

“The Belt and Road” and Cross-Border Judicial Cooperation

Zheng Sophia Tang*

The Belt and Road Initiative (B&R) is aimed at fostering “peace, development, cooperation and mutual benefit” among Asia, Europe and Africa, with China as a hub. It is expected to improve connectivity and increase cross-border civil and commercial activities of companies and individuals in this region. The success of B&R requires improving certainty and predictability for cross-border players by removing legal obstacles generated by the existence of different legal and judicial systems. This article proposes the judicial cooperation approach over harmonisation, explains how a properly developed judicial cooperation scheme could assist the success of the B&R initiative and which method is most effective in improving judicial cooperation in this region. The article’s recommendations draw on a survey and comparative study of cross-border judicial cooperation in 69 B&R countries in applicable law, jurisdiction, judicial assistance and judgment enforcement. It reveals that judicial cooperation between B&R countries is achieved partially through international treaties, partially by bilateral agreements and mostly through unilateral domestic law. The status quo is extremely complicated, piecemeal, unpredictable and largely ineffective. After analysing the pros and cons of international, bilateral and national approaches, this article suggests that the most effective way to improve judicial cooperation between B&R countries is an informal, China-led, regional approach. China would act as a role model, a facilitator, a dispute centre and a sign-poster in this process.

1. Introduction

The “Silk Road Economic Belt and the 21st-Century Maritime Silk Road”, in abbreviation, “the Belt and Road” or “B&R” was proposed by the Chinese President Xi Jinping in 2013,¹ aiming at fostering “peace, development, cooperation and mutual benefit” among Asia,

* Chair in Law and Commerce, School of Law, Newcastle University, UK.

¹ The Chinese abbreviation for this initiative is 一带一路 [Yi Dai Yi Lu]. According to the guidance of the Leading Group on the Construction of the Belt and Road, the officially recommended translation abbreviation is “the Belt and Road”, “B&R” or “the Belt and Road Initiative”. Other forms of translation are not recommended. See “The Formal English Translation of the Belt and Road” (in Chinese), available at <https://www.yidaiyilu.gov.cn/ztindex.htm> (visited 10 May 2017). The “Silk Road Economic Belt” connects Asia with Europe, the Mediterranean Sea, the Persian Gulf and the Indian Ocean, aiming at building a new Eurasian Land Bridge and three international economic cooperation corridors. The “21st-Century Maritime Silk Road” connects China’s coast with South Pacific, and Europe through South China Sea and Indian Ocean, focusing on building more efficient maritime transport route. For more introductions, see National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the PRC, with State Council authorisation, “Vision and Proposed Actions Outlined on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road” (Action Plan), March 2015 [国家发展与改革委员会、外交部和商务部, <共同建设丝绸之路经济带和 21 世纪海上丝绸之路的愿景和行动>]; Zeng Lingliang, “Conceptual Analysis of China’s Belt and Road Initiative” (2016) 15 *Chinese Journal of International Law* 517; M Du, “China’s ‘One Belt, One Road’ Initiative: Context, Focus, Institutions, and Implications” (2016) 2 *Chinese Journal of Global Governance* 30; H Yu, “Motivation behind China’s ‘One Belt, One Road’ Initiatives and Establishment of the Asian Infrastructure Investment Bank” (2017) 26 *Journal of Contemporary China* 353.

Europe and Africa, with China as a hub.² This ambitious initiative reinforces the Chinese opening-up policy. Its core is to strengthen connectivity between China and Eurasian countries. It is well understood that connectivity by smoothing transportation helps to fix spatial limitation and reduce transaction costs. Building the economic belt and corridors would facilitate the movement of goods, services, people and capital, assisting regional trade and economic development.³ Although the B&R initiative is generated with a view to boost China's economic growth, this plan could only be successful with the contribution of other countries alongside of the belt and road and other foreign neighbours and partners. China describes this initiative as "open and inclusive" and welcomes participation of all countries of the world.⁴

The B&R initiative was enforced from 2015. It is too early to assess its success and its influence and impact in China, Eurasia and the rest of the world. However, it is reasonable to anticipate that, the B&R would encourage more cross-border transactions, investment and communication between individuals and companies in China and other B&R countries. The increasing interactions in the regional cooperation would lead to the requirement for more predictable law and regulation that could provide certainty and predictability to individuals and businesses.⁵ This objective could be achieved through two means. The first is the harmonisation approach which relies on uniform substantive law governing civil and commercial matters among participating countries, and a uniform supranational judicial system to hear transnational disputes. This approach is too ambitious to be realistic. The second approach which this article proposes is a judicial cooperation approach. Judicial cooperation is narrowly defined in this article to cover jurisdiction, applicable law, mutual judicial assistance and mutual enforcement of judgments in civil and commercial matters between difference states. This approach maintains the diversity of domestic civil and commercial law of every participating country but focuses on addressing legal conflict and

² Zeng Lingliang (n 1 above).

³ See, in general, Summers; H Yu (n 1 above).

⁴ "Action Plan" s VIII, para 1.

⁵ It is true that many transactions go through without legal problems and businessmen usually could use their own way, such as private contract and business customs, to mitigate the uncertainty associated in the diversity of legal systems in transnational commerce. See Arthur S Hartkamp, "Modernisation and Harmonization of Contract Law" (2003) 8 *Uniform Law Review* 81. The needs for law reform is not urgent at the beginning. However, as cross-border relationship becomes more intensive, the weakness of the lack of predictable law will emerge to hamper the continuous development of economy. Law and economic development interacts. See Boris Kozolchyk, "Modernization of Commercial Law: International Uniformity and Economic Development" (2009) 34 *Brooklyn Journal of International Law* 709; Michael Trebilcock and Jing Leng, "The Role of Formal Contract Law and Enforcement in Economic Development" (2006) 92 *Virginia Law Review* 1517; Norman L Greene, "Perspectives from the Rule of Law and International Economic Development" (2008) 86 *Denver University Law Review* 53.

judicial cooperation from the conflict of laws perspective. Section 2 justifies the judicial cooperation approach over harmonisation and explains how a properly developed judicial cooperation scheme could assist the success of the B&R initiative. Section 3 examines the current judicial cooperation among B&R countries. Section 4 examines the potential approaches to improve judicial cooperation among B&R countries. Section 5 concludes.

2. B&R and Cross-Border Judicial Cooperation

Sixty-nine countries including China are involved in B&R and the number is likely to continuously grow as the project progresses.⁶ Although the needs for legal certainty will not be extremely strong at the beginning as sophisticated businessmen would use other means, such as contracts and negotiation, to mitigate commercial risk and resolve uncertainty and disputes, more intensive connections and more frequent transactions inevitably call for more predictable and reliable law which helps private parties to better predict the legal consequences of their cross-border activities and resolve disputes.⁷

(a) Harmonisation of Substantive Law and Procedure

Transnational legal certainty may be achieved by harmonisation of substantive law. However, harmonisation in B&R countries is impractical, unrealistic and difficult. First, B&R is an ambitious initiative, covering the cooperation in almost all civil and commercial matters.⁸ The initiative starts from infrastructure building, centres on promoting trade, finance and economic cooperation, and extends to other fields, such as education, culture and communication.⁹ It may be possible to enter into an umbrella framework agreement on the shared interests and principles, but it would be extremely difficult to establish detailed harmonised rules that intend to regulate rights and obligations of individuals and businesses in all the above fields.

The existing international uniform commercial laws may reduce commercial risk and uncertainty in B&R. International Conventions exist in sale of goods, carriage of goods by sea, negotiable instruments, letter of credit and air carriage.¹⁰ A large number of soft laws

⁶ According to the information provided by the Belt and Road Portal, available at https://eng.yidaiyilu.gov.cn/info/iList.jsp?cat_id=10076_ (visited 10 May 2017).

⁷ D Chen and S Deakin, "On Heaven's Lathe" (2015) 8 *Law and Development Review* 123–145. See also works referred to in note 5.

⁸ This may include trade, services, finance, investment, technology, transportation, education, communication and cultural exchange. Ministry of Foreign Affairs and Ministry of Commerce of PRC, "Action Plan", Ch IV.

⁹ *Ibid.*

¹⁰ The UN Convention on International Sale of Goods 1980 regulating parties rights and obligations in international sale of goods transactions; International Convention for the Unification of Certain Rules of Law

also exist to enhance certainty,¹¹ which can be incorporated into contracts to unify practice and interpretation. The international model laws and principles also help to improve harmonisation at a certain level.¹²

However, the international harmonisation on substantive law is unlikely to provide a complete and satisfactory solution. First, international harmonisation cannot cover all the areas of law relevant in transnational activities. For example, there is no globally harmonised law on the transfer of property and proprietary rights; cross-border banking and financing services; cross-border insolvency; enforcement of IP rights; consumer law; employment law; and insurance law. Furthermore, international harmonisation primarily exists in commercial areas. Civil matters, such as contract, tort, marriage, family, etc., are left untouched.¹³ Third, international harmonisation may not be implemented in all B&R countries. In particular, a large number of B&R countries are not widely open to the international society and are underdeveloped in internationalisation of substantive law.¹⁴ These countries are not actively involved in negotiation, ratification or accession of international harmonised law. For example, although the CISG is one of the most successful international conventions on cross-

Relating to Bills of Lading 1924 (Hague Rules), the Hague–Visby Rules, the UN Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) and the UN convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules), which provide minimum responsibilities for ship owners in international carriage of goods by sea; the UN Convention on International Bills of Exchange and International Promissory Notes 1988 that regulates international payment by financial instruments; UN Convention on Independent Guarantees and Stand-By Letters of Credit 1995 that covers certain issues in international payment by letter of credit; Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (Warsaw Convention) and its amendments; and the Montreal Convention 1999 to address liabilities of international air carriers.

¹¹ Such as the Uniform customs and Practice for Documentary Credits (UCP600) and Incoterms.

¹² Such as UNCITRAL Model Law on Secured Transactions (2016); UNCITRAL Model Law on Cross-Border Insolvency (1997); UNCITRAL Model Law on International Credit Transfers (1992); UNCITRAL Model Law on Electronic Transferable Records (2017); UNCITRAL Model Law on Electronic Signatures (2001); UNCITRAL Model Law on Electronic Commerce (1996); UNIDROIT Principles of International Commercial Contracts (2016); UNIDROIT Model Law on Leasing (2008). See S Gopalan, “Transnational Commercial Law: The Way Forward” (2003) 18 *American University International Law Review* 803, 817–819.

¹³ Harmonisation of civil law is better attempted at the regional instead of international level. The EU has worked to harmonise civil law matters, including contract law and family law, but it is generally not very successful. For more discussion, see Masha Antokolskaia, “The ‘Better Law’ Approach and the Harmonization of Family Law” (2006) VI *European Journal of Law Reform* 159; Masha Antokolskaia, “Harmonization of Substantive Family Law in Europe” (2010) 22 *Child and Family Law Quarterly* 397; Haris Tagaras, “European Harmonization of Tort Law” (2005) 58 *Revue Hellenique de Droit International* 1; Klaus Peter Berger, “Harmonization of European Contract Law — The Influence of Comparative Law” (2001) 50 *ICLQ* 877; Marc Picat and Stessie Soccio, “Harmonization of European Contract Law: Fiction or Reality” (2011) *International Business Law Journal* 371.

¹⁴ Arman Mazhikeyev, T Huw Edwards and Marian Rizov, “Openness and Isolation: The Trade Performance of the Former Soviet Central Asian Countries” (2015) 24 *International Business Review* 935; Arman Mazhikeyev and T Tuw Edwards, “Central Asian Trade Relations in the Post-Soviet Era”, available at <http://www.etsg.org/ETSG2013/Papers/126.pdf> (visited 10 October 2017); Jack McMahon, “Rule of Law in Central Asia” (2001) 44 *Advocate (Idaho State Bar)* 13; Nawal K Paswan, “Investment Cooperation in Central Asia” (2013) 69 *India Quarterly* 13.

border transactions, with 85 contracting parties, it has not been ratified by 36 B&R countries.¹⁵ One of the oppositions from many Middle East countries is that CISG rules, especially those in relation to interests, are incompatible with Islamic jurisprudence.¹⁶ The lack of Islamic elements is also present in many other substantive law treaties, which makes future ratification difficult. Finally, international harmonisation would only exist in the area of law, but not in judiciary or judicial practice. It is unrealistic to establish a supranational court to hear all cross-border civil and commercial disputes. The harmonisation approach, therefore, could not help in terms of dispute resolution.

Not only international harmonisation but also regional harmonisation of substantive law proves unrealistic. The ambitious B&R initiative covers a large number of countries cross East Asia, South Asia, Central Asia, West Asia, Europe and Africa, with widely diverse legal culture and tradition. Regional harmonisation requires the finding of common core and shared legal language cross multiple legal families, including the former soviet-socialist law,¹⁷ Chinese socialist law,¹⁸ French civil law,¹⁹ German civil law,²⁰ Islamic law,²¹ common law,²² Hindu law²³ and customary law.²⁴ This daunting task may not be achievable as a matter of reality. This is the greatest difficulty that prevents successful regional harmonisation. Furthermore, the level of development in law varies among B&R countries. Some countries, such as New Zealand, Estonia and Singapore, have developed the modern legal system; some countries, such as China, Thailand, Malaysia and Vietnam, are in the progress of transition and modernisation of their domestic law; however, some other countries, such as Cambodia, Afghanistan, Pakistan and Egypt, are subject to criticism for

¹⁵ Afghanistan, Bangladesh, Bhutan, Brunei, Cambodia, Czech Republic, Ethiopia, India, Indonesia, Iran, Jordan, Kazakhstan, Kuwait, Laos, Macedonia, Malaysia, Maldives, Moldova, Myanmar, Nepal, Oman, Pakistan, Palestine, Philippines, Qatar, Russia, Saudi Arabia, South Africa, Sri Lanka, Syria, Tajikistan, Thailand, Timor-Leste, Turkmenistan, UAE and Yemen.

¹⁶ See the discussion in Mona Ahadi, "The Adoption of the CISG in Iran: Practical Difficulties in Implementing the CISG", available at http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/76-AHADI-The_Adoption_of_the_CISG_in_Iran.pdf (visited 21 November 2018).

¹⁷ For example, Russia, Belarus, Kazakhstan, Azerbaijan, Kyrgyzstan and Turkmenistan. These countries' legal system is transitioning from soviet law but formal socialist law influence continues to remain.

¹⁸ Such as China. The difference between Chinese socialist and other former soviet law is that Chinese socialist law is the combination of the influence of market economy, socialist and Confucianism.

¹⁹ Such as Romania.

²⁰ For example, Estonia, Latvia, Bosnia, Croatia, Macedonia, Montenegro, Slovenia, Serbia and Turkey.

²¹ For example, Saudi Arabia, Egypt, Iran, Oman, Yemen, Brunei, Qatar, Pakistan, UAE, Iraq, Afghanistan and Indonesia.

²² For example, Malaysia, New Zealand, Pakistan, UAE, Bangladesh, Brunei, Philippines, Sri Lanka, Thailand and South Africa.

²³ Such as India.

²⁴ For example, India, South Africa and Mongolia.

underdeveloped rule of law and civil justice systems.²⁵ In the 2016 Rule of Law Index published by the World Justice Project, these four countries fall within the bottom 10 among 113 countries and regions in the world,²⁶ raising concerns on constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement and civil and criminal justice. Harmonisation of law and uniform judicial enforcement among countries with such a big diverse development level in rule of law and judicial practice would prove an impossible project. Third, there is no institutional infrastructure in Eurasia to facilitate harmonisation. Countries are involved with bilateral agreements or announcement. There are no supranational governance bodies and comparable legislative and judiciary entities in B&R region to facilitate harmonisation.

Although the EU regional harmonisation of law is generally successful, it is necessary to recall a few fundamental differences between EU and B&R. First, the similar legal tradition and culture are generally present in EU Member States, at least before the enlargement to include Central and Eastern Member States during 2004 and 2007.²⁷ Although diversities exist, for example, the United Kingdom and Ireland follow the common law tradition and continental Member States follow the Roman law tradition, the level of diversity is not so severe to prevent a proper harmonisation of law. Second, the EU integration is more advanced with established supranational governance and legislative bodies.²⁸ The Commission drafts and submits legislative proposals to the European Parliament,²⁹ which together with the Council decides whether or not to amend, adopt or reject it.³⁰ The supranational judiciary, the Court of Justice of the European Union, is established to encompass judiciary of the whole EU. The whole legislative and enforcement procedure is mature and complete. Comparatively, the level of integration is much lower in B&R. Countries are involved with bilateral agreements or announcement. There are no supranational governance bodies or comparable legislative entities in B&R. Third, even in EU, full harmonisation of substantive law is still not achieved; instead, more successful harmonisation exists in the area of private international law and judicial cooperation. In terms

²⁵ See, in general, World Justice Project, Rule of Law Index 2016, available at <http://data.worldjusticeproject.org/> (visited 10 May 2017).

²⁶ *Ibid.*

²⁷ For EU harmonisation, see Catherine Skinner, "Codification and the Common Law" (2009) 11 *European Journal of Law Reform* 225; Walter van Gerven, "A Common Law for Europe: The Future Meeting the Past" (2001) 9 *European Review of Private Law* 485; Petra Weingerl, "The Europeanisation of English Tort Law" (2017) 54 *Common Market Law Review* 658.

²⁸ TEU Art 17(1); TFEU Art 225; rr 37, 46, 52 and Annex XIII of the Rules of Procedure.

²⁹ *Ibid.*

³⁰ TFEU art 289 and rr 47–49 of the Rules of Procedure.

of substantive law, the uniform private and commercial law only exists in a few areas, such as consumers,³¹ company³² and intellectual property right.³³ However, some important areas are left outside. For example, the Uniform EU contract law project is unsuccessful³⁴ and the later EU common sale law also faces difficulty to progress.³⁵ Even in those areas where substantial harmonisation has been done, harmonisation cannot be seamless and gaps still exist. For example, regardless of numerous EU law on substantive consumer sales, no harmonised rules are provided to cover the formation and validity of consumer contracts. It is reasonable to argue that the EU harmonisation cannot prove a feasible model for B&R to follow.

Regional harmonisation of commercial law also exists in Africa. The organisation for the Harmonisation of Business Law in Africa (OHBLA, or “OHADA” in French”) has adopted numerous uniform Acts on general commercial law,³⁶ contracts for the carriage of goods by road,³⁷ commercial companies and economic interest groupings³⁸ and the organisation and

³¹ The EU harmonised certain standards in protecting general consumers: Directive 2011/83/EU on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of repealing Council Directive 85/577/EEC and Directive 97/7/EC, [2011] OJ L 304/260; Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Commercial Practices Directive), [2005] OJ L 149/22; law that protects passengers: Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by the sea and inland waterway and amending Regulation (EC) No 2006/2004, [2010] OJ L 334/142; Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, [2004] OJ L 46/1; consumers in credit sales: Directive 2008/48/EC on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] OJ L 133.58.

³² Directive 2011/35/EU concerning mergers of public limited liability companies, [2011] OJ L 110/1; Directive 2009/102/EC in the area of company law on single-member private limited liability companies, [2009] OJ L 258/20; Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies, [2007] OJ L 184/17; Regulation (EC) No 1606/2002 on the application of international accounting standards, [2002] OJ L 243/1.

³³ For example, Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, [2016] OJ L 157/1; Directive (EU) 2015/2436 to approximate the laws of the Member States relating to trade marks, [2015] OJ L 336/1; Directive 2009/24/EC on the legal protection of computer programs, [2009] OJ L 111/16; Directive 2006/116/EC on the term of protection of copyright and certain related rights, [2006] OJ L 372/12; Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10; Directive 98/71/EC on the legal protection of designs, [1998] OJ L 289/28.

³⁴ The Commission of European Contract Law was formed in 1982 and produced the Principles of European Contract Law in 2002, which is not an EU legal instrument but largely an academic work providing model rules showing the common core of the European system. See O Lando and H Beale, *Principles of European Contract Law* (Alphen aan den Rijn: Kluwer, 1999–2003); Y Adar and P Sirena, “Principles and Rules in the Emerging European Contract Law” (2013) 9 *European Review of Contract Law* 1; O Lando, “Principles of European Contract Law and Unidroit/Principles: Moving from Harmonization to Unification?” (2003) 8 *Uniform Law Review* 123.

³⁵ The European Commission submitted the Proposal for a Regulation on a Common European Sales Law COM(2011) 0635 final, 2011/0284(COD). In 2015, the Commission abandoned this proposal and decided to replace it with a new initiative to remove contractual barriers to cross-border sales, see “Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods”, 12 June 2015.

³⁶ Adopted on 15 December 2010 in Lome (Togo) and entered into force on 15 May 2011.

³⁷ Adopted on 22 March 2003 in Yaounde and entered into force on 1 January 2004.

³⁸ Adopted on 30 January 2014 and entered into force on 5 May 2014.

harmonisation of business accounting.³⁹ These uniform Acts bind 17 Member States of OHADA.⁴⁰ Again, a regional organisation is created to undertake the legislative role and all Member States share similar history, culture, tradition and economic needs.⁴¹ Most OHADA Member States are former French Colonies, heavily influenced by the French law and French judicial proceedings. The regional organisation, OHADA, undertakes the legislative law. Even so, there is doubt that whether the OHADA may successfully harmonise the commercial law of all countries in the continent, because of the culture difference in other African countries.⁴²

The large number of involved countries, the vast diversity of legal culture and tradition, the different development and quality of law and judicial system, and the different level of economic development in B&R countries make regional harmonisation of civil and commercial law an unrealistic option.

(b) Judicial Cooperation Approach

Without uniform law and judicial system, cross-border judicial cooperation would be the most promising means to provide certainty and predictability. B&R focuses on connectivity instead of the European style “integration”.⁴³ That means it would facilitate the cross-border flow of goods, people and capital but leave production, political and legal side to every individual country.⁴⁴ The co-existence of multiple independent legal systems means that where cross-border transactions occur and, in particular, disputes arise out of these transactions, the governing law, competent court, potential procedure and possibility to enforce foreign judgments would be inevitable questions to answer.

The judicial cooperation approach is based on the mutual understanding that every country involved in B&R has the different, separate and independent legal system. It is not necessary to have substantive law harmonised among these countries, or to establish a supranational

³⁹ Adopted in Yaounde on 24 March 2000 and entered into force on 1 January 2001.

⁴⁰ Benin, Burkina Faso, Cameroon, Central African Republic, Côte d’Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo, Senegal, Chad and Togo.

⁴¹ A Mouloul, *Understanding the Organization for the Harmonization of Business Law in Africa (O.H.A.D.A)* (OHADA, 2nd ed., June 2009); B Fagbayibo, “Towards the Harmonization of Laws in Africa” (2009) 42 *Comparative and International Law Journal of Southern Africa* 309; P Winship, “Law and Development in West and Central Africa”, SMU Dedman School of Law Legal Studies Research Paper No 272; G Kalm, “Building Legal Certainty through International Law: OHADA Law in Cameroon” (Working Paper No 11-005, Buffett Center for International and Comparative Studies, 2011); R Beauchard and MJV Kodo, “Can OHADA Increase Legal Certainty in Africa?” (Working Paper 17/2011, Justice and Development, 2011).

⁴² Fagbayibo (n 41 above) pp 316–319.

⁴³ See, in general, “Action Plan”.

⁴⁴ P Ferdinand, “Westward Ho - the China Dream and ‘One Belt, One Road’: Chinese Foreign Policy under Xi Jinping”, (2016) 92 *International Affairs* 941, 948-950.

judiciary for dispute resolution. Certainty can be achieved by providing mechanisms helping the parties to predict the potential applicable law and competent court and by facilitating cooperation between the courts of different countries to enforce each other's judgments and to ease cross-border procedure.

For example, without proper judicial cooperation, a country may not allow its court to recognise and enforce foreign judgments in civil and commercial matters and require all cross-border disputes with the potential enforcement needs to be adjudicated in its courts. If this country's judicial system and commercial law are not advanced, foreign parties could encounter potential risk of not being able to enforce their rights if something goes wrong. With judicial cooperation, this country may enter into bilateral or multilateral treaties with other countries promising to respect each other's judgments in principle, or unilaterally lower the threshold in its domestic law for foreign judgments enforcement. The uncertainty concerning the enforceability of judgments would be largely lifted.⁴⁵

The other area that also shows clear needs for judicial cooperation is transnational litigation procedure. Service of procedure abroad requires effective judicial cooperation between relevant countries, without which the court must follow both the law of its own and the local law of the foreign country. If one relevant country does not permit more flexible way to serve a process, complicated, time-consuming and very inefficient diplomatic approach may have to be followed.⁴⁶ More difficulty may exist in taking evidence abroad. As most B&R countries are civil law countries, they do not allow foreign officials or persons authorised by foreign authorities to take evidence in their territory.⁴⁷ Judicial cooperation provides efficient channels for authorities in different countries to assist each other in carrying out certain judicial activities in their jurisdiction. For example, a country may permit the foreign court to directly serve the defendant in its territory by post; or a country may allow the agent authorised by a foreign authority to collect evidence in its territory.⁴⁸ This would largely reduce litigation cost and speed up the process.

⁴⁵ However, uncertainty will not be completely removed because there usually will be exceptions, subject to conflicts of jurisdiction, natural justice, procedural fairness, defendant's right to defend and, most importantly, the ambiguous public policy defence.

⁴⁶ Robert Casad, "Service of Process Abroad" (1986) *Arizona Journal of International and Comparative Law* 93; Gary A Magnarini, "Service of Process Abroad under the Hague Convention" (1988) 71 *Marquette Law Review* 649, 652–657.

⁴⁷ Jianxina Gao, "Taking of Evidence Abroad and Its Comparison between Countries of Civil Law and Common Law" (1994) 1 *Asia Pacific Law Review* 116–117.

⁴⁸ *Ibid.*, 117–118.

In terms of jurisdiction, the lack of judicial cooperation may lead to concurrent proceedings over the same cause of action between the same parties. Conflict of jurisdiction may be caused by the difference in every country's domestic jurisdiction rules, but it may also exist with harmonised jurisdiction rules. For example, the EU harmonisation of jurisdiction rules does not aim to designate just one competent court for one dispute but allows more than one court to be competent, which enables the claimant to choose.⁴⁹ This level of flexibility is usually necessary in case a competent court is inappropriate or there is substantial difficulty for the claimant to sue in that country. The main goal of judicial cooperation is not to harmonise jurisdiction rules by only granting one court competence for one dispute but to prevent concurrent proceedings, though harmonised jurisdiction rules would assist higher predictability, reduce compliance and learning cost and prevent unnecessary surprise when an unexpected court asserts jurisdiction.⁵⁰

In terms of governing law, different or unclear choice of law rules in different countries may lead to uncertainty to predict the applicable law and may encourage forum shopping. For example, if both country A and country B have jurisdiction, while A's choice of law permits the application of the law of country A while country B's choice of law directs to the law of country C. Choosing country A or country B may lead to the different applicable law, and the result. The parties thus cannot ascertain their rights and obligations in advance given the potentially different applicable law applied by the different court. Judicial cooperation may require harmonisation of choice of law rules at certain level, adopting the common principles or standards, which may improve certainty and predictability.

3. Judicial Cooperation: *Status Quo*

The *status quo* of judicial cooperation in the B&R region can be remarked as being complicated, largely piecemealed and hardly effective. It does not mean nothing has been done to promote jurisdiction cooperation. On the contrary, some B&R countries have joined international judicial cooperation/assistance treaties,⁵¹ some countries are active in

⁴⁹ For example, in a contract dispute, the claimant can sue either in the defendant's domicile (art 4(1)), or the place where the contract is performed (art 7(1)); in a tort dispute, the claimant can also choose between the defendant's domicile (art 4(1)), the place where the tort activity occurred or the place where the damage/harmful result occurred (art 7(2)).

⁵⁰ For example, in a multinational project where 10 or 20 countries are involved, a company may need to know the domestic jurisdiction rules of every country in order to predict which country's court may be competent in order to estimate its potential costs and works to reduce the litigation risks. It generates high compliance and learning cost.

⁵¹ See Section 3(c).

concluding bilateral judicial cooperation agreements,⁵² and most countries have enacted relevant domestic law to respect foreign judicial proceedings and foreign law. However, the detailed analysis below shows that the existing cooperation is far from being satisfactory and cannot achieve the purpose to smooth cross-border transactions between B&R countries.

(a) Applicable Law

There is no international or regional achievement on harmonised choice of law rules in cross-border commercial matters readily applicable in all B&R countries. The Hague Conference on Private International Law had indeed made the effort to harmonise choice of law in specific areas, but they are not received very well. For example, the protocol on the Law Applicable to Maintenance Obligations 2007 applies to 14 B&R countries;⁵³ the Convention on the Law Applicable to Traffic Accidents 1971 has 13 B&R signatories;⁵⁴ 5 B&R countries succeeded the Convention on the Law Applicable to Products Liability 1973;⁵⁵ the Convention on the Law Applicable to Trusts and on their Recognition only applies to Hong Kong;⁵⁶ five B&R countries signed the Convention on the Law Applicable to Maintenance Obligations 1973;⁵⁷ only Czech, Moldova and Slovakia signed the Convention on the Law Applicable to Contracts for the International Sale of Goods 1986; other Hague choice of law conventions receive no official accession or ratification in B&R countries.⁵⁸

In 2015, the Hague Conference on Private International Law adopted the Principles on Choice of Law in International Commercial Contracts (the Principles) to promote party autonomy in commercial contracts.⁵⁹ The Principles is not a binding instrument or a model law, but a set of principles that the Conference encourages individual countries to incorporate in their domestic law to assist the reform and modernisation of domestic choice of law rules.⁶⁰ The Principles could assist the clarification of choice of law questions in B&R

⁵² See Section 3(d).

⁵³ Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Serbia, Slovakia, Slovenia and Ukraine.

⁵⁴ Belarus, Bosnia and Herzegovina, Croatia, Czech Republic, Latvia, Lithuania, Montenegro, Macedonia, Poland, Serbia, Slovakia, Slovenia and Ukraine.

⁵⁵ Croatia, Macedonia, Montenegro, Serbia and Slovenia.

⁵⁶ China does not ratify this Convention. This Convention is signed and ratified by the United Kingdom and applies to Hong Kong as a result of an extension made by the United Kingdom. It continues to apply to Hong Kong after it was restored to China on 1 July 1997.

⁵⁷ Albania, Estonia, Lithuania, Poland and Turkey.

⁵⁸ Such as Convention on the Law Applicable to Agency 1978; Convention on the Law Applicable to Matrimonial Property Regimes 1978; Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary 2006.

⁵⁹ The Principles, "Introduction" para I.11 and Preamble para 1.

⁶⁰ The Principles, "Introduction" para I.8.

countries and, in particular, help the courts of some countries, where no modern choice of law system is established, to resolve the applicable law problem in a cross-border contract according to the proposed international code of practice.⁶¹

However, the record shows that none of the B&R countries have incorporated the Principles in their domestic legislation.⁶² The Principles is relevantly young and its factual impact is yet to be seen. However, it is important to note some points of reality. First, countries that have already updated their domestic choice of law rules to respect party autonomy, which works generally well in practice, may feel there is no need to reform their domestic law in a short term to incorporate the Hague Principles.⁶³ Second, countries that have not yet recognised party autonomy may feel difficult to adopt the Principles in their domestic law, especially when the Principles are ambitious on some controversial matters and provide innovative rules, such as recognition of the choice of non-state law and the uniform rules dealing with the battle of the forms.⁶⁴ Third, although the Principles provides workable “best practice” in dealing with party autonomy in commercial contracts, it does not provide choice of law rules for contracts in the absence of choice of law agreements.⁶⁵

Unofficial regional efforts have also been made to harmonise regional choice of law rules in Asia. For example, conflict of laws scholars in 10 East Asian countries have worked in the project of Asian Principles of Private International Law (Asian General Principles) that is based on the comparative study of the conflict of laws in 10 East and Southeast Asian countries.⁶⁶ This work has summarised similarities of conflict of laws in these countries and proposed harmonised conflicts rules, covering general principles and concepts of conflict of laws, jurisdiction, choice of law, recognition and enforcement of judgments. The Asian General Principles, however, is primarily an academic work by a group of scholars without the involvement of policymakers, governments or judiciary. The Asian General Principles

⁶¹ The Principles, “Introduction” para I.20.

⁶² The only country that has done so is Paraguay.

⁶³ Such as countries that have implemented the Regulation (EU) No 593/2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6.

⁶⁴ Articles 3 and 6(1)(b).

⁶⁵ For more discussion of the Hague Principles, see SC Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments” (2013) 61 *American Journal of Comparative Law* 873.

⁶⁶ Japan, the Republic of Korea, Mainland China, the Hong Kong Special Administrative Region, Taiwan, Vietnam, Indonesia, the Philippines, Thailand and Singapore. For more information on this project, see Weizuo Chen and Gerald Goldstein, “The Asian Principles of Private International Law” (2017) 13 *Journal of Private International Law* 411.

may have limited impact in reality and may not lead to the official regional harmonisation of choice of law, in the form of convention, model law or principles.

Therefore, the choice of law rules primarily rest on the domestic law of individual states. It is unfortunate the level of development of domestic choice of law varies largely from country to country. Choice of law is well developed in some countries, such as New Zealand and Singapore.⁶⁷ Some other countries have recently updated their domestic choice of law rules. China, for example, adopted the new choice of law status, “Choice of Law for Foreign-Related Civil Relationships Act”, in 2010,⁶⁸ and the Supreme People’s Court has published the first judicial interpretation to this Act in 2012.⁶⁹ The Chinese domestic choice of law, though imperfect, is updated and partially modernised, largely consistent with the international best practice.⁷⁰ Besides, Albania,⁷¹ Belarus,⁷² Bulgaria,⁷³ Czech Republic,⁷⁴ Poland,⁷⁵ Serbia,⁷⁶ Turkey,⁷⁷ Vietnam,⁷⁸ etc., have reformed and updated their choice of law rules in the past 10 years. Domestic choice of law rules in these countries are generally updated, and some of them are clearly influenced by the EU choice of law instruments.⁷⁹ On the other hand, the choice of law in many other countries remains outdated. For example,

⁶⁷ For comments, see PRH Webb and FM Auburn, “New Zealand Conflict of Laws — A Bird’s Eye View” (1977) 26 *ICLQ* 971; Elsabe Schoeman, “Conflict of Laws” (2013) 2 *New Zealand Law Review* 301; Peter Kincaid, “Rationalising Contract Choice of Law Rules” (1993) 7 *Otago Law Review* 93.

⁶⁸ Order No 36 of the President of the People’s Republic of China. Adopted at the 17th session of the Standing Committee of the 11th National People’s Congress on 28 October 2010; entered into force on 11 April 2011.

⁶⁹ Supreme People’s Court of China, Interpretations of the SPC on Several Issues Concerning Application of the Law of the People’s Republic of China on Choice of Law for Foreign-Related Civil Relationships (I), [2012] Fa Shi No 24, adopted at the 1563rd Session of the Judicial Committee of the Supreme People’s Court on 10 December 2012 and entered into effect on 3 January 2013.

⁷⁰ See comments in Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Laws in the People’s Republic of China* (Cheltenham: EEL, 2016) Ch 14.

⁷¹ Albanian Law on Private International Law Act of 2011 (Law 10.428 of 2 June 2011); AG Bushati and N Dollani, “Albanian PIL Act and Its Implementation in Judicial Practice” (2016) 18 *AnaliPravnogFakultetaUniverziteti u Zenici* 147; E Cela and M Qoku, “Contractual Obligations under the Private International Law in Albania” (2014) 10 *Academicus — International Scientific Journal* 181.

⁷² Civil Code of Belarus (1998), amended in 2009, arts 1093–1136.

⁷³ Bulgarian Private International Law Code (Law No 42 of 2005 as amended by Law No 59 2007).

⁷⁴ Law No 91 of 25 January 2012 on Private International Law, effective 1 January 2014.

⁷⁵ Act of Private International Law of 4 February 2011.

⁷⁶ Serbian Ministry of Justice Draft of 20 July 2012 on Private International Law Code.

⁷⁷ Law No 5718 of 27 November 2007 adopting the Turkish Code of Private International Law and International Civil Procedure.

⁷⁸ Civil Code of Vietnam, adopted on 24 November 2015 and entered into force from 1 January 2017.

⁷⁹ The EU choice of law instruments clearly influence the domestic law of those Eastern European countries that later joined the EU, such as Bulgaria, Estonia, Lithuania, Romania and Slovenia, and other non-EU Eurasia countries, such as Armenia, Belarus, Croatia, Korea, Kyrgyzstan, Moldova, Russia, Turkey and Ukraine. See Symeonides (n 65 above) p 875, fn 9.

Afghanistan,⁸⁰ Bosnia and Herzegovina,⁸¹ Jordan⁸² and Montenegro⁸³ have not updated their choice of law legislatures over 40 years.

Furthermore, although most countries permit the parties to choose the applicable law governing their transactions, detailed rules and practice differ. According to a 2015 survey done by Allen & Overy,⁸⁴ although many B&R countries adopt the modern approach to grant the parties freedom to choose the foreign law for their commercial contracts,⁸⁵ some require significant connