Resolving Infrastructure Disputes: The Interplay between International Commercial Courts and International Arbitration

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Introduction

The emergence of international commercial courts has increased the resources available for resolving international infrastructure disputes and is driving innovation across the landscape of dispute resolution. In this paper, we consider: the special features of infrastructure disputes; the attractions of international arbitration; the challenges international arbitration faces; what international commercial courts can offer; and how the emerging dispute resolution processes can meet the needs of Belt and Road Initiative (**BRI**) disputes.

I - Special Features of Infrastructure Disputes

The special features of infrastructure disputes are well documented. The 2019 Queen Mary University of London Arbitration Survey focused on "*International Construction Disputes*" and highlighted three factors that distinguish international construction arbitration from other kinds of arbitration. These are factual/technical complexity (chosen by 73% of respondents), the large amounts of evidence involved (chosen by 66% of respondents), and multiple claims and / or multiple parties (chosen by 49% of respondents). [1] Each of these characteristics presents challenges for arbitration.

Many contracts - many parties

Infrastructure projects and the disputes that arise from them involve a large number of participants in an intricate web of contracts and subcontracts. In many cases, it is not possible for the contractor to undertake the entirety of the project with its own resources. Instead, subcontractors are employed to perform various aspects of the works. In addition, construction disputes are often associated with high levels of risk and complex financial arrangements due to unpredictable economic, political, and climatic forces that may impact delivery. These risk and economic profiles create the need for insurers and external financiers. As a result, a typical construction project involves many participants, including subcontractors, financiers, insurers, suppliers, architects, engineers, and of course, the employer and contractor. Indeed, according to the ICC Court of Arbitration, nearly 50% of their new cases in 2016 involved three or more parties, whilst over 20% involved more than five parties.[2] This development reflects the reality that construction disputes now arise from interrelated contracts, making the resolution of construction disputes challenging for those involved. The advent of the 'megaproject' has increased project complexity and driven technological advance in project planning and management.

Voluminous evidence

The second significant challenge arises from the need to navigate technically complex facts, which necessarily entails voluminous amounts of evidence. The sheer scale of construction disputes differentiates construction disputes from those of other industries. Construction disputes can involve

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[1] '2019 International Arbitration Survey: Driving Efficiency in International Construction Disputes' (2019) Pinsent Masons and Queen Mary University of London Research Survey <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>) ('QMUL Survey 2019'), 9 and 10.
[2] 'Full 2016 ICC Dispute Resolution Statistics published in Court Bulletin', International Chamber of Commerce, <https://iccwbo.org/media-wall/news-speeches/full-2016-icc-dispute-resolution-statistics-published-court-bulletin>.

mountains (or terabytes) of documents, particularly when projects span many years from conception to completion. Parties incur high costs in trawling through the sea of data to find the documents that are relevant and material to the dispute. The communications accumulate over the life of a project. Although this once took the form of communications on paper, it is now mostly electronic. The challenge of grappling with the data necessary to understand the facts of the dispute is a massive undertaking. In one arbitration involving the construction of an oil and gas platform, the claimant filed 126 document requests, with many documents sought exceeding 1,000 pages in length. These documents might be critical but producing them can be cumbersome and expensive.

Technical complexity

A related challenge concerns the technical complexity of infrastructure disputes and the need for expert evidence. Reliable and relevant expert testimony serves the dual purpose of providing insight that may support a party's case, as well as assisting the tribunal to decipher the technical details of the evidence. While often necessary, the use of expert evidence does not come without its difficulties. Construction disputes often turn on evidence from experts speaking to issues of quantum and the extent or cause of delay or defects. However, where experts are used as a mouthpiece to further a party's own case, rather than to provide independent insight into an area, their evidence may serve to both delay and increase expense of the proceedings, without adding much value. Therefore, the effective management of expert evidence is crucial to ensure parties and the tribunal benefit from the process.

II - Attractions of International Commercial Arbitration to Resolve Infrastructure Disputes

There are many features of international arbitration that present advantages to parties over litigation. These include the flexibility of proceedings, the final and binding nature of arbitral awards, the international enforceability of arbitral awards, the perceived neutrality of arbitral tribunals, the confidentiality of proceedings, and the perceived efficiency of dispute resolution.

