CHAPTER-9

THE IMPACT OF THE OBOR INITIATIVE IN THE ASIA PACIFIC REGION

Md. Imam Hossain*

I INTRODUCTION

In 2013, the President of Central People's Government of China Mr Xi Jinping announced the 'One Belt One Road' (OBOR) Initiative, which is also known as the Belt and Road Initiative' (BRI) to foster closer economic cooperation with countries lying along two ancient economic corridors that is 'Silk Road Economic Belt' and '21st Century Maritime Silk Road', which run from China through the continents of Asia, Europe and Africa. Already, 64 countries have agreed to come within the umbrella of the OBOR Initiative. The announcement of initiating the OBOR or the BRI came two years after the USA initiated the Trans-Pacific Partnership (TPP) trading bloc across the Pacific region and excluded China from this Partnership. Now that the USA has officially withdrawn from the TPP, the experts have opined that the OBOR will gain momentum.

China has planned to invest about $4 trillion under the OBOR Initiative, which will certainly require cooperation from both public and private sectors. As the huge number of parties will participate, disputes are inevitable. As a result, the necessity of an effective mechanism to resolve those disputes should be considered at the early stage of the OBOR Initiative. Taking into consideration the stance of the Chinese government and Supreme People's Court (SPC) of China, it can be assumed that 'arbitration' is getting preference over all other dispute resolution procedures.

Considering the changing communication method of increasing dependency on electronic communication for conducting international commercial activities, it is needless to say that the OBOR Initiative will come within the same ambit. Hence, the potential impact of 'United Nations Convention on the Use of Electronic Communication in International Contracts, 2005' needs to be explored. Besides, the Convention might also influence the growing trend of 'paperless arbitration'.

Paperless arbitration may play a significant role to resolve a dispute arising from an international contract between two or more parties not from the same country. It will make the arbitration process less costly, more speedy and efficient because of using modern technology by the parties for communications. The UN Convention on the Use of Electronic Communications in International Contracts 2005 and the UNCITRAL Arbitration Rules as revised in 2010 will help to achieve the harmonizing standard of paperless arbitration.

II THE OBOR IN BRIEF

One Belt One Road is the buzz phrase in the contemporary geo-economic sphere. About 2000 years ago, a concept was developed to establish a network among China, Central Asia and the Arab World to enhance trade among these nations. In 2013, Mr Xi Jinping, the

* Barrister-at-Law (Lincoln's Inn), Advocate, Supreme Court of Bangladesh.

president of China, declared his vision about the new silk road to establish the world's largest platform for 'economic cooperation area'. Ministry of Foreign Affairs and Ministry of Commerce jointly released the blueprint for the OBOR Initiative in March 2015.

According to the Economist magazine about $1 trillion money will be spent on the Initiative.[1] Funding the huge number of the OBOR projects is the biggest challenge for China. The information that has been published so far regarding the OBOR Initiative demonstrates that the Asia Infrastructure Investment Bank (AIIB), proposed by China in 2013, will lend $100 billion and the China Development Bank will invest almost $900 billion into more than 900 projects.

III IMPACT ON ASIA PACIFIC REGION

Under the OBOR Initiative, investors from China and from other countries which have agreed to join in the OBOR Initiative, will get the opportunity to invest in each other territories. However, entering into a partnership with a Chinese company will be a pre-condition for the investors of other countries before investing in any projects in China.

In USA leading the TPP, China was deliberately excluded to be a partner country of that economic bloc and it was the biggest challenge for the OBOR Initiative to be successful. But now that the USA has withdrawn from the TPP[2], the OBOR Initiative will undoubtedly get momentum and the possibility of this Initiative to become the largest and most influential economic zone in modern history has been largely increased. Moreover, the constitutional hindrance for Xi Jinping to continue his role as a president has been removed[3]. As a result, Mr. Xinping will get more opportunity to go further with his brainchild, the OBOR Initiative.

Under the OBOR Initiative the infrastructure development in Asia and Pacific will exceed $22.6 trillion through 2030, which means $1.5 trillion per year[4]. However, so far, the Asia Infrastructure Investment Bank (AIIB) has sanctioned only $1.73 billion to support the projects under the OBOR Initiative in Bangladesh, Tajikistan, Pakistan, Indonesia, Azerbaijan, Oman and Myanmar[5]. Although, about $900 billion has been estimated for various projects but most of the projects are infrastructure projects, which will run by Chinese state-owned enterprises. Hence, how much benefit other countries will get from BRI remains a big question because most of the money will go into the accounts of Chinese companies.

After two years of the declaration of the OBOR Initiative by Chinese president, Xi Jinping, the BRI started to become visible through various projects range from building railroads in Eastern Europe to the construction of highways and acquisition of ports in Europe.[6] But the potential of China to become the biggest economy of the world might rise

---

[1] Bert Hofman, 'China's One Belt One Road Initiative: What We Know thus Far' (World Bank, 12 April 2015) <http://blogs.worldbank.org/eastasiapacific/china-one-belt-one-road-Initiative-what-we-know-thus-far> accessed 17 February 2018.

[2] <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> accessed 10 April 2018.

[3] Choi Chi-yuk, 'Does Xi Jinping Really Want to Be Chinese President for Life?' (South China Morning Post China 22 March 2018) <http://www.scmp.com/news/china/policies-politics/article/2138439/does-xi-jinping-really-want-be-chinese-president-life> accessed 11 April 2018.

[4] <http://knowledge.wharton.upenn.edu/article/can-chinas-one-belt-one-road-Initiative-match-the-hype/> accessed 20 November 2017.

[5] Ibid.

