
CHALLENGES AND OPPORTUNITIES OF CHINESE INTERNATIONAL ARBITRAL INSTITUTIONS AND COURTS IN A NEW ERA OF CROSS-BORDER DISPUTE RESOLUTION

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ABSTRACT

The number of Chinese cross-border international arbitrations has grown tremendously in the past decade. The expansive scope of China's "Belt & Road" transactions signals a further acceleration of Chinese involvement of the cross-border dispute resolutions. This paper examines how could Chinese mainland international arbitral institutions better compete with popular international arbitral institutions that actively seek to arbitrate Belt & Road disputes, such as the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and International Chamber of Commerce (ICC), through proactive reforms. First, the neutrality of Chinese international arbitral institutions should be fostered by standardizing and modernizing arbitration rules through the adoption of the UNCITRAL Model. Second, Chinese domestic courts should cooperate with the arbitral institutions to publish a track record of Chinese courts' recognition and enforcement of foreign arbitral awards against the Chinese party's assets in mainland China. Third, China should utilize the distinct legal systems of the mainland and Hong Kong to attract arbitrations to the China International Economic and Trade Arbitration Commission's (CIETAC) Hong Kong sub-commission in the transitional period of the Chinese domestic arbitration reform. Fourth, Chinese courts' recognition and enforcement of foreign court judgment under the principle of reciprocity should be recognized and encouraged as a constructive liberation of the Chinese judicial system.

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I. CHINESE-RELATED DISPUTE RESOLUTION IN THE CONTEXT OF THE "BELT AND ROAD" INITIATIVE

Zhou Enlai, China's first prime minister and famous diplomat, once said that "there are no small matters in foreign affairs," because they involve China's relationships with other countries as well as the integrity of the Chinese state.¹ Following the introduction of China's open-door policy in the late 1970s, launched to end the monopoly on foreign trade by state-owned companies, Chinese participation in cross-border commercial activities have increased markedly.² In the ensuing decades, China's economic policy has focused on increasing foreign trade and investment.³

¹ Susan Finder, *Some comments on the China International Commercial court rules*, SUPREME PEOPLE'S COURT MONITOR (Feb. 11, 2019), <https://supremepeoplescourtmonitor.com/2019/02/11/some-comments-on-the-china-international-commercial-court-rules/> [https://perma.cc/M6HA-JKH2] (citing Zhou Enlai's saying *Waishi Wu Xiaoshi* (外事无小事) [There are no small matters in foreign affairs]).

² See Anyuan Yuan, *China's Entry into the WTO: Impact on China's Regulation Regime of Foreign Direct Investment*, 25 INT'L L. 195, 214 (2001).

³ See Piotr Lasak & Rene W.H. van der Linden, *The Financial Implications of China's Belt and Road Initiative: A Route to More Sustainable Economic Growth* 16 (Springer Nature Switzerland AG, 2019).

To further promote international economic development and cooperation on land and at sea, China initiated the Belt and Road Initiative (the “B&R”) in 2013, which consists of the two principal plans.⁴ The ‘Belt’ refers to projects to strengthen economic and transport links between China, Central Asia, and Europe, while the ‘Road’ focuses on bolstering maritime routes between Asia, the Indian Ocean, the Middle East, Africa and Europe.⁵ The purpose of the B&R is to build a new Eurasian Land Bridge and to develop “China-Mongolia-Russia, China-Central Asia-West Asia and China-Indochina Peninsula economic corridors” by deepening bilateral investment as well as multilateral development cooperation among participating countries.⁶

According to Xiong Xuanguo, Vice Minister of the Ministry of Justice of the People’s Republic of China (“PRC”), Chinese president Xi Jinping proposed this initiative as an active exploration of a “new model of international cooperation and global governance.”⁷ Many B&R projects involve building infrastructure to recreate the historic routes of Silk Road between China to Europe to open up international trade and investment opportunities.⁸ The B&R has been described as one of the most ambitious development programs since the post-World War II Marshall Plan in the 1940s.⁹ More than 100 countries and international organizations have participated in the B&R, and China has signed over 50 cooperation agreements with other countries and international organizations.¹⁰ Countries that have established bilateral cooperation agreements with China are referred to as “B&R countries.”¹¹ In the context of this overarching plan, China

⁴ *The Belt and Road*, BELT AND ROAD PORTAL, <http://eng.yidaiyilu.gov.cn/ztindex.htm> (last visited Jan. 17, 2020) (stating that the English version of “Yidaiyilu (一带一路)” is “the Belt and Road,” which can be abbreviated as ‘B&R’).

⁵ *The Belt and Road*, *supra* note 4; *Belt and Road Dispute Resolution*, INTERNATIONAL CHAMBER OF COMMERCE (last visited Jan. 27, 2020), <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/> [<https://perma.cc/SD8N-K6HS>].

⁶ *Id.*

⁷ Xuanguo Xiong, *Preface “Yidaiyilu” Yanxian Guojia Falu Huanjing Guobie Baogao (“一带一路”沿线国家法律环境国别报告)* [LEGAL ENVIRONMENT REPORT OF THE “BELT AND ROAD” COUNTRIES], at 3 (Peking Univ. Press, 2017).

⁸ Ronald A. Brand, *Recognition of Foreign Judgments in China: The Liu Case and the “Belt and Road” Initiative*, 37 J.L. & COM. 29, 40 (2018).

⁹ Stuart Salt, James McLaren, Xiaohui Ji & Andrew Compton, *A Mile Marker*, 35 INT’L FIN. L. REV. 42, 42 (2016). The Marshall Plan was a comprehensive plan to rebuild Europe following the political and economic destruction of World War II, and “inspired a new international order.” Henry A. Kissinger, *Reflections on the Marshall Plan*, THE HARVARD GAZETTE (May 22, 2015), <https://news.harvard.edu/gazette/story/2015/05/reflections-on-the-marshall-plan/>.

¹⁰ Xiong, *supra* note 7; *The Belt and Road*, *supra* note 4.

¹¹ See *The Belt and Road Initiative: Country Profiles*, HKTDC RES. available at <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative-Country->

has built 56 economic cooperation zones in more than 56 B&R countries and implemented projects in over 20 B&R countries.¹²

Although a clear scope of the B&R initiative has not been established, the B&R projects generally consist of cross-border projects and transactions that are carried out outside of mainland China. In order to discuss the features of these B&R transactions, this note will rely on existing data of cross-border dispute resolutions to illustrate the characteristics of the potential disputes in the B&R context.

In October 2017, the Chinese government announced a “new era” in developing the Chinese rule of law suited to existing “national conditions” in the 19th Congress of the Communist Party of China.¹³ Currently, international arbitration is a popular dispute resolution mechanism for cross-border commercial disputes.¹⁴ Despite the increasing number of dominant Chinese international arbitral institutions, such as China International Economic and Trade Arbitration Commission (“CIETAC”), Beijing Arbitration Commission (“BAC”), Shanghai International Arbitration Center (“SHIAC”), Shenzhen Arbitration of International Arbitration (“SCIA”) and Chinese Maritime Arbitration Commission (“CMAC”), international arbitral bodies outside of mainland China are more popular to resolve cross-border disputes involving Chinese parties.¹⁵ This note will use quantitative data analysis to demonstrate these dynamics and discuss the role of Chinese international arbitral institutions and domestic courts in the B&R context.

This note analyzes the role of Chinese international arbitral institutions through a quantitative survey on the caseloads of the Chinese mainland institutions and other popular arbitral institutions outside of mainland China. The number of Chinese cross-border disputes have increased in the past decade.¹⁶ The B&R creates an opportunity for China to contribute to the formulation of international legal norms in the area of international commercial

Profiles/obor/en/1/1X000000/1X0A36I0.htm [https://perma.cc/9XR3-29CF] (last visited, Jan. 17, 2020).

¹² *The Belt and Road*, *supra* note 4. Economic cooperation zones are the implication of B&R as an initiative of regional cooperation that combined market tools with state involvement in promoting international cooperation. See Weidong Liu & Michael Dunford, *Inclusive Globalization: unpacking China’s Belt and Road Initiative*, AREA DEV. & POL’Y 13-14 (2016).

¹³ Weixia Gu, *China’s Belt and Road Development and a New International Commercial Arbitration Initiative in Asia*, 51 VAND. J. TRANSNAT’L L. 1305, 1350 (2018).

¹⁴ See White & Case & Sch. of Int’l Arbitration at Queen Mary Univ. of London, 2018 International Arbitration Survey: The Evolution of International Arbitration 2 (2018), available

at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf> [hereinafter 2018 International Arbitration Survey].

¹⁵ See discussion *infra* Section III.C.

¹⁶ See *id.*

dispute resolution.¹⁷ With the potential increase in Chinese cross-border disputes related to B&R projects, parties in these disputes are likely to resort to international arbitral institutions outside of mainland China. In this context, this note examines how could the Chinese mainland international arbitral institutions make themselves more attractive than the popular international arbitral institutions, such as the Hong Kong International Arbitration Centre (“HKIAC”), Singapore International Arbitration Centre (“SIAC”) and International Chamber of Commerce (“ICC”), through proactive reforms of its international arbitration system.

II. LEGAL FRAMEWORKS OF CHINESE INTERNATIONAL ARBITRATION

A. *Establishment of Chinese International Arbitral Institutions*

In China, arbitration is widely considered to be the most attractive option to resolve commercial disputes.¹⁸ China’s civil law system empowers the National People’s Congress (“NPC”) and the NPC Standing Committee to enact and amend basic laws.¹⁹ The NPC Standing Committee has the power to interpret statutes, and the NPC has authorized the Supreme People’s Court (“SPC”) to interpret specific applications of laws.²⁰ The SPC’s interpretation provides the most authoritative guidance to lower courts.²¹ Within the past few years, the SPC has issued three opinions that significantly changed the rules on enforcement of arbitral awards in China.²²

The primary laws governing domestic arbitration in China are the Arbitration Law of the PRC (“Arbitration Law”), entered into force on September 1, 1995, and the PRC’s Civil Procedure Law (“CPL”), amended on July 1, 2017, which covers jurisdiction, procedures, recognition and enforcement of arbitral awards in China.²³ Internationally, as a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (“the New York Convention”), the recognition and enforcement of foreign arbitral awards in

¹⁷ Gu, *supra* note 13, at 1350.

¹⁸ FRESHFIELDS BRUCKHAUS DERINGER, *Resolving Commercial Disputes in China through Arbitration*, PRACTICE NOTES, WL 0-381-9781(2019), at 2, available at <https://us.practicallaw.thomsonreuters.com/0-381-9781>.

¹⁹ Vai lo Lo, *Towards the Rule of Law: Judicial Lawmaking in China*, 28 BOND L. REV. 149, 150 (2016).

²⁰ *Id.* at 151.

²¹ *See id.* at 151-52.

²² *Id.* (“In December 2017, the SPC released two new judicial interpretations to address gaps in the PRC Arbitration Law. The Interpretation clarified the trail and reporting procedures in cases involving the juridical review of arbitration.... [and there is] another judicial interpretation in February 2018 that revised the rules applicable to the enforcement of arbitration awards made in China.”).

²³ Freshfields Bruckhaus Deringer, *supra* note 18, at 3.

China are subject to the New York Convention.²⁴ China has not adopted the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law, a set of rules “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.”²⁵ 83 states, in a total of 116 jurisdictions, have adopted legislation based on the UNCITRAL Model Law.²⁶

PRC law recognizes three kinds of arbitration proceedings, as summarized below:²⁷

²⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. See also Zhang Shouzhi, *Arbitration procedures, and practice in China: overview*, COUNTRY Q&A, WL 3-520-0163, at 25 (2020), available at <https://us.practicallaw.thomsonreuters.com/3-520-0163>. Arbitral awards are “enforced under either the New York Convention or through voluntary recognition by the state.” *Mediation of Investor-State Conflicts*, 127 HARV. L. REV. 2543, 2545 (2014).

²⁵ United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, June 21, 1985 (with amendments in 2006), United Nations document A/40/17, annex I, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [https://perma.cc/W9NZ-YARL] [hereinafter UNCITRAL Model Law]. See also Zhang, *supra* note 24, at 4.

²⁶ United Nations Commission on International Trade Law, *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [https://perma.cc/AT6H-EGNU].

²⁷ Freshfields Bruckhaus Deringer, *supra* note 18, at 4-5.

Table 1. Summarization of Arbitration Proceedings

Types		Scope	Seated	Applicable law
Chinese Arbitrations	Domestic Arbitration	Involve only Chinese parties; no foreign elements ²⁸	In China; administered by Chinese arbitral institutions	PRC Law
	Foreign-related Arbitration	Must have at least one foreign element	In or outside of China; administered by Chinese arbitral institutions	Foreign law at parties choice
Foreign Arbitration		Parties' identities are irrelevant	Outside of China; or in Hong Kong, Macau, and Taiwan	Depends on the arbitral seat

This note will concentrate on Chinese institutional administration of the Chinese foreign-related arbitration and Chinese courts' recognition and enforcement of foreign arbitral awards that are conferred by arbitral institutions outside of China. In international arbitration, parties can choose the law governing the arbitration agreement, and if the parties fail to do so, the law of the seat of the arbitration shall apply.²⁹ The leading Chinese mainland arbitral institutions dealing with international arbitrations are: the China International Economic and Trade Arbitration Commission ("CIETAC"), the Beijing Arbitration Commission ("BAC"), the Shanghai International Arbitration

²⁸ "Foreign elements" has been defined by SPC. *Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Shiyongfa> Ruogan Wenti de Jieshi* (最高人民法院关于适用<中华人民共和国民事诉讼法涉外民事关系适用法>若干问题的解释) [Interpretation (I) of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relationships"], promulgated by the Adjudication Committee of the Supreme People's Court, Dec. 10, 2012, effective Jan. 7 2013, available at <http://www.chinacourt.org/law/detail/2012/12/id/146055.shtml> [<https://perma.cc/NNL6-ZC7C>] (stating that 'foreign elements' means: 1) at least one party is a foreign national, foreign legal entity, or other organization or individual without nationality; 2) the usual residence of one or both parties is in the territory of a foreign state; 3) the subject matter is located outside China; 4) the legal facts establishing, altering or terminating the parties' relationship occurred outside China; or 5) any other circumstances where the legal relationship can be regarded as being foreign-related.).