Finality

While no party is pleased to receive a result that it regards as incorrect, there are many situations in which commercial parties value the finality of a result that enables them to move forward from the impasse of the dispute. Whether or not they seek to continue to deal with the other party to the dispute, and whether or not an unfavourable result will impact their finances, the limited recourse against arbitral awards attracts those who wish to put the resolution of disputes behind them efficiently so as to focus on the business.

Internationally enforceable outcomes

For many international transactions and projects, there is a need to ensure that the decisions in disputes can be enforced across international borders. The places where enforcement is desired will include places where the parties are based, or where their assets are located, especially where these are different from the place where the contract is to be performed or the place where the parties agree that disputes are to be resolved. This is an important reason why parties choose international arbitration for their disputes. With more than 170 states as parties to the New York Convention, recipients of arbitral awards can have considerable assurance of those awards being enforced around the world. The current options for enforcing court judgments, by comparison, are an uncertain patchwork of possibilities that vary from country to country based on the law of foreign judgments in the country of enforcement.

Choice of arbitrator

It remains of fundamental importance to many parties that they have the ability to choose their arbitrators (there being a norm for disputes of complexity), with the chair selected by the co-arbitrators, often in conjunction with the parties, or by an institution. The centrality of this right to party autonomy in

the appointment of arbitrators is demonstrated by Article 11 of the Model Law.[3] Results from the 2018 QMUL survey provide empirical support for the importance of this choice. The survey identified the ability to select arbitrators as respondents' fourth most valued feature of international arbitration.[4]

Flexible procedure and confidentiality

The flexibility of procedure in arbitration can, if skilfully handled, ensure that a dispute is resolved both fairly and efficiently. This a highly valued feature of arbitration. In the 2018 QMUL survey, flexibility was ranked the third most valuable characteristic of arbitration.[5] This flexibility provides scope for innovation enabling arbitrators and parties to devise bespoke procedures for the instant case. Equally important in the survey was confidentiality and privacy.[6]

III- Challenges for International Commercial Arbitration

However, despite these recognised advantages of commercial arbitration, the process faces a number of challenges in the resolution of infrastructure disputes. These include: the ability to join third parties; the efficiency of enforcing orders; unnecessary procedural complexity (or 'due process paranoia'); perceived arbitrator bias, as well as a lack of recourse in circumstances of substantive error.

Joining all relevant parties in one proceeding

Given the many parties to infrastructure projects, there can be considerable value in the capacity for all of them to be joined in the proceeding, whether or not they all consent.[7] However, the jurisdiction of arbitral tribunals is generally confined to the parties to the arbitration agreement in the absence of statutory rules to the contrary. Major projects often involve many agreements with different arbitration agreements between the various parties.

For example, in a PPP project, there would be an arbitration agreement between the State and concession company, another in the EPC contract between the concession company and the EPC contractor, others between the EPC contractor and the sub-contractors, and still others, for example, for the take-off contract for electricity and water, and for the operation of the completed assets. Further agreements may arise across the project phase. These all run separately as separate arbitrations and, in the ordinary course, restrict the involvement of these various parties to different arbitrations even in related disputes.

In the 2018 QMUL Survey, 39 per cent of respondents identified the lack of power in relation to third parties as one of the worst features of international arbitration,[8] making it one of the top three complaints about arbitration.[9] Anecdotal experience provides a useful illustration of the problem. A dispute arose in relation to services rendered in the construction of a major piece of public infrastructure. Half of the claims arising from the contractual dispute were brought in a London-seated arbitration and the other were brought in a Swiss-seated arbitration. All the claims were made by the same parties in relation to the same project, but two arbitration references were made, one under the design agreement and one under the construction agreement. A confluence of expert evidence occurred – the experts in the Swiss proceedings sought to alter their position from the initial expert reports following the conclusion of the

[3] UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 23 (2008), Article 11.
[4] '2018 International Arbitration Survey: The Evolution of International Arbitration' (Research Survey, White & Case and Queen Mary University of London, 2018) ('QMUL Survey 2018'), 9.
[5] Ibid 7.
[6] Ibid.
[7] Michael Hwang, 'Commercial Courts and international arbitration—competitors or partners?' (2015) 31 Arb Int 193, 195; Thomas Bathurst, 'Benefits of Courts such as the Singapore International Commercial Court (SICC)' (The Sydney Arbitration Week, Sydney, 21 November 2016) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20161121.pdf>, 7.
[8] QMUL Survey 2018 (n 4)10.
[9] Ibid.

