediation, arbitration and litigation, and how the parties can benefit from the one-stop dispute resolution platform. With respect to the coordination between mediation and litigation, parties who choose mediation to resolve the dispute can, after successful mediation, directly request the CICC to make a judgment. Parties who have already filed a lawsuit in the CICC can also transfer the dispute to the Expert Committee or an international commercial mediation institution for mediation.¹²⁹ With respect to the coordination between arbitration and litigation, parties who choose arbitration may, in accordance with the SPC Provisions on CICC and the Procedural Rules, apply to the CICC for preservation of evidence, assets or acts either before or after the commencement of the arbitral proceedings. After the arbitral award is rendered, an application may be made to the International Commercial Court for setting aside or enforcing the arbitral award.¹³⁰

Apart from the legal basis, the CICC also provides institutional and

Mediation Institutions in the “One-stop” Diversified International Commercial Dispute Resolution Mechanism” (5 December 2018), online: CICC <www.cicc.court.gov.cn/html/1/219/208/210/1144.html>.

126 See The Decision on the Establishment of International Commercial Expert Committee of the Supreme People’s Court, 24 August 2018, *Zuigao Renmin Fayuan*. For a list of member of the International Expert Committee, see China International Commercial Court, “Expert Committee”, online: China International Commercial Court <[cicc.court.gov.cn/html/1/219/235/237/index.html](http://www.cicc.court.gov.cn/html/1/219/235/237/index.html)>.

127 See Judges Law, *supra* note 117.

128 “ICCs Eye Expanded Role”, *supra* note 112.

129 See *Provisions of the Supreme People’s Court on Several Issues Concerning the Establishment of the International Commercial Courts*, 2018, *Zuigao Renmin Fayuan Gongbao* at arts 12–13.

130 See *ibid* at art 14.

logistical support to improve the coordination among different modes. It allows the arbitration and mediation institutions to set up offices at the venue of the CICC to provide convenience for the parties. An information-based work platform is also established, allowing the parties to exchange evidence and arrange hearings and delivery electronically.

According to Tao Jingzhou, a member of the Expert Committee, “the ‘one-stop’ dispute resolution mechanism not only provides parties to international commercial disputes with convenience and multiple choices with lower costs; it also provides a “direct train” to the SPC, crossing the traditional territorial jurisdiction limit and level jurisdiction limit and avoiding potential local protectionism”.¹³¹

The goals of integrating mediation, arbitration and litigation into the CICC offers parties more choices on one platform, saving time and costs, while enhancing judicial efficiency. According to SPC vice-president Luo Dongchuan, “the quicker we solve their disputes, the better for [the disputants] to push forward with BRI-related construction projects, such as building bridges or railways. In the past, solving a foreign-related commercial dispute would take much more time in China. But now, thanks to the integrated platform, such disputes can be solved faster.”¹³²

3. Prospects

The CICC is believed to play a bigger role in “strengthening legal protections for countries involved with the initiative and providing a better business environment for investors from home and abroad.”¹³³

For Chinese investors, the CICC serves a strategic role for China in protecting the interests of domestic firms who invest in some of the world’s most difficult business environments. Across countries participating in the BRI, the average time for resolving a commercial dispute through a local court is 621 days, according to the World Bank.¹³⁴ Chinese companies actively participating in BRI trade and investment projects may fear being placed in a disadvantageous position concerning dispute resolution. The CICC aims at promoting the use of Chinese institutions as part of the push to move the locus of BRI-related dispute resolution to China.¹³⁵ For foreign litigants,

¹³¹ See Tao, *supra* note 108.

¹³² “ICCs Eye Expanded Role”, *supra* note 112.

¹³³ *Ibid.*

¹³⁴ See Jonathan E. Hillman & Matthew P. Goodman, “China’s ‘Belt and Road’ Court to Challenge Current US-led Order”, *Financial Times* (24 July 2018), online: <www.ft.com/content/b64d7f2e-8f4d-11e8-b639-7680cedcc421>.

¹³⁵ See Susan Finder, “Some Comments on the China International Commercial Court

it is also hoped they can gain a better understanding of the Chinese legal system and increase their trust in Chinese justice through improved global credibility of the judiciary.

In the long run, some of the Chinese norms and values, such as the consensual spirit, the pragmatic approach to resolve the disputes in amiable ways through flexible means, and the integrated platform of dispute resolution may be seen as a real alternative to the U.S.-led paradigm for the dispute resolution process.

At the signing ceremony of the Singapore Convention, discussions were held regarding the *mixed mode* of dispute resolution and hybrid processes and how to move forward, including with respect to various efforts towards building a *one-stop* platform for users allowing parties to section off different aspects of their disputes to arbitration, mediation and litigation, as appropriate.¹³⁶

According to an online survey associated with the Global Pound Conferences, taken at more than thirty sites around the world, when respondents were asked to identify what makes up effective dispute resolution processes, the most popular answer was “combining adjudicative and non-adjudicative processes (e.g. arbitration/litigation with mediation/conciliation).”¹³⁷

In light of the users’ demand, a Mixed Mode Taskforce was initiated by the International Mediation Institute to examine and seek to develop model standards and criteria for ways to combine different dispute resolution processes that may involve the interplay between public or private adjudicative systems (e.g., litigation, arbitration, or adjudication) with non-adjudicative methods that involve the use of a neutral method (e.g., conciliation or mediation); whether in parallel, sequentially or as integrated processes.¹³⁸ As a member of the Executive Committee of the Task Force and Co-Chair of Working Group 3, I have witnessed numerous meetings and discussions where members explored and investigated mixed mode practices from various cultural and legal standpoints. Experiences from China’s hybrid proceedings are also referred to when we explore best

Rules” (11 February 2019), online (blog): *Supreme People’s Court Monitor* <www.supremepeoplescourtmonitor.com/2019/02/11/some-comments-on-the-china-international-commercial-court-rules/>.