[6] NORD/LB Norddeutsche Landesbank, '"One Belt, One Road" – Connecting Asia Pacific' (*HKTDC Research,* China 10 August 2017) <http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/One-Belt-One-Road-Connecting-Asia-Pacific/obor/en/1/1X000000/1X0AB3ZS.htm> accessed 27 December 2017.

the political tension among the big political and economic players, e.g. USA, India, Russia, Japan, European Union etc. Most of the countries, which have agreed to join in BRI, are underdeveloped in infrastructure and have low income rate. Although, Chinese investment may help these underdeveloped countries to boost their economy but whether it can ensure sustainable economic growth will remain a big question. To ensure the long-term effects, which is necessary for the success of the OBOR, it is crucial to focus on the domestic activity besides infrastructure. The countries should consider in utilizing their advantages, e.g. geographical location, cheap labor costs, natural resources etc. to gain the most out of the OBOR Initiative. However, there are also critics who believe that economic prosperity is not the only motive of China under BRI rather China will try to establish the influence of China over countries such as Sri Lanka and Saud Arabia, who were once supported by the USA and India.

Although, the OBOR Initiative is at its early stage and disputes have not started to commence yet, nevertheless, massive investments inside and outside China under the OBOR Initiative will undoubtedly create a huge number of disputes, e.g. pure commercial disputes, investor-state disputes etc. This chapter will mainly focus on the possibility of disputes that might arise under the OBOR Initiative and attempt to find out an effective mechanism, and impact of that mechanism on Asia-Pacific especially South-Asia, to resolve those disputes to ensure the smooth progress of the OBOR Initiative.

IV DISPUTE RESOLUTION UNDER OBOR:

On one hand, the OBOR Initiative opens the door of potential trade between China and the other 64 countries, but on the other hand it increases the potential cross-border disputes. Dispute among the investors is inevitable under the OBOR Initiative. It has been estimated that under the OBOR Initiative, $8 trillion worth of infrastructure will be needed for Asia only[7]. Hence, it is highly likely that disputes will arise regarding infrastructure projects and related matters. Along with investment disputes, maritime disputes might also increase under BRI.

The possibility of three types of disputes that may arise more than any other disputes are the state to state trade disputes, investor-state disputes and pure commercial disputes. If the parties take the disputes in the national courts where the disputes arose, then contradiction with Chinese law with the law of that country will rise the question of sovereignty of China. Moreover, if no bilateral agreement has been conducted between China and other nations to give effect of the judgments of the court of that country, then the whole procedure under national legislation will be frustrated.

Most of the countries which will connect under the OBOR Initiative are also members of WTO. As a result, they can resolve their disputes through the Dispute Settlement Body of WTO. Some of the OBOR countries including China are signatory countries of International Centre for Settlement of Investment Disputes (ICSID), which has the perspective of Investor State Dispute Resolution (ISDS). But not all the countries which will come under the BRI could come within the ambit of the above-mentioned international organizations. As a result, it is essential to explore and develop an effective and practical mechanisms to resolve those disputes, if possible, an exclusive dispute resolution mechanism should be developed for all the countries that may come within the umbrella of the BRI. Considering all the options available at this moment, alternative dispute resolution

[7] Mathew Maavak, 'How Malaysia Scholar Sees the Belt & Road Initiative?' (*chinadaily.com.cn* China, 02 March 2016) http://www.chinadaily.com.cn/china/2016twosession/2016-03/02/content_23715138.htm accessed 18 April 2018.

proceedings, e.g. arbitration, mediation etc., could be more effective than going to national courts where the disputes arise.

The ongoing movement towards the implementation of arbitration is evident from the decisions of the Supreme People's Court (SPC) of China, where the SPC upholds the arbitral award of an arbitration procedure administered by International Chamber of Commerce (ICC). But we should not ignore the fact that those were generally seated in China, which raises the obvious question whether the same effect will be given to any other foreign organization administered arbitration, which does not seat in China. To clear their stance and to demonstrate 'pro-arbitration' attitude the SPC has published a paper to demonstrate its 'pro-arbitration' attitude towards enforcing the award of arbitration, which is administered by foreign arbitral institutions.

The SPC, through its power to promulgate judicial interpretation, has demonstrated its standing towards pro-diversified dispute, which includes reaffirmation of SPC's resolution to develop diversified alternative dispute resolution method, including mediation and arbitration in China[8]. The SPC also intends to bring the reformation in increasing the communication between arbitration institutions and Chinese national courts, to non-enforcement and set-aside of arbitral awards, to regulate judicial review etc. SPC also has the resolution to diversify ADR mechanism for internationalization. It can be assumed that this stance of SPC is the consequence of government policy of China to make the OBOR Initiative an effective development program. The SPC has taken the pro-arbitration stance to ensure the foreign investors and partners of the OBOR Initiative that arbitration is an effective dispute resolution mechanism in China.

In 2016, the SPC took a more liberal and innovative approach, which is evident from its Opinion, where the SPC gave 'Judicial Safeguarding' assurance to the establishment of Pilot Free Trade Zone, which will make it easier for the parties to conduct arbitration in Pilot Free Trade Zone. This attitude of SPC demonstrates precisely its intention towards less interventionist approach to uphold the validity of arbitration clauses[9].

Gao Xiaoli, a Senior Judge of the SPC, on 10 March 2015 published a report on the public policy of the People's Republic of China, the situations when the government will refuse the enforcement of arbitral Awards under the New York Convention[10]. He mentioned that the public policy ground will only be raised in China to refuse the foreign arbitral awards when the award 'manifestly contrary to the principle of the law, fundamental interests of the society, safety of the country, sovereignty, or good social customs'.[11] Although, the report tried to ensure that the refusal on public policy is an exceptional scenario for foreign arbitral awards, however, the harsh truth is that domestic arbitrations have suffered by this obstacles for numerous times. Hence, it is necessary to focus on the both issues, harmonization of arbitration rules and equal treatment for all the parties, irrespective of national and international, involved in an arbitration.

The stance of SPC in favor of enforcing foreign arbitral awards and the invitation of Shanghai FTZ to establish the presence of foreign arbitral institutions in China, gave confidence to Singapore International Arbitration Centre (SIAC), ICC and Hong Kong

---

[8] Jingzhou Tao and Mariana Zhongh, 'The Asia-Pacific Arbitration Review 2018' [2017] Global Arbitration Review <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2018/1141954/china> accessed 29 November 2017.