London Arbitration in light of the factual and expert evidence presented there. This added complexity to the process. Furthermore, the proceedings were confidential, which limited witness evidence in one arbitration from being reproduced in the other. Scheduling difficulties arose as the developments in the separate proceedings impacted each other. All of this detracted from the much-valued efficiency of arbitration.

Arbitral institutions have worked over the years to develop joinder and consolidation mechanisms to provide, to the extent possible, a means to address the challenges of multi-party disputes. However, a comprehensive solution remains elusive. The 2021 ACICA Rules represent the current standards in procedural innovation developing a workable framework for consolidation and joinder. While the power of joinder remains reliant on the consent of the parties or the existence of a common arbitration,[10] the power of consolidation is broader in its ambit. Under the ACICA Rules, the proceedings may be consolidated with the consent of the parties.[11] Where no consent is forthcoming, consolidation may be available where all relevant proceedings relate to the same transaction.[12] An additional requirement is that ACICA finds the relevant arbitration agreements to be 'compatible'. The determination of 'compatibility' is to be made by the ACICA executive on advice from the ACICA council, composed of experienced practitioners in international arbitration. In reaching this decision ACICA may consider whatever circumstances it believes are relevant including whether arbitrators have been appointed in the other matters. Had such rules been available in the example presented above, this may have resolved some of the procedural issues identified. However, the success of this procedural reform remains to be seen, and the scope of 'compatibility' is yet to be fully defined. It is also to be seen how these issues will be considered by the courts when issues of recognising and enforcing awards are considered.

Directly enforceable orders

The coercive authority of courts plays a significant role in supporting the arbitral process throughout the life of the arbitration. The court at the seat may provide a forum for assisting in the constitution of the tribunal[13] or reviewing its jurisdiction,[14] dealing with the challenge to and replacement of arbitrators, ordering or enforcing orders for interim measures,[15] assisting in obtaining evidence, and deciding applications to set aside the award[16] or to resist its enforcement.[17] Absent this support, the efficacy of arbitration would be reduced dramatically.

'Due process paranoia'

A concern that has special implications for construction disputes is raised by 'due process paranoia'. While the enforceability of the award depends upon ensuring that the parties have a reasonable opportunity to present their case, in the absence of their cooperation, it can be difficult to deal efficiently with the disputes that are the size and complexity of construction disputes.

In the 2019 QMUL Survey on International Construction Disputes, several criticisms of arbitration were raised – including inefficiency, party tactics, and "due-process paranoia". About 35% of respondents to

[10] Australian Centre for International Commercial Arbitration ('ACICA'), ACICA Arbitration Rules (2021) <https://acica.org.au/acica-rules-2021/> ('ACICA Rules 2021') Article 17.
[11] Ibid Article 16(a).
[12] Ibid Article 16(c).
[13] Ibid Articles 11, 13 and 14.
[14] Resolution on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, 308, UN Doc A/RES/40/72 (1985) ('Model Law') Article 16.
[15] Ibid Articles 9 and 17J.
[16] Ibid Article 34.
[17] Ibid Articles 35 and 36.

the survey chose not to pursue an international construction arbitration because of concerns about its efficiency at least half the time.[18]

In successful arbitrations, tribunals have developed various techniques to maximise efficiency of the process. Where there are hundreds of individual claims, a tribunal may create a summary procedure to limit the arguments on each claim, or it may arrange to award damages for the smaller claims in proportion with those awarded in the main claims, accepting no evidence on the smaller claims.[19] Where there is evidentiary overload, tribunals may limit document production requests or develop other bespoke procedures to handle the situation. These novel processes require creativity on the part of the tribunal and support from the parties. In turn, their success depends upon the confidence of tribunals and parties that the courts at the seat or the place of enforcement will set a high threshold for subsequent challenges that a party who is dissatisfied with the result may launch against the techniques adopted. Where this confidence is lacking, tribunals are forced to proceed with processes that are cumbersome and costly for the parties.[20]