²⁹ *Zhonghua Renmin Gongheguo Shewai Minshiguanxi Shiyongfa* (中华人民共和国民事诉讼法涉外民事关系法律适用法) [Law of the People's Republic of China on Application of Laws to Foreign-Related Civil Relations], (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011) art. 18 <Beida Falu Xinxiwang (北大法律信息网) [lawinfochina]>, <http://www.lawinfochina.com/display.aspx?lib=law&id=8315&CGid=>; see also FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 9.

Center (“SHIAC”), Shenzhen Court of International Arbitration (“SCIA”), and the China Maritime Arbitration Commission (“CMAC”).³⁰

B. *Enforcement of Arbitral Awards in Chinese Courts*

A sound enforcement mechanism within an institutional dispute resolution system is crucial for the success of China’s B&R initiative.³¹ In China, there are three kinds of arbitrations: domestic arbitration, foreign-related arbitration, and foreign arbitration.³² Domestic arbitration, which involves only Chinese parties with no foreign elements, and foreign-related arbitration, which occurs in China and contains specific foreign elements, are both enforced under the PRC’s Arbitration Law, and the PRC CPL.³³ A foreign arbitral award, which is an arbitration that is seated outside of China, is enforced under the New York Convention.³⁴ As a party to the New York Convention, China recognizes and enforces arbitral awards conferred by other New York Convention contracting states.³⁵

Chinese laws regulating domestic arbitrations are more restrictive than those governing either foreign-related and foreign arbitrations. Enforcement of foreign-related awards may be scrutinized only on procedural grounds, while domestic awards are subject to scrutiny on both procedural and substantive grounds.³⁶ This dissimilar treatment creates the possibility of forum shopping and deters Chinese parties from choosing to arbitrate in China because foreign arbitral awards qualifying for application of the New York Convention are more favorable to the parties.³⁷

³⁰ See generally FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 2.

³¹ Guiguo Wang, *Legal Challenges to the Belt and Road Initiative*, 4 J. INT’L & COMP. L. 309, 327-328 (2017) (explaining that the effectiveness of the B&R relies on a market economy, lowered barriers to access the market, and a reflection of the legal systems of B&R countries, which entails transparency of the decision-making process and an appeal process).

³² Freshfields Bruckhaus Deringer, *supra* note 18, at 4-5.

³³ *See id.*

³⁴ UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; *see also* FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 4.

³⁵ Zuigao Renmin Fayuan Guoji Shangshi Fating (最高人民法院国际商事法庭) [CHINA INTERNATIONAL COMMERCIAL COURT], Zuigao Renmin Fayuan Guanyu Chengren Woguo Jiaru <Chengren ji Zhixing Waiguo Zhongcai Caijue Gongyue> de Tongzhi (最高人民法院关于承认我国加入《承认及执行外国仲裁裁决公约》的通知) [Notice of the Supreme People’s Court on the Implementation of the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” Acceded to by China] (Dec. 2, 1986), available at <http://cicc.court.gov.cn/html/1/218/62/84/658.html>.

³⁶ Joao Ribeiro & Stephanie Teh, *The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law*, 34 J. INT’L ARB. 459, 476 (2017).

³⁷ *Id.*

In 2017, the SPC issued interpretations and amended some procedural rules in regard to both foreign-related and domestic arbitration.³⁸ This was the SPC's attempt to standardize the scope of judicial review of a Chinese court over foreign-related and foreign arbitrations.³⁹ Among the reforms, the SPC requires each trial court handling foreign-related commercial cases to adjudicate each case with a standard judicial review when confirming the validity of an arbitration agreement.⁴⁰ If the intermediate court decides an award should not be enforced, the case is to be reviewed by a higher court. In the event the higher court affirms the non-enforcement decision of the intermediate court, the case then is submitted for the SPC's review under a pre-reporting scheme.⁴¹ The pre-reporting system ensures that no court can deny the validity of a foreign-related arbitration agreement or set aside a foreign-related or foreign award without SPC's final review.⁴² This is a strict system, providing a guarantee that Chinese courts have acted in compliance with its obligations under the New York Convention.⁴³

The 2017 SPC interpretations also streamlined the reporting system regarding domestic arbitrations. When reviewing a domestic arbitral award, if a trial court finds an arbitration agreement to be invalid, or refuses to enforce an arbitral decision, then the trial court must submit the case to a higher court for review.⁴⁴ This is meant to maintain the autonomy of the arbitration system from the interference of local courts and eliminate the effect of a dual-track system, which discriminates between domestic arbitration and foreign-related arbitrations.⁴⁵

Statistics reveal that prior to 2000, China recognized and enforced approximately 90% of the relevant decisions in front of its courts, and fulfilled its obligation under the New York Convention to recognize and enforce foreign

³⁸ See Susan Finder, Supreme People's Court Strengthens Judicial Review of Arbitration, SUPREME PEOPLE'S COURT MONITOR (Nov. 9, 2017), available at <https://supremepeoplescourtmonitor.com/category/arbitration/> [https://perma.cc/URE6-EX8Y].

³⁹ Huanran Qiao, *Significant Changes in 2018 to China's Arbitration Legal Structure*, THE AM. LAWYER 2 (Oct. 1, 2018), available at <https://advance.lexis.com/api/permalink/41e06ca7-526d-49ee-bd07-c0869c074351/?context=1000516>.

⁴⁰ Jingzhou Tao & Mariana Zhong, China's 2017 Reform of Its Arbitration-Related Court Review Mechanism with a Focus on Improving Chinese Courts' Prior-Reporting System, 35 J. INT'L ARB. 371, 375 (2018).

⁴¹ 6 *Key Considerations in China-related Arbitrations*, LATHAM & WATKINS INT'L ARB. PRACTICE 1 (Oct. 12, 2017), available at <https://www.lw.com/thoughtLeadership/6-key-considerations-china-related-arbitrations> [https://perma.cc/E949-EQF2].

⁴² Tao & Zhong, *supra* note 40, at 375.

⁴³ 6 *Key Considerations in China-related Arbitrations*, *supra* note 41.

⁴⁴ Practice Law China, *SPC issues new interpretations on arbitral judicial review cases*, WL W-012-5927 (Jan 10, 2018), <https://us.practicallaw.thomsonreuters.com/w-012-5927>.

⁴⁵ See Tao & Zhong, *supra* note 40, at 376; see also Qiao, *supra* note 39, at 2.

arbitral awards.⁴⁶ After 2000, with the increasing complexity of international commercial arbitrations, the total number of non-recognition or non-enforcements increased.⁴⁷ According to a 2007 survey of foreign-related and foreign arbitration, out of 74 cases that involved the recognition and enforcement of foreign arbitral awards, only 5 of the cases were rejected.⁴⁸ Courts made affirmative rulings in 58 of the 74 cases.⁴⁹ SPC judges reported that from 2000 to 2011, lower courts have refused to recognize and enforce 56 cases and referred them to the SPC.⁵⁰ SPC confirmed the refusal to recognize or enforce foreign awards in 21 of those cases.⁵¹

C. A Case Study on an Enforcement of an Arbitral Award

B&R facilitated a trend in Chinese courts to better recognize and enforce the foreign or foreign-related arbitral award under the New York Convention. This section will review *Siemens International Trading (Shanghai) v. Shanghai Golden Landmark Company Limited*, a 2015 case that illustrates how the Chinese judiciary began to further liberalize its interpretation of foreign arbitration agreements, likely as a result of the B&R.⁵² In this case, Shanghai Golden Landmark Company Limited (“Golden Landmark”) and Siemens International Trading (Shanghai) Co. (“Siemens”), both wholly foreign-owned enterprises,⁵³ signed a contract for a supply of goods.⁵⁴ The contract contained a

⁴⁶ Zhang Yunyang & Zhao Ziyu, *China: Enforcement of International Arbitral Awards in China*, MONDAQ (Dec. 29, 2017), available at <http://www.mondaq.com/china/x/659666/Arbitration+Dispute+Resolution/Enforcement+of+International+Arbitral+Awards+in+China> [https://perma.cc/4HGY-LZ7V].

⁴⁷ *Id.*

⁴⁸ Fan Kun, *Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan*, 5 AM. U. BUS. L. REV. 447, 468-69 (2016).

⁴⁹ *Id.*

⁵⁰ *Id.* at 469.

⁵¹ *Id.*

⁵² Ximenzi Guoji Maoyi (Shanghai) Youxian Gongxi Su Shanghai Huangjin Zhidi Youxian Gongsu Shenqing Chengren he Zhixing Waiguo Zhongcai Caijue Yian Yishen Minshi Caidingshu (西门子国际贸易(上海)有限公司诉上海黄金置地有限公司申请承认和执行外国仲裁裁决一案一审民事裁定书) [Siemens Int’l Trading (Shanghai) Co. Ltd. v. Shanghai Golden Landmark Co. Ltd., A Case of an Application for the Recognition and Enforcement of a Foreign Arbitral Award], STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (Shanghai Interm. People’s Ct. Nov. 27, 2015) (China), available at <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2017/08/CGCP-BR-English-Typical-Case-12.pdf> [hereinafter *Siemens Int’l v. Golden Landmark*].

⁵³ Tereza Gao & Edison Li, *Through Siemens v. Golden Landmark, China Reforms Arbitration for Free Trade Zones in Order to Prepare for “Belt & Road”*, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (June 2018), available at <https://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-5-gao-li/> (explaining that both companies were registered in the Shanghai Pilot Free Trade Zone).

⁵⁴ *Siemens Int’l v. Golden Landmark*, *supra* note 52, at 2.

dispute resolution provision stipulating that the terms were to be governed by PRC law and that any disputes would be submitted to SIAC for resolution.⁵⁵ Golden Landmark later rescinded the contract and stopped payments, prompting the parties to enter arbitration, where SIAC ruled in favor of Siemens in November 2011.⁵⁶ After Golden Landmark refused to pay a substantial amount of the arbitral award, Siemens sought to enforce the arbitral decision before the Intermediate People's Court of Shanghai ("IPC Shanghai").⁵⁷ IPC Shanghai found that under the New York Convention, the foreign arbitral award should be recognized and enforced.⁵⁸

Both Chinese domestic law and the New York Convention provide that if the parties' contractual relationship at issue contains foreign elements and the arbitration clause is valid, then the foreign arbitral award should be enforced.⁵⁹ Prior to this case, the SPC – and consequently, lower courts – adopted a restrictive approach to adjudicating foreign disputes, rendering many arbitration agreements invalid.⁶⁰ However, in December 2012, the SPC changed course and offered lower courts much more liberal interpretive guidance on this point.⁶¹ The SPC offered a new criteria to determine the nature of a foreign nature, which include: (1) either party (or both) is a foreign citizen, foreign legal person, or stateless person; (2) the habitual residence of either party (or both) is located outside the territory of mainland China; (3) the subject-matter is outside the territory of mainland China; (4) the legal fact that creates, changes, or terminates the civil relationship happens outside of mainland China, or (5) other circumstances which the relationship may be determined to be foreign-related.⁶²

Here, IPC Shanghai found that the contractual relationship between Siemens and Golden Landmark involved foreign-related elements because: (1) the places of registration for both parties were within the territory of the Shanghai Pilot

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 2-3.

⁶⁰ Gao & Li, *supra* note 53. Under this approach, if "[t]he two parties who entered into the Trade Agreement are legal persons of China, the subject-matter was in China, and the agreement was entered into and was to be performed in China," then there was no foreign-related civil relationship and thus no legal basis for enforcing the underlying arbitration agreement. *Id.*

⁶¹ Zuigao Renmin Fayuan Guanyu Shiyong 《Zhonghua Renmin Gongheguo Shewai Minshi Guanxi falu Shiyongfa》 Ruogan Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释) [Interpretation (I) of the Supreme People's Court on Several Issues Concerning the Application of the "Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relationships"] (promulgated by the Adjudication Committee of the Supreme People's Court. Dec. 10, 2012, effective as of Jan. 7, 2013), available at <http://www.chinacourt.org/law/detail/2012/12/id/146055.shtml>.

⁶² *Id.*; Gao & Li, *supra* note 53.

Free Trade Zone (outside of mainland China); (2) both parties were wholly foreign-owned enterprises by nature; and (3) the performance of the contract contained foreign-related elements. Due to these foreign elements, IPC Shanghai recognized and enforced the arbitration award.⁶³ This decision is considered to be unprecedented enforcement of an arbitral award that would have recently been regarded as domestic and thus unenforceable.⁶⁴ This move by the SPC and IPC Shanghai was likely heavily influenced by the B&R, and the desire to promote the role of arbitration in B&R disputes.⁶⁵

By January 2017, the SPC bolstered this liberal construction in its Opinion on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones, providing that:

where wholly foreign-owned enterprises registered in pilot free trade zones mutually agree to submit a commercial dispute to arbitration outside the territory [of China], [a people's court] should not determine that the related arbitration agreement is invalid merely because the [enterprises'] disputes do not have foreign-related elements.⁶⁶

The SPC opined that opening the scope of China's recognition and enforcement of foreign arbitral awards will encourage foreign investment through the establishment of a stable and predictable non-litigation dispute resolution mechanism.⁶⁷

III. CHALLENGES TO CHINESE INTERNATIONAL ARBITRAL INSTITUTIONS

This section will discuss the background, caseloads, notable features, and challenges of major arbitral institutions both in and outside mainland China. The data reviewed in this section will demonstrate how arbitral institutions in China have struggled to compete with other arbitral institutions in the number of foreign cases adjudicated, thus illustrating the need for reform.

