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On the present and the future of land freight transport dispute-resolution

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Abstract: The resolution of land freight transport disputes along Europe-China corridors and along the regional routes that link China to other Asian countries poses legal challenges to the existing *lex mercatoria* in this field. The CMR is the unrivalled convention on the road freight transport contract and the adhesion of China and other Asian countries to it is the most reasonable way of bringing legal certainty to the resolution of these relatively new road freight transport disputes. The cross-border legal regime of rail freight is geographically fragmented (between the CIM Rules and SMGS) and the universalization of these regimes seems unfeasible in the short term. In the long term, a new overarching convention on the rail freight transport contract could resolve the challenges derived from fragmentation. So far, when neither the CIM Rules nor SMGS can be applied *proprio vigore*, the resolution of disputes relies upon a series of contractual legal instruments designed by rail freight industry associations. When it comes to third-party adjudication, international treaties favor litigation before State courts through private international law mechanisms on *lis pendens* and on the recognition and enforcement of court rulings. Meanwhile, the aforementioned contractual legal instruments often favor the utilization of ADR mechanisms.

Keywords: Land (road and rail) freight transport disputes Europe-China rail corridors Convention on the Contract for the International Carriage of Goods by Road (CMR) Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Rules) CIM/SMGS Consignment Note Alternative Dispute Resolution (ADR) mechanisms.

(A) INTRODUCTION: THE RECUPERATION AND THE CREATION OF LAND FREIGHT TRANSPORT ROUTES

Land transport physical and legal infrastructure are catalyzers of development, trade and the fight against climate change. Events such as the scarcity of containers available for maritime freight transport caused by the recent global pandemic and the blockade of the Suez Canal in March 2021 evidence the urgent need to diversify the global supply chains upon which our common economic prosperity relies.[1]

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Maritime freight is the predominant mode of freight transport at a global scale. It is "the lifeblood of the World economy", as has been described in World Trade Organization (WTO) Report No. S/C/W/315.[1] Meanwhile, at a regional scale, land transport is already crucial. Land transport plays a quintessential role in continental logistics in Europe: in 2019 road transport accounted for 53.4%, followed by maritime (29.6%) and rail (21.3%).[2] Land freight transport has also increased its role in Western China and its importance in global supply chains will keep growing.

Along the ancient Silk Roads, land transport was carried out across the old continents: Europe, Asia and parts of Africa. The heyday of maritime trade fostered by the discovery of the American continent came along with the decay of transcontinental land transport. Relatively inefficient land transport became a constraint to global trading routes. In times of the great spice trading routes and the first globalization led by the Iberian peoples, the price of spices coming from the West Indies to the port of Lisbon used to double as these reached the markets of Toledo in the interior of Castile, Spain due to onerous land transport.[3]

Throughout contemporary history, land transport allowed major geopolitical regional changes in the newly discovered continents, such as the conquest of the West of the United States of America and the control of the Australian territory. However, transcontinental trading routes since the modern ages became increasingly maritime ones. Along the 19th and 20th Centuries, maritime transport infrastructure and engineering projects such as the Suez Canal and the Panama Canal enabled the creation of contemporary transcontinental maritime trading routes. It is still to be seen whether contemporary land transport infrastructure in our days will lead to a new paradigm in global logistics.

Multilateral and national infrastructure initiatives, including the Belt and Road Initiative (BRI) are contributing to the construction, upgrading and refurbishing of land transport infrastructure, notably in Western China, Central Asia and Eastern Europe.[4] Land transport, unlike maritime and air transport, does not only require ports and mobile equipment, but also road and rail networks. The road and rail freight transport

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1 'Suez Canal blocked after huge container ship runs aground', Financial Times on 24 March 2021, text available electronically at <https://www.ft.com/content/eec9f3a6-2817-45f5-b007-a290f3e530c6>, accessed on 25 March 2021.
'Suez Canal Blocked After Giant Container Ship Gets Stuck', The New York Times on 24 March 2021, text available electronically at <https://www.nytimes.com/2021/03/24/world/middleeast/suez-canal-blocked-ship.html>, accessed on 25 March 2021.
'Un megabuque provoca el caos en el canal de Suez y atasca el comercio global [A Sheer Scale Vessel Causes Havoc at the Suez Canal Blocking Global Trade]', El País 25 March 2021, at 42.
'El cierre del canal de Suez amenaza el comercio global durante semanas [The Closure of the Suez Canal Threatens Global Trade for Weeks]', El País 26 March 2021, at 39.

1 WTO Report No. S/C/W/315, 7 June 2010.

2 The modal split mentioned above refers to intra-EU transport. The weight of land transport between the EU and the rest of the World is much lower, but still significant.
See: Eurostat, 'Freight Transport Statistics: Modal Split', text available electronically at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Freight_transport_statistics_-_modal_split#Modal_split_in_the_EU>, accessed on 29 June 2021.

3 J.H. Elliot, La España Imperial: 1.469-1.716 [Imperial Spain: 1,469-1,716] (Vicens Vives, 1972), at 124-125.

4 A.G. Jiménez, 'Land Freight Transport along the Belt and Road: State-to-State and Investor-State Disputes', 13(3) *Journal of WTO and China* (2023), at 82-114.

infrastructure that is currently being built enables two kinds of relatively new land freight transport routes: Europe-China corridors and the regional routes that link China to other Asian countries.

The development of the "legal infrastructure" required for the resolution of land freight transport disputes along these new routes is as important as the development of physical infrastructure.[5] The resolution of land freight transport dispute along these new routes constitutes an opportunity for the improvement of the *lex mercatoria* for the resolution of land freight transport disputes.

(1) Europe-China Corridors and Regional Land Freight Transport Routes that Link China to other Asian Countries

WTO Report No. S/C/W/324 identified the global trends and the bottlenecks of cross-border road freight transport.[6] Road transport takes place predominantly within the regions of Europe, Asia and North America, since there are no road routes connecting North America neither to Asia nor to Europe.[7] In 2010, when the aforementioned report was issued, it was noted that, although Europe-Asia road transport was possible, it was too complex and seldom used. Europe-Asia corridors have been gaining ground in recent years, but trade in goods between Europe and Asia will continue to be carried out predominantly by sea in the foreseeable future.

Maritime transport will continue to lead the modal split of freight transport.[8] However, upgrading land freight transport is a priority for the development and policy banks in Europe, China, India, Japan, Russia and Turkey, as well as in other Middle Eastern, Central Asian and South-East Asian countries.[9] International Financial Institutions (IFIs) also award great importance to land freight transport, including the World Bank's International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and the Asian Infrastructure Investment Bank (AIIB).

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5 J.A.E. Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules', 44 *Texas International Law Journal* (2009), at 277, 290-292.

6 WTO Report No. S/C/W/324, 29 October 2010.

7 By 2014 the construction of the China-Russia-Canada-America high-speed train was discussed, which would have permitted the creation of land freight transport routes between Asia and North America. This project has, at least so far, not become a reality.
Jonathan Kaiman, 'Chinese experts in discussion over building high-speed Beijing-US railway: China-Russia-Canada-America line would run for 13,000 km across Siberia and pass under Bering Strait through 200 km tunnel', The Guardian, 8 May 2014.

8 Trade in goods is predominantly carried out by sea. According to UNCTAD, "more than 80 per cent of world merchandise trade by volume is carried by sea".
UNCTAD, *2020 Review of Maritime Transport* (Geneva, 2020), at 20 [doi: 10.18356/9789210052719].

9 See, for instance, Connecting Europe facility for the period 2021-2027:
European Commission, *Agreement on 2021-2027 Connecting Europe Facility*, available electronically at: <https://ec.europa.eu/inea/en/news-events/newsroom/agreement-2021-2027-connecting-europe-facility>, accessed 12 July 2021.

The Center for Strategic and International Studies (CSIS), a think tank, launched the Reconnecting Asia database, which tracks infrastructure projects (with an emphasis on land transport and energy infrastructure) financed by major Asian economies and Europe, as well as International Financial Institutions.[10] The main idea behind this project is that land routes had great importance in the Ancient World and their revival may have a major geostrategic impact. By March 2021, 812 tracked projects were related to rail infrastructure, 1,545 to road infrastructure and 157 to other dry ports and logistical infrastructure that can support land transport.

The institutional interest in developing land freight transport infrastructure serves two main objectives. First, transport infrastructure fosters economic growth and development. The current frontiers for the improvement of global logistics and supply chains can be largely found in the need to build and upgrade land transport infrastructure. Second, a modal shift towards land transport and notably towards rail transport can have a positive effect towards the decarbonization of the global economy and can contribute to reduce the vulnerability of global supply chains to the effects of climate change by diversifying risks. Sustainable, efficient and resilient freight transport is key to foster the objectives of the main global governance initiatives currently supported by the United Nations: the 2030 Agenda for Sustainable Development and the Paris Climate Change Agreement.[11]

Regional land transport routes are primarily those that connect China to Southeast Asia, South Asia and the Korean Peninsula. Regional routes are often part of bilateral or regional economic corridors, such as the China-Pakistan Economic Corridor, the Bangladesh-China-India-Myanmar (BCIM) Economic Corridor and the China-Indo-China Peninsula Economic Corridor (CICPEC). Some regional land transport routes launched by international organizations also receive the support of China. Such is the case of projects launched by the ADB, such as the ones under the Greater Mekong sub-region and the South Asia sub-regional Economic Cooperation (SASEC). China also supports projects launched under the auspices of the Association of South-East Asian Nations (ASEAN), such as the Singapore-Kunming Rail Link.

The development of overland corridors to link Europe and Asia has been a priority of the international community at least for the last two decades and may well be considered the major challenge in global logistics of our times. Already in 2002, in view of the rapid growth of merchandise trade between Europe and East Asia, the United Nations Economic Commission for Europe (UNECE) and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) launched the Euro-Asian Transport Links (EATL). This project had three phases. In Phase I of this project, which lasted until 2007, an Expert Group was created in order to identify priority rail and road

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10 Reconnecting Asia Project Overview', available electronically at: <https://reconasia.csis.org/about/>, accessed 15 March 2021.

11 UNCTAD, 'Urgent need for climate adaptation in transport, say experts', available electronically at: <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2063&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#1721;#Transport;#1788;#Transport%20Policy%20and%20Legislation;#2170;#Transport,%20Climate%20Change%20and%20Maritime%20Transport;#2197;#Transport,%20Climate%20Change%20Impacts%20and%20Adaptation;#1450;#Technology%20and%20Logistics>, accessed 12 September 2020.

routes between Europe and Asia. In Phase II of this project (from 2008 to 2013) the Expert Group identified nine Eurasian rail corridors and another nine road corridors that link Europe and Asia. Phase III of the EATL started in 2013 and finished in 2017. It focused on making EATL overland links operational. In order to achieve this, it dealt with financing of infrastructure and "facilitating and removing physical and administrative bottlenecks when crossing borders in overland transport between Europe and Asia".[12]

When it comes to Europe-China land freight corridors currently being effectively and efficiently utilized, trans-Siberian routes outstand. The trans-Siberian route from China to Europe, which can be made shorter through the territories of Kazakhstan (trans-Siberian Kazakh route) or Mongolia (trans-Siberian Mongolian route). The diversification of trans-Siberian routes is a priority of the BRI and other infrastructure initiatives, including the Moscow-Beijing Railway Initiative, the Mongolia-China-Russia Trilateral Economic Corridor, the Northern Railway Links of Economic Corridor. We may see the consolidation of new Europe-China corridors in the years and decades to come through the extension of the land routes that link Pakistan, Iran and Turkey to the West towards Europe and to the East towards China.[13]

Among the transcontinental routes directly supported by the BRI, the following must be mentioned: the International Transit Corridor "Western Europe Western China", the East-West Economic Corridor, the Central Asia Regional Economic Cooperation Program (CAREC), the China-Kyrgyzstan-Tajikistan-Afghanistan-Iran railway (Five Nations railway), the Russia-Kazakhstan-Kyrgyzstan-Tajikistan railway, the Trans-Asian Railway.