Decisionmaker bias

The party-appointed nature of arbitration may be the subject of criticism and accusations of bias. This criticism has been particularly prevalent in investor-state disputes, which frequently relate to infrastructure projects. The existing legal framework to ensure arbitrator independence and impartiality is supported by many international guidelines, soft law instruments[21] and domestic legislation[22] requiring arbitrators to act impartially and independently. Arbitrators must disclose relationships which may raise doubts about their impartiality or independence, both at the time of appointment and throughout the arbitration.[23]

The issue has arisen in a number of ICSID cases.[24] It has also been discussed by the UNCITRAL Working Group III which it was recognized that arbitrators may be perceived as pro-State or pro-investor based on repeat appointments.[25] The concerns were particularly acute in situations of "double-hatting", where an individual acts serves in different roles, arbitrator, and counsel or expert, thereby, creating

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[18] QMUL Survey 2019 (n 1) 22.

[19] For further discussion see further Doug Jones, 'Let's Get Together: Quo Vadis International Construction Arbitration' (Keynote Address, GAR Live Paris: Construction Disputes, 9 July 2020).

[20] QMUL Survey 2019 (n 1) 22; Chief Justice Sundaresh Menon 'Dispelling Due Process Paranoia: Fairness, Efficiency and The Rule of Law' (2021) 17(1) *Asian International Arbitration Journal* 1, 2.

[21] See IBA Guidelines on Conflicts of Interest in International Arbitration (2014). https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918, 3.3.8 ('IBA Guidelines').

[22] See for instance, in the United States, the *Federal Arbitration Act* Section 10(a)(2) which provides:

> (a)In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
> …
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

This has been interpreted stringently by Courts see further *Commonwealth Coatings Corp. v. Continental Casualty Co* (SCOTUS, 1968); *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Co.,* 2015 WL 1524911 (Ala. April 3, 2015); In both those decisions, the arbitrator failed to disclose a known relationship with one of the parties or counsel.

[23] Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc (A/40/17) (21 June 1985) (amended on 7 July 2006), Art 12.

[24] See for example *Opic Karimum Corporation v Bolivarian Republic of Venezuela, Decision on the Proposal to Disqualify Professor Philippe Sands, ICSID Case No. ARB/10/14 (May 5, 2011)* holding that 'multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge'. The authors acknowledge that Professor Doug Jones AO acted as an arbitrator in this matter. For a decision holding that repeat appointments do not indicate a lack of independence, see *Tidewater Inc. and others v Bolivarian Republic of Venezuela, ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010*.

[25] UNCITRAL, Note by the UNCITRAL Secretariat on the Possible reform of investor-State dispute settlement: Ensuring the independence and impartiality on the part of arbitrators and decision makers in ISDS, 30 August 2018, 6.

conflicts of interest.[26] The debate on "double-hatting" or "role confusion" at the 35th session of the Working Group concerned, on one hand, the issue that such conflicts damage the perception of the legitimacy of ISDS, and on the other hand, the fact that prohibiting "double-hatting" would detrimentally impact the quality and rigor of decision makers.[27]

Jan Paulsson and Albert Jan van den Berg, have expressed the view that party-appointed arbitrators almost always decide in favour of the party who appointed them in ISDS cases. In 2010, Paulsson argued that 'unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators'.[28] These sentiments, as shared by van den Berg,[29] have been reinvigorated by growing levels of data which show the tendency for party-appointed arbitrators to find in favour of their appointer in the context of investor-state arbitration.[30] Despite the differences between ISDS matters and commercial matters, the concerns in ISDS have been extended to commercial disputes justifying the imposition of more stringent standards, including those for the obligation of disclosure itself. Even where no conflict arises that may challenge the validity of an award, a failure to disclose relevant relationships may give rise to other legal, financial or reputational consequences for arbitrators.