[9] Ibid.

[10] James H Carter, *'The International Arbitration Review'* (7th edn, Law Business Research Ltd 2016).

[11] Ibid.

International Arbitration Centre (HKIAC) to establish their representative offices in the Shanghai FTZ.

The establishment of the representative of foreign arbitration institutions in China, will open the door of opportunity for Chinese judges, arbitrators and practitioners to enhance their skill in arbitration to learn from the 'experts' from those institutions. On the other hand, the arbitrators of those institutions can acquire knowledge about the Chinese arbitration rules because any arbitration that has its seat in China should follow the rules of China. By sharing the knowledge on arbitration, a level playing field will be established between the local players of arbitration and their international counterparts. Although a light of hope can be seen from the above-mentioned development, nevertheless, the obstacles that remain in conducting an arbitration under the Chinese law cannot be overlooked. Whether any arbitration proceeding, which has its venue in China, can be administered by the representative offices of international institutions is yet to be decided. More importantly there is no clear indication whether SPC will enforce the award made by the arbitral tribunal in the said arbitration proceedings. Furthermore, public policy is playing a key role for the refusal of foreign arbitral awards.

In the era of the OBOR, the role of China to follow the growing trend of internationalization and globalization of arbitration in China is a vital issue. Different arbitration organizations in China have taken necessary steps to set up and modify their arbitration rules to synchronize with the modern trend. China International Economic and Trade Arbitration Commission Arbitration Rules 2015 (CIETAC Arbitration Rules 2015), the China (Shanghai) Pilot Free Trade Zone Arbitration Rules 2015 (Shanghai FTZ Arbitration Rules 2015), the Beijing Arbitration Commission Arbitration Rules 2015 (BAC Arbitration Rules 2015), all have come after the OBOR Initiative have been introduced in 2013. CIETAC has also declared about the formulation of an exclusive 'international investment arbitration' rules to resolve the investment related dispute[12].

Chinese courts have a plan to develop the infrastructure for the judicial review of arbitration involving Hong Kong, Macau and Taiwan parties.[13] A plan for the unified system of arbitration for parties involving Hong Kong, Macau and Taiwan for recession and refusal of arbitral awards has been discussed in ALB Hong Kong In-House Legal Summit 2015 on 22 September 2015. Besides, there is also an ongoing movement towards harmonization of international arbitration procedure.

Liu Jinxin, chief architect of the Bangladesh-China-India-Myanmar Corridor, emphasized the necessity of harmonization of legal structure.[14] So far only one harmonized arbitration procedure has been offered by the 'International Academy of the Belt and Road' in its 'Blue Book', where it has been proposed to adopt a harmonized dispute resolution mechanism by adopting 'mediation' at first and then 'arbitration'. It is yet to be seen how much support it can gain from all the countries that come within the umbrella of the OBOR Initiatives.

In order to conduct arbitration, regarding BRI disputes, through an exclusive forum, Wuhan Arbitration Commission declared that it will establish 'One Belt One Road Court'

---

[12] Evgeny Raschevsky, 'When "One Belt One Road" Project Disputes Arise, who will Resolve Them?' (Arbitration Blog, 23 November 2017) <http://arbitrationblog.practicallaw.com/when-one-belt-one-road-project-disputes-arise-who-will-resolve-them/> accessed 10 December 2017.

[13] James H Carter, *The International Arbitration Review* (7th edn, Law Business Research Ltd 2016).

[14] Brian Eyler, 'Who's afraid of China's One Belt One Road Initiative?' (*East by* Southeast, 24 April 2015) < http://www.eastbysoutheast.com/whos-afraid-of-chinas-one-belt-one-road-Initiative/> accessed 30 March 2018.

(OBOR Arbitration Court)[15]. The aim of the proposed OBOR Arbitration Court is to govern the disputes, formulate rules, set up a platform to provide legal services and discuss the issues regarding the OBOR projects.[16] As the OBOR Arbitration Court has not started its function yet, we have to wait to observe the impact of the OBOR Arbitration Court under the OBOR and whether it can function better than international and regional arbitration centers.

Although harmonization of arbitration has become a practical demand but the challenge of harmonization of arbitration system cannot be overlooked. Amongst other challenges, there are cultural differences, language barrier, different commercial practices of different jurisdiction, different legal systems of the OBOR countries, some of the countries which come under the umbrella of the OBOR Initiative have their own arbitration institutes and legislation on arbitration etc. For example, in Article 81 of the CIETAC Arbitration Rules 2015, Article 72 of the BAC Arbitration Rules 2015, Article 79 of the Shanghai FTZ Arbitration Rules 2015, although it gives the parties option to choose the language of arbitration, but the default language is Chinese. This might not be a problem if the parties can agree upon the language prior to the proceeding but if the proceeding has been completed with Chinese language then it will encounter the difficulty during enforcement of the award of that arbitration proceeding in other jurisdiction where Chinese is not an official language. Hence, more exploration and discussion, among the countries which will come within the umbrella of the OBOR Initiative, is necessary about the effective mechanism for harmonization procedure.

In contrast to the harmonization procedure, another option is available to resolve the disputes which is the adoption of the current international arbitration regime, e.g. UNCITRAL Model law, which can be implemented in all the 159 signatory nations of New York Convention, 1958, to enable the arbitral award be recognized and executed in signatory countries. However, this is not an easy task also. But it is essential to remember that the goal of arbitration and any other dispute resolution procedure, is to establish consistent set of rules for the society of both in civil law and common law jurisprudence, which will have a predictive application procedure and also ensure certainty. If the New York Convention, 1958 is adopted then the legitimate rights and interests of the disputed parties and smooth progress of overseas projects could be ensured. Where only 10 OBOR countries have signed judicial assistance treaties with China, 57 OBOR countries are signatory country of New York Convention, 1958, among which 32 countries have formulated arbitration law of their countries pursuant to the UNCITRAL Model Law on International Commercial Arbitration.