⁶³ Siemens International v. Golden Landmark, *supra* note 52, at 4.

⁶⁴ Gao & Li, *supra* note 53

⁶⁵ *Id.*

⁶⁶ *Id.*; Zuigao Renmin Fayuan Guanyu wei Ziyou Maoyi Shiyangu Jianshe Tigong Sifa Baozhang de Yijian (最高人民法院关于为自由贸易试验区建设提供司法保障的意见) [Opinions of the Supreme People's Court on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones] (promulgated by Supreme People's Ct. Jan. 9, 2017) (China), available at <http://www.court.gov.cn/zixun-xiangqing-34502.html>.

⁶⁷ See Siemens International v. Golden Landmark, *supra* note 52.

A. *Major Chinese International Arbitral Institutions*

1. China International Economic and Trade Arbitration Commission (CIETAC) & its Hong Kong Subcommission

China International Economic and Trade Arbitration Commission (CIETAC) covers the arbitration of disputes “arising from economic and trade transactions of contractual or non-contractual nature.”⁶⁸ These disputes can be grouped into three main categories: 1) international or foreign-related disputes, 2) disputes related to the Hong Kong Special Administration Region (“SAR”), the Macao SAR, and the Taiwan region; and, 3) domestic disputes.⁶⁹

The latest revision of CIETAC’s arbitration rules, which entered into force on January 1, 2015, aims at enhancing competitiveness as an international arbitration institution through several measures, including the establishment of the CIETAC Hong Kong Arbitration Center.⁷⁰ This permits CIETAC parties to submit their disputes to this separate arbitration panel, where: 1) the seat of an arbitration administered by CIETAC Hong Kong will be Hong Kong; 2) the law applicable to the arbitral proceedings will be the arbitration law of Hong Kong; and, 3) the arbitral award will be a Hong Kong award.⁷¹

The CIETAC Hong Kong Arbitration Center is significant in several respects. First, by incorporating this special provision in the general arbitration rules, parties who choose the CIETAC Hong Kong subcommittee will benefit from enhanced efficiency under the CIETAC framework. Second, by creating a seat in Hong Kong and applying Hong Kong law, there is increased structural certainty for participating parties. Third, it demonstrates active collaboration, as well as competition between CIETAC and Hong Kong International Arbitration Centre (“HKIAC”), which incentivizes CIETAC to develop more standardized procedural and substantive rules that are more appealing to the participants in international commercial arbitrations in China.

Charts A-1, A-2, and A-3 are based on data derived from CIETAC’s annual reports.⁷² Chart A-1 illustrates the exponential growth of the total number of cases accepted and administered by CIETAC, from 633 in 2000 to 2962 in 2018,

⁶⁸ *Scope of Jurisdiction*, CIETAC, available at <http://www.cietac.org/index.php?m=Page&a=index&id=189&l=en> [https://perma.cc/3ZCT-M5RJ] (last visited Jan. 18, 2020).

⁶⁹ *Id.*

⁷⁰ Zhongguo Guoji Jingji Maoyi Zhongcai Weiyuanhui Zhongcai Guize (中国国际经济贸易仲裁委员会仲裁规则) [CIETAC Arbitration Rules], CIETAC, (Promulgated by China Chamber of Int’l Com. Nov. 4, 2015, effective Jan. 1, 2015), available at <http://www.cietac.org/index.php?m=Page&a=index&id=106&l=en> [https://perma.cc/6CHQ-QD72] (last visited Jan. 18, 2020) [hereinafter CIETAC Arbitration Rules]; FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 5.

⁷¹ CIETAC Arbitration Rules, *supra* note 70, arts. 73-80.

⁷² *Research, Annual Report*, CIETAC, available at <http://www.cietac.org/index.php?m=Article&a=index&id=255&l=en> (last visited Mar. 28, 2019).

representing a fivefold increase in the past 18 years. According to the earliest available data, CIETAC only accepted 37 cases in 1985.⁷³ However, while the total number of domestic cases increased at this high rate, the number of foreign-related cases accepted by CIETAC remained constant over the years.⁷⁴ As shown in Chart A-2, there is a sharp decrease in the percentage of foreign-related cases over the total cases received by CIETAC every year.⁷⁵ The percentage of foreign-related cases accepted as a percentage of the total case accepted is 80% in 2000, but CIETAC received only 20% of foreign-related cases in 2018.⁷⁶ Chart A-3 illustrates CIETAC caseload increase compared to the prior year by type.⁷⁷ Chart A-3 indicates that the increase of domestic cases and cases overall each year were mostly positive, but the growth of foreign-related cases fluctuated to a more significant extent.⁷⁸ As the most well-established international arbitral institution in China with a good track record, CIETAC case data demonstrates that foreign-related disputes are less likely to find recourse through Chinese mainland arbitral institutions, despite the dramatic increase in the demand for commercial arbitration in China.

Arbitrators are crucial to the establishment of the arbitral institution, and Chart A-4 demonstrates CIETAC's panel arbitrators by region.⁷⁹ According to CIETAC rules, parties may agree to nominate arbitrators from outside the panel, subject to approval by the CIETAC Chairman.⁸⁰ Although the arbitrators from mainland China are still dominant in number, consisting of 1028 or 72% of the total number of arbitrators on the panel, the panel has over 300 foreign arbitrators, 22% of all CIETAC arbitrators.

⁷³ See *Statistics: CIETAC Annual Caseload*, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION, available at <http://www.cietac.org.cn/index.php?m=Page&a=index&id=40&l=en> [https://perma.cc/7JKZ-5CBN] (last visited Jan. 18, 2020).

⁷⁴ See *infra* Chart A-1.

⁷⁵ See *infra* Chart A-2.

⁷⁶ See *id.*

⁷⁷ See *infra* Chart A-3. Percentage Change from Prior Year = (Year 2 – Year 1) / Year 1. This Chart demonstrate the scope of caseload increase for each type of the cases received by the institution.

⁷⁸ See *id.*

⁷⁹ See *infra* Chart A-4.

⁸⁰ CIETAC Arbitration Rules, *supra* note 70, art. 26.2.

Chart A-1. CIETAC Caseload Data⁸¹

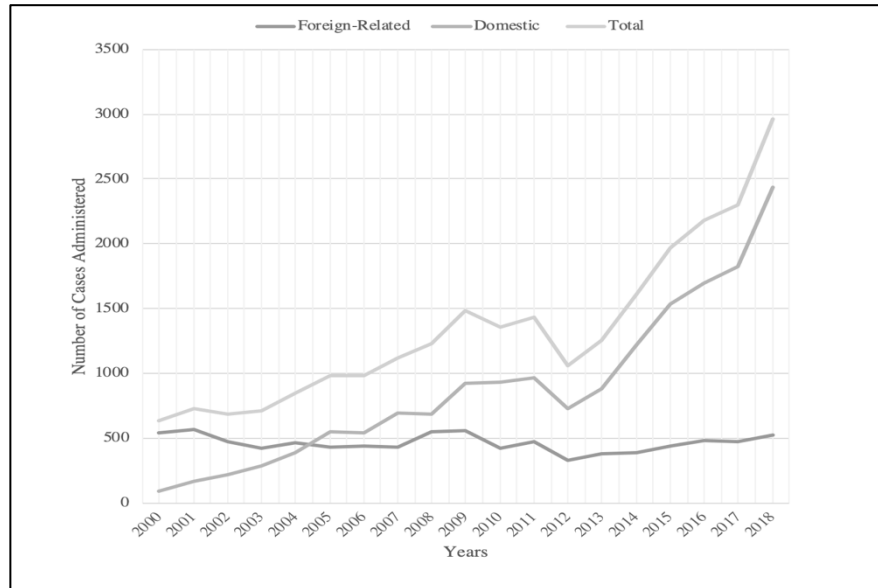
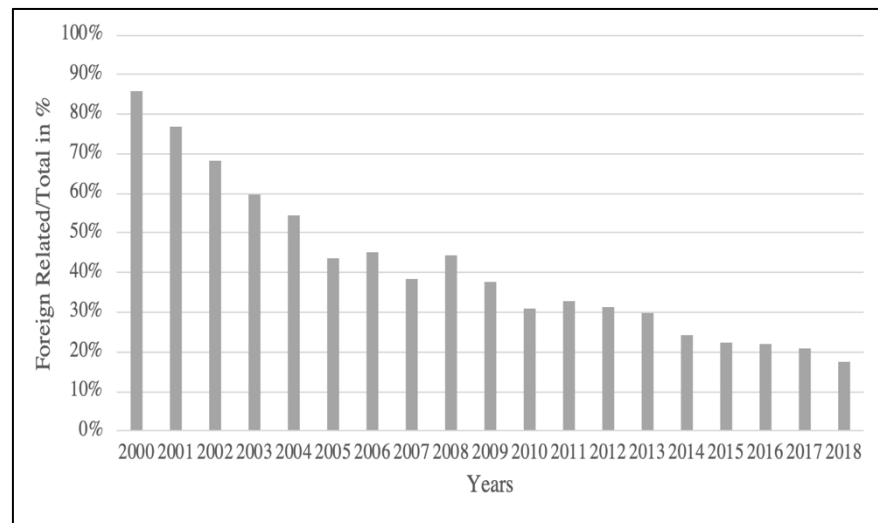


Chart A-2. CIETAC Percentage of Foreign Related Cases Data⁸²



⁸¹ Graph created by author based on data derived from CIETAC website. See *Statistics: CIETAC Annual Caseload*, *supra* note 73.

⁸² *Id.*

Chart A-3. CIETAC Percentage Increase of Cases by Type⁸³

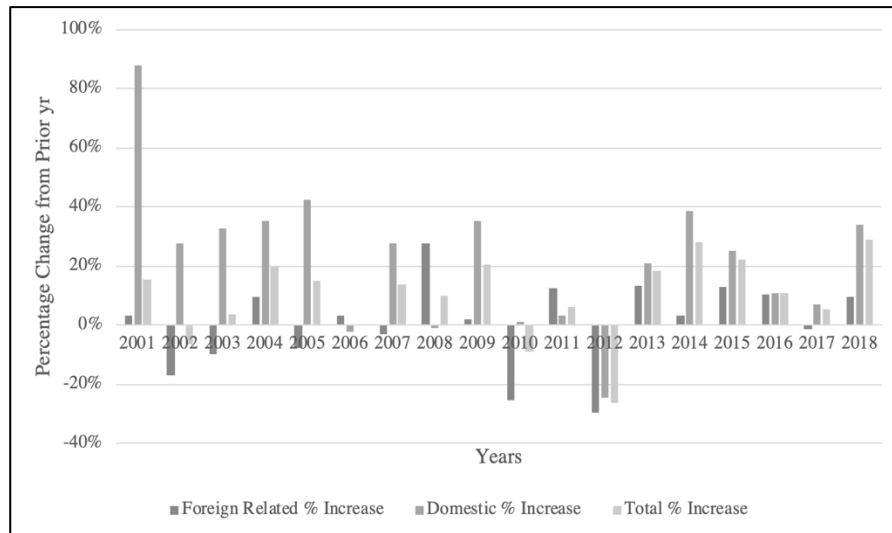
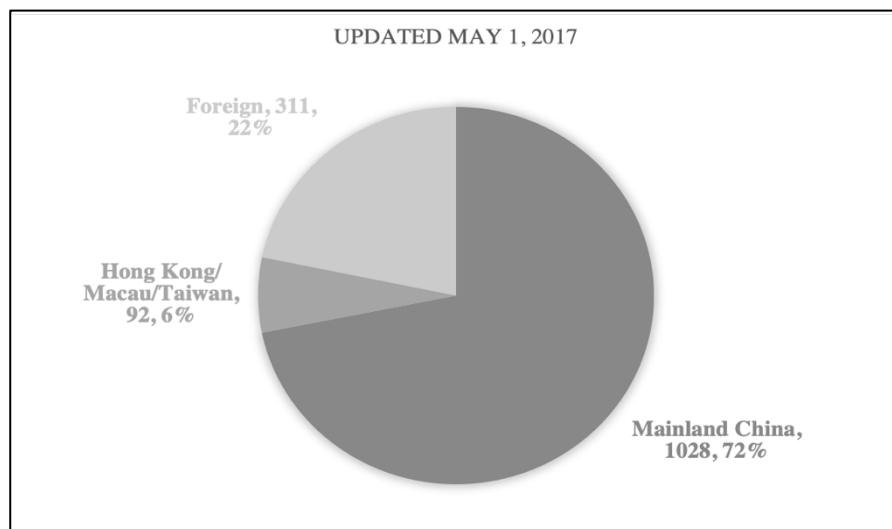


Chart A-4. CIETAC Arbitrator Panel Distribution by Region⁸⁴



⁸³ *Id.*

⁸⁴ Graph created by author based on data derived from CIETAC website. See *Panel of Arbitrators*, CIETAC, available at <http://www.cietac.org/Uploads/201705/59074e909a6a7.pdf> [https://perma.cc/WWY9-9HR9] (last visited Jan. 18, 2020).