These developments highlight the emerging tension between promoting confidence in arbitrator independence and limiting the availability for appointment of seasoned and active practitioners. There also seems to be emerging an international divergence as to how this balance should be best struck. An example can be seen in *Laker* Airways *Inc. v. FLS Aerospace Ltd* [2000] 1 WLR 113, in which a US company objected to the arbitrator in that case coming from the same chambers as those of the acting barrister, who represented a party to the dispute. It was alleged that such conduct would not occur in America and that such perceptions should be considered in an application to set aside the award. Although in *Laker* it was ultimately found that there was no "real danger" of bias – as was the relevant test in the UK at the time – and as such the award was not set aside, whether such conduct would allow an award to be the subject of a successful challenge in the US remains an open question. So long as there remain international variations in the approach to this issue, there will remain uncertainty in the enforceability of arbitral awards.

In attempting to establish an international norm for dealing with conflicts of interest, the effectiveness of the IBA Guidelines on Conflicts of Interest (2004, 2014) has been hampered by the differences of approach taken by arbitral institutions and the differences of interpretation in various legal systems.

Recourse for serious error

As mentioned, a key attraction of arbitration is the finality offered by the arbitral award; and the judicial support for finality that makes a seat attractive requires that courts establish a high threshold for setting aside an award. For example, in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia,* the Full Court of the Federal Court[31] held that an award should not be set aside pursuant to that Article 18 of the Model Law unless it was established there was "demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice and procedural fairness".[32]

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[26] Ibid.
[27] Ibid 7.
[28] Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Lecture, University of Miami School of Law, 29 April 2010).
[29]Albert Jan Van Den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnoush Arsanjani et al (Eds.), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman, 2011* (Martinus Nijhoff Publishers, 2010).
[30] Anton Strezhnev (2016) 'Detecting Bias in International Investment Arbitration' (Lecture, 57th Annual Convention of the International Studies Association, University of Georgia, Atlanta, 16 March 2016).
[31] As enacted by domestic legislation, for example *International Arbitration Act 1974 (Cth)* s 34.
[32] *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, [55] (Allsop CJ, Middleton and Foster JJ).

However, with a high threshold such as this, there is little scope for review or correction of serious arbitrator error on the merits. While a non-interventionist approach like this may be suitable for many commercial parties, it may raise concerns for public authorities or large institutions that have the responsibility to be accountable more broadly. The confidentiality of arbitral awards and the lack of precedence, which also enhance finality, may also detract from the potential for ensuring the 'correctness' or predictablility of the result.

IV- What International Commercial Courts Can Offer

Recent years have witnessed the emergence of many international commercial courts. To the long established Business and Property Courts of England and Wales ('Commercial Court and TCC') (UK) have been added new international commercial courts in Europe, the Middle East and Singapore. Thus the class of international commercial courts includes: Singapore International Commercial Court (SICC); Hybrid Courts in the Gulf Region and in Central Asia, including Dubai International Financial Centre Courts (DIFC Courts), Qatar International Court and Dispute Resolution Centre (QICDRC), Abu Dhabi Global Market Courts (ADGM Courts), and Astana International Financial Centre Court (AIFC Court); Chinese International Commercial Court (CICC); and Commercial Courts in Europe, including, the Netherlands Commercial Court (NCC) and the International Chamber of the Paris Courts (Paris Chambers). Of these international commercial courts, only the TCC in England and Wales, and with the creation of its Technology & Infrastructure and Construction List ('TIC'), the SICC in Singapore, specialise in infrastructure disputes.

The Singapore International Commercial Court TIC List

The SICC TIC List illustrates the capacity of international commercial courts to address the special requirements of construction disputes. In particular, the SICC innovations in structure and procedure have sought to draw upon some of the attractive features of international arbitration to improve upon the benefits otherwise available in leading commercial courts.

As with international arbitration, the SICC's mandate is to consider international commercial matters that are transferred to it from the High Court or are submitted to it by an agreement of the parties.[33] A 'TIC Claim' may be placed on the SICC TIC List by the agreement of the parties or by motion of the Court. The TIC specialises in claims involving technically complex issues or questions that would benefit from the case management procedures offered by the TIC List.