Recently government of China has introduced a plan to establish a new and exclusive dispute settlement mechanism dedicated to the BRI, which will provide legal protection including litigation, arbitration and mediation. According to the plan, an international commercial court will set up by SPC, which will have three branches in Beijing, Xi'an and Shenzhen[17]. Each of the branches will cover different areas of disputes. The headquarters of the planned court will be in Beijing. While the one in Xi'an will cover the

---

[15] ChinaGoAbroad, 'China establishes "One Belt, One Road" Arbitration Court' (*ChinaGoAbroad,* China) <http://www.chinagoabroad.com/en/article/21685 > accessed 2 January 2018.

[16] Aleksandra Kuczerawy, 'United Nations Convention on the Use of Electronic Communications in International Contracts' (2007) 1 CBKE e-BIULETYN <http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf> accessed 19 January 2018.

[17] Sabena Siddiqui, 'Beijing Plans New Mechanism for Belt and Road Arbitration' (Asia Times China, 7 February 2018) <www.atimes.com/belt-road-arbitration-new-mechanism/?fb_comment_id=1594967983955997_1594992083953587#fb387f7162944c> accessed 10 February 2018.

disputes arising from land based BRI, the one in Shenzhen will cover the disputes arising regarding sea routes.

Although the government of China has been trying to demonstrate the friendly approach of the judiciary in implementing arbitration awards in China, however, the history makes the foreign parties unwilling to take the arbitration procedure in China. Though the situation has changed a lot since the OBOR Initiative has taken place, but lack of information makes it difficult for the world to appreciate the change. As a result, regional neutral forum could play a significant role here, which offers skilled panel of arbitrators, neutral venue, and comprehensive rules to govern the procedure from starting to award. As Paul J Hayes, in his presentation at the Kuala Lumpur International Arbitration Week on 15 May 2017[18], has mentioned that neutral forums for arbitration, e.g. KLRCA etc., can play a significant role to resolve the disputes and it is essential to implement a uniform set of OBOR Rules based on the UNCITRAL Rules. He also suggests an independent New York Convention, 1958 arbitration regime should be applied to resolve the OBOR disputes, which will smoothen the functional trade, stability and prosperity for all the OBOR participants[19]. SIAC has revised its arbitration rules and started implementing SIAC Investment Arbitration Rules from 1 January 2017. In 2018, the President of the ICC Court announced the establishment of the commission, which will drive the development of ICC's existing dispute resolution procedures and infrastructure to support Belt and Road disputes during the ICC Court's working session last autumn[20]. Adopting New York Convention 1958 would make it easier for the neutral venues to play key role in resolving the OBOR disputes.

As discussed earlier that the motive of China is not totally precise, hence, there is a controversy whether China is planning the economic prosperity of the Asia-Pacific region through the OBOR Initiative or is there any hidden agenda of China that lies under the OBOR. Although China's massive economic plan to connect the countries from of Asia, Africa and Europe clearly indicates China's ambition and budding global ambitions. In contrast with earlier plan, which is ASEAN Plus Three, the OBOR is much more extensive which will extend across the world. The assumption is that the hidden desire of China to establish China's own hybrid global production networks forced China to start the OBOR Initiative. This will transform China from 'world factory' to 'world builder'[21].

Although China is moving forward with its plan for the OBOR, but not all the countries have agreed to the terms of the OBOR Initiative. India has not demonstrated any willingness to be part of the OBOR yet. Instead, Ms. Sushma Sawraj in her visit to China in February 2015, has cleared the stance of India and stated that the OBOR is a plan of China instead of a multilateral plan and India will not provide any blanket support to it.[22] India, one

---

[18]Paul J Hayes FCIArb 'The China Syndrome: Rethinking arbitration on the 'One Belt, One Road'' [2017] Kuala Lumpur International Arbitration Week <http://www.39essex.com/content/wp-content/uploads/2017/05/2017-KLIAW-OBOR-Harmonisation-of-Arbitration-Rules-PJHayes-3rd.pdf> accessed 2 December 2017.

[19] Ibid.

[20] Dawn Chardonal, 'ICC Court Launches Belt and Road Initiative Commission'(International Chamber of Commerce Paris, 05 March 2018) <https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-Initiative-commission/> accessed 12 April 2018.

[21] International Political Science Association 'World Congress - Brisbane 2018' <https://wc2018.ipsa.org/events/congress/wc2018/panel/beyond-geopolitics-one-belt-one-road> accessed 11 April 2018.

[22] Brig Vinod Anand 'The Impact of China's "One Belt, One Road" Strategy on Political, Military and Economic Situations in the Asia Pacific Region' [2017] Vivekananda International Foundation <http://www.vifindia.org/sites/default/files/the-impact-of-china-s-one-belt-one-road.pdf> accessed 10 October 2017.

of the largest economy of Asia, is a key player for the success of the OBOR but the current attitude of India towards the BRI does not give any hope to China. Another major player of Asia, Japan was initially reluctant to support the BRI but the country has changed its stance and has agreed to cooperate with China in the OBOR Initiative[23]. In order to implement 'arbitration' to resolve the disputes regarding international contract, it is crucial to adopt the growing trend of the current world, which is 'paperless arbitration'. In this regard United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 will play the key role to harmonize the standards of paperless arbitration from proceedings to award.

V UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS 2005[24]

Considering the increased use of electronic communications over international commercial activities and the obstacle resulted from the uncertainty as to the legal value of such uses of electronic communications, uniform rules was necessary to bring the harmony into the international trade law. Consequently, a new 'Convention on the Use of Electronic Communications in International Contracts (hereinafter 'Convention'[25])' has been adopted by the United Nations on 23rd November 2005 and which come to enter into force on 1st March 2013. It was prepared by the 'United Nations Commission on International Trade Law (UNCITRAL)' since 2002-2005. As of January 2018, it has been signed by 18 countries and 9 countries have become party to it only, so far.[26]

In the explanatory note prepared by the Secretariat of UNCITRAL for information purposes only, it has outlined the main features of the Convention stating that 'The purpose of the "Electronic Communications Convention"[27] is to offer practical solutions for issues related to the use of electronic means of communication in connection with international contracts'[28]. The Convention was never intended to provide a uniform rule for substantive contractual issues, which are not specifically related to the use of electronic communication. Even though the Convention contains some substantive rules in order to ensure the effectiveness of electronic communications, conceiving the idea that a complete and strict separation between technology-related and substantive issues is unwanted and less desirable in the area of international trade.[29]

5.1 Principles

---

[23] CNBC 'Japan to help finance China's Belt and Road projects' (*CNBC World Economy* 5 Dec 2017) <https://www.cnbc.com/2017/12/05/japan-to-help-finance-chinas-belt-and-road-projects.html> accessed 12 November 2017.

[24] United Nations Commission on International Trade law, *The United Nations Convention on the Use of Electronic Communications in International Contracts* (Sales No. E.07.V.2, United Nations Publication, January 2007) <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018

[25]The convention has 25 Articles contained into four chapters, namely, Sphere of application (Articles 1 – 3), General Provisions (Articles 4 – 7), Use of electronic communications in international contracts (Articles 8 – 14) & Final provisions (Articles 15 – 24).

[26] <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 01 January 2018.

[27] 'The United Nations Convention on the Use of Electronic Communications in International Contracts' has been termed as 'Electronic Communications Convention' or 'Convention' in the explanatory note by the UNCITRAL secretariat.

[28] United Nations Commission on International Trade law, *The United Nations Convention on the Use of Electronic Communications in International Contracts* (Sales No. E.07.V.2, United Nations Publication, January 2007) 13 <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018.

[29] Ibid.

The Convention has been propounded upon two principles, which have been specified into the fifth paragraph of the Preamble. These two principles are: technological neutrality and functional equivalence. In order to improve the efficiency of commercial activities these two principles are the core of any legislation of transactions done with the use of electronic communication[30].

5.1.1 Technological Neutrality

This principle has been enunciated to provide the necessary flexibility to cover all kinds of technology or the medium used for the electronic communications, so that it can easily accommodate the future developments. Such neutrality and flexibility on the use of technology is highly appreciative because specifying any specific technology of transmission or storage of information may cause possible obsolescence of the law with the advent of future innovations or development of technology. Therefore, neutral approach aims to accommodate any future development without further legislative work.

5.1.2 Functional Equivalence

The idea behind this principle is to provide functional equivalence between electronic and traditional documents, and also, between electronic signature and handwritten signatures. Such approach has been preferred to remove the obstacles, which have been created from the legal requirements for the use of paper-based documents, prescribing particular forms, hindering the development of electronic communication means.[31] To meet up this challenges 'functional equivalence' principle provides that after meeting the specific requirements for example writing, original, signed and record by electronic documents it will have the same degree of legal certainty like the paper-based system.

5.2 Drawbacks to Achieve Harmonization

Aleksandra Kuczerawy pointed out that though the above two principles provides the necessary flexibility to achieve the uniform application of the Convention, but the flexibility contained in the last chapter of the convention whereby necessary power has been given to the States to alter the application of the convention may create an obstacle from obtaining a harmonizing application and creating legal certainty of the Convention.[32] Such drawbacks turn out to be true as upon acceptance, the Russian Federation has declared that the Convention will apply only when parties have agreed to regulate their international contract by it. It has also specifically stated that the Convention will not be applied to such transactions for which a notarized for or State registration is required under the Russian law or to transactions for the sale of those goods, which has been prohibited or restricted to be transferred across the Customs Union border. Upon ratification, Singapore has also declared that electronic communications relating to any contract for the sale or other disposition of immovable property or any interest in such property, the Convention will not be applied. Additionally, in respect of will, indenture, trust or power of attorney executed for any contract governed by the Convention, it will also not be applicable. And, Sri Lanka has declared upon ratification that the Convention will be refused to apply to electronic communications or transactions, which are expressly excluded under Section 23 of Electronic Transactions Act No. 19 of 2006, of Sri Lanka.[33] Though the Convention is intended to

---

[30] Aleksandra Kuczerawy, 'United Nations Convention on the Use of Electronic Communications in International Contracts' (2007) 1 CBKE e-BIULETYN <http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf> accessed 28 January 2018.

[31] Ibid.

[32] Ibid.

[33] United Nations Commission on International Trade Law, 'Status United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) '(*UNCITRAL*)

permit States the flexibility to adapt the new advent developments in 'communications technology', which will be applicable to trade law into the domestic law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements, but in practice, States have refrained to adopt the whole application of the Convention intact. Thus, the uniform application of the Convention to harmonize the use of electronic communication in international trade has not been fulfilled, yet necessary changes should be taken involving the flexibility of States power to alter the application of the Convention.

5.3 Impact

To attract the application of the Convention, both the parties need not be Contracting State to the Convention provided that the law of the contracting State is the applicable law in the international contract between a Contracting State and Non-Contracting State. The purpose of the Convention is to provide the electronic communications the same degree of legal certainty just like paper-based communications. And, to eradicate the discrimination between electronic documents and paper-based documents, the Convention has ensured that the validity and enforceability of electronic documents could not be denied just because the information contains in paper-based documents. In the body of the Convention the contract has not been defined to cover arbitration agreement. However, from the reading of the explanatory notes of the Convention it has been transpired that 'contract' word should be understood in a wider sense than domestic laws. The word 'contract' should be construed as to cover 'arbitration agreements' which are in electronic form. In addition, the Convention has expressly specified, through its provision contained in Article 20(1), that it applies to the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)' (New York Convention). Since, the Convention applies to 'New York Convention' therefore even if the arbitral award is in the form of electronic form, it could be enforced against the other party who is not Contracting State provided that non-contracting State is a signatory State to the 'New York Convention'. Again, the use of electronic communications in accordance with the Convention, it requires prior consent from the both parties or where no express consent has been given, it will be inferred from the dealings of the parties. Therefore, it is pertinent to say that the parties must give their consent for the arbitral award in the electronic form. Or, in other cases it might be implied where 'arbitration agreement' is already in electronic form or they have agreed for paperless arbitration.