2. Beijing Arbitration Commission(BAC)/ Beijing International Arbitration Center (BIAC)

The BAC, also known as BIAC, is an arbitration institution in Beijing, China that resolves contractual disputes and other disputes of rights and interest in property between natural persons, legal persons, and other organizations.⁸⁵ BAC covers foreign-related disputes with a jurisdictional scope similar to CIETAC.⁸⁶

Chart B-1 shows that the BAC caseload data demonstrates a similar trend in the number of disputes heard as compared to CIETAC.⁸⁷ Chart B-1 shows a steady increase in the number of both domestic cases and total cases that were accepted and administered by BAC from 2012 (BAC received 805 domestic cases and 831 cases in total) to 2017 (BAC received 2084 domestic cases and 2161 cases in total).⁸⁸ At the same time, as shown in Chart B-2, the number of foreign-related cases accepted and administered by BAC consists of no more than 5% of caseload of BAC from 2012 to 2017.⁸⁹

Chart B-4 illustrates the result of BAC's attempt to incorporate more arbitrators outside of mainland China.⁹⁰ There are 121 foreigners and 24 individuals from Hong Kong, Macau, and Taiwan seated on the arbitrator panel, making up 26% of the total number of arbitrators.⁹¹ In order to further incentivize parties to select BAC for cross-border arbitration, BAC allows a party to foreign-related cases to select arbitrators from outside the panel, without the consent of the counterparty.⁹²

⁸⁵ *Introduction*, BAC, https://www.bjac.org.cn/english/page/gybh/introduce_index.html. For the purpose of this note, BAC will be used to indicate this institution.

⁸⁶ FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 6-7.

⁸⁷ *Compare infra* Chart B-1, *with supra* Chart A-1.

⁸⁸ *See id.*

⁸⁹ *See infra* Charts B-1, B-2.

⁹⁰ *See infra* Chart B-4.

⁹¹ *See infra* Chart B-4.

⁹² *See* Beijing Zhongcai Weiyuanhui Zhongcai Guize (北京仲裁委员会仲裁规则) [BAC Arbitration Rules] (promulgated by the BAC, July 4, 2019, effective Sept. 1, 2019) BAC, art. 64.2, http://www.bjac.org.cn/english/page/zc/guize_en2019.html (China).

Chart B-1. BAC/BIAC Caseload Data⁹³

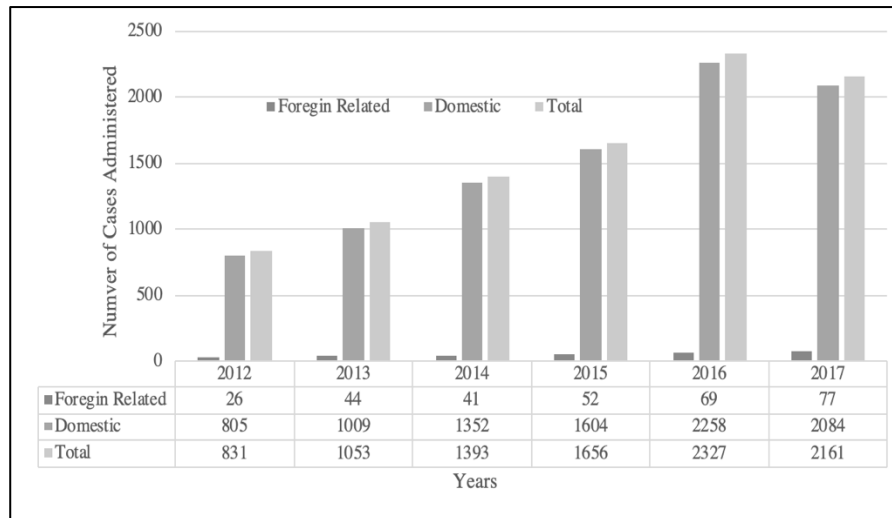
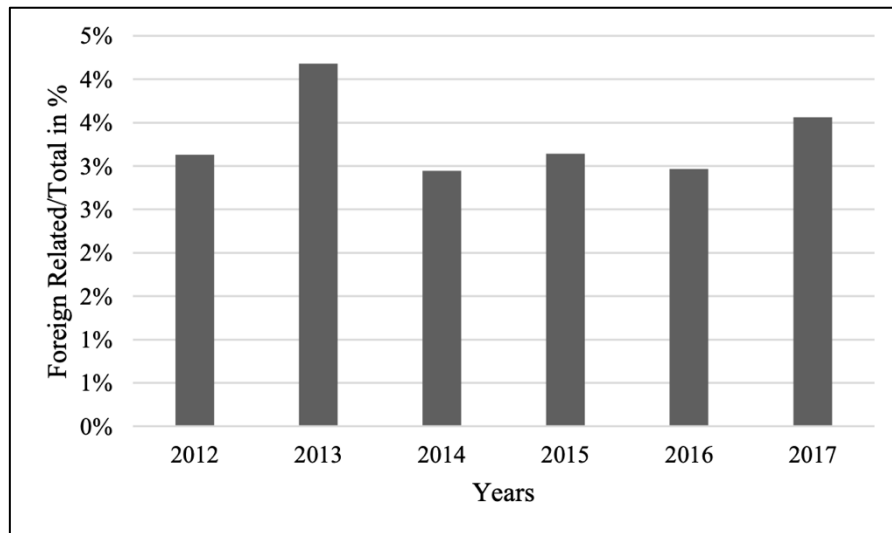


Chart B-2. BAC/BIAC Percentage of Foreign Related Cases Data⁹⁴



⁹³ Graph created by author based on data derived from the BAC website. *Annual Report*, BAC/BIAC, available at http://www.bjac.org.cn/english/page/gybh/introduce_report.html (last visited Jan. 26, 2020).

⁹⁴ *Id.*

Chart B-3. BAC/BIAC Percentage Increase of Cases by Type⁹⁵

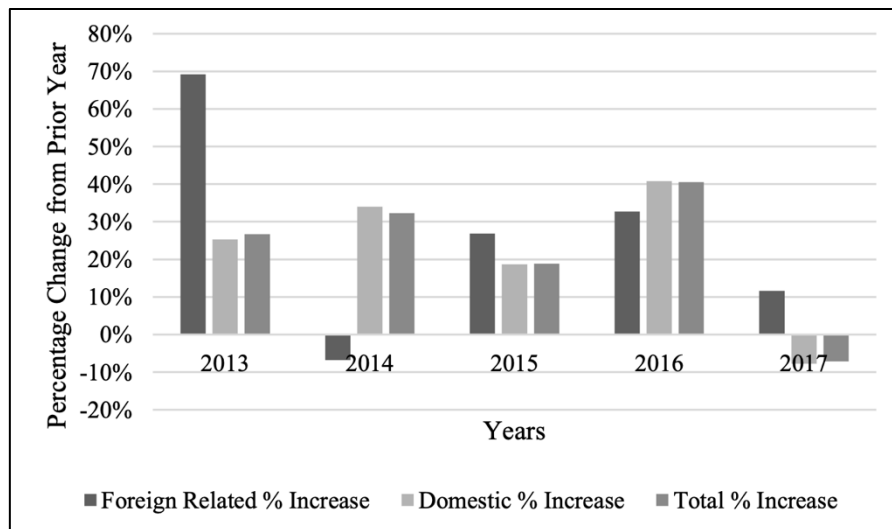
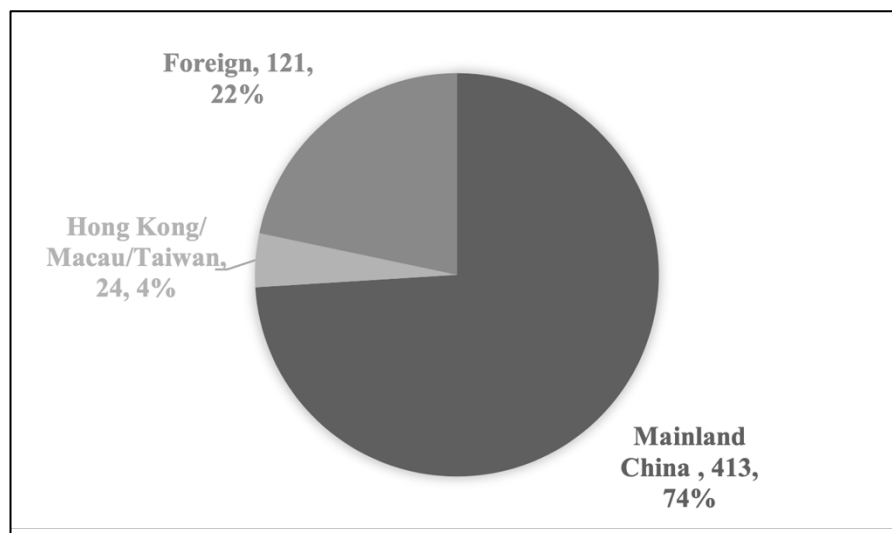


Chart B-4. BAC Arbitrator Panel Distribution by Region⁹⁶



⁹⁵ *Id.*

⁹⁶ Graph created by author based on data derived from the BAC website. *Panel of Arbitrators*, BAC, available at http://www.bjac.org.cn/attached/file/20190218/List%20of_%20Arbitrators_en.pdf [https://perma.cc/3ELK-SGHV] (last visited Jan. 26, 2020).

3. Shanghai International Economic and Trade Arbitration Commission (SHIAC)

The SHIAC sub-commission split from CIETAC in 2012 and became an independent arbitral commission.⁹⁷ SHIAC is now an independent arbitral institution with jurisdiction over arbitrations where parties have selected SHIAC as a forum in their arbitration clause.⁹⁸ SHIAC arbitrates disputes involving trade, investment, transfer of technology, mergers and acquisitions, finance, securities, insurance, real estate, construction, logistics, intellectual property, franchising, energy, environment interest, and information technology.⁹⁹

According to SHIAC caseload data, the growth in the number of foreign-related cases, as a percentage of overall cases, shows an upward trend that is substantially similar to the number of CIETAC cases.¹⁰⁰ This finding is unsurprising due to SHIAC's former status as a part of CIETAC. Chart C-3 depicts a much more significant growth fluctuation in the foreign-related cases than the domestic data and the overall data.¹⁰¹ The SHIAC arbitrator panel distribution chart, updated on May 1, 2018, illustrates the significant incorporation of arbitrators from Hong Kong, Macau, Taiwan, and other foreign countries.¹⁰² Overall, there are 284 foreign arbitrators, which consists of 30% of the total number of arbitrators.¹⁰³

⁹⁷ FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 6.

⁹⁸ *People's Court Ruled SHIAC Has the Jurisdiction on the Clause "China International Economic and Trade Arbitration Commission Shanghai Sub-Commission"*, SHIAC, available at http://www.shiac.org/SHIAC/news_detail_E.aspx?id=210 [https://perma.cc/TL6F-H6E4] (last visited July 15, 2020).

⁹⁹ *SHIAC: Introduction*, SHIAC, available at http://www.shiac.org/SHIAC/aboutus_E.aspx?page=4 [https://perma.cc/5TMW-RRV6] (last visited July 15, 2020).

¹⁰⁰ Compare *supra* Charts A-1, A-2, with *infra* Charts C-1, C-2.

¹⁰¹ See *infra* Chart C-3.

¹⁰² See *infra* Chart C-4.

¹⁰³ *Id.*

Chart C-1. SHIAC Caseload Data¹⁰⁴

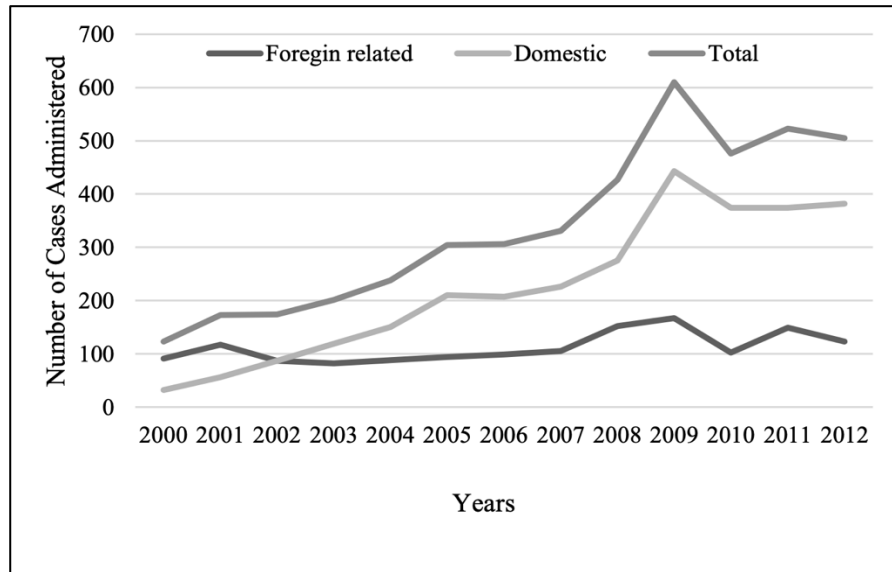
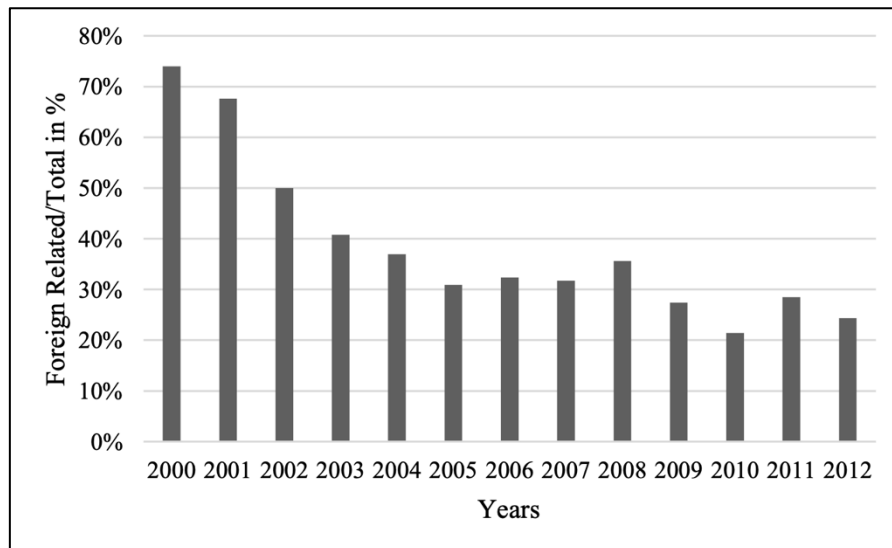


Chart C-2. SHIAC Foreign Related Cases Data¹⁰⁵



¹⁰⁴ Graph created by author based on data derived from SHIAC website. *Statistic Data*, SHIAC, available at http://www.shiac.org/SHIAC/aboutus_E.aspx?page=5 [<https://perma.cc/M5QG-M65M>] (last visited Jan. 26, 2020).

¹⁰⁵ *Id.*

Chart C-3. SHIAC Percentage Increase of Cases by Type¹⁰⁶

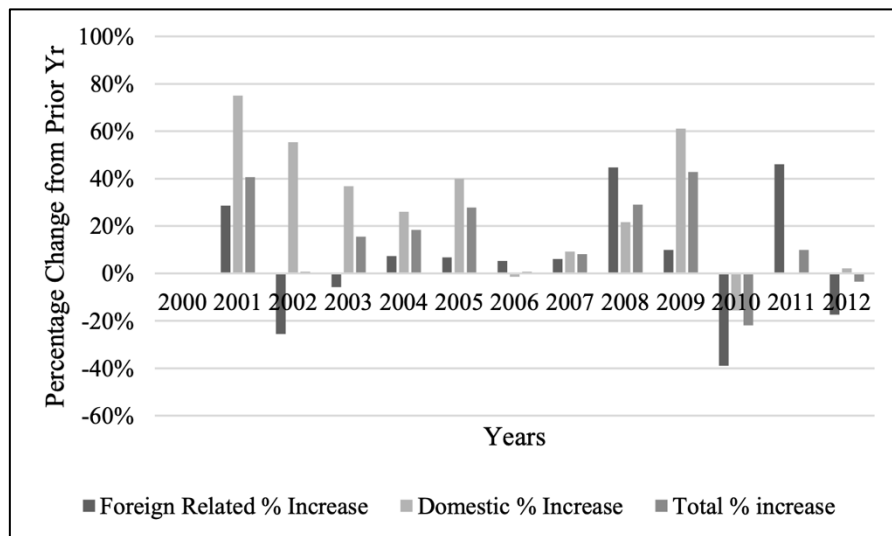
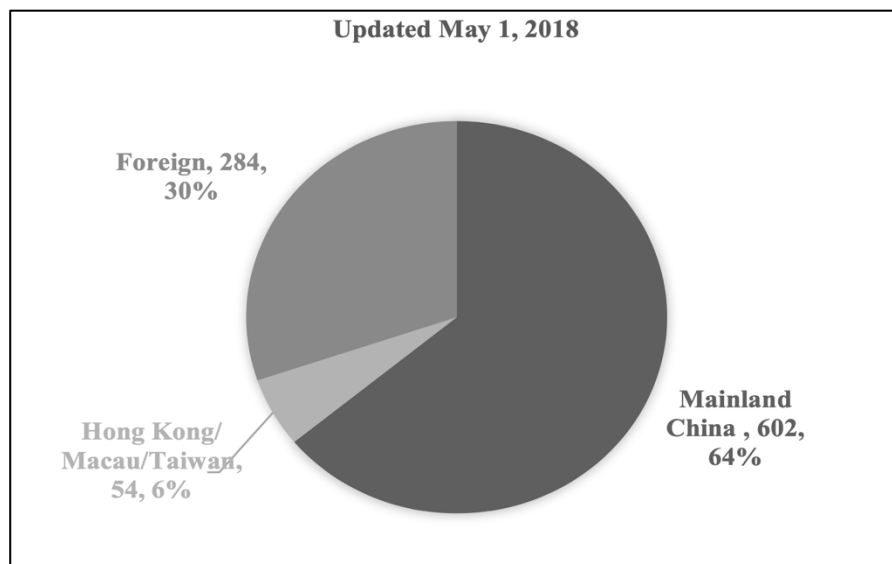


Chart C-4. SHIAC Arbitrator Panel Distribution by Region¹⁰⁷



¹⁰⁶ *Id.*

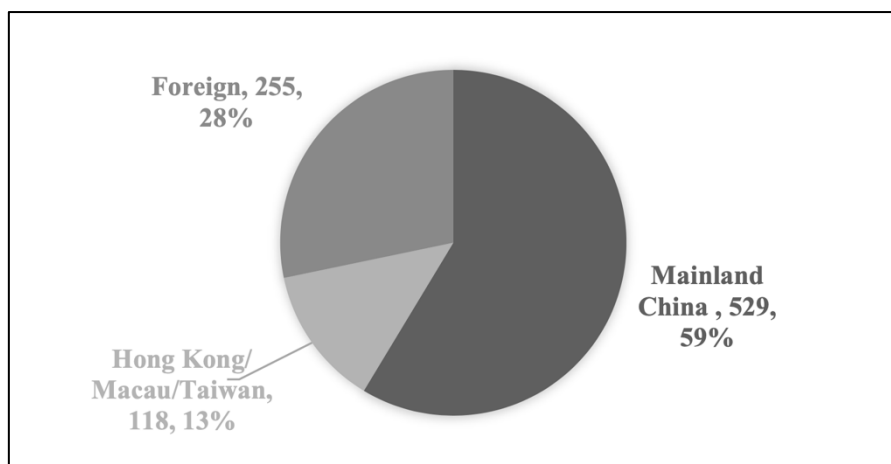
¹⁰⁷ *Panel of Arbitrators, SHIAC, available at* http://www.shiac.org/upload_files/file/2018/20181128165237_1592.pdf (last visited Mar. 28, 2019).

4. Shenzhen International Court of Arbitration (SCIA)

SCIA was also split from CIETAC and became an independent arbitral institution since 2012.¹⁰⁸ SCIA is an arbitration institution designed to resolve contracts and other property rights disputes among individuals, legal entities, and other institutions from domestic China and overseas.¹⁰⁹ In December 2017, SCIA and the Shenzhen Arbitration Commission (“SAC”), a separate entity, merged together and became the Shenzhen Court of International Arbitration (“SCIA”).¹¹⁰

Due to its recent institutional reorganization, SCIA does not have case data publicly available. Regarding the arbitrator makeup, the SCIA arbitrator panel has the highest percentage of non-mainland Chinese arbitrators compared to other Chinese arbitral institutions.¹¹¹ There are 255, or 28% foreign arbitrators, and 118 or 13% arbitrators from Hong Kong, Macau, and Taiwan, altogether consisting of more than 41% of the SCIA arbitrator panel.¹¹²

Chart D. SCIA Arbitrator Panel Distribution by Region¹¹³



¹⁰⁸ FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 6.

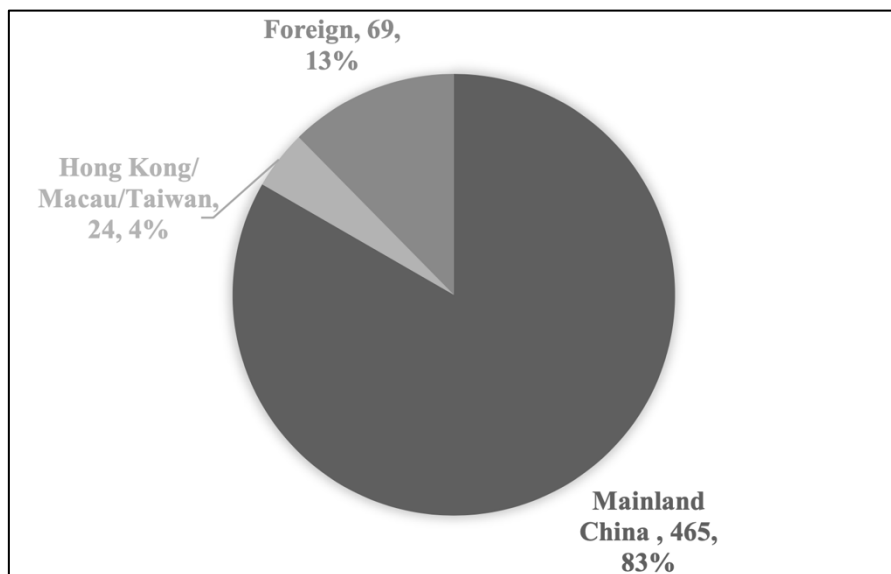
¹⁰⁹ Shenzhen Guoji Zhongcai Yuan 2019 Zhongcai Guize (深圳国际仲裁院2019仲裁规则) [SCIA Arbitration Rules] (promulgated by SCIA, effective Feb. 21, 2019) SCIA, art. 2, available at [http://www.sccietac.org/files/fckFile/file/SCIA%20Arbitration%20Rules%20\(effective%20from%20Feb_%202021,%202019\).pdf](http://www.sccietac.org/files/fckFile/file/SCIA%20Arbitration%20Rules%20(effective%20from%20Feb_%202021,%202019).pdf) (China).

¹¹⁰ FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 6.

¹¹¹ See *infra* Chart D.

¹¹² *Id.*

¹¹³ Panel of Arbitrators, SCIA, available at <http://www.sccietac.org/files/fckFile/file/深圳国际仲裁院2019仲裁员名册.pdf> [https://perma.cc/A9KD-9U9V] (last visited Jan. 26, 2020).

Chart E. CMAC Arbitrator Panel Distribution by Region¹¹⁴

5. China Maritime Arbitration Commission (CMAC)

The scope of CMAC's jurisdiction is the same as CIETAC in three main categories: 1) international or foreign-related disputes; 2) disputes related to the Hong Kong SAR, the Macao SAR and, the Taiwan region; and 3) domestic disputes.¹¹⁵ Specifically, CMAC provides a forum for disputes that are 1) disputes arising from admiralty and maritime; 2) related disputes arising from aviation, railways, and highways; 3) other commercial disputes arising from trade, investment, finance, insurance, and construction; and 4) other cases where the parties have agreed to refer their disputes to CMAC for arbitration.¹¹⁶

For no discernible reason, the caseload database of CMAC is not publicly available for analysis. Chart-E provides its panel distribution by region, which represents the most substantial domination by mainland Chinese arbitrators among the five major Chinese international arbitral institutions.¹¹⁷ There are 465 mainland Chinese arbitrators included in the list of this institution, which consists 83% of the overall arbitrator available on the panel.¹¹⁸

¹¹⁴ *Panel of Arbitrators*, CHINA MARITIME ARBITRATION COMMISSION (last visited Jan. 26, 2020), <http://www.e arbitration.org.cn/arbitrator/list?pageSize=100&pageNo=1> [https://perma.cc/A47E-AHZU] (last visited Jan. 26, 2020).

¹¹⁵ *Scope of Jurisdiction*, CMAC, http://www.cmac.org.cn/?page_id=1347&lang=en [https://perma.cc/EY6T-6YSU] (last visited Jan. 26, 2020).

¹¹⁶ *Id.*

¹¹⁷ See *supra* Chart-E.

¹¹⁸ *Id.*

B. *Major International Institutions Outside of Mainland China*

1. Hong Kong International Arbitration Centre (HKIAC)

Hong Kong and mainland China's Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland And the Hong Kong Special Administrative Region (the "2000 Arrangement") ensures that Hong Kong's arbitral awards are recognized and enforceable in the mainland China.¹¹⁹

Chart-F shows that HKIAC administers a significantly higher number of international cases than mainland Chinese international arbitral institutions.¹²⁰ The percentage of international cases for HKIAC varies between 60% to 90%.¹²¹ Notably, there is a growing trend of international cases from 2010 to 2015, which can be attributed to the fact that Hong Kong adopted the 2006 version of the UNCITRAL Model Law in 2010, which entered into force in 2011.¹²² Adopting this predictable and standardized arbitration law help to facilitate Hong Kong's status as a top-five most preferred seat in 2015.¹²³

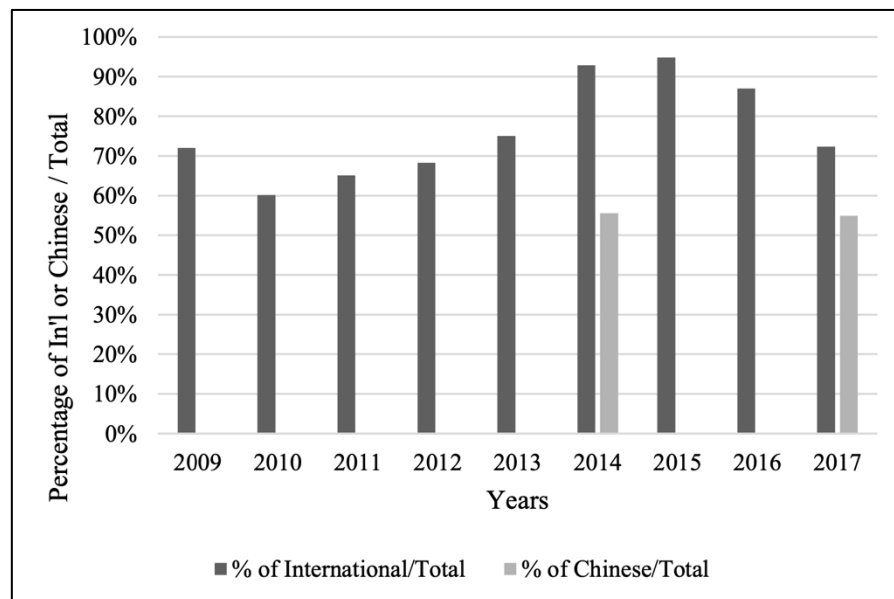
¹¹⁹ See Edmund Wan et al., *One Arrangement, Two Systems: considerations when enforcing awards between Hong Kong and the PRC*, KING & WOODS MALLESONS (Sept. 15, 2016), <https://www.kwm.com/en/hk/knowledge/insights/enforcing-arbitral-awards-between-hong-kong-and-china-20160915> [https://perma.cc/B24H-H2U2]; ARRANGEMENT CONCERNING MUTUAL ENFORCEMENT OF ARBITRAL AWARDS BETWEEN THE MAINLAND AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION (2000), <https://www.doj.gov.hk/eng/topical/pdf/mainlandmutual2e.pdf> [https://perma.cc/HP5L-N4AT].