Joinder of non-consenting parties

An important benefit for infrastructure disputes is the Court's ability to join third parties, particularly in disputes involving related contracts where it may be necessary to add parties who do not consent.[34] The SICC may order the joinder and consolidation on application from a party or on its own motion. In the case of a state or sovereign of a state, joinder requires the state to have submitted to the jurisdiction of the SICC. Although this is available more broadly, the many parties and complex contractual arrangements makes the benefits the SICC TIC List especially valuable in construction disputes.

Enforceability of SICC orders and judgments

As a Singapore court, the SICC has the tools available to compel compliance with its orders.[35] For example, where a party refuses to comply with an interim order, the order is immediately enforceable. It does not need to be taken, as an arbitral order would, to a court for review and enforcement. Beyond Singapore, the SICC judgments may be enforced by registration in other Commonwealth countries

[33] *Supreme Court of Judicature Act 1969* (Singapore) s 18A, 18J(2); *Rules of Court* (Singapore) Order 110, Rule 7, 12(1). There is no minimum monetary requirement and no requirement of a connection to Singapore.
[34] See discussion above of the frequency with which this issue arises in international arbitration
[35] *Rules of Court* Rule 45; *Singapore International Commercial Court Protocol* (Singapore) Rule 18.

through the Reciprocal Enforcement of Commonwealth Judgments Act[36] and in countries that, like Singapore, have implemented the Hague Choice of Court Convention.[37]

Significantly, judgments and orders of the Court are enforceable in the PRC.[38] This was the result of *de facto* reciprocity since the 2014 enforcement by the Singapore High Court of a Chinese judgment and the subsequent enforcement in Jiangzhu province of a Singaporean judgment. The SICC has signed other memoranda of guidance with other leading courts and newly established international courts.[39] These courts include the Commercial Court (Queen's Bench Division) of England and Wales; the Supreme Court of New South Wales; the Federal Court of Australia; the High Court of Kenya (Commercial and Admiralty Division); the Ras Al Khaimah courts; the UAE Ministry of Justice; the US District Court Southern District NY; the UAE Ministry of Justice (Department of International Cooperation); and the Supreme Court of the Republic of Kazakhstan.[40] Accordingly, while less extensive than for arbitral awards, the international enforcement options for judgments of the SICC are better than many other leading courts regularly chosen in dispute resolution clauses in cross-border consensual agreements, and are particularly beneficial in dealings with Chinese parties.

Procedural efficiency and flexibility

The SICC can combine the efficiency of court process and administration with some of the procedural flexibility and autonomy found in arbitration. As an institution specially created by Constitutional amendment, the SICC has innovated in a variety of ways. For example, foreign law may be presented by counsel's submissions rather than expert evidence, foreign rules of evidence may be applied, and proceedings may be conducted confidentially.

The SICC TIC List includes a Simplified Adjudication Procedure Guide, which provides parties with an array of case management options derived from best practice in international arbitration. Two such procedures include a unique chronology for the handling of experts with an emphasis on the production of joint expert reports and bespoke summary procedures to deal with small claims by reference to the recovery of larger value claims. Moreover, unlike arbitral processes, the judges may conduct the proceedings without the fear of 'due-process paranoia', due to the discretionary procedural powers afforded to Court proceedings. Chief Justice Sundaresh Menon has advocated for minimal judicial intervention, to allow for innovative arbitral procedures to be adopted, and avoid 'due process paranoia'.

Appeals

The SICC also boasts the ability to provide an appellate mechanism or provide the finality of an arbitral award. Whilst a party may appeal to the Singapore Court of Appeal, they may also waive their right to do so. This may be attractive to the parties, as further court proceedings would impose additional costs and removing an avenue of appeal means that the decision reached will give the parties certainty and finality.

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[36] Including the United Kingdom, Australia (federal jurisdiction, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory, Norfolk Island and Northern Territory), New Zealand, Sri Lanka, Malaysia, Windward Islands, Pakistan, Brunei Darussalam, Papua New Guinea, India (except the State of Jammu and Kashmir) and Hong Kong.