The world's longest land routes are the ones that go from China to Europe. The so-called "silk road train" has been operating between the cities of Yiwu and Madrid since 2014. With 13.052 km, it was considered the world's longest rail route, going through inland China, Kazakhstan, Russia, Belarus, Poland, Germany, France and Spain. The Madrid-Yiwu train is an example of how new overland freight routes may link cities that had never before been directly connected.[14]

Besides road and rail networks, dry ports also play a major role in fostering land freight transport routes. Khorgos dry port is a clear example of how this kind of logistics infrastructure can not only contribute to the recovery and upgrading of ancient overland trading routes, but also support relatively new road and rail routes. Khorgos dry port was constructed in the border between China and Kazakhstan, since this city had great importance in the trading routes of the old Silk Roads. Khorgos International Centre for Cross-Border Cooperation has already become the biggest land port in Central Asia and a key logistical center for the region. This sort of new infrastructure enables the modal

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12 UNECE, 'Trade: Euro-Asian Linkages' (2019), available electronically at: <https://unece.org/about-us-31>, accessed 19 January 2021 [doi: 10.18356/16e21aa9-en].

13 These corridors were identified in a study published by the Organization for International Carriage by Rail (OTIF) in 2016.
D. Galushko, 'Study on Corridors' (OTIF publications, 2016), available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/Studien/STUDY_ON_CORRIDORS_-_Final.pdf>, accessed 15 July 2023, at 4-6.

14 'El tren que batió el récord mundial y tenía su destino final en Madrid [The Train that Broke the World Record with destination to Madrid]', El País (Madrid's regional supplement) 21 March 2021, at 3.

diversification of freight transport. Goods can reach Europe in 15 days from Khorgos dry port, constituting an alternative that is faster than maritime routes and cheaper than air routes. However, the volume of goods handled in Khorgos is still not comparable to that of the biggest Chinese and international ports.[15]

(2) Land Freight Transport Disputes and the Creation of Contemporary Cross-border Commercial Usages and Practices

Land transport enabled trade both in Ancient Rome and in Ancient China. Ensuring the adequate condition of the network of roads was a major concern of traditional political and economic thought in these two civilizations. Ancient Romans built a complex system of roads that was the basis of the material prosperity of Roman provinces such as Hispania and enabled East-West trading routes.[16] Hence the well-known aphorism, often attributed to which, "all roads lead to Rome". Similarly, a well-known Chinese aphorism, "要想富，先修路", could be translated as "those who want to prosper, first have to build [or repair] roads". It can be argued whether these trading routes allowed direct economic exchanges between ancient Romans and the Han Dynasty.[17] However, both of these old civilizations one of them in Western Europe, the other one in Eastern Asia were well aware of the importance of land routes.

The term "Silk Roads" evokes the historical phenomenon of trade between the East and the West of the Eurasian continent described by 19th century European scholars. Throughout history, East-West trading routes led to the development of norms that governed and facilitated economic exchanges. Trade involving Mediterranean City-States during the 11th and 12th Centuries led to the creation of legal compilations that received the name of *lex mercatoria* or *jus mercatorum*: the laws of merchants. Commercial

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15 These projects also create synergies with the development strategies of Central Asian nations through initiatives such as the Khorgos-Eastern Gates Special Economic Zone.
R. Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 264-271 [doi: 10.1093/cjcl/cxaa006].

16 T. Mommsen, *Historia de Roma I* [*History of Rome I*] (RBA, 2005), at 216 *et seq*.
"(…) [T]he Orient supplied Italy with perfumes and diverse ornaments, as well as with fabrics and purple dye, ivory and incense, which served since very old times for making ribbons, royal scarlet cloaks, scepters, and also for the sacrifices."
"(…) [A]ncient Italy, as well as imperial Rome, brought from the Orient all their luxury items before starting to manufacture their own ones by copying models from abroad."
The original version was written in German. I translated into English from a Spanish translation first published in 1876 and revised in 2003.
See also: J. Marías, *España Inteligible: Razón Histórica de las Españas* [*Intelligible Spain: Historical Reason of the Spains* (*Sic.*)] (Alianza Editorial, 2014), at 65-67.
"The urban density of Hispania was much higher than in other Occidental provinces of the Roman Empire. […] Cities are the organs of cohabitation, dialogue and projects. […] Romanization was always about urbanization. Roads allowed the links among cities, giving cohesion to the territory and its diverse populations."

17 Sinologist believe that Chinese Silk was popular in Rome already in 44 BC, during the Han dynasty. However, Silk trade was carried out with the help of intermediaries, namely, Indian and other merchants.
P. B. Ebrey, *The Cambridge Illustrated History of China* (Cambridge University Press, Cambridge, 1999), at 70 [doi: 10.1017/9781009151436].

usages and practice along the Mediterranean crystallized into the statutes (*statuta*) of the trading cities of the Western Mediterranean, such as Valencia, Barcelona, Marseille, Milano, Genoa, Pisa, Florence, Siena, Amalfi and Venice.[18] At the other end of the ancient Silk Roads, there seems to be historical evidence that Chinese courts would exercise jurisdiction over cross-border trade, even when it involved non-Chinese (such as Iranian) merchants.[19]

The concept of "new *lex mercatoria*" refers to the contemporary set of rules, including customary norms, usages and practices, applied in international commercial relations; such norms can be found in international conventions, statutory norms, arbitration practices, trade practices, norms created by business associations, etc.[20] "New *lex mercatoria*" may also be translated as "contemporary cross-border commercial usages and practices". In our days, there is no *lex mercatoria* as a true legal order, but rather an ensemble of sectorial *lege mercatoriae* for specific sorts of economic transactions, that are used in specific economic sectors.

The sectorial *lex mercatoria* applicable available for the resolution of land freight transport needs to be adapted to the needs of these relatively new road and rail routes and deserves particular attention as road and rail freight transport infrastructure is upgraded. The resolution of land freight transport disputes along Europe-China land corridors and along the regional land routes that link China to other Asian countries is a relatively new phenomenon.

A remarkable feature of these disputes is that they emerge out of or in relation with a land freight transport contract in which either the place for taking over the goods or the place for delivery of the goods is located in China. More often than not, Chinese parties will be present in this particular kind of commercial disputes. In the following section, the resolution of land freight transport disputes along these relatively new routes will be addressed from the perspective of the development of the so-called BRI dispute-resolution system.

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18 A.L.C. Caravaca & J.C. González, *Derecho Internacional Privado Vol. 2* [*Private International Law Vol. 2*] (16th ed., Comares, Granada, 2016), at 866-874.
According to Calvo Caravaca the *lex mercatoria* could be characterized through three main features: (i) it was a set of rules built on the basis of commercial custom, the usages and practices of merchants, adapted to an urban and transnational economy of the late Middle Ages. (ii) It was a sort of law created by and for the merchants, not by the political power through legislative action, and such laws were applied by their own Judges, often called consuls". (iii) These laws presented certain uniformity: despite the fact that each guild had its own set of rules, these were quite similar among analogous guilds in distant cities.
See also: 'Lex mercatoria y arbitraje privado internacional', 12(1) *Cuadernos de Derecho Transnacional* (2020) 66-85 [doi: 10.20318/cdt.2020.5180].
R. Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 264-271 [doi: 10.1093/cjcl/cxaa006].

19 Valérie Hansen refers to the existence of judicial remedies along the overland trading routes of the ancient Silk Roads.
V. Hansen, *The Silk Road: A New History* (Oxford University Press, 2012), at 3.

20 There have been attempts to codify a new *lex mercatoria*, such as the UNIDROIT Principles of International Commercial Contracts and, at a regional level, the Principles of European Contract Law (PECL) and the Organization for the Harmonization of Business Law in the Caribbean (OHADAC) Principles on International Commercial Contracts.

(B) LAND FREIGHT TRANSPORT DISPUTES WITHIN THE BRI DISPUTE-RESOLUTION SYSTEM

The presence of Chinese parties in this relatively new and currently evolving kind of disputes makes it useful to study them from the perspective of the so-called BRI dispute-resolution system. The so-called BRI dispute-resolution system is the ensemble of dispute-resolution mechanisms and institutions available for the resolution of disputes related to the Belt and Road Initiative.[21] A remarkable feature of BRI disputes is the presence of Chinese parties.

BRI disputes are often classified using a tripartite division into: State-to-State, investor-State and commercial disputes. The disputes that may occur out of or in relation with a land freight transport contract or other land freight transport documents along Europe-China corridors and along the regional routes that link China to other Asian countries (which could receive the name of "BRI land freight transport disputes") belong to the third category of BRI disputes, that is, they fall under the category of BRI commercial disputes. State-to-State disputes in the field of land freight transport will be briefly characterized in the following sub-section. However, these must be clearly differentiated from BRI land freight transport disputes, which are of a commercial nature.

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[21] On the BRI dispute-resolution system, see:
J.X. Shi, 'The Belt and Road Initiative and International Law', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 9-31 [doi: 10.1017/9781108332651.002].
J.M. Lee, 'The Belt and Road Initiative under Existing Trade Agreements', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 59-80 [doi: https://doi.org/10.1017/9781108332651.004].
W. Shen, 'The Belt and Road Initiative, Expropriation and Investor Protection under BITs', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 132-162 [doi: https://doi.org/10.1017/9781108332651.007].
Y.H. Chai, 'Regional Dispute Resolution', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 261-276 [doi: 10.1017/9781108332651.012].
S.L. Jiang, 'Establishment of an International Trade Dispute Settlement Mechanism under the Belt and Road Initiative', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 295-311 [doi: 10.1017/9781108332651.014].
S. Zhang, 'Developing China's Investor-State Arbitration Clause', in W.H. Shan *et al.* (eds.), *Normative Readings of the Belt and Road Initiative: Road to New Paradigms* (Springer, 2018) [doi: 10.1007/978-3-319-78018-4_8].
J.Y. Wang, 'China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations and Law', 14 *Global Trade and Customs Journal* (2019) 5, at 223 [doi: 10.54648/gtcj2019021].
M. Sornarajah, 'Chinese Investment Treaties in the Belt and Rad Initiative Area', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 55-78. (2020) [doi: 10.1093/cjcl/cxaa008].
Y.L. Tan, 'Global PPPs and the Choice of Law Challenge', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 79-115 [doi: 10.1093/cjcl/cxaa011].
Y.L. Zhang, 'Developing Cross-Border Blockchain Financial Transactions under the Belt and Road Initiative', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 143-176 [doi: 10.1093/cjcl/cxaa010].
J.F. Chen, 'Tension and Rivalry: The Belt and Road Initiative, Global Governance, and International Law', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 177-196 [doi: 10.1093/cjcl/cxaa009].
W.X. Gu, 'Belt and Road Dispute Resolution: New Development Trends', 36 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2020), at 152 [doi: 10.1163/9789004414181_007].
J. Chaisse & J. Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty', 23 *Journal of International Economic Law* (2020), at 245-269 [doi: 10.1093/jiel/jgz047].