¹²⁰ See *infra* Chart F.

¹²¹ See *id.*

¹²² Andrew McDougall, Tuuli Timonen & Nika Larkimo, *Attracting International Arbitration With a Predictable and Transparent National Law*, WHITE & CASE PUBLICATIONS 5, 3 (Aug. 28, 2018), <https://www.whitecase.com/sites/whitecase/files/files/download/publications/attracting-international-arbitration-predictable-transparent-national-law.pdf> [https://perma.cc/H7U6-N3GB].

¹²³ *Id.*

Chart F. HKIAC Percentage of International or Chinese/Total¹²⁴

2. Singapore International Arbitration Centre (SIAC)

SIAC, which began operations in 1991, is an independent and not-for-profit organization that provides quality and neutral arbitration services to the international business community.¹²⁵ Singapore is a UNCITRAL Model Law country, together with Hong Kong SAR.¹²⁶ Both Singapore and Hong Kong are among the most preferred seats worldwide in the 2018 International Arbitration Survey.¹²⁷ SIAC is a popular institution for disputes involving Indian counterparties, as well as those involving Chinese counterparties.¹²⁸ SIAC's

¹²⁴ Graph created by the Author based on data derived from HKIAC Annual Reports from 2009 to 2017. *Annual Report*, HKIAC (last visited Jan. 26, 2020), <http://www.hkiac.org/about-us/annual-report> [https://perma.cc/E3S8-82YR].

¹²⁵ *About Us*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE, <https://www.siac.org.sg/2014-11-03-13-33-43/about-us> [https://perma.cc/2HGC-LVQK] (last visited Jan. 26, 2020).

¹²⁶ McDougall, *supra* note 122, at 4.

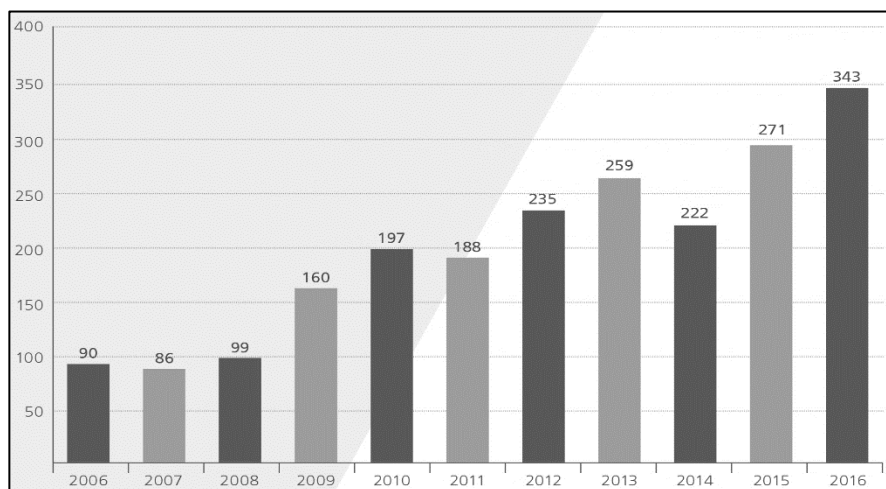
¹²⁷ *Id.* Conducted by the Queen Mary University of London, "[t]he 2018 International Arbitration Survey is an empirical study the objective of which was to identify the principal drivers and stakeholders that the arbitration community expects to influence the future direction of international arbitration." *Id.* at n.7.

¹²⁸ *International Arbitration: Which Institution?*, ASHURST (Sep. 5, 2018), <https://www.ashurst.com/en/news-and-insights/legal-updates/qg-international-arbitration-which-institution/> [https://perma.cc/GX5G-QMK7].

popularity is partly attributed to its lower costs of the arbitration.¹²⁹ Additionally, SIAC has an expedited procedure as well as an early summary disposal procedure, which increases the efficiency of the resolution of disputes.¹³⁰

Chart G-1 demonstrates SIAC's constant positive growth in its caseload from 2006 to 2016. Although the total number of arbitrations administered by SIAC does not exceed the number of cases administered by Chinese arbitral institutions, Chart G-2 shows that the percentage of disputes involving a Chinese party in SIAC maintains a trend of positive growth from 2010 to 2017.¹³¹ SIAC data shows a reverse trend than that of the major Chinese arbitral institutions, as shown in Chart A-2 and Chart C-2, which indicate a clear decrease in the number of foreign-related arbitrations.¹³² The two categories, the percentage of China-related cases in SIAC (Chart G-2) and the percentage of the foreign-related cases in Chinese arbitral institutions (Charts A-2 and C-2), are comparable because they are both cross-border dispute resolution through arbitration involving Chinese party. This comparative analysis shows that the number of cross-border arbitration cases involving Chinese parties is growing out of mainland China.

Chart G-1. Total Number of New Cases Handles by SIAC (2006-2016)¹³³



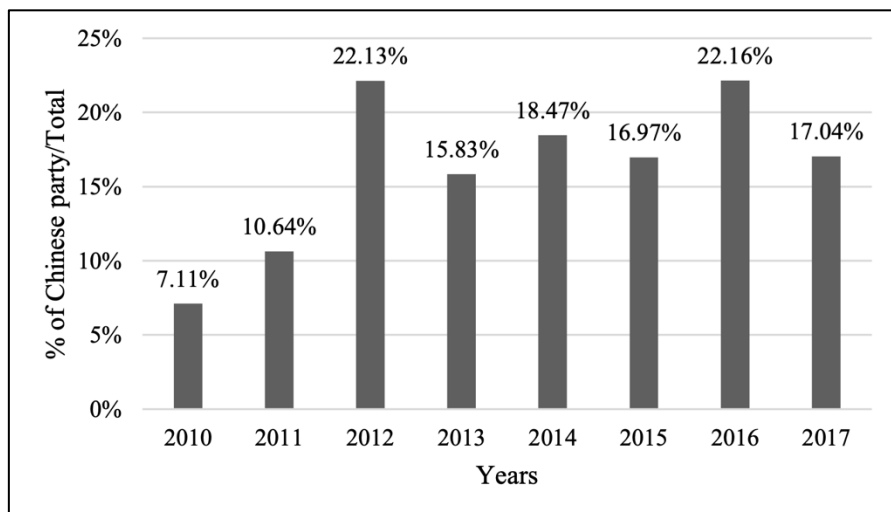
¹²⁹ *Id.*

¹³⁰ *Id.* “An application for the early dismissal of claims/defen[s]es can be made. The claim/defen[s]e in question must either be (a) manifestly without legal merit or (b) manifestly outside the jurisdiction of the tribunal. An expedited arbitration procedure is available for disputes where the claim or counterclaim does not exceed SGD6 million, the parties agree, or in cases of exceptional urgency.” *Id.*

¹³¹ Compare *supra* Charts A-1, C-1, with *infra* Chart G-2

¹³² Compare *supra* Charts A-2, C-2, with *infra* Chart G-2.

¹³³ *Total Number of New Cases Handled by SIAC (2006-2016)*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE <http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics> [<https://perma.cc/R5CY-EWLL>] (last visited Jan. 26, 2020).

Chart G-2. SIAC Percentage of Chinese Party/Total¹³⁴

3. International Court of Arbitration of the International Chamber of Commerce (ICC)

Since 1923, the International Court of Arbitration (“ICC”) has aided international dispute resolution.¹³⁵ Although it does not make formal judgments, the ICC is considered the leading international arbitration institution, and is reputable for its scrutiny of arbitral awards to ensure parties of the “highest possible standard and less susceptible to annulment.”¹³⁶ It is also generally acknowledged that it is easier for ICC arbitration awards to be recognized and enforced worldwide because of its significant global reach.¹³⁷

Chart H shows the most frequent nationalities of parties involved in the ICC arbitration in 2017.¹³⁸ As compared to participation in HKIAC and SIAC, where parties from China were among the top two frequent parties, Chinese parties were the seventh most frequent users of the ICC arbitration dispute mechanism, making up 3% of the total number of cases in front of ICC.¹³⁹

¹³⁴ Graph created by the Author based on data derived from SIAC Annual Reports from 2010 to 2017. *Annual Report*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE, <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report>, (last visited Mar. 29, 2019).

¹³⁵ *ICC International Court of Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE (ICC), <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> [https://perma.cc/Z4TF-X6X9] (last visited Jan. 26, 2020).

¹³⁶ *International Arbitration: Which Institution?*, *supra* note 128.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *infra* Chart H.

Chart H. Most Frequent Nationalities Among Parties¹⁴⁰

Country of origin	Number of parties	% of total no. of parties in all 2017 filings
USA	194	8.4%
Germany	128	5.5%
France	124	5.4%
Brazil	115	4.5%
Spain	102	4.4%
Italy	73	3.2%
China (including Hong Kong)	69	3.0%
United Kingdom	68	2.9%
South Korea	59	2.6%
Netherlands	57	2.5%
India	56	2.4%
Mexico	55	2.4%
Turkey	49	2.1%
United Arab Emirates	46	2.0%
Switzerland	44	1.9%
Belgium	42	1.8%
Austria	41	1.8%
Qatar	40	1.7%

C. Challenges Facing Chinese International Arbitral Institutions

1. Although the Growth of Chinese cross-border Activities Renders a Significant Increase in the Number of Arbitrations Brought in Chinese Arbitral Institutions, the Chinese Cross-border Arbitral Dispute Resolutions are Growing Outside of Mainland China.

Although the total number of cases brought to Chinese arbitral institutions has increased significantly, the data from CIETAC and SHIAC show that this growth is mainly attributable to the growth of domestic arbitrations, rather than foreign-related disputes.¹⁴¹ The percentage of foreign-related disputes administered by Chinese arbitral institutions decreased over time.¹⁴² In contrast,

¹⁴⁰ ICC *Dispute Resolution Bulletin 2018*, ICC PRACTICE AND PROCEDURE 53 (2018), <https://iccwbo.org/publication/2017-icc-dispute-resolution-statistics/> [https://perma.cc/9PYZ-XHLR].

¹⁴¹ See discussion *supra* Sections III.A.1., Section III.A.3.

¹⁴² *Id.*

Chart F and Chart G-2 illustrate the constant growth of China-related cross-border arbitration in HKIAC and SIAC over the years.¹⁴³

This finding is unsurprising because, for disputes arising from a situation involving a Chinese party, counterparties will be deterred from choosing an arbitration seat in China due to neutrality concerns. This is potentially problematic for Chinese international arbitral institutions if they want to assume more active roles and increase Chinese commercial activities in the B&R context. Chinese arbitral institutions should reflect on why these arbitral institutions, such as HKIAC and SIAC, are more popular than mainland Chinese arbitral institutions.

2. Arbitral Institutions Worldwide are Paying Significant Attention to China's B&R Dispute Settlement Opportunities.

Arbitral institutions outside of mainland China have shown significant interest in China's B&R initiative as a potential opportunity to expand their respective arbitral services. To support the growing number of businesses interested in the project, the HKIAC hosts a knowledge database where information related to the B&R project is publicly available.¹⁴⁴ The ICC provides a professional forum for B&R's dispute resolution by incorporating the Belt and Road Dispute Resolution into its services platform.¹⁴⁵ The ICC acknowledges that the construction of infrastructure projects on such a large scale will inevitably generate cross-border disputes that involving many actual and potential complex disputes.¹⁴⁶ These targeted initiatives demonstrate that international arbitral institutions are actively competing with Chinese arbitral institutions in the B&R.

IV. OPPORTUNITIES FOR CHINESE INTERNATIONAL ARBITRAL INSTITUTIONS

The B&R initiative's broad scope involves more than 70 countries across Asia and Europe, which are likely to choose more established arbitral forums outside mainland China.¹⁴⁷ China has a strong incentive to provide reliable commercial dispute resolution services because of its instrumental role in the B&R. Although there are tremendous external challenges, B&R affords Chinese institutions a potential opportunity to enhance its competitiveness in international arbitration.

¹⁴³ See discussion *supra* Sections III.B.1., III.B.2.

¹⁴⁴ See *Belt and Road Knowledge Database*, HKIAC, <http://www.hkiac.org/Belt-and-Road/belt-and-road-knowledge-database> [<https://perma.cc/YTA6-63J2>] (last visited Jan. 27, 2020).

¹⁴⁵ *Belt and Road Dispute Resolution*, *supra* note 5.

¹⁴⁶ *Id.* The ICC estimates \$900 billion dollars in B&R projects are planned or underway.

Id.

¹⁴⁷ See *id.*

A. *Considerations in the Selection of a Forum for International Arbitration*

In the 2018 International Arbitration Survey, 97% of the respondents expressed that international arbitration is their preferred dispute resolution method.¹⁴⁸ Furthermore, 99% of respondents recommended international arbitration for cross-border dispute resolution in the future.¹⁴⁹ This report provides some insights into how the international arbitrations' participants choose arbitral seats and institutions in the event of a cross-border dispute.

An arbitral seat is the judicial base of the arbitration.¹⁵⁰ The selection of a given forum of arbitration will subject any potential arbitration to that forum's national laws.¹⁵¹ The five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong, and Geneva.¹⁵² These seats are the most favorable for international arbitration area because of the: 1) general reputation and recognition of the seat; 2) neutrality and impartiality of the legal system; 3) national arbitration law; 4) track record in enforcing agreements to arbitrate and arbitral awards; and 5) availability of quality arbitrators who are familiar with the seat.¹⁵³

According to the 2018 International Arbitration Survey, the neutrality of arbitration, the enforceability of awards, and avoiding particular national legal systems are among the most valuable considerations of international arbitration.¹⁵⁴ Consequently, when negotiating an arbitration clause, parties are willing to choose a seat in a jurisdiction considered "safe," meaning that there are limited court interference and history of courts issuing pro-arbitration decisions.¹⁵⁵ The five most preferred arbitral institutions reflect the most favored arbitral seats are International Court of Arbitration of the International Chamber of Commerce ("ICC"), London Court of International Arbitration ("LCIA"), Singapore International Arbitration Centre ("SIAC"), Hong Kong International Arbitration Centre ("HKIAC"), and Arbitration Institute of the Stockholm Chamber of Commerce ("SCC").¹⁵⁶ The reasons for the popularity of these institutions are similar to that of the most favorable arbitral seats, which include the: 1) general reputation and recognition of the institution; 2) high level of administrative efficiency; 3) previous experience of the institution; 4) neutrality and internationalism of the institution, and 5) access to a wide pool of high-

¹⁴⁸ 2018 INTERNATIONAL ARBITRATION SURVEY, *supra* note 14, at 2.

¹⁴⁹ *Id.*

¹⁵⁰ HERBERT SMITH FREEHILLS LLP, *How significant is the seat in international arbitration?* (2019), PRACTICE NOTES, WL 7-205-5092, available at <https://uk.practicallaw.thomsonreuters.com/7-205-5092>.

¹⁵¹ *Id.*

¹⁵² 2018 INTERNATIONAL ARBITRATION SURVEY, *supra* note 14, at 2.

¹⁵³ *Id.* at 11.

¹⁵⁴ See McDougall, *supra* note 122, at 2.

¹⁵⁵ HERBERT SMITH FREEHILLS LLP, *supra* note 150, at 10.

¹⁵⁶ 2018 INTERNATIONAL ARBITRATION SURVEY, *supra* note 14, at 13.

quality arbitrators.¹⁵⁷ The popularity of a specific international arbitral institution is bolstered by their internal arbitral rules and how the external national legal frameworks harmonize with such rules. Several essential attributes to the neutrality of a forum are discussed as follows:

1. Transparency and Standardization of the Arbitration Procedure

Sophisticated arbitrating parties prefer institutional arbitration.¹⁵⁸ The level of procedural standardization is the most important contributing factor for this preference.¹⁵⁹ Arbitral institutions can achieve standardization through the adoption of the New York Convention or the UNCITRAL Model Law.¹⁶⁰ The UNCITRAL Model Law is “recognized worldwide as a legal point of reference that grants parties maximum autonomy” while limiting local courts’ intervention to extreme cases.¹⁶¹ It also provides parties with supplementary rules to fill legal gaps in domestic jurisdictions, which helps mitigate risk by avoiding uncertainties and ensuring the smooth functioning of cross-border arbitration proceedings.¹⁶²

Hong Kong rose to the top five most preferred seat of arbitration in 2015 after it reformed its arbitration law in 2011 to allow for the application of the UNCITRAL Model Law.¹⁶³ A more standardized national arbitration law provides more certainty and a foreseeable legal framework to the participants of such international arbitrations. While a predictable legal framework will attract international arbitration, it is difficult for jurisdictions without such a comprehensive legal system to implement.

2. Quality of the Arbitrators

The quality of the arbitrators available in a specific institution and arbitral seat is another important consideration in the selection of an arbitral institution. 70% of respondents in the 2018 International Arbitration Survey stated that they often obtain information about the arbitrator in their decision-making through “word of mouth,” “internal colleagues,” and “publicly available information.”¹⁶⁴ Published awards will provide valuable insights into individual arbitrators’ approaches to both procedural and substantive issues.¹⁶⁵ The 2018 International Arbitration Survey does not demonstrate a causal relationship between parties’ choice of the institution and the panel’s diversity.¹⁶⁶ However, the inquiry about

¹⁵⁷ *Id.* at 14.

¹⁵⁸ *See id.* at 5.

¹⁵⁹ *See id.* at 6.

¹⁶⁰ *See* McDougall, *supra* note 122, at 2-3.

¹⁶¹ *Id.* at 4.

¹⁶² *Id.*

¹⁶³ *Id.* at 3.

¹⁶⁴ 2018 INTERNATIONAL ARBITRATION SURVEY, *supra* note 14, at 2.

¹⁶⁵ *Id.* at 22.

¹⁶⁶ *Id.* at 2.

“neutrality” and “internationalism” implies an underlying expectation that the arbitrators are expected to be diverse in their nationalities.¹⁶⁷ The arbitrator selection rules applying to LCIA, SCC, and HKIAC that if the parties are of different nationalities, “the sole arbitrator or presiding arbitrator [cannot be] the same nationality as [any of the parties],” also implicate this consideration.¹⁶⁸

3. National Arbitration Law

A country’s national arbitration law plays a critical role in the selection of an arbitration seat.¹⁶⁹ Parties tend to choose an arbitration seat that provides supportive arbitration rules in their national arbitration laws.¹⁷⁰ These permissive arbitration laws are designed to support the parties’ autonomy to a large extent and explicitly fetter the ability of national courts to interfere with arbitrations brought to that jurisdiction.¹⁷¹

Section 44 of the English Arbitration Act of 1996 (“Section 44”) provides an example of a supportive arbitration rule.¹⁷² Section 44 empowers courts to make orders in support of an arbitral institution by permitting the grant of injunctive relief, order of the preservation of evidence, and compulsion of witnesses to provide evidence.¹⁷³ The statute demonstrates the English legal system’s attempt to preserve arbitral institutions’ power by placing limits on how courts can exercise power in this context and prevent parties from making unilateral applications to lower courts.¹⁷⁴

4. Enforcement of the Arbitral Awards

There are two principal considerations in evaluating the enforcement of arbitral awards. The first focuses on the difficulty of enforcing an award rendered by a particular arbitral institution in other jurisdictions. The second looks at whether a foreign arbitral award is easily enforceable in the jurisdiction where arbitration is seated.

Regarding the first consideration, the level of difficulty in enforcing an award is connected to the arbitral institution’s reputation. The ability of parties to enforce arbitral awards is the most valuable characteristic of international arbitration, according to the 2018 International Arbitration Survey.¹⁷⁵ For example, because of the ICC’s high scrutiny in rendering its arbitral awards, its

¹⁶⁷ See *id.* at 14.

¹⁶⁸ *International Arbitration: Which Institution?*, *supra* note 128.

¹⁶⁹ See McDougall, *supra* note 122, at 2.

¹⁷⁰ HERBERT SMITH FREEHILLS LLP, *supra* note 151, at 3.

¹⁷¹ *Id.* at 4.

¹⁷² See Arbitration Act 1996 (of England), c. 44 (Eng.).

¹⁷³ Arbitration Act 1996 (of England), §§ 2(a), 2(b), 2(e); see also HERBERT SMITH FREEHILLS LLP, *supra* note 150, at 4.

¹⁷⁴ See *id.*

¹⁷⁵ 2018 INTERNATIONAL ARBITRATION SURVEY, *supra* note 14, at 2.

awards are easily enforceable in foreign jurisdictions.¹⁷⁶ The second consideration relies on whether the seat itself has a predictable background that supports the enforcement of a foreign arbitral award because that impacts whether such arbitral award is recognizable and enforceable in certain courts. The recognition and enforcement of the arbitral award are subject to the New York Convention.¹⁷⁷

5. General Reputation

In selecting an arbitral seat, parties always prefer to choose a “safe seat,” a place with a robust judicial track record of issuing pro-arbitration decisions.¹⁷⁸ A robust judicial track record should be clear and easily accessible to the public and is, therefore, essential to the institution’s reputation.¹⁷⁹ It ensures the popularity of the institutions with a long history, but on the other hand, deters parties from choosing newly established forums. Even if a jurisdiction has supportive infrastructures, such as arbitration laws and supportive judicial attitudes, the lack of a track record would deter parties from choosing it as their arbitration seat.¹⁸⁰

B. *Enhancing the Competitiveness of the Chinese Mainland International Arbitral Institutions*

1. The Neutrality of Chinese International Arbitral Institutions can be Cultivated through Standardization and Modernization of Arbitration Rules.

Scholars have pressed for changes to mainland China’s arbitration laws for it to become an attractive seat for future international commercial arbitration.¹⁸¹ Namely, China should incorporate the UNCITRAL Model Law into its legal system, because it provides a clear and widely adopted international norm of arbitration law and is more attractive than Chinese domestic law for foreign arbitral parties.¹⁸² Hong Kong SAR and Singapore have adopted the UNCITRAL Model Law and demonstrated significant success in increasing their forum popularity as a seat for arbitration.¹⁸³

For instance, regarding ad hoc arbitration, which “is a proceeding that requires the parties to select the arbitrator(s), and select the rules and

¹⁷⁶ *International Arbitration: Which Institution?*, *supra* note 128.

¹⁷⁷ HERBERT SMITH FREEHILLS LLP, *supra* note 150, at 8.

¹⁷⁸ *See id.* at 4.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Ribeiro & Teh, *supra* note 36, at 461.

¹⁸² *Id.*

¹⁸³ *See discussion supra* Section IV.A.

procedures,”¹⁸⁴ China does not recognize ad hoc arbitration unless the arbitration agreement selects and specifies an arbitral institution for the administration of the dispute.¹⁸⁵ However, as a party to the New York Convention, China is bound to recognize and enforce all foreign arbitral awards, including ad hoc awards.¹⁸⁶ As a result of this distinction, parties may encounter difficulty in enforcing ad hoc awards conferred from a foreign jurisdiction and may have their autonomy significantly undermined by this process.¹⁸⁷ In adopting the UNCITRAL Model Law, China would have to recognize ad hoc arbitration, a crucial step to demonstrate the Chinese system’s endorsement of parties’ autonomy under a modern, standardized international arbitration system.¹⁸⁸

Establishing neutrality through the modernization of arbitration laws is one of China’s most viable options because this change is specific and can be carried out in a short time period. Other means to demonstrate neutrality, such as bolstering the forum’s general reputation, require more time, which is unattractive as disputes arising from the B&R are forthcoming.

2. Track Record of Chinese Domestic Courts’ Recognition and Enforcement of Foreign Arbitral Awards against Chinese Assets in Mainland China Will Establish China’s Viability as a Popular Seat.

Publicly available data on a forum is vital for parties to assess an institution’s credibility. CIETAC, the most well-established international arbitral institution in China, has consistently provided specific data and annual reports to establish its reputation. In contrast, other Chinese international arbitration institutions do not provide sufficient data for the public, therefore deterring parties in international commercial transactions from choosing such a forum. Simultaneously, an absence of a strong track record of Chinese judicial enforcement of arbitral awards against Chinese parties’ assets undermines China as a pro-arbitration jurisdiction.¹⁸⁹ Considering that B&R projects will primarily involve Chinese parties’ investing in projects abroad, a better track-record of publicly available data of Chinese courts’ recognition and enforcement of foreign arbitral awards would establish China as a pro-arbitration jurisdiction.

According to CPL, a foreign party seeking to enforce an arbitral award conferred outside of China must file an application in the court where the party being enforced against is domiciled or where the assets are located for such

¹⁸⁴ William Harnett & Michael Schafler, *Ad Hoc v. Institutional Arbitration – Advantages and Disadvantages*, ADR PERSPECTIVES (September 2017), <http://adric.ca/wp-content/uploads/2017/09/Hartnett-and-Shafler.pdf> [https://perma.cc/BX39-RG8J]. In contrast, institutional arbitration “is a proceeding where the parties designate an institution to administer the arbitral process in accordance with its arbitration rules.” *Id.*

¹⁸⁵ Ribeiro & Teh, *supra* note 36, at 479.

¹⁸⁶ *Id.* at 480.

¹⁸⁷ *Id.* at 480-81.

¹⁸⁸ *Id.* at 481.

¹⁸⁹ See *supra* discussion Section III.A.

enforcement.¹⁹⁰ An outside party will consider a Chinese seat “safe” if it can rely on the Chinese courts to attach the local assets of the Chinese parties to a certain extent, and consequently will prefer to arbitrate in China if it knows that enforcing against a Chinese party’s assets is easier in a Chinese domestic court. In order to construct an arbitration enforcement friendly system, the Chinese judiciary must seek cooperative changes in its procedural rules and record-keeping system, and make them available to the general public.

3. The Different Legal Systems of Mainland China and Hong Kong Under China’s “One Country, Two Systems” Policy can Both be a Challenge and an Opportunity for China to Attract More Chinese Cross-border Arbitrations into Chinese Arbitral Institutions.

Chinese institutions and judiciaries have already made efforts to promote the harmonization of arbitral rules.¹⁹¹ For example, CIETAC passed a special provision to give Hong Kong a separate judicial and arbitration regime, which designated Hong Kong as the default seat for disputes and incorporated Hong Kong’s arbitration rules.¹⁹² This provides greater flexibility for claimants who chose CIETAC as their arbitral institution but prefer a seat in Hong Kong.¹⁹³

Under the “One Country, Two Systems” political scheme for mainland China and Hong Kong, Hong Kong retains a common law system distinct from mainland China.¹⁹⁴ This structure allows Chinese domestic arbitral institutions to provide greater flexibility by utilizing Hong Kong as a jurisdiction to seat. However, in the context of the B&R, where the Chinese judiciary would likely prefer to oversee B&R disputes, a special provision like this would divert arbitration to Hong Kong rather than mainland China. Moreover, heavy reliance on these types of special provisions would impede China’s mainland arbitral institution’s desire to develop its own rules and procedures. This consequential lack of incentive to make fundamental changes would be a significant challenge to institutional reforms.