136 See Justice Anselmo Reyes, “The Future of International Dispute Resolution: Challenges and Opportunities for Access to Justice” (Address at Singapore Convention on Mediation, Singapore, 7 August 2019) [unpublished].

137 Global Pound Conference, “The Singapore Report” (2017), online (pdf): *International Mediation Institute* <immediation.org/research/gpc/series-data-and-reports/#4-gpc-reporting> at Session 2 Question 5: Global Results.

138 See “Mixed Mode Task Force”, online: *International Mediation Institute* <www.immediation.org/about/who-are-imi/mixed-mode-task-force/>.

practices and develop potential protocol to guide future implementation of mixed mode processes by neutrals.

The creation of a “*one-stop*” dispute resolution platform by the CICC is an institutional effort to better facilitate the interconnection between mediation, arbitration and litigation, thus enabling a fair, efficient and convenient resolution of international commercial disputes in the context of the BRI. It is also a step away from the traditional Chinese hybrid process where the same person assumes the role of the mediator and the arbitrator in a pending arbitration proceeding (“*med-arb*”).¹³⁹ The link between mediation institutions and arbitration institutions into one platform resembles the Arb-Med-Arb Protocol signed between the Singapore International Arbitration Centre (“SIAC”) and Singapore International Mediation Centre (“SIMC”) in 2014¹⁴⁰, but on a larger scale. By incorporating two mediation institutions and five arbitration institutions into the “*one-stop*” diversified dispute resolution platform, the CICC also gives parties the option to conduct mediation and arbitration by separate institutions, if they are concerned with the incompatibility of the roles of a mediator and an arbitrator. Further guidance is needed from the legislature and the judiciary concerning the coordination of med-arb-med under the CICC, whether the same mediators can act as arbitrators if mediation fails and arbitration continues, and what precautions are needed if the parties choose the conduct med-arb/arb-med by the same person.

The introduction of Chinese-style “soft” and flexible components into the dispute resolution proceedings – whether med-arb or the integrated platform of mediation, arbitration and litigation – may lead to a reconceptualization of the function of arbitration as a method of administrative of justice.

IV. Conclusion

On one hand, China is making selective adaptations to bring its practice in line with transnational standards. Examples of China’s adaptations may be seen at the judicial level. For instance, a series of judicial interpretations issued by the SPC take transnational standards into account. Adaptations are also visible at the institutional level, through the reforms undertaken by arbitration institutions to bring their practice in line with transnational standards. The growing body of individual transnational legal elites in

¹³⁹ See Weixia Gu, “Hybrid Dispute Resolution Beyond the Belt and Road: Towards a new Design of Chinese Arb-Med(-Arb) and Its Global Implications” (2019) 29 Wash Intl LJ 117 at 119.

¹⁴⁰ See Singapore International Mediation Centre, “SIAC-SIMC Arb-Med-Arb Protocol”, online: *Singapore International Mediation Centre* <<http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>>.

China also exerts a significant impact on the internationalization of the practice of arbitration in China. Adaptations in the field of commercial dispute resolution are largely driven by market force. As a service industry, arbitration evolves as part of competition within the “law” market. To make China a more appealing hub of dispute resolution and meet the needs of users, stakeholders must adhere to transnational rules, otherwise the parties will choose to conduct their arbitration elsewhere. These adaptations also reflect the “Chinese legal pragmatism”,¹⁴¹ because they are considered to be in line with China’s “actuality” (shishi), such as protecting Chinese investors in BRI regions and enhancing the legitimacy of Chinese institutions.

On the other hand, China is increasingly participating in the shaping of transnational norms, with some examples of Chinese innovations influencing transnational practice. An example of such a Chinese innovation is the *one-stop* diversified international commercial dispute settlement mechanism established by the CICC. This potential Chinese influence is a reflection of the economic necessity for international commercial arbitration. Following the general evolution of dispute resolution, the excessive formalisation of arbitration will inevitably lead users to seek new forms of dispute resolution, which may include combinations of different methods and integrated forum.¹⁴² The Chinese integrative approach of dispute resolution offers a “soft” opening to the otherwise increasingly formalized and proceduralized arbitration proceedings. This might be seen as a return to the roots of arbitration as a flexible and amicable device. Furthermore, the extensive introduction of “soft”, non-adjudicatory components into proceedings may also lead to a reconceptualization of the function of arbitration as a method of dispute resolution: this introduction may be perceived as weakening the alignment of arbitration with procedural justice and giving precedence to other values, such as compromise, harmony and consensus.

141 Xingzhong Yu, “Legal Pragmatism in the People’s Republic of China” in Tahirih Lee, ed, *Basic Concepts of Chinese Law* (New York: Garland Publishing, 1997).

142 Gabrielle Kaufmann-Kohler, “When Arbitrators Facilitate Settlement: Towards a Transnational Standard” (2009) 25:2 Arb Intl 187 at 203.