(1) State-to-State and Investor-State Disputes Related to Land Freight Transport

(a) State-to-State Disputes Related to Land Freight Transport

The main kinds of State-to-State disputes related to land transport include: disputes related to freedom of transit (Art. V GATT and Chapter II of the Trade Facilitation Agreement), the controversies related to the liberalization of road and rail freight transport services that may eventually arise and the investment disputes that could eventually arise out of or in relation with the construction of BRI land transport infrastructure projects. The latter may often give rise to investor-State disputes instead of State-to-State disputes.

So far, there has been no dispute under the Dispute Settlement Understanding (DSU) of the WTO concerning the liberalization of land freight transport services. However, there have been two cases concerning freedom of transit, namely DS512 and DS532.[22] In both of these cases Ukraine has acted as claimant and the Russian Federation as respondent. As road and rail freight transport services further liberalize and infrastructure enables new land freight transport routes and reduces the bottlenecks in land freight transport, disputes concerning not only freedom of transit, but also WTO commitments on the liberalization of land transport services, are increasingly likely to take place.

(b) Investor-State Disputes Related to Land Freight Transport

Potentially, there may be BRI investor-State disputes related to BRI land transport infrastructure projects for building, upgrading and refurbishing Europe-China land corridors and the regional overland routes that link China to other countries in Asia. To our knowledge, no such dispute has arisen yet. In any case, in the current context of Investor-State Dispute-Settlement (ISDS) reform, the position that China may adopt in relation to the resolution of BRI investment disputes will contribute to shape the future of investor-State dispute-resolution.[23]

(2) On the Resolution of BRI Commercial Disputes

The discipline of "BRI commercial disputes" aims at overcoming the challenges of resolving commercial disputes that involve Chinese parties (especially from Mainland China) and non-Chinese parties. The legal complexity of BRI commercial disputes

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[22] WTO, 'DS512-Russia: Measures Concerning Traffic in Transit', available electronically at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm>, accessed 10 October 2022.
WTO, 'DS532-Russia: Measures Concerning the Importation and Transit of Certain Ukrainian Products', available electronically at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm>, accessed 10 October 2022.

[23] See, for instance: J.A.C. Fernández *et al*., 'Paradojas del arbitraje comercial y de inversiones, desde la perspectiva interna, europea y transnacional [Paradoxes of Commercial and Investment Arbitration, from the Internal, European and Transnational Perspective]', in J.S. Liceras *et al*. eds., *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2021* [*Vitoria-Gasteiz International Law and International Relations Courses 2021*] 325-402 (Tirant lo Blanch, 2022).

derives to a large extent from the legal, political and cultural diversity of the countries that have signed BRI agreements. In Asia only, it is possible to find a large variety of legal systems, including Islamic law, common law and civil law.[24]

BRI commercial disputes may arise out of a large variety of commercial contracts, including contracts for the sale of goods, supply contracts, contracts for the sale of services (such as insurance contracts), contracts concerning intellectual property rights and, of course, freight transport contracts. Depending on the mode of transport, freight transport contracts may be classified into maritime, air, inland waterways, rail, road and multimodal freight transport contracts.

Commercial disputes may be resolved either before State Courts (including international commercial courts) or utilizing ADR methods. The resolution of BRI commercial disputes before State courts relies upon the norms of private international law of countries along the BRI. Private international law has been substantially harmonized among European nations. In the American continent, there have also been attempts to harmonize private international law. However, at a global scale, there is very little harmonization of the norms on private international law.

China is trying to facilitate the cross-border enforcement of State court judgements along the BRI through bilateral and multilateral international treaties. The Hague Convention on Choice of Court Agreements of 2005 may serve to foster legal certainty in the resolution of BRI commercial disputes before State courts in general.[25] However, this convention is not applicable to the particular field of the carriage of goods. Therefore, The Hague Convention on Choice of Court Agreements cannot facilitate the resolution of BRI land freight transport disputes before State courts.

International commercial courts could play a major role in the resolution of BRI commercial disputes. Besides, China launched the China International Commercial Court (CICC), a sui generis one-stop dispute resolution mechanism that aims at facilitating the resolution of BRI commercial disputes through a dispute-resolution system that integrates State court litigation and ADR methods.

Among ADR methods, arbitration has consolidated throughout the second half of the 20th Century as the preferred means for the resolution of cross-border commercial

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24 On 27 June 2018, the General Office of the Communist Party Central Committee and the General Office of the State Council issued the Opinions Concerning the Establishment of International Dispute Settlement Mechanism and Institutions for the Belt and Road, which enshrines four principles. First: "extensive consultation, joint efforts, shared benefits". Second: fairness, efficiency and convenience. Third: party autonomy. Fourth: diversity in dispute resolution, encouraging "the integration of these methods".
See: China International Commercial Court, 'Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/210/819.html>, accessed 26 July 2021.
Original version in Mandarin: 最高人民法院国际商事法庭 [SPC CICC], '中共中央办公室 国务院办公厅印发《关于建立"一带一路"国际商事争端解决机制和机构的意见》[Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions]', available electronically at: <http://cicc.court.gov.cn/html/1/218/149/192/602.html>, accessed 26 July 2021.

25 The Hague Conference on Private International Law, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', available electronically at: <https://assets.hcch.net/docs/89beobce-36c7-4701-af9a-1f27be046125.pdf>, accessed 23 September 2021.

disputes, along with the universalization of the New York Convention of 1958.[26] Arbitration has indeed played a vital role in the reform and opening-up of the Chinese economy and will continue to be widely utilized for the resolution of BRI commercial disputes, including BRI land freight transport disputes. The success that the Singapore Convention may reach in the coming years will determine the role that cross-border mediation may be able to play in the resolution of BRI commercial disputes.

(a) The resolution of BRI commercial Disputes Before State Courts

The resolution of BRI commercial disputes before State Courts relies upon the norms on Private International Law of China and other countries along the BRI.[27] Jurisdiction over cross-border commercial disputes derives from a duty of the State to respect international standards concerning the treatment of aliens. In the words of Ian Brownlie, the obligation to "maintain a system of courts empowered to decide civil cases and, in doing so, prepared to apply private international law where appropriate in cases concerning a foreign element".[28]

Each State defines its own norms on Private International Law, that is, regulates private international situations. Calvo Caravaca refers to this feature as "statehood" of Private International Law. The Courts of each state apply the Private International Law of that particular state (the so-called "exclusivity" of Private International Law). Meanwhile, the "relativity" of the norms on Private International Law refers to the fact that these norms differ from State to State.[29] Exclusivity and relativity of Private International Law lead to legal uncertainty in cross-border commercial transactions.

The harmonization of Private International Law can reduce legal uncertainty in cross-border mercantile transactions and in the resolution of cross-border commercial disputes. Legal certainty in the resolution of BRI commercial disputes could be greatly improved through Private International Law harmonization among States along the BRI. Private International Law harmonization among European States has reached the highest standards so far. This has reduced legal uncertainty in commercial transactions and in the resolution of commercial disputes across this region, contributing to consolidation of the European single market. There have also been more modest attempts to coordinate Private International Law in the American Continent, such as the Bustamante Code. Nonetheless, the coordination of Private International Law at a global scale has much room for improvement.

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26 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted New York 10 June 1958, entered into force 7 June 1959), 330 UNTS 3.

27 On the Private International Law of China, see for instance:
W.Z. Chen, *Chinese Civil Procedure Law and the Conflict of Laws* (Tsinghua University Press, Beijing, 2011).

28 I. Brownlie, *Principles of Public International Law* (7th ed., Oxford University Press, 2010) at 300.

29 A court judgement or a writ of execution obtained in one State does not produce legal effects in another state unless it obtains recognition and enforcement from the competent authorities. The dynamics of Private International Law lead to the phenomena of "rush to the courts" and "forum shopping". That is, the parties to a dispute have an incentive to sue first and to sue before the State courts that will apply the most favorable laws to its case.
A.L.C Caravaca & J.C. González, *Derecho Internacional Privado Vol. 1* [*Private International Law Vol. 1*] 1-65 (16th ed., Comares, Granada, 2016), at 1-65.

The SPC's BRI Opinions address the need to foster the mutual recognition and enforcement of judgements. Foreign Sentences can be enforced in China either as agreed by treaty or following the criteria of reciprocity, according to Arts. 281 and 282 of China's Civil Procedure Act.[30] "Sino-foreign judgements mutual recognition was rare not long ago" but, as Zhang Wenliang and Tu Guangjian have acknowledged, the BRI "might have urged Chinese courts to be more liberal towards [the recognition and enforcement of] foreign judgements".[31]

Improving China's treaty network on mutual recognition and enforcement of commercial judgements is key for the efficient resolution of BRI commercial disputes before State Courts, especially since China has not yet concluded such treaties with some of its main trading partners.[32] According to China Justice Observer (CJO, 中国司法观察), as updated by May 2020, the following countries had concluded bilateral treaties on judicial assistance in civil and commercial matters containing provisions on the enforcement of foreign judgements: Algeria, Argentine, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Cuba, Cyprus, Egypt, Ethiopia, France, Greece, Bulgaria, Iran, Italy, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lithuania, Mongolia, Morocco, North Korea, Peru, Poland, Romania, Russia, Singapore, South Korea, Spain, Tajikistan, Thailand, Tunisia, Turkey, United Arab Emirates, Ukraine, Uzbekistan and Vietnam.[33]

Another vector that can foster the transnational recognition and enforcement of commercial judgements across the BRI consists on moving from China's traditional "de facto reciprocity" system towards the "presumptive reciprocity" system, that is, the recognition of reciprocity with another country if that country has not yet refused to recognize and enforce a judgement by a People's court.[34] Steps in this direction were

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30 北大法宝 [Beijing University Law Search Engine], '中华人民共和国诉讼法 (2021修正) [Civil Procedure Law of the People's Republic of China, with amendments as to 2021]', original version in Mandarin and unofficial English translation available electronically at: <https://www.pkulaw.com/en_law/3ce82cb92ee006b6bdfb.html>, accessed 18 December 2023.

31 W.L. Zhang & G.J. Tu, 'The Hague Judgements Convention and Mainland China-Hong Kong SAR Judgements Arrangement: Comparison and Prospects for Implementation', 20 Chinese Journal of International Law (2021), at 125 [doi: 10.1093/chinesejil/jmab009].

32 *Ibid*. at 133.

33 M. Yu, 'List of China's Bilateral Treaties on Judicial Assistance in Civil and Commercial Matters (Enforcement of Foreign Judgements Included)', available electronically at: <https://www.chinajusticeobserver.com/a/list-of-chinas-bilateral-treaties-on-judicial-assistance-in-civil-and-commercial-matters>, accessed 23 August 2021.
Legal instruments for the recognition and enforcement of Court judgements have been concluded between the Mainland and the Special Administrative Region (SAR) of Hong Kong. The 2019 Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong SAR (the "Mainland China-Hong Kong SAR Judgements Arrangement"), substitutes a previous agreement that had a narrower scope (which was limited to monetary judgements), the 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned.