[37] 'Choice of Court Agreements Act' (*Singapore Statutes Online*, 8 June 2016) <https://sso.agc.gov.sg/Acts-Supp/14-2016/Published/20160608?DocDate=20160608>.

[38] Ibid. This Act applies to Hong Kong Special Administrative Region of the People's Republic of China (HKSAR) (judgments on or after 1 July 1997).

[39] 'Enforcement of Money Judgments' (*Singapore International Commercial Court*, 14 June 2018). <https://www.sicc.gov.sg/guide-to-the-sicc/enforcement-of-money-judgments> accessed 26 October 2018.

[40] 'DIFC Enforcement Guide 2016' (DIFC, 2016) <https://www.difccourts.ae/wp-content/uploads/2018/01/ENFORCEMENT-GUIDE-2016-AW.pdf; https://iclg.com/practice-areas/enforcement-of-foreign-judgments-laws-and-regulations/united-arab-emirates>.

Judicial expertise and cost containment

The SICC is staffed by senior jurists from Singapore and around the world with several whose experience is in the field of construction law. While the parties are not permitted to choose their judges as they would an arbitrator, the judges assigned to construction disputes have that expertise. Further, in the SICC, parties pay a capped fee for the court time that is substantially less than the tribunal costs that would be incurred in an arbitration.

Enriching the dispute resolution landscape

The increasingly market-based approach to dispute resolution that initially fostered the growth in international commercial arbitration has now encouraged national courts to improve the means by which they can secure the economic benefits associated with providing international dispute resolution services. International commercial courts provide parties with enhanced choice for dispute resolution with a specialised focus on international commercial law and, in particular, international infrastructure disputes. They build on the best features of the commercial courts to form a part of a broader dispute resolution picture, in which, for sophisticated parties, they serve as a complement to international arbitration, rather than a competitor, with each filling gaps in the services offered by the other.[41]

V- BRI and Beyond

Belt and Road Initiative (BRI) agreements

BRI projects have already made a lasting impact on the world stage, through the development of ports, roads, railways and airports, as well as power plants and telecommunications networks. The 'Belt' pursues infrastructure projects along the traditional silk road, whilst the 'Road' comprises its maritime route counterpart. The project has expanded in scope from 64 economies since its inception to over 100.[42] These initiatives involve cooperation agreements with the countries across Asia, the Middle East and Europe, and extend to New Zealand, Panama, and several African nations.[43] Project delivery often involves Chinese State Owned Enterprises (SOEs), with subcontracts to some local providers. According to the study by the Center for Strategic and International Studies, a Washington-based think-tank, of the contractors working on China-funded transport infrastructure projects in 34 Asian and European countries, 89% were Chinese contractors.[44]

The following are some categories of agreement likely to be part of the BRI:

- Development and project facilitation agreements entered into between, or China or Chinese SOEs and the host countries, or host country entities;
- Financing agreements;
- "Head" Contracts for the execution of the work necessary to deliver projects;
- Design and project management agreements;
- "Offshore" fabrication and supply contracts;
- "Onshore" subcontracts;
- Short- and long-term operating agreements;
- Off-take agreements; and
- Operating and supply contracts.

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[41] Chief Justice Tom Bathurst, 'Benefits of Courts such as the Singapore International Commercial Court (SICC)' (Speech delivered at Sydney Arbitration Week, Sydney, 21 November 2016). http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20161121.pdf

[42] Organisation for Economic Co-operation and Development 'China's Belt and Road Initiative in the global trade, investment and finance landscape' (2018) *OECD Business and Finance Outlook 2018*: <https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf>.

[43] Ibid.

[44] Financial Times 'Chinese contractors grab lion's share of Silk Road projects': <https://www.ft.com/content/76b1be0c-0113-11e8-9650-9c0ad2d7c5b5>.

These agreements involve many different parties and dispute resolution provisions, and are connected with other agreements necessary for successful project implementation. If domestic or international arbitration is adopted in one or more of the contracts this will limit (subject to agreement following the emergence of the dispute) both resort to courts and the parties who can participate in the arbitrations under those agreements.

Special considerations in resolving BRI disputes

The kinds of issues likely to arise under BRI agreements will vary, as will the considerations relevant to their resolution. However, some present special challenges.