¹⁹⁰ Tao & Zhong, *supra* note 40, at 377.

¹⁹¹ See Gu, *supra* note 13, at 1323.

¹⁹² See FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 18, at 6.

¹⁹³ See *id.*

¹⁹⁴ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 23391, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>; The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, XIANGGANG JIBEN FA art. 8. Upon the transfer of Hong Kong’s sovereignty from the United Kingdom to China, Hong Kong retained its own economic and legal system and government, distinct from mainland China. *Id.*

4. The Chinese Domestic Courts' Standardization of its Recognition and Enforcement of Foreign Court Judgments through the Principle of Reciprocity indicates liberalization of the Chinese Judicial System.

Given domestic courts' integrated function in the enforcement of international arbitration, the liberalization of domestic courts' attitude towards foreign court judgments is worth mentioning. According to Article 281 of the CPL, international treaties and the principle of reciprocity are two legal bases for recognizing and enforcing of foreign court judgments in China.¹⁹⁵

First turning to international treaties, the most notable multilateral attempt is the 1971 Hague Convention on the Foreign Judgment in Civil and Commercial Matters and its supplementary Protocol, which attempts to resolve the issue of unpredictable domestic enforcement of foreign arbitral awards.¹⁹⁶ This treaty's authority is limited, as there are only five signatories, with China being a party to neither to the Convention itself nor its supplementary protocol.¹⁹⁷ In 2017, China signed the Hague Convention on Choice of Court Agreements, which requires parties to recognize and enforce choice of court agreements and judgments given by other parties to the treaty.¹⁹⁸ However, the Chinese Parliament has not approved this treaty, so it is not binding.¹⁹⁹ Regarding bilateral treaties, China is not a party to any bilateral treaty explicitly concerning the recognition and enforcement of court judgments.²⁰⁰

So, in the absence of multilateral and bilateral treaties regarding this matter, Chinese courts can enforce foreign judgments by reciprocity.²⁰¹ Under the principle of reciprocity, a "court can recognize and enforce the foreign judgment if it does not violate the basic principles of law, the state sovereignty and

¹⁹⁵ Bin Sun, *The Future of Cross-border Litigation in China: Enforcement of Foreign Commercial Judgments based on Reciprocity*, 50 N.Y.U. Int'l L. & Pol. 1135, 1135 (2018).

¹⁹⁶ See Convention on the Recognition and Enforcement of Foreign Judgments in the Civil and Commercial Matters, Feb. 1, 1971, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=78> [<https://perma.cc/M8R8-8TA4>].

¹⁹⁷ *HCCH Ratifications, Approvals and Accessions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf> [<https://perma.cc/8MFP-ZFLK>] (showing that only 5 signatories to this treaty: Albania (accession), Cyprus (Ratified), Netherlands (Ratified), Portugal (Ratified), and Kuwait (Accession, as a non-member country)).

¹⁹⁸ Convention on Choice of Court Agreements, June 30, 2005, available at <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf>.

¹⁹⁹ See Status Table Convention of 30 June 2005 on Choice of Court Agreements (April 2, 2020), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>; NUO JI, YANHUA LIN, LINGQI WANG & YIRAN LI, ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS IN CHINA: OVERVIEW (Fangda Partners, 2019), available at [https://uk.practicallaw.thomsonreuters.com/8-619-0132?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/8-619-0132?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1).

²⁰⁰ See JI ET AL., *supra* note 199.

²⁰¹ See Sun, *supra* note 195, at 1136.

security, or the public interests of the [PRC].”²⁰² Although the principle of reciprocity lacks a settled definition under both international and Chinese law,²⁰³ some foreign judgments have been recognized and enforced by Chinese courts, illustrating the liberalization and standardization of the Chinese judiciary’s interpretation of the principle of reciprocity.

The SPC’s 2015 interpretation of the principle of reciprocity to promote mutual recognition and enforcement of court judgment with B&R countries illustrates the liberalization of the judicial application of reciprocity.²⁰⁴ Critics have pointed out the limitation of such applications in enforcing a foreign court judgment in China due to the limited scope and monetary damages involved in the two publicly available cases.²⁰⁵ However, this nonetheless signals further liberalization of the Chinese judiciary system that may provide an institutional structure with more certainty in its rule of law. This note will review two cases demonstrating the recognition of foreign judgments by intermediate Chinese courts.

a. *Case 1: Kolmar Group AG (2016) – Chinese Court Recognized a Singaporean Court Judgment*

Kolmar Group AG illustrated a significant development of the principle of reciprocity in 2016.²⁰⁶ This case is the first time a Chinese court recognized and enforced a commercial judgment of a Singaporean court under the principle of reciprocity.²⁰⁷ In this case, the Kolmar Group AG (“Kolmar”), a Swiss company, reached a settlement agreement with the Jiangsu Textile Industry (Group) Import & Export Co., Ltd. (“Jiangsu Textile”), a Chinese company, following a dispute arising from their sale and purchase contract.²⁰⁸ When Jiangsu Textile failed to compensate Kolmar pursuant to the settlement agreement, Kolmar filed suit in the High Court of Singapore, following the jurisdiction clause under the

²⁰² Alison Lu Xu, Belt & Road Typical Case 13: Towards a Liberal Interpretation of the Reciprocity Principle for Recognition and Enforcement of Foreign Judgments, STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (June 2018), available at <https://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-3-alison-xu/> [<https://perma.cc/J8H4-D5QV>].

²⁰³ See King Fung Tsang, The Role of Hong Kong in the dispute resolutions of One Belt One Road, in CHINA’S ONE BELT ONE ROAD INITIATIVE AND PRIVATE INTERNATIONAL LAW 205 (Sooksripaisarnkit & Garimella eds., 2018).

²⁰⁴ Sun, *supra* note 195, at 1147.

²⁰⁵ See *id.* at 1147-48.

²⁰⁶ Gao’er Jituan Gufen Youxian Gongsi yu Jiangsusheng Fangzhi Gongye (Jituan) Jinchukou Youxian Gongsi (高尔集团股份有限公司与江苏省纺织工业(集团)进出口有限公司) [*Kolmar Group AG v. Jiangsu Textile Industry Group*], STANFORD LAW SCHOOL CHINA GUIDING CASES PROJECT (Nanjing Interm. People’s Ct. Dec. 9, 2016) [http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13-\(China\)](http://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/typical-case-13-(China)) [hereinafter *Kolmar Group AG*].

²⁰⁷ *Id.*

²⁰⁸ *Id.*

settlement agreement, which rendered a judgment in favor of Kolmar.²⁰⁹ Due to nonpayment by Jiangsu Textile, Kolmar sought to enforce this Singapore judgment to a Chinese court in Jiangsu, where the assets of Jiangsu Textile were located.²¹⁰

Jiangsu Textile argued that the judgment was not enforceable because the bilateral treaty between China and Singapore underlying this issue – Treaty on Judicial Assistance in Civil and Commercial Matters – did not contain any provision concerning mutual recognition and enforcement of court’s judgments.²¹¹ Nevertheless, the Intermediate People’s Court in Nanjing Municipality (“IPC Nanjing”) ruled that pursuant to Article 282 of the CPL, the court can recognize and enforce a court ruling through either an international treaty or the principle of reciprocity.²¹² With no express provisions in China’s bilateral treaty with Singapore, IPC Nanjing recognized and enforced the Singaporean commercial judgment based on the principle of reciprocity.²¹³ The court reached this conclusion on the grounds that (1) the High Court of Singapore previously enforced a civil judgment of a court in China, and (2) the judgment of this case did not violate the basic principles of Chinese law, national sovereignty, security or social and public interests.²¹⁴

IPC Nanjing ruled solely by the principle of reciprocity, which is not an entirely settled legal judgment method before the B&R context. The proactive move is a powerful manifestation that China had made advances in its realization of judicial cooperation in mutual recognition and enforcement of civil and commercial judgments with foreign countries, particularly in the backdrop of the B&R.²¹⁵

²⁰⁹ *Id.* Jiangsu Textile chose not to appear before the High Court of Singapore, which rendered a default judgment and ordered Jiangsu Textile to pay Kolmar \$350,000 plus interest. Jessica Fei & Joanna Du, *PRC court recognises and enforces a Singapore High Court judgment based on reciprocity principle*, HERBERT SMITH FREEHILLS (Mar. 22, 2017), <https://hsfnnotes.com/asiadisputes/2017/03/22/prc-court-recognises-and-enforces-a-singapore-high-court-judgment-based-on-reciprocity-principle/> [https://perma.cc/B3TG-R3YA].

²¹⁰ Kolmar Group AG, *supra* note 206.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* “Article 282 provides that, the PRC court, if after examining the foreign judgment or ruling in accordance with (1) the international treaty concluded or acceded to by PRC or (2) under the reciprocity principle, deems it not to be in violation of the basic principles of the PRC law or sovereignty, security or public interest of PRC, shall issue a ruling recognizing and enforcing the foreign judgment or ruling.” Fei & Du, *supra* note 209.

²¹⁵ See Tsang, *supra* note 203, at 206.

b. *Case 2: Liu Li v. Tao Li & Tong Wu (2017)- Chinese Court
Recognized a United States Court Judgment*

The increasing effort by Chinese courts to utilize the principle of reciprocity following the initiation of the B&R also extends to non-participant countries.²¹⁶ The Intermediate People's Court of Wuhan ("IPC Wuhan") recognized a U.S. judgment for monetary damages based on reciprocity in *Liu Li v. Tao Li & Tong Wu*, a dispute first brought to court in Los Angeles, California, on June 30, 2017.²¹⁷

This case involved a dispute arising out of an agreement to transfer 50% of the shares of Jiajia Management, Inc. from Tao Li (and his wife, Tong Wu) to Liu Li in exchange for \$150,000.²¹⁸ After receiving payment of \$125,000 from Liu, in accordance with the agreement, Tao failed to transfer the agreed-upon shares.²¹⁹ Liu filed a suit in the Los Angeles Superior Court, which issued a default judgment in favor of Liu, ordering the return of \$125,000 and other interests and costs, for a total of \$147,492.²²⁰ Unable to collect the award in the United States, Liu brought Tao and Tong to court in Wuhan, China, where their property was located, seeking enforcement of the Los Angeles judgment plus post-judgment interests.²²¹

IPC Wuhan based its ruling on Article 281 and 282 of the CPL, finding no treaty between China and the United States on the mutual recognition and enforcement of judgments.²²² So, the court resorted to the principle of reciprocity, finding that a U.S. court previously recognized and enforced a Chinese judgment in *Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.* (2011).²²³ The *de facto* reciprocity established for the basis of mutual recognition and enforcement in this case.²²⁴

²¹⁶ *Id.*

²¹⁷ Liu Li yu Tao Li, Tong Wu (刘利与陶莉, 童武) [Liu Li v. Tao Li & Tong Wu] CHINA JUDGEMENTS ONLINE, (Wuhan Interm. People's Ct. June 30, 2017), *available at* <http://wenshu.court.gov.cn/website/wenshu/181029CR4M5A62CH/index.html>; *See also* Brand, *supra* note 8, at 30.

²¹⁸ Brand, *supra* note 8, at 31.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 31-33.

²²³ *Id.* at 33. The U.S. District Court for the Central District of California recognized and enforced a judgment from the Hubei People's Supreme Court and the Ninth Circuit U.S. Court of Appeals affirmed the decision in 2011. *See also Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co.*, 425 F. App'x 580, 581 (9th Cir. 2011).

²²⁴ Brand, *supra* note 8, at 37.

CONCLUSION AND RECOMMENDATIONS

This paper analyzes the development of Chinese cross-border commercial dispute resolutions through primary data analysis from major international arbitral institutions in mainland China and worldwide. Data shows that although Chinese cross-border activities' growth renders a significant increase in the number of arbitrations brought in Chinese mainland arbitral institutions, the Chinese cross-border arbitral dispute resolution is growing out of mainland China. In the B&R context, this is a significant challenge for the Chinese mainland international arbitral institutions to take on a more leading role in developing dispute resolution framework. More popular arbitral institutions such as HKIAC and ICC are actively seeking China's B&R dispute settlement opportunities.

In order to enhance the competitiveness and neutrality of Chinese mainland arbitral institutions, the Chinese government and legislatures should consider reforming the: 1) transparency and standardization of the arbitration procedure; 2) quality of the arbitrators; 3) national arbitration law; 4) enforcement of the arbitral awards; and 5) general reputation of the institution and seat.

First, the neutrality of Chinese international arbitral institutions should be cultivated through standardization and modernization of arbitration rules by adopting the UNCITRAL Model Law. This would standardize Chinese arbitration rules to the most widely accepted global model and encourage the parties' autonomy by allowing ad hoc arbitration in China.²²⁵ Second, Chinese domestic courts and arbitral institutions should publish a track record of the Chinese courts' recognition and enforcement of foreign arbitral awards against the Chinese parties' assets in mainland China. This would ensure the foreign counterparties in B&R projects the accessibility of Chinese assets in a dispute resolution system administered in China. Third, China should utilize the different mainland and Hong Kong legal systems under the "One Country, Two Systems" policy to attract Chinese cross-border arbitration in the CIETAC Hong Kong subcommission in the transitional period of reform. Fourth, the public recognition and enforcement by Chinese courts of foreign court rulings from Singapore and the United States should be considered as a constructive liberalization of the Chinese judicial system in the future. Through each of these reforms, China will have an opportunity to position itself as a desirable seat of arbitration in this new era of Chinese cross-border dispute resolution in the B&R context.

²²⁵ Ribeiro & Teh, *supra* note 36, at 481.