From the reading of Convention and its explanatory notes, it has also transpired that it allows parties to a contract to exchange information between them irrespective of stages of the contract, i.e. negotiation, during performance of the contract or after the contract has already been performed. Therefore, it will sufficiently facilitate the whole paperless arbitration process from proceedings to award. Because, by virtue of the Convention in paperless arbitration the statement of claim, statement of defense, expert witness in writing and other evidences in electronic form will have the same legal certainty as much as paper-based documents have under ordinary arbitration proceedings. As the convention does not provide any specific technology to be used for electronic communications thereby in the paperless arbitration it can be suitable for a party who is not well equipped with the modern technology. As the Convention applies to New York Convention, then there is no hurdle to give the Award in electronic form under the paperless arbitration proceedings.

Furthermore, UNCITRAL Arbitration Rules as revised in 2010 allows all the Notices from the Arbitration Tribunal or from the parties and the Notice of the Arbitration

---

<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 01 January 2018.

can be exchanged through e-mails. If such notices complies with the requirements for statement of claims and statement of defences respectively, then such notices can be treated as statement of claims and statement of defences, therefore, no paper based copies need to be delivered by post to the parties.[34] Under Article 28(4) of the rules, a Tribunal can examine the witness and expert witness through the means of telecommunication (such as video conferencing) and do not require their presence at the time of hearing.

As UNCITRAL Arbitration Rules provides rules and regulation of arbitration proceedings about using the use of electronic communications and the Convention is also providing the same legal certainty to the information contained in electronic form as much as paper based documents, therefore, together with both are providing essential features for paperless arbitration to achieve a harmonized standard.

VI HARMONIZATION OF PAPERLESS ARBITRATION

To harmonize the paperless arbitration two principles, i.e. 'technological neutrality' and 'functional equivalence', based on which Convention has been developed, could be very effective. However, it should be borne in mind that 'flexibility' may bring uniformity, but some level of rigidity is needed to bring the uniformity. As it has been seen above that allowing too much flexibility in making choice to the States in order to alter the application has failed to bring the intended harmonization of the application of the Convention.

Along with the above two principles, another principle could be regarded to harmonize the application of paperless arbitration and that is 'non-discrimination principle'[35]. As 'Technological neutrality' necessarily will allow the use of the future advance technology without changing the domestic law but it may create a problem in paperless arbitration, when a party to the arbitration is using advance technology which is not available to the other party. So, an agreement needs to be struck. This hurdle can be overcome by giving the power to the arbitral tribunal in choosing the technology to be used in arbitration process after considering the position of the both parties. Hence, 'non-discrimination' principle is necessary along with the 'Technological-neutrality' principle.

The second principle, i.e. 'functional equivalence', may play a significant role in paperless arbitration because it will allow the same legal effect to both paper-based documents and electronic documents in the arbitration procedure from the proceeding stage to award enforcement stage. Because by virtue of this principle electronic documents will have the same legal effect as paper-based documents even though the State has yet not been taken any step to enunciate legal rules to give the same legal effect of electronic documents as paper-based documents.

According to *Thomas D. Halket*, using appropriate technology in arbitration process will significantly increase the speed and efficiency and will decrease the cost.[36] As large amounts documentary evidence can be analyzed by software in a way which is not possible by hand. Video conferencing will be more cost effective and comprehensive as an alternative to the traditional in-person hearing based procedures, which is overly costly, and it will be more convenient when in-person hearing is not possible for unavoidable circumstances.

---

[34] See Articles 3, 4, 20 & 21 of UNCITRAL Arbitration Rules, as revised in 2010.

[35] 'Non-discrimination' principle was adopted as one of fundamental principles along with 'technological neutrality' and 'functional equivalence' in 'UNCITRAL Model Law on Electronic Commerce (1996)' <http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html> accessed 17 January 2018.

[36] Thomas D. Halket, 'The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties' (2007) 81 ST. JOHN'S LAW REVIEW269.
<http://www.halketweitz.com/use_of_technology_in_arbitration.pdf> accessed 1st February 2018.

Another advantage to the paperless arbitration has been pointed out by *Gillian Lemaire* that the problem to accommodate large number of voluminous printouts of electronic files or photocopies will be mitigated because sometimes it becomes very difficult to arrange significant storage space by arbitration institutions or to carry such documents each and every time when the hearing took place.[37]

In paperless arbitration it is highly likely that one party may not be equally well equipped or experienced of technologies, which could be used for electronic communications. Inevitably, parties will not be on equal footing, which may result detrimental to the due process of arbitration proceedings. Hence, 'non-discrimination' principle must apply, so that parties can be brought to an equal footing in paperless arbitration process. Therefore, 'non-discrimination' principle will ensure that both the parties in paperless arbitration are on equal footing thereby the reliance on win-win situation, which is the essence of arbitration will be upheld. Therefore, determination of the technology, which is to be used in the paperless arbitration must be decided in a way after taking into account the availability of equipment, technology and experiences from both parties to ensure the fair and due process. Hence, to accommodate such situation, wider discretion of using technology can be achieved through 'Technological neutrality' principle as it does not provide any specific or particular use of technology for electronic communication. Lastly, to give effect the same level of legality to the electronic documents as much as paper documents, which could be ensured by incorporating the 'functional equivalence' principle in paperless arbitration. One may raise the question that once the same level of degree of legality has already been given under the Convention of electronic documents and paper documents, then, why it is necessary to incorporate it into the rules. Because if the requirements to attract the application of the Convention are not possible then to give legal certainty to the electronic documents like papers 'functional equivalence' rule is very essential. Precisely arbitration does not specifically link to any specific geographic location and the dispute is being resolved based on the chosen law by the parties. If the choice of law under an international agreement is not a Contracting State with a Non-Contracting State, then the Convention will not be applicable. Accordingly, if they choose paperless arbitration, then parties will be bound by its rules. Therefore, to achieve harmonization in paperless arbitration, these three principles taking as a single unit can play an active role to harmonize the process.