Project facilitation agreements usually involve state parties or state-related parties. The independence of any dispute resolution body is important to such parties, as is the parties' mutual respect for that body. Further, the opportunity for genuine negotiation prior to the commencement of binding adjudication of the issues and, possibly, during the process is often of particular interest to the parties.

Other special features of these contracts are similar to those discussed above and, as with other major construction contracts, there is often an arbitration agreement. For example, under the FIDIC Standard Form Contracts, the default position is to have the ICC Court of Arbitration as the institution of choice with three arbitrators comprising the tribunal – one nominated by each party and a president chosen in consultation with parties by the nominated arbitrators. The potential limitations of arbitration agreements have also been considered.[45] However, the potential for using the local courts for BRI disputes is likely to be unattractive, as court procedures are often associated with delay, local bias, judges lacking subject matter expertise, and inflexible and inefficient procedures.

Further, long-term operating agreements and supply agreements face the inevitable challenge of changing circumstances and changing markets. These considerations often give rise to the need for discussion and negotiation before resorting to binding processes. It is also often the case that the rights of the wider public will be impacted by the outcome of binding dispute processes. Arbitration provisions do not usually allow the rights of affected non-parties to be addressed effectively in disputes between the main contracting parties. Hence there emerge the issues that echo those attending the multiparty problems of construction contract chains.

BRI project financing and the relevant financing agreements can come in many different forms. There can be bilateral or multilateral Official Development Assistance (**ODA**) loan agreements, or commercial loan agreements. Issues can arise under the financing agreements, and issues can arise in respect of disputes threatening the successful outcome of the financed project. For disputes under the financing documents there will normally be different considerations governing ODA agreements, where the issues are more likely to be resolved at the development bank / government level, and commercial financing where the choice of governing law will usually be driven by the need for certainty. In the latter, the dispute resolution provision is often tied to the courts of jurisdiction of the chosen law, perhaps with an option for the financier to elect arbitration. Speed and certainty of enforcement are critical here.

Integrating ADR processes

Although international commercial courts complement international commercial arbitration, there is growing interest in including dispute resolution options beyond both. It is becoming increasingly clear that mediation will form a significant part of resolving international disputes whether they are arbitral or judicial in nature. Until recently, too little careful thought outside of Asia was given to integrating mediation into arbitration and litigation.

[45] See section on **Joining all relevant parties in one proceeding**

With the coming into force of the 'Singapore Convention'[46] and the enhanced enforceability of international mediation settlements,[47] the use of mediation will continue to grow, enhancing the efficiency and finality of the resolution of international disputes. Singapore law recognizes the value of mediation by providing that an agreement reached in a mediation may be enforced as a Court order,[48] negotiations that take place in mediation proceedings are confidential,[49] and a failure to conduct a mediation may be considered in assessment of costs (and an adverse costs order could be granted against a party).[50]

With the importance placed on reaching results by consensus, the integration of ADR into BRI disputes will be critical to effective dispute resolution processes in the years ahead.

Conclusion

International commercial courts have emerged in recent years as an important means to enhance the dispute resolution options for infrastructure disputes. While neither international commercial courts nor international arbitration have all the procedural features necessary to secure the efficient and effective resolution of these large, complex, multi-party disputes, each of them have been challenged to innovate and improve their offerings. With the advent of BRI and the disputes that these infrastructure projects will inevitably generate, judges, arbitrators and counsel will be challenged to innovate to further to serve the interests of commercial and sovereign parties. This will necessarily entail the integration of ADR processes, as are being trialled in Singapore and, particularly, in the SICC TIC List.

[46] *The United Nations Convention on International Settlement Agreements resulting from Mediation,* opened for signature 7 August 2019, 73 UNTS 198 (entered into force 12 September 2020).
[47] Menon (n 20).
[48] *Mediation Act 2017* (Singapore); *Singapore Convention on Mediation Act 2020* (Singapore).
[49] *Community Mediation Centres Act 1997* (Singapore) s 19, 20; *Evidence Act 1997* (Singapore) s 23.
[50] *Rules of Court* (Singapore) Order 59 Rule 5(c).