34 A list of cases on recognition and enforcement of foreign judgements between China and selected jurisdictions, updated as of 16 July 2019, can be found in: Du Guodong & Yu Meng, List of China's Cases on Recognition of Foreign Judgements, available at: https://www.chinajusticeobserver.com/a/list-of-chinas-cases-on-recognition-of-foreign-judgments (retrieved on the 1st of August 2021).
See: J.Y. Wang, 'Dispute-Settlement in the Belt and Road Initiative: Progress, Issues and Future Research Agenda', 8 The Chinese Journal of Comparative Law (2020) at 13-14.

taken within the China-ASEAN Justice Forum, such as the Nanning Declaration of 2017.[35]

The Hague Convention on Choice of Court Agreements of 2005 has a huge potential to foster legal certainty in the resolution of BRI commercial disputes before State Courts.[36] The Hague Convention of 2005 aims at ensuring the effectiveness of choice of court agreements (also referred to as "forum selection clauses" or "jurisdiction clauses") in commercial cross-border transactions among parties located in contracting parties.[37] Choice of court agreements are not automatically recognized in many jurisdictions and this Convention aims at redressing this situation and promoting cross-border legal certainty.[38]

In order to be truly effective for the resolution of BRI commercial disputes, The Hague Convention on Choice of Court Agreements of 2005 would require more ratifications from countries along the BRI. This entered into force on the 1st of October 2015, but is has primarily been ratified by States in the European continent so far.[39] In Asia, only Singapore has ratified this Convention. China (just like the United States of America) has signed this Convention, becoming a contracting party to it. Nevertheless, since China has not (yet) ratified this Convention, it has not entered into force for this country.

Acknowledging the great potential of The Hague Convention of 2005 for the resolution of BRI commercial disputes in general, it must be noted that "the carriage of passengers and goods" is excluded from the scope of application of this convention, according to Art. 2(2)(f) of The Hague Convention.[40] The exclusion of freight transport contracts from the scope of this convention seems to be: "the existence of more specific international

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35 G.D. Du & M. Yu, 'The Nanning Statement: A Milestone in Recognizing and Enforcing Foreign Judgements in China', available electronically at: <https://www.chinajusticeobserver.com/a/the-nanning-statement-a-milestone-in-recognizing-and-enforcing-foreign-judgments-in-china>, accessed 1 August 2021.

36 The Hague Conference on Private International Law (HCCH) is constantly developing instruments that could be useful for the resolution of BRI commercial disputes. Among the current concerns of the HCCH, the following issues should be addressed: "On which grounds should the parties to a civil or commercial dispute be able to seize the courts of a certain State; on which grounds can a State exercise jurisdiction in civil and commercial matters; how can harmonized rules in this area reduce the risk of parallel litigation in multiple States?".
The Hague Conference on Private International Law, 'Jurisdiction Project', available electronically at: <https://hcch.net/en/projects/legislative-projects/jurisdiction-project>, accessed 24 September 2002.
See also: M. Hwang *et. al.*, 'One Belt, One Road, One Clause for Dispute Resolution?', in Shan Wenhua *et. al.* eds., *China and International Dispute Resolution in the Context of the "Belt and Road Initiative"* (Cambridge University Press 2020), at 23-47.

37 The Hague Conference on Private International Law, 'Choice of Court Section', available electronically at: <https://www.hcch.net/en/instruments/specialised-sections/choice-of-court>, accessed 23 September 2021.

38 The Hague Conference on Private International Law, 'Outline: The Hague Convention of 30 June 2005 on Choice of Court Agreements', text available electronically at: <https://assets.hcch.net/docs/89beobce-36c7-4701-af9a-1f27be046125.pdf>, accessed 23 September 2021.

39 The Hague Conference on Private International Law, 'Status Table: The Hague Convention of 30 June 2005 on Choice of Court Agreements', available electronically at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>, accessed 23 August 2023.

40 The Hague Conference on Private International Law, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', text available electronically at: https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e09725100d8b.pdf, accessed 9 October 2021.

instruments, and national, regional or international rules that claim exclusive jurisdiction for some of these matters".[41] The reason for excluding the carriage of goods from the scope of application of the Convention on Choice of Court Agreements is to avoid conflicts with more specific conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Convention concerning International Carriage by Rail (COTIF).[42]

(b) International Commercial Courts and the Resolution of BRI Commercial Disputes

International commercial courts may play an active role in the resolution of BRI commercial disputes. International commercial courts may be utilized by Chinese parties when carrying out commercial transactions abroad. China has created the China International Commercial Court (CICC), which is a sui generis International Commercial Court institutionally linked to the Supreme People's Court (SPC) for the resolution of BRI commercial disputes.

International commercial courts had traditionally been established in places with a strong commercial activity, such as the International Commercial Chamber of Paris Appellate Court, the German Chambers for International Commercial Disputes, The Netherlands Commercial Court, the London Commercial Court, the Delaware Court of Chancery and Federal District Court for the Southern District of New York.[43]

Since the beginning of the 21st Century, international commercial courts have proliferated in newly-industrialized countries and even in developing countries. Such is the case of Dubai International Financial Centre (DIFC) Courts, established in 2004, Qatar International Court and Dispute Resolution Centre (QICDRC), founded in 2009, Abu Dhabi Global Markets (ADGM) Court, and Singapore International Commercial

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41 The Hague Conference on Private International Law, *supra* n. 37.

42 Convention on the Contract for the International Carriage of Goods by Road (CMR), 399 UNTS 189. Convention concerning International Carriage by Rail (COTIF), 1396 UNTS 2 et seq., 1397 UNTS 2 *et seq*. The Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements mentioned explicitly potential conflict with The Hague-Visby Rules (The Hague Rules of 1924 amended by the Brussels Protocol of 1968). However, conflicts may well occur with other conventions concerning other modes of transport.
See: M. Dogauchi & T.C. Hartley, 'Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements, 10-11', available electronically at: https://assets.hcch.net/upload/wop/jdgm_pd26e.pdf, accessed 9 October 2021 [doi: 10.1017/CBO9780511551215.013].
The general rule *specialia generalibus derogat* is also useful to avoid conflicts among international conventions. Besides, the specialty rule in Art. 71 of the Brussels I bis Regulation as interpreted by the judgment of the Court of Justice of the European Union (CJEU) TNT *v*. AXA. of 4 May 2010 (Case C-533/08) and the respect of unimodal conventions such as the CMR should be recalled.
See: J.J.A. Rubio, 'La regla de especialidad como cauce para superar los conflictos normativos entre el Derecho comunitario y los Convenios internacionales en materias especiales. [The Specialty Rule as a Channel to Overcome Normative Conflicts between EU Law and International Conventions on Special Matters.]', 7499 *Diario La Ley* (2010).

43 Secretariat to the Standing International Forum of Commercial Courts, 'SIFoCC: France', available electronically at: <https://sifocc.org/countries/france/>, accessed 2 October 2020.
The Netherlands Commercial Court, 'Commercial litigation in the Netherlands', available electronically at: <https://netherlands-commercial-court.com>, accessed 2 October 2021.

Court (SICC) since 2015.[44] More recently, in 2018, the Court of Astana International Financial Center (AIFC) was created in Kazakhstan.[45]

SICC is particularly well situated among international commercial courts in order to resolve BRI commercial disputes. Singapore's historical role as a hub for trade between China and India contributes to the general perception of this city-State as a neutral place for dispute resolution.[46] The recognition and enforcement of international commercial court's rulings abroad, as a general rule, is subject to numerous challenges from the perspective of private international law. The recognition and enforcement of state-court judgements between Singapore and China has been upgraded through a non-binding Memorandum of Guidance between the SPC and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgements in Commercial Cases.[47]

Initiatives such as the Asian Business Law Institute (ABLI), the Singapore International Commercial Court (SICC) and the Singapore-China Annual Legal and Judicial Roundtable also contribute to fostering the role of Singapore in the resolution of BRI disputes. ABLI, which focuses on the harmonization of Asian business laws, has made significant progress on the recognition and enforcement of foreign judgement across the continent.

Besides, Singaporean court rulings benefit from reciprocal enforcement in various jurisdictions. Enforcement of Singaporean rulings may be obtained in jurisdictions such as the United Kingdom, Australia and Hong Kong under the legal framework of the Commonwealth. Furthermore, enforcement of SICC rulings in China and in the United Arab Emirates may be sought in the terms of the Memorandum of Guidance on the Enforcement of Money Judgements with the SPC, DIFC Courts and ADGM Courts. Besides, The Hague Convention of 2005 has already entered into force in Singapore.

The CICC is a permanent adjudication organ of the SPC, established for the purpose of resolving disputes under the BRI. The SPC Provisions on Several Issues Regarding the Establishment of the International Commercial Court contain guidelines for establishing the CICC and create CICC tribunals in the cities of Shenzhen and Xi'an. Judge Sun Xiangzhuang defines the CICC as a "one-stop forum for a dispute settlement

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44 Dubai International Financial Centre Courts, 'About the DIFC Courts', available electronically at: <https://www.difccourts.ae/about-courts-2/>, accessed 2 October 2021.
Qatar International Court and Dispute Resolution Centre, 'QICDRC: History', available electronically at: <https://www.qicdrc.gov.qa/history-origins-court>, accessed 2 October 2021.
Abu Dhabi Global Markets Courts, 'About ADGM Courts', available electronically at: <https://adgm-courts.com/ADGM/About>, accessed 2 October 2021.
Singapore International Commercial Court, 'About SICC', available electronically at: <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>, accessed 2 October 2021.

45 Astana International Financial Centre Court, 'AIFC Court: An Introduction', available electronically at: <https://court.aifc.kz/an-introduction/>, accessed 2 October 2021.

46 S. Chong, 'Dispute Settlement in the Belt and Road Initiative: Lessons from the Singapore Experience', 8 *The Chinese Journal of Comparative Law* (2020) at 31-33 [doi: 10.1093/cjcl/cxaa013].

47 Supreme Court of Singapore, 'Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgements in Commercial Cases', available electronically at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/spc-mog-english-version---signed.pdf, accessed 1 August 2021.

mechanism integrating litigation, mediation, and arbitration".[48] Meanwhile, Judge Long Fei highlights that the CICC "creates an organic connection between mediation, arbitration and litigation".[49]

The CICC is supported by an International Commercial Expert Committee (ICEC), composed of 31 Chinese and foreign legal experts. After assuming jurisdiction, the CICC may entrust the dispute to mediation before members of the ICEC or before an international commercial mediation institution. Under the CICC mechanism, disputes may also be submitted to an international commercial arbitration institution, to be chosen among the ones that have concluded agreement with the CICC.[50]

(c) ADR Mechanisms for the Resolution of BRI Commercial Disputes

ADR methods tend to be a good option for the resolution of disputes among parties with different legal and cultural backgrounds. Arbitration and mediation outstand among the ADR methods that may be used for the resolution of BRI commercial disputes. The institution of arbitration is recognized, in a more or less liberal form, in nearly all jurisdictions. The lowest common denominator of different regulations concerning arbitration is the authorization for private parties to conclude a binding contractual agreement that stipulates that present and future disputes shall be settled by the arbitral mechanism chosen by them (the arbitration agreement or the arbitration clause).[51]

In the last decades of the 20th Century and the beginning of the 21st Century, international commercial arbitration has consolidated as the preferred ADR method for the resolution of commercial disputes. Furthermore, arbitration has been and will continue to be a key legal tool for the consolidation of the reform and opening-up of the Chinese economy. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is the cornerstone of the success of this ADR method. Cross-border enforceability of arbitral awards under the New York Convention is a clear advantage of arbitration over other ADR methods.[52] The New York Convention of 1958

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48 X.Z. Sun, 'A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court', 8 *The Chinese Journal of Comparative Law* (2020), at 45 [doi: 10.1093/cjcl/cxaa015].