VII IMPACT OF OBOR ON BANGLADESH

In October 2016, during the visit of Mr. Xi Jinping, the President of China, Bangladesh formally joined the OBOR Initiative and became a part of the proposed Bangladesh-China-India-Myanmar corridor, one of the six corridors of the OBOR Initiative. The OBOR is the golden opportunity for Bangladesh to merge with the global market. In order to be a successful partner of the OBOR Initiative, it is essential to embrace reforms in economic and policy aspects.

By adopting proper policy in co-ordination with China, Bangladesh could attract a large amount of investment of the $4 trillion that will be invested under the OBOR Initiative. One of the potential investment areas is deep-sea port in Bangladesh. China may invest in this sector to build 21st Century Maritime Silk Road Initiative. China has also signed Memorandum of Understanding to build various component of the Pyra Deep Sea-Port. Because of the geographical location of Bangladesh in between ASEAN countries and India, and between South Asia and South-East Asia, Bangladesh could be key player for trans-

[37] Gillian Lemaire, 'Paperless Arbitrations – Where Do We Stand?' (*Kluwer Arbitration Blog*, 19 February 2014) <http://arbitrationblog.kluwerarbitration.com/2014/02/19/paperless-arbitrations-where-do-we-stand/?_ga=2.233101854.1834001926.1523691267-598905935.1523691267> accessed 21 January 2018.

regional integration, which would attract more investment under the OBOR projects. Moreover, Bangladesh could transform its huge unemployed population into manpower because China is looking for highly productive economics for long-term investment.

However, the road ahead of us is not free of hindrances. Financial system of Bangladesh is not ready yet to absorb this huge amount of investment. Policy deficits and corruption remain the main obstacle, we have not overcome yet. Besides, the stance of India against the OBOR will make it difficult to implement the OBOR Initiative in Bangladesh. Moreover, China wants to convert a part of its 'soft loans' pledged to Bangladesh into commercial credits, which could be very expensive for Bangladesh and could cause a long term debt crisis.[38] Strategy should also be developed to secure the interests of Bangladesh vis-à-vis India and China.[39]

It is crucial for Bangladesh to overcome the shortcomings to become the part of new era of win-win globalization. The continuous progress of Chinese economy gives the indication that China will become the leader of 21st century. The geographical location could be the trump card for Bangladesh to become the partner of the OBOR Initiative. Hence, full co-operation with China will be the most pragmatic approach for Bangladesh.

Like any other countries under the OBOR Initiative, investment in Bangladesh could trigger dispute among the investors and their subsidiaries, investor with state (Bangladesh), the employee and the investors etc. So, legal disputes cannot be ignored. As discussed earlier about the significance of 'arbitration' to become the most effective method for resolving disputes, the future of arbitration in Bangladesh under the OBOR Initiative need to be explored.

Like most of the Asian countries, the number of completed arbitration proceedings in Bangladesh is very low, however, this situation has been gradually changing. By enacting Arbitration Act, 2001, which is largely influenced by the UNCITRAL Model Law, Bangladesh has taken a positive step towards entering the golden age of Asian arbitration. Section 2 of the Arbitration Act 2001 gives wide definition about 'international commercial arbitration'. The Act also gives the opportunity to parties to choose arbitrators and parties are free to select the place of arbitration. After the Arbitration Act 2001 came into effect, national courts have demonstrated their willingness in implementation of foreign arbitral awards. Moreover, investors in Bangladesh tend to prefer alternative dispute resolution (e.g. mediation, arbitration etc.) over national legal system. As a result, the culture of applying other dispute resolution procedure over national courts are increasing gradually. Besides, being the signatory country of the New York Convention 1958, Bangladesh has demonstrated its standing towards enforcing foreign arbitral awards. Furthermore, geographical advantage of Bangladesh to be part of the Bangladesh-China-India-Myanmar corridor, which is one of the six corridors of the OBOR Initiative, will make Bangladesh a key player in the OBOR Initiative.

VIII CONCLUSION

With the formulation of new rules by the existing arbitration institutions and declaration of establishing new arbitration courts for dealing with the disputes arising exclusively under the OBOR Initiative, it is clear that 'arbitration' will play the key role to resolve the disputes. The stance of the SPC for allowing foreign arbitral awards in China, it is

---

[38] Rubiat Saimum, 'What One Belt One Road Means for Bangladesh' (*Dhaka Tribune Dhaka*, 31 October 2017) <https://www.dhakatribune.com/opinion/op-ed/2017/10/31/one-belt-one-road-means-bangladesh/> accessed on 2 February 2018.

[39] Ibid.

needless to say that China is desperate to run the commercial activities under the OBOR Initiative smoothly without wasting times and losing confidence of the investors over Chinese government, in resolving disputes. The obvious impact of the OBOR Initiative on the economics as well as on the legal system of the countries of Asia-Pacific, especially in South Asia, is not difficult to understand.

As the commercial activities will be conducted among the parties living in different territories, the use of electronic communication will be a typical issue. In this regard, it will be a wise decision for the businessmen to take into consideration of the 'United Nations Convention on the Use of Electronic Communication in International Contracts, 2005' because, China is already a signatory country of the Convention. Hence, it has the potential to play a crucial role, when paperless arbitration will become popular among the disputed parties.

Since the paperless arbitration will be conducted without using any paper it is necessary that electronic documents should have the same status, validity and enforceability as much as papers under domestic law. Otherwise the purpose of the paperless arbitration will be redundant if the award given under the paperless arbitration cannot be enforced against a party in another State. Under the UN Convention on the Use of Electronic Communications in International Contracts, 2005 electronic documents and communications are enjoying the same legal certainty of papers through the 'functional equivalence' and 'technological neutrality' principles. On the other hand, UNCITRAL Arbitration Rules as revised in 2010 allows to use electronic technology and electronic document in an arbitration proceeding. Hence, these two UNCITRAL instruments provide comprehensive rules to harmonize the paperless arbitration.