49 F. Long, 'Innovation and Development of the China International Commercial Court', 8 *The Chinese Journal of Comparative Law* (2020) at 42-43 [doi: 10.1093/cjcl/cxaa014].

50 On 21 November 2018, the SPC issued the Procedural Rules for the International Commercial Court of the Supreme People's Court.
See: China International Commercial Court, 'Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/210/1183.html>, accessed 27 July 2021.
Original version in Mandarin: 最高人民法院国际商事法庭 [SPC CICC], '最高人民法院办公厅关于印发《最高人民法院国际商事法庭程序规则（试行）》的通知 [Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)]', available electronically at: <http://cicc.court.gov.cn/html/1/218/19/278/1122.html>, accessed 27 July 2021.

51 S. Greenberg *et al.*, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010) [doi: 10.1017/CBO9780511997365].
See also: M.G. Jene, *Arbitraje comercial internacional* [*International Commercial Arbitration*], (Civitas, 2023).

52 Contemporary commercial arbitration finds its origins in the first decades of the 20th century, with the Geneva Protocol of 1923 concerning arbitration clauses and the Geneva Convention of 1927 on the enforcement of Foreign Arbitral Awards, which were designed within the League of Nations. The Protocol

became one of the most successful international treaties ever, having reached virtually universal recognition, with 168 parties.[53]

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) was signed in 2019 with the aim of creating a legal instrument in the field of cross-border mediation analogous to the New York Convention.[54] The names of these conventions are rather symbolic: the heyday of the New York Convention is contemporaneous to the consolidation of the United States of America as a mercantile unrivalled superpower and the drafting of the Singapore Convention coincides with the unprecedented prosperity of the Asia-Pacific Region.

The Singapore Convention can potentially play a major role in the resolution of BRI commercial disputes. However, it is far from having reached the universality of the New York Convention. It has reached 56 signatories so far, with a strong presence of countries in the Asia-Pacific Region, but also from Africa and the Middle East. However, it has only entered into force for eleven parties and, among G20 countries, only Saudi Arabia and Turkey have ratified this convention.[55]

ADR institutions in Asia and around the World have designed their own strategies in order to better serve to the resolution of BRI disputes. Most ADR institutions in China have launched BRI dispute resolution strategies. In the mainland, for instance, China International Economic and Trade Arbitration Centre (CIETAC), Beijing Arbitration Commission (BAC), Shanghai International Arbitration Centre (SHIAC) and Shenzhen Court of International Arbitration (SCIA) have made efforts to better adapt to the resolution of BRI commercial disputes. ADR institutions in other parts of China have also sought to serve the BRI commercial dispute-resolution system, such as Hong Kong International Arbitration Centre (HKIAC).

Various ADR institutions across Asia also explicitly aim at contributing to the resolution of BRI commercial disputes, such as Singapore International Arbitration Centre (SIAC), the Singapore International Mediation Centre (SIMC) and the Asian International Arbitration Centre, in Kuala Lumpur. The resolution of BRI commercial disputes has also received considerable attention in regional arbitration institutions, such as the Arbitration Foundation of Southern Africa (AFSA) and the Nairobi Centre for International Arbitration (NCIA). At a global scale, the International Chamber

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of 1923 was paradigmatic in recognizing the validity of an agreement between private parties for the resolution of commercial and other arbitral disputes. The New York Convention includes and combines elements of the aforementioned Geneva Protocol of 1923 and the Geneva Convention of 1927. By using this ADR method, the parties to a dispute could avoid the jurisdiction of state Courts and Tribunals. UNCITRAL, 'Dispute Settlement: International Commercial Arbitration' (United Nations, Geneva / New York, 2005), available electronically at: < https://unctad.org/system/files/official-document/edmmisc232add38_en.pdf>, accessed 20 July 2023.

53 UNCITRAL, 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', available electronically at: <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>, accessed 6 May 2021.

54 United Nations Treaty Collection, 'Status: United Nations Convention on International Settlement Agreements Resulting from Mediation', text available electronically at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>, accessed 20 April 2022.

55 *Ibid*.

of Commerce (ICC) has also developed a specific strategy for the resolution of BRI commercial disputes.

(3) On the Legal Nature of BRI Land Freight Transport Disputes

BRI land freight transport disputes are commercial disputes, but they have to be treated in a specific way, given the peculiarities of the legal regime applicable to the cross-border land freight transport contract. The regulation of the transport of goods is the result of municipal and international legal regimes that sometimes overlap, which results into the multi-layered legal regime of road and rail freight transport contracts.[56]

In the words of de la Vega Justribó, there is "a network of uniform material rules that can be considered the most complete one in the field of Commercial Law, even though the uniformity pursued by them is not full".[57] The main differences among substantive legal instruments regulating land transport include: the scope of application, the nature of the carrier's liability (different grounds for exception of responsibility), the period of responsibility, and the persons for whom the carrier is liable.[58] Such differences may often be at the origin of land freight transport disputes.

In order to understand the present and the future of the resolution of road and rail freight transport disputes along Europe-China corridors and along the regional routes that link China to other Asian countries, some of the "layers" of the legal regime applicable to the land freight transport contracts that may give rise to such disputes must be analyzed. First and foremost, the role of international conventions and other cross-border legal instruments will be addressed. Subsequently, the contractual legal instruments that enable the legal interoperability across rail transport legal regimes need to be analyzed. Following, the suitability of different dispute-resolution mechanisms for the resolution of BRI land freight transport disputed (including litigation before State-courts, arbitration and other ADR mechanisms) will be explored.

(C) THE ROLE OF THE CMR, THE CIM RULES, SMGS AND CONTRACTUAL INSTRUMENTS IN THE RESOLUTION OF BRI LAND FREIGHT TRANSPORT DISPUTES

The cross-border legal instruments that will be here analyzed are the primary legal instruments for the resolution of cross-border land freight transport disputes. The first one is an international treaty: the Convention on the Contract for the International Carriage of

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56 Nevertheless, there is a "significant international legal uniformity".
See: C.L.G. de Segura, 'La Ley aplicable al contrato de transporte internacional según el reglamento Roma I', 2 *Cuadernos de Derecho Transnacional* (2009), at 161.

57 As translated by the author of the present article.
B. de la V. Justribó, 'Arbitraje marítimo internacional [International Maritime Arbitration]', in Estudio Mario Castillo Freyre eds., *Diccionario Terminológico del Arbitraje Nacional e Internacional (Comercial y de Inversiones): Vol. 18 Biblioteca del Arbitraje [Dictionary on National and International Commercial and Investments Arbitration Vol. 18 Arbitration Library]* (Lima, 2011), at 243.

58 Y. Zhu & V. Filimonov, 'Comparative Study of International Carriage of Goods by Railway between CIM and SMGS', 13 Frontiers of Law in China (2018), at 124-134 [doi: 10.3868/s050-007-018-0008-5].

Goods by Road (CMR). The second one is an annex to COTIF (which is an international treaty): the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Rules). The third one is an agreement among the Ministries with competence over transport, which finds its historical and legal roots in cooperation among Soviet republics: the Agreement on International Railway Freight Communications (SMGS).[59]

(1) The Convention on the Contract for the International Carriage of Goods by Road

The CMR is the unrivalled legal instrument for the resolution of road freight transport disputes.[60] Even if China is not a party to this convention, the BRI commercial dispute-resolution system can benefit from this legal instrument by applying it on a contractual basis. The CMR applies *proprio vigore* along Europe-China road freight corridors, as well as along some regional Asian routes. Along other regional routes involving only countries that are not parties to the CMR, at least the substantive norms in this legal instrument can still be applied on a contractual basis.[61]

The CMR brings legal certainty to the resolution of road freight transport disputes before State courts through private international law norms: this convention refers to the courts with jurisdiction over covered disputes and creates a cross-border *lis pendens* mechanism and a mechanism for the recognition and enforcement of judgements. The

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[59] CMR *supra* n. 43.
COTIF *supra* n. 43.
'Uniform Rules concerning the Contract for International Carriage of Goods by Rail, contained in Appendix B to COTIF, (CIM Rules)', available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/01_COTIF_80/cotif-cim-1980-e.PDF>, accessed 20 May 2023.
Throughout this text, any reference to the CIM Rules is to the CIM Rules 1999, as revised through the Vilnius Protocol of Amendment in June 1999.
Organization for Cooperation of Railways (OSJD), 'Agreement on International Railway Freight Communications (SMGS)', available electronically at: <https://en.osjd.org/api/media/resources/2067?action=download>, accessed 15 November 2022.
Note that SMGS is not an international treaty, but rather an agreement among the Ministries with competence over rail transport of the countries that decide to join this legal instrument. Hence, this instrument cannot be found in the United Nations Treaty Series.

[60] M.A. Clarke, *International Carriage of Goods by Road: CMR* (6th ed., Informa Law Routledge, 2014), at 21 [doi: 10.4324/9781315851402].
See also: U.B. Martín, *Derecho europeo y transporte internacional por carretera* [*European Law and International Road Transport*] (Thomson Reuters Aranzadi, 2015).
D.C. Aguado, 'Regulación jurídico-privada del contrato internacional de transporte de mercancías por carretera [Private-International-Law Regulation of the Contract for the Cross-border Transport of Goods by Road]', in M.V.P. Lavall & A. Puetz eds., *El transporte como motor del desarrollo socioeconómico* [*Transportation as a Driver of Socioeconomic Development*] (Marcial Pons, 2018).
J. Putzeys, *Le contrat de transport routier de marchandises* [*The Contract for the Carriage of Goods by Road*] (Brussels, Bruylant, 1981).
F.J. Sánchez-Gamborino, *El contrato de transporte internacional de mercancías por carretera: CMR* [The Contract for the International Transport of Goods by Road: CMR] (Madrid, Tecnos, 2020).
A. Messent & D. Glass, *CMR: Contracts for the International Carriage of Goods by Road* (4th ed., Informa Law from Routledge, 2017) [doi: 10.4324/9781315689623].

[61] According to Art. 6(1)(k) of the CMR, the CMR consignment note shall contain "a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention".
See: CMR, *supra* n. 43, Art. 6(1)(k).

routes that are key to the BRI go through the territory of countries, some of which are not parties to the CMR. Therefore, these legal mechanisms that facilitate the cross-border resolution of road freight transport disputes before State courts cannot always be utilized.

In the mid and long run, China and other Asian countries may join the CMR, which would foster legal certainty in the resolution of BRI road freight transport disputes before State courts.[62] However, in the short run, ADR mechanisms and notably arbitration may be utilized for the resolution of BRI road freight transport disputes.[63]

(2) The Role of the CIM Rules and SMGS

The resolution of BRI rail freight transport disputes is determined by the coexistence of two cross-border legal instruments on rail freight transport contracts: the CIM Rules and SMGS.[64]

Each of these legal instruments contains norms on dispute resolution and plays an important role across different BRI rail freight transport routes. CIM Rules pay great attention to the resolution of covered disputes before State Courts, in a similar pattern to the CMR. CIM Rules address the jurisdiction of State Courts over covered disputes and creates both a cross-border *lis pendens* mechanism and a mechanism for the cross-border recognition and enforcement of judgements, favoring the resolution of covered disputes before State Courts. This convention also awards importance to the reports mechanism and even creates a special ADR mechanism: COTIF arbitration. However, this special kind of arbitration has been barely used in practice.[65] A major reason why COTIF arbitration is seldom utilized is that the vast majority of differences that arise under a CIM consignment note can be resolved without resource to third-party adjudication, just by using the reports system created by the CIM Rules.[66]

SMGS also favors the early settlement of claims through a very detailed reports system and defines in great detail in an almost administrative manner the mechanisms

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62 International Road Transport Union, 'Road Transport in the People's Republic of China' (2009), available electronically at: < https://www.iru.org/sites/default/files/2016-01/en-rt-in-china.pdf>, accessed 16 July 2023, at 50.

63 On the private-international-law aspects of jurisdiction and arbitration related to the cross-border transport of goods by road, see, for instance:
U.B. Martín, 'Jurisdicción / arbitraje en el transporte de mercancías por carretera: ¿comunitarización frente a internacionalización? [Jurisdiction / Arbitration in the Carriage of Goods by Road: Communitarization *versus* Internationalization?]', 7(3) *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* 707-743 (2014).
U.B. Martín, 'The CMR 1956 Convention: Some Specific Issues from a Private International Law Perspective', 18 *Yearbook of Private International Law* 569-590 (2016-2017) [doi: 10.9785/9783504385637-025].
U.B. Martín, 'El presupuesto de validez de la cláusula arbitral en el CMR: extensión vs. límites. Sentencia del Tribunal Superior de Justicia de Cataluña de 27 de mayo de 2022 [The Assumption of Validity of the Arbitration Clause in the CMR: Extension vs. Boundaries. Ruling of the Superior Court of Justice of Catalonia of May 27, 2022]', 14 *La Ley: Mediación y Arbitraje* (2023).

64 International Rail Transport Committee, 'Freight Traffic CIM/SMGS (2019)', available electronically at: <https://www.cit-rail.org/media/files/documentation/freight/scopes/scope_of_application_of_cim-smgs_2019-05-01.pdf?cid=204902>, accessed 15 June 2023.

65 M. A. Clarke & D. Yates, *Contracts of Carriage by Land and Air* (2nd ed., Informa Law Routledge, 2008), at 15-18 [doi: 10.4324/9781315795881].

66 Interview to Prof. Dr. Erik Evtimov, Deputy Secretary General of the International Rail Transport Committee on 2 June 2021.

for handling claims covered by this cross-border agreement. Disputes covered by SMGS may be resolved before States Courts, as well as utilizing ADR mechanisms. However, in SMGS, there is a clear preference for the settlement of disputes without the intervention of a third-party adjudicator. State courts and ADR mechanisms receive very little attention in SMGS.

China is a party to SMGS, but not to the CIM Rules contained in COTIF. A number of countries in Asia have decided to join the CIM Rules in order to facilitate cross-border rail freight transport along Europe-Asia corridors, even when they are not contracting parties to other COTIF annexes. China has shown little interest in joining this convention, at least in the short term.

So far, the resolution of rail freight transport disputes across different legal regimes that is, involving countries that are only parties to CIM Rules as well as countries that are only parties to SMGS is primarily enabled through contractual agreements.[67] The most popular, standardized contractual legal instruments have been created under the auspices of rail industry associations, notably the International Rail Transport Committee (CIT).

In the long term, a new overarching convention on the rail freight transport contract may be developed. In the short term, China may not join the CIM Rules, but this may eventually take place in the middle and long term. A new convention would only be effective in resolving the problem of fragmentation if it truly became an overarching convention among at least all the current members to the CIM Rules and SMGS. Chinese scholars believe that, at least in the short and middle term, China will not adhere to the CIM Rules.[68] They consider that, if a new international treaty was to be drafted, it would be an opportunity include some demands of the Chinese rail freight services industries. The main technical constraint of the current railway transport documents, as perceived by Chinese rail freight services industries, is the fact that these are non-negotiable, and therefore "the consignee cannot obtain financing by opening a letter of credit".[69]

Multimodal freight transport documents, unlike land freight transport documents, tend to be negotiable instruments. However, the utilization of multimodal transport documents does not seem to be a solution to this challenge of land freight transport documents. The 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) presents two major impediments. First, it is a "maritime plus" multimodal transport contract and, therefore, it cannot be utilized for a land freight transport contract that does not include at least one maritime haul.[70] Second, this treaty requires twenty ratifications to enter into force,

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67 E. Evtimov, *European and International Rail Transport Law* (Editions Weblaw, Bern 2020), at 177.

68 Written interview to Prof. Dr. Zhang Lying, Professor at the China University of Political Science and Law, received on 12 March 2022. As translated by the author.

69 L.Y. Zhang & C. Shao, '中欧班列铁路运单的公约困境及解决路径 [The Challenges Ahead the Europe-China Rail Waybill and the Path to Overcome Them]', 3 国际贸易 [*International Trade Journal*] (2021).

70 On the Rotterdam Rules see, e.g.:
C.L.G. de Segura, 'Las Reglas de Rotterdam (I) [The Rotterdam Rules (I)]', 1 *Cuadernos De Derecho Transnacional* 165-185 (2010).
C.L.G. de Segura, 'Las Reglas de Rotterdam (II) [The Rotterdam Rules (II)]', 2 *Cuadernos de Derecho Transnacional* 104-125 (2010).

whereas only five States have done it so far.[71] The 1980 United Nations Convention on Multimodal Transport of Goods has not entered into force either, which would require at least thirty ratifications, having reached eleven so far.[72]

(3) The Role of Legal Instruments Designed by Rail Industry Associations

"[The] [c]reation of the harmonized international rail freight legal regime has been the declared long-term legal and political goal for the next 10-15 years. Whilst waiting for the states to create this new uniform legal framework, the United Nations Economic Commission for Europe (UNECE) is encouraging the railways and trade associations involved to achieve harmonized solutions on a contractual basis".[73] This is the main challenge of rail freight transport in our days, as Erik Evtimov has synthesized it.

The creation of a new overarching convention on the rail freight transport contract would constitute a milestone in global logistics that François Davenne, Director General of the International Union of Railways (UIC) has compared to the Chicago Convention on International Civil Aviation.[74] However, in the meanwhile, cooperation in the field of rail freight transport law primarily takes place among the members of the industry, not among states, as Sandra Géhénot, Director for Freight of the International Union of Railways, reminds us.[75]

In the short and middle term, when neither the CIM Rules nor SMGS may be applied *proprio vigore*, the parties to a rail freight transport contract may contractually agree upon the utilization of either a CIM consignment note or a CIM-SMGS consignment

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R.E. Calabuig, 'Jurisdicción, libertad contractual e intereses de terceros en las reglas de Rotterdam [Jurisdiction, Contractual Freedom and Third-Party Interests in the Rotterdam Rules]', in R. E. Calabuig ed., Las Reglas de Rotterdam Sobre Transporte Marítimo: Pros y Contras del Nuevo Convenio [The Rotterdam Rules on Maritime Transport: Pros and Cons of the New Convention] (Tirant lo Blanch, Valencia, 2013).
M.A. Fernández, 'Solución de controversias en las reglas de Rotterdam: jurisdicción y arbitraje. Normas sobre jurisdicción en las reglas de Rotterdam: del conflicto en el mercado al compromiso en la ley [Dispute-resolution in the Rotterdam Rules. Norms on Jurisdiction in the Rotterdam Rules: from Conflict in the Market to Commitement through the Law]', in R.E. Calabuig ed., Las Reglas de Rotterdam Sobre Transporte Marítimo: Pros y Contras del Nuevo Convenio [The Rotterdam Rules on Maritime Transport: Pros and Cons of the New Convention], (Tirant lo Blanch, Valencia, 2013).
T. Fujita, 'Jurisdicción y arbitraje [Jurisdiction and Arbitration]', in R.I. Ortiz & M.A. Fernández eds., Las Reglas de Rotterdam: Una Nueva Era en el Derecho Uniforme del Transporte [The Rotterdam Rules: A New Era in Transportation Uniform Laws] (Dykinson, 2012) at 141-158.

71 UNCITRAL, 'Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea', available electronically at: <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status>, accessed 31 August 2022.

72 United Nations Treaty Collection, 'Status: United Nations Convention on International Multimodal Transport of Goods', available electronically at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en>, accessed 31 August 2022.

73 E. Evtimov, 'Moving to a new legal regime for global rail freight', 25 Global Railway Review (2019) 2, at 26-29. See also: A.G. Jiménez, 'Resolving Rail Freight Transport Disputes along Europe-China Corridors and Asian Regional Routes', 13(4) Journal of WTO and China 27-56 (2023).

74 F. Davenne, 'Interview to François Davenne, Director General, International Union of Railways' (15 June 2021) (Interview carried out by the author of the present article).
Convention on International Civil Aviation 1944, 15 UNTS 295.

75 S. Géhénot, 'Interview to Sandra Géhénot, Director for Freight, International Union of Railways' (15 June 2021) (Interview carried out by the author of the present article).

note on a contractual basis. In these cases, a number of legal instruments created under the auspices of CIT may be particularly useful for the avoidance of differences, the early settlement of claims and the resolution of rail freight transport disputes.

When a CIM consignment note is utilized on a contractual basis, the following contractual legal instruments could be utilized in order to resolve the disputes that may arise: the CIM Consignment Note Manual (GLV CIM) the CIM General Terms and Conditions (GTC-CIM) and the Agreement Concerning the Resolution of Rail Freight Transport Disputes in Respect of International Freight Traffic by Rail (AIM).[76] Meanwhile, under a CIM-SMGS common consignment note, the following contractual instruments may contribute to the resolution of disputes: the CIM-SMGS Consignment Note Manual (GLV CIM-SMGS), the EurAsia General Terms and Conditions (GTC Eurasia) and Appendix 10 to AIM.[77]

All the contractual legal instruments analyzed aim, first and foremost, at avoiding the emergence of disputes and try to foster the early settlement of claims among the parties. The preservation of the long-term commercial relationship is key in the rail freight transport services market, given the limited number of railway undertakings operating in each country. Standard forms foster the settlement of dispute among the parties involved.

If a settlement cannot be reached among the parties, standard forms also provide a basis for the eventual resolution through third-party adjudication. Both GTC CIM and GTC EurAsia refer to the resolution of disputes through third-party adjudication, giving preference to the utilization of the dispute-resolution mechanisms that may best preserve the long-term business relationship.

(a) CIM Consignment Note used on a Contractual Basis

When the parties to a rail freight transport contract agree upon the utilization of a CIM consignment note, GLV CIM and AIM focus on the avoidance and early settlement

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76 International Rail Transport Committee, 'CIM-SMGS Consignment Note Manual (GLV CIM) (2019)', available electronically at: <https://www.cit-rail.org/secure-media/files/glv-cim_en_2019-07-01.pdf?cid=251703>, accessed 15 June 2023.
International Rail Transport Committee, 'General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC CIM) (2019)', available electronically at: <https://www.cit-rail.org/media/files/abb-cim-en_2019-01-01_signed.pdf?cid=294317>, accessed 15 June 2023.
International Rail Transport Committee, 'Agreement concerning the Relationships between Carriers in respect of International Freight Traffic (AIM) (2021)', available electronically at: <https://www.cit-rail.org/en/freight-traffic/products/agreements/#content-330235>, accessed 15 June 2023.

77 International Rail Transport Committee, 'CIM/SMGS Consignment Note Manual (GLV-CIM/SMGS) (2023)', available electronically at: <https://www.cit-rail.org/secure-media/files/glv_cim-smgs_en_2023-03-06_app_1_signe.pdf?cid=329115>, accessed 16 June 2023.
International Rail Transport Committee, 'General Terms and Conditions of Eurasian carriage by rail (GTC EurAsia) (2019)', available electronically at: <https://cit-rail.org/secure-media/files/documentation/freight/gtc-eurasia/gtc-eurasia_en_2019-01-01.pdf?cid=103623>, accessed 16 June 2023.
International Rail Transport Committee, 'Appendix 10 to the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic: Handling of CIM-SMGS Claims (Appendix 10 AIM) (2021)', available electronically at: <https://www.cit-rail.org/en/freight-traffic/products/agreements/#-content-330235>, accessed 16 June 2023.

of disputes through the utilization of standard forms and the description of claims-handling mechanisms. Meanwhile, GTC CIM addresses the resolution of disputes through third-party adjudication.

GTC CIM envisages the resolution of disputes through ADR. This instrument refers to conciliation, mediation and arbitration and makes special mention to COTIF arbitration.[78] The reason for this is that, when the CIM Rules apply on a contractual basis as opposed to *proprio vigore* the resolution of covered disputes before State Courts does not benefit neither from the cross-border *lis pendens* mechanism, nor from the mechanism for the cross-border recognition and enforcement of court rulings that the CIM Rules create. Therefore, ADR could be utilized in order to avoid parallel proceedings and non-enforcement of judgements.

AIM brings legal certainty to the relationship among successive carriers, but also projects its legal effects on the defense from claims against carriers. The utilization of AIM by Chinese railway undertakings (RUs) could contribute to the resolution of BRI rail freight transport disputes. Even before Chinese RUs eventually decide to apply AIM, this legal instrument still plays a role in the resolution of BRI rail freight transport disputes, since it is binding upon the remaining successive carriers that are CIT members.

(b) CIM-SMGS Consignment Note

When the parties to a rail freight transport contract decide to utilize a CIM-SMGS consignment note, the reports mechanism in GLV CIM-SMGS and the claims-handling mechanism contained in Annex 10 AIM contribute to the avoidance and early settlement of differences. The approach to the avoidance and early settlement of disputes under these two legal instruments strongly resembles that of SMGS.

Meanwhile, GTC EurAsia addresses the resolution of disputes through third-party adjudication, including litigation before State courts and ADR. In the absence of a treaty that contains norms on private international law that avoid parallel proceedings and the non-enforcement of courts judgements, the resolution of BRI land freight transport disputes through third-party adjudication could benefit from the utilization of ADR mechanisms, notably arbitration.

(D) THE ROLE OF ARBITRATION AND OTHER DISPUTE-RESOLUTION METHODS

In the long term, if China decides to join the CMR and/or the CIM Rules, litigation before State courts could eventually become the method of choice for the resolution of BRI land freight transport disputes, contributing to the diversification of the BRI commercial dispute-resolution system. However, in the short and middle term, arbitration is expected to consolidate its role in the resolution of this specific sort of commercial disputes.

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[78] Intergovernmental Organization for International Carriage by Rail, 'OTIF Arbitration Rules', available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/02_organe/07_schiedsger/RA_TAR_01.01.2007_e.pdf>, accessed 17 August 2022.

(1) The Role of Arbitration

Arbitration has become the unrivalled ADR mechanism for the resolution of commercial disputes and its importance to the BRI commercial dispute-resolution system is unfathomable. Cross-border legal instruments on land freight transport contracts CMR, CIM Rules, SMGS , as well as contractual legal instruments developed under the auspices of CIT focus on the avoidance and early settlement of claims. Some of these instruments specifically refer to the resolution of disputes through arbitration, among other forms of third-party adjudication.

Both the CMR and the CIM Rules favor the resolution of disputes before State courts through the creation of a cross-border *lis pendens* mechanism and a mechanism for the recognition and enforcement of court rulings that resolve road freight transport disputes and rail freight transport disputes respectively. Since China is not a party to these conventions, arbitration may be a more suitable form of third-party adjudication in the context of the BRI, given the fact that arbitration awards benefit from cross-border recognition and enforcement under the New York Convention of 1958. Some of the contractual legal instruments that enable legal interoperability of rail freight transport across SMGS and CIM Rules, such as GTC EurAsia which may be incorporated to a CIM-SMGS common consignment note , explicitly foresee the utilization of arbitration.

In some cases, specific forms of arbitration are explicitly mentioned in these legal instruments, but this does not preclude the possibility to utilize other forms of arbitration as agreed by the parties. For instance, CIM Rules, as well as GTC CIM refer to COTIF arbitration. In fact, this form of arbitration is seldom used.[79] The reason for this, as has been explained by the legal department of COTIF, can be found in the preference of the parties concerned "to bring their disputes before the national courts" (when third party adjudication is required, since most disputes are settled among the parties through the utilization of standard forms).

Meanwhile, GTC EurAsia foresees the utilization of ICC arbitration. ICC arbitration seated in Paris is the preferred form of arbitration among members of the rail freight transport services industry (at least among those that belong to CIT) could well amount for at least 50% of the disputes resolved through ADR under a CIM-SMGS consignment note.[80] The ICC also seems to be a good option for the resolution of BRI land freight transport disputes through arbitration, since the ICC International Centre for ADR has sought specialization in BRI disputes through the creation of the ICC Belt and Road Commission and has published "guidance notes on resolving Belt and Road disputes using mediation and arbitration".[81]

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79 Written answer from the legal department of OTIF, received on 13 September 2021.

80 Interview to Prof. Dr. Erik Evtimov, *supra* n. 67.

81 International Chamber of Commerce, 'Guidance notes on resolving Belt and Road disputes using mediation and arbitration', available electronically at: <https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf>, accessed 5 October 2021.
International Chamber of Commerce, 'Belt and Road Commission', available electronically at: <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/>, accessed 16 March 2022.

Other forms of arbitration may be utilized for the resolution of BRI land freight transport disputes, including other arbitration institutions, as well as specialized forms of ad hoc arbitration developed under the auspices of certain industry associations, such as specific trade-in-commodities arbitration, maritime arbitration and aviation arbitration. These specialized forms of arbitration tend to be coined through model dispute resolution clauses and general terms and conditions, specialized arbitration rules and lists of arbitrators proposed by industry associations. Hence the swift adaptability of these forms of arbitration to the market structure, which is a clear asset for the resolution of BRI land freight transport disputes.

However, trade-in-commodities arbitration, maritime arbitration and aviation arbitration are often *ad hoc* forms of arbitration. This may be perceived as an obstacle for the resolution of BRI land freight transport disputes, since there is still a traditional preference for institutional arbitration in mainland China, despite the progressive easing of the use of *ad hoc* arbitration in China (notably in Free Trade Zones (FTZs)).[82] In fact, arbitration in some of these industries is increasingly being carried out before arbitration institutions. Such is the case of maritime arbitration, in which institutional arbitration is gaining ground against ad hoc arbitration, notably in Asia. Besides, ad hoc arbitration is being eased in mainland China. A clear example of this trend is the creation of Shanghai International Aviation Court of Arbitration (SIACA) and China (Shanghai) Pilot FTZ Arbitration Rules.

Cotton arbitration, grains and feed arbitration, oil, seeds and fats arbitration, coffee arbitration and cocoa arbitration among others may be utilized for the resolution of BRI land freight transport disputes related to contracts for the carriage of each of these commodities respectively. Very often, these disputes will arise out of a land haul within a multimodal (maritime plus) freight route.

Maritime arbitration may be utilized for the resolution of BRI land freight transport disputes, notably when disputes arise out of maritime plus route which ends with a land regional haul that goes from a seaport in Asia to the designated place in mainland China. The utilization of forms of arbitration originally created for the resolution of maritime disputes for resolving transport disputes that arise in other modes of transport is not new. This phenomenon can be explained as a result of the preponderance of maritime freight transport over other modes of transport. For instance, China Maritime

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The ICC also settled and office in Hong Kong in 2008 and has signed a memorandum of understanding with Shenzhen Court of International Arbitration in order to favor the use of SIAC facilities in the context of the BRI.

See also: International Chamber of Commerce, 'History', available electronically at: <https://iccwbo.org/about-us/who-we-are/history/>, accessed 17 November 2021.

On international commercial mediation, see, for instance: F.R. Risueño & J.C.F. Rozas, *Mediación civil y mercantil* [*Civil and Commercial Mediation*] (2nd ed., Tirant lo Blanch, 2022).

82 On commercial arbitration in China, see:

X.W. Zhao, *International Commercial Arbitration Law* (3rd ed., Renmin University Press, 2012).

J.Z. Tao, *Arbitration Law and Practice in China* (Kluwer Law International, 2004).

F. Kun, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing, 2013).

J.Z. Tao & M. Zhong, 'Resolving Disputes in China: New and Sometimes Unpredictable Developments', in P. Quayle & X. Gao eds., *International Organizations and the Promotion of Effective Dispute Resolution: 2019 AIIB Yearbook of International Law* (Brill, 2019), at 60-61 [doi: 10.1163/9789004407411_006].

Arbitration Commission (CMAC), which finds its origins in the resolution of maritime disputes, has created specialized sections for the resolution of transportation disputes for each mode of transport.[83]

(2) The Role of Other Dispute-Resolution Methods

Besides arbitration, other dispute-resolution methods may play a considerable role in the resolution of BRI land freight transport disputes, such as mediation, med-arb and Chinese courts – including Rail Transport People's Courts and the CICC – for the resolution of BRI land freight transport disputes. The Transport Administrative Adjudication Boards (TAABs) system has also been studied as a potential source of inspiration for reforming the resolution of BRI land freight transport disputes.

Despite the growth of mediation in the Asia-Pacific region and the creation of specialized cross-border mediation institutions, this ADR mechanism on its own cannot compete with arbitration for the resolution of BRI land freight transport disputes, notably due to the limited geographical scope of the Singapore convention (at least so far).[84] Recognition and enforcement of arbitral awards under the New York Convention of 1958 – which has reached virtually universal scope – is still a major advantage of arbitration when compared to cross-border mediation.[85] However, combined ADR mechanisms that include mediation, such as med-arb, constitute solid alternatives to arbitration for the resolution of BRI land freight transport disputes.[86]

The resolution of BRI land freight transport disputes before Chinese courts faces considerable private international law challenges, despite the Chinese efforts to foster the cross-border recognition and enforcement of commercial court judgements as part of the BRI commercial dispute-resolution system.[87] The norms on cross-border *lis pendens* and cross-border recognition and enforcement of court judgements contained

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83 China Maritime Arbitration Commission, 'CMAC Introduction', available electronically at: <www.cmac.org.cn/en/about-us-cmac>, accessed 27 April 2022.

84 UN Treaty Collection, *supra* n. 55.

85 UNCITRAL, *supra* n. 54.
Awards The New York Convention became one of the most successful international treaties ever, having reached virtually universal recognition, with 168 parties.

86 On med-arb, see: S.F. Ali, 'The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities', 10 *Dispute Resolution International* (2016) 2, at 123-124, 127-128.
C. Kang, 'Oriental Experience of Combining Arbitration with Conciliation: New Development of CIETAC and Chinese Judicial Practice', 40 *Fordham International Law Journal* (2017) 3, at 919-952.
W.X. Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', 29 *Washington Law Review* (2019), at 117-172.
See also: Singapore International Mediation Centre, 'SIAC-SIMC Arb-Med-Arb Protocol', available electronically at: <www.simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>, accessed 7 October 2021.
International Chamber of Commerce, 'ICC Mediation Clauses', available electronically at: <https://iccwbo.org/content/uploads/sites/3/2014/12/Suggested-ICC-Mediation-clause-in-ENGLISH-1.pdf>, accessed on 7 October 2021.

87 Asian Business Law Institute, 'ABLI Asian Principles for the Recognition and Enforcement of Foreign Judgements', available electronically at: <https://abli.asia/Projects/Foreign-Judgements-Project>, accessed 2 May 2022.
A Chong (ed.), *Asian Principles for the Recognition and Enforcement of Foreign Judgements* (ABLI, Singapore, 2020).

in the CMR and in the CIM Rules cannot fully display legal effects for the resolution of BRI land freight transport disputes, since China is not a party to these two international conventions. If China eventually decided to join these conventions, much of their potential would be unleashed.

Former Rail Transport People's Courts were specialized courts for the resolution of land transport disputes in China from 1980 to 2008, when these were integrated into ordinary People's Courts.[88] These courts predominantly resolved municipal disputes, given the few cross-border land freight transport routes involving China that existed at that time. In any case, arbitration still presents considerable advantages over State court litigation, especially concerning the possibility to seek cross-border recognition and enforcement of arbitral awards under the New York Convention.

The CICC creates a "one-stop" dispute-resolution mechanism that integrates mediation, arbitration and State-court litigation.[89] The CICC system was conceived for the resolution of the most important cross-border commercial disputes within the BRI commercial dispute-resolution system. Therefore, it is not suitable for the overwhelming majority of BRI land freight transport disputes, but only for the most important ones.

The TAABs system for the resolution of land freight transport disputes could serve as inspiration for reform of the resolution of BRI land freight transport disputes in China. This model presents advantages over litigation, including the high level of specialization of the members of the boards, the absence of excessive formalities and the possibility to seek cross-border enforcement of TAABs arbitration awards under the New York Convention. Furthermore, TAABs present a clear advantage over international commercial arbitration, which is the fact that they charge no litigation fees to the parties (except from those derived from the production of evidence).[90]

China International Commercial Court, 'The Nanning Declaration at the 2nd China-ASEAN Justice Forum', available electronically at: <https://cicc.court.gov.cn/html/1/219/208/209/800.html>, accessed 29 April 2022.

Singapore Courts, 'Enforcement of Money Judgements between Singapore and Foreign Courts', available electronically at: <https://www.judiciary.gov.sg/who-we-are/enforcement-money-judgements-singapore-foreign-courts>, accessed 2 May 2022.

88 Global Times, 'China reforms railway court system', available electronically at: <https://www.globaltimes.cn/content/724320.shtml>, accessed 23 August 2022.

89 X.Z. Sun, *supra* n. 49.

F. Long, *supra* n. 50.

China International Commercial Court, 'Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court: Judicial Interpretation of the Supreme People's Court of the People's Republic of China Fa Shi [2018] 11', available electronically at: <https://cicc.court.gov.cn/html/1/219/208/210/817.html>, accessed 4 May 2022.

China International Commercial Court, 'The China International Commercial Court in 2018', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/209/1316.html>, accessed 5 October 2021.

90 M.M. Tejedor, *La Actividad Arbitral de la Administración en el Transporte Terrestre* [*The Arbitration Functions of the Administration in the Field of Land Trasnport*] (Marcial Pons, 1998), at 52-53, 59-60, 75-76.

F. Sánchez-Gamborino, 'Juntas arbitrales del transporte: actividades de mediación [Transport Arbitration Boards: Mediation Functions]', in M. Sanz ed., *Manual de Derecho del Transporte* [*Handbook on Transport Law*] (Marcial Pons, 2010), at 250.

M.B. de Cominges, 'El arbitraje de transporte terrestre: las juntas arbitrales de transporte [Land Transport Arbitration: Transport Arbitration Boards]', in *I Congreso Internacional de Transporte: Los Retos del Transporte en el Siglo XXI* [*First International Congress on Transportation: The Challenges ahead in the 21st Century*] (Tirant lo Blanch, Valencia, 2005), at 1821.

(E) CONCLUSIONS

The present article has analyzed the legal instruments and the dispute-resolution mechanisms available for the resolution of land freight transport disputes along relatively new road and rail routes, namely Europe-China corridors and along the regional routes that link China to other non-SMGS Asian countries.

(1) Which Dispute-Resolution Mechanisms Should Prevail?

The current legal framework is a multi-layered and geographically fragmented one and the existing legal instruments at different levels, such as international conventions and contractual arrangements, provide for different options that find solutions for the resolution of land freight transport disputes. All these dispute-resolution methods currently coexist, each of them playing an important role under different circumstances. The answer to whether a dispute-resolution method should prevail over others largely depends on the concrete land freight transport contract that gave rise to the dispute in question.

International treaties on land freight transport contracts (CMR, CIM Rules and SMGS) will play a major role in the resolution of BRI land freight transport disputes. Some of these treaties (CMR and CIM Rules) have an enormous potential for playing an even greater role in the resolution of BRI land freight transport disputes. In the case of road freight transport, this potential could be unleashed if China would become a party to the CMR. As for rail transport, China may in the middle and long term either join COTIF's CIM Rules or support the international efforts towards the creation of a new overarching convention on the rail freight transport contract.

In the short term, the resolution of BRI rail freight transport across a fragmented cross-border legal regime can rely upon contractual instruments, notably the ones that have been developed under the auspices of CIT, an association of the rail freight transport industries. When a CIM consignment note is utilized on a contractual basis, legal instruments such as GLV CIM, GTC CIM and AIM could be utilized for the avoidance, early settlement and resolution of rail freight transport disputes. Meanwhile GLV CIM-SMGS, GTC Eurasia and Appendix 10 AIM can contribute to the avoidance, early settlement and resolution of disputes under a CIM-SMGS consignment note.

When disputes cannot be settled among the parties by themselves and third-party adjudication is required, both the CMR and the CIM Rules favor litigation before State courts through the creation of cross-border *lis pendens* mechanisms and mechanisms for the recognition and enforcement of judgements. Since China is not a party to these

J.M.T. Jiménez, 'El arbitraje de derecho administrativo [Administrative Law Arbitration]', 143 *Revista de Administración Pública* (1997), at 84.
A.A. Lucas, 'Ejecución de laudos arbitrales. Especialidad de laudos de las juntas arbitrales en el extranjero [Enforcement of Arbitral Awards. The Specificity of Transport Arbitration Awards Seeking Enforcement Abroad]', in *Consejería de obras públicas, urbanismo y transportes eds., Jornadas Organizadas por la Dirección General de Transportes de la Comunidad de Madrid [Workshop Organized by the Directorate General of Transportation Of Madrid]* (Comunidad de Madrid, 2000), at 55-62.

conventions, at least for the time being, arbitration constitutes the most suitable option for the resolution of most BRI land freight transport disputes, since arbitral awards may be enforced under the New York Convention of 1958.

A large variety of forms of arbitration could be utilized for the resolution of BRI land freight transport disputes. GTC CIM refers to COTIF arbitration; however, China is not a member of OTIF, and this form of arbitration has *de facto* not been used for decades. GTC EurAsia refer to ICC arbitration, which is one the most suitable forms of arbitration available for the resolution of BRI land freight transport disputes. Among other arbitration institutions suitable for the resolution of BRI land freight transport disputes, HKIAC and SIAC clearly outstand.

The forms of arbitration developed by trade-in-commodities industry associations can easily adapt to changes in the structure of markets, which is a major advantage for the resolution of BRI commercial disputes. A potential negative point of these forms of arbitration is that these are often of an *ad hoc* nature. Similarly, ad hoc arbitration has been common for the resolution of maritime and air transport disputes. The double-track arbitration system in China has traditionally favored institutional over ad hoc arbitration, but there is a growing trend towards easing the utilization of ad hoc arbitration, especially in Free Trade Zones and we may see further easing of ad hoc arbitration in mainland China in the coming years.

Mediation on its own cannot rival with arbitration for the resolution of BRI land freight transport disputes, but combined ADR mechanisms such as med-arb could play a major role in the resolution of BRI land freight transport disputes, especially along the regional routes that link China and other Asian countries.

Cross-border legal certainty in the resolution of BRI land freight transport disputes before State courts including international commercial courts will largely rely upon the consolidation and extension of the network of treaties on the recognition and enforcement of foreign commercial judgements of China and other countries in the region (notably Singapore).

(2) The Present *versus* the Future of Land Freight Transport Disputes: Is the Current Legal Framework Enough?

BRI land freight transport disputes, both along Europe-China corridors and along the regional routes that link China to other Asian countries, can be resolved under the current legal framework. However, there is room for simplification and improvement of the current multi-layered legal system. Ideally, geographical fragmentation concerning the international conventions on land freight transport contracts should be progressively reduced.

In the case of BRI road freight transport disputes, the solution seems to be rather straightforward: as China and other Asian countries eventually join the CMR, legal harmonization would improve, including the private international law aspects of the resolution of cross-border road freight transport disputes. This is due to the fact that there is no convention comparable to the CMR concerning the regulation of road freight transport disputes.

The CMR creates a cross-border *lis pendens* mechanism, as well as a mechanism for the recognition and enforcement of court rulings. Therefore, if and when the CMR reaches wider geographical scope in Asia including China , State court litigation may become the preferred dispute-resolution method for BRI road freight transport disputes. However, for the time being, arbitration seems to be the most efficient means for the resolution of this particular kind of commercial disputes. This is, to a large extent, due to the fact that arbitral awards may benefit from virtually universal cross-border recognition and enforcement under the New York Convention of 1958.

In the field of rail freight transport, the coexistence of two cross-border legal regimes on the rail freight transport contract adds complexity to the resolution of BRI rail freight transport disputes. In face of the difficulties to unify the cross-border legal regimes on the rail freight transport contract, contractual solutions have been designed to enable the resolution of this kind of commercial disputes. If China and other Asian countries eventually decided to adhere to the CIM Rules, State court litigation could become an efficient mechanism for the resolution of BRI rail freight transport disputes. Nevertheless, so far, interoperability across the CIM Rules and SMGS is made possible through the utilization of contractual arrangements. Under these circumstances, commercial arbitration presents the advantage that arbitral awards may seek cross-border recognition and enforcement under the New York Convention.

A major constraint of the current cross-border legal regimes on the rail freight transport contract, as perceived by the Chinese rail sector, is that rail consignment notes are non-tradable. Creating a new overarching convention may constitute an opportunity to overcome this shortcoming of rail transport documents. However, this project would not only require remarkable human and material resources and lengthy negotiations, but it also entails considerable risk of further legal fragmentation, eventually leading to the coexistence of three cross-border legal instruments instead of two. In order to avoid this, a hypothetical new convention on the rail freight transport contract should include at least all the current members to both the CIM Rules and SMGS.

There is no single path towards the future of land freight transport dispute-resolution. The present thesis has explored the legal options currently available for the resolution of BRI land freight transport disputes, as well as some policy options that may be taken into consideration in order to foster legal certainty along the new Silk Roads and further improve the BRI commercial dispute-resolution system.