BIBLIOGRAPHY

PRIMARY SOURCES:

Sri Lankan Legislation

Electronic Transactions Act No. 19 of 2006

UN Instruments

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958

UNCITRAL Arbitration Rules as revised in 2010

UNCITRAL Model Law on Electronic Commerce (1996)

UNCITRAL Model Law on Electronic Signatures (2001)

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

SECONDARY SOURCES:

Books

Carter J H, *The International Arbitration Review* (7th edn, Law Business Research Ltd 2016).

Chin H and He W, *The Belt and Road Initiative: 65 Countries and Beyond* (Global Sourcing, Fung Business Intelligence Centre May 2016) <https://www.fbicgroup.com/sites/default/files/B%26R_Initiative_65_Countries_and_Beyond.pdf> accessed 24 February 2018.

United Nations Commission on International Trade law, *The United Nations Convention on the Use of Electronic Communications in International Contracts* (Sales No. E.07.V.2, United Nations Publication, January 2007) <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf> accessed 01 January 2018.

Journal Articles

Thomas D. Halket, 'The Use of Technology in Arbitration: Ensuring the Future is Available to Both Parties' (2007) 81 ST. JOHN'S LAW REVIEW 269 <http://www.halketweitz.com/use_of_technology_in_arbitration.pdf> accessed 1st February 2018.

Jingzhou Tao and Mariana Zhongh, 'The Asia-Pacific Arbitration Review 2018' (2017) Global Arbitration Review <https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2018/1141954/china> accessed 29 November 2017.

Websites and Blogs

<http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf> accessed 28 January 2018

<https://www.cnbc.com/2017/12/05/japan-to-help-finance-chinas-belt-and-road-projects.html> accessed 12 November 2017

<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP> accessed 10 April 2018

<http://knowledge.wharton.upenn.edu/article/can-chinas-one-belt-one-road-Initiative-match-the-hype/> accessed 20 November 2017

<http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/One-Belt-One-Road-Connecting-Asia-Pacific/obor/en/1/1X000000/1X0AB3ZS.htm> accessed 27 December 2017

<http://www.chinagoabroad.com/en/article/21685 > accessed 2 January 2018

<http://www.39essex.com/content/wp-content/uploads/2017/05/2017-KLIAW-OBOR-Harmonisation-of-Arbitration-Rules-PJHayes-3rd.pdf> accessed 2 December 2017

<http://www.vifindia.org/sites/default/files/the-impact-of-china-s-one-belt-one-road.pdf> accessed 10 October 2017

<http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf> accessed 19 January 2018

<http://www.bibliotekacyfrowa.pl/Content/22563/United_Nations.pdf> accessed 28 January 2018

<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html> accessed 01 January 2018

<http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html> accessed 17 January 2018

<http://www.vifindia.org/sites/default/files/the-impact-of-china-s-one-belt-one-road.pdf> accessed 10 October 2017

Zheping Huang, 'One Belt, One Road; Your Guide to Understanding OBOR, China's New Silk Road Plan' (*QUARTZ*, 15 May 2017) <https://qz.com/983460/obor-an-extremely-simple-guide-to-understanding-chinas-one-belt-one-road-forum-for-its-new-silk-road/> accessed 30 March 2018

Bert Hofman, 'China's One Belt One Road Initiative: What We Know thus Far' (*World Bank, 12 April 2015)* <http://blogs.worldbank.org/eastasiapacific/china-one-belt-one-road-Initiative-what-we-know-thus-far> accessed17 February 2018

Brian Eyler, 'Who's afraid of China's One Belt One Road Initiative?' (*East by* Southeast, 24 April 2015) < http://www.eastbysoutheast.com/whos-afraid-of-chinas-one-belt-one-road-Initiative/> accessed 30 March 2018

Evgeny Raschevsky, 'When "One Belt One Road" Project Disputes Arise, who will Resolve Them?' (*Arbitration Blog*, 23 November 2017) <http://arbitrationblog.practicallaw.com/when-one-belt-one-road-project-disputes-arise-who-will-resolve-them/> accessed 10 December 2017

Gillian Lemaire, 'Paperless Arbitrations – Where Do We Stand?' (*Kluwer Arbitration Blog*, 19 February 2014) <http://arbitrationblog.kluwerarbitration.com/2014/02/19/paperless-arbitrations-where-do-we-stand/?_ga=2.233101854.1834001926.1523691267-598905935.1523691267> accessed 21 January 2018.

Newspaper Articles

Choi Chi-yuk, 'Does Xi Jinping Really Want to Be Chinese President for Life?' *South China Morning Post* (China 22 March 2018) <http://www.scmp.com/news/china/policies-politics/article/2138439/does-xi-jinping-really-want-be-chinese-president-life> accessed 11 April 2018.

Dawn Chardonal, 'ICC Court Launches Belt and Road Initiative Commission' *International Chamber of Commerce* (Paris, 05 March 2018) <https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-Initiative-commission/> accessed 12 April 2018.

Mathew Maavak, 'How Malaysia Scholar Sees the Belt & Road Initiative?' *CHINADAILY.COM.CN* (China, 02 March 2016) <http://www.chinadaily.com.cn/china/2016twosession/2016-03/02/content_23715138.htm> accessed 18 April 2018.

Rubiat Saimum, 'What One Belt One Road Means for Bangladesh' *Dhaka Tribune* (Dhaka, 31 October 2017) <https://www.dhakatribune.com/opinion/op-ed/2017/10/31/one-belt-one-road-means-bangladesh/> accessed on 2 February 2018.

Sabena Siddiqui, 'Beijing Plans New Mechanism for Belt and Road Arbitration' *Asia Times* (China, 7 February 2018) <www.atimes.com/belt-road-arbitration-new-mechanism/?fb_comment_id=1594967983955997_1594992083953587#fb387f7162944c> accessed 10 February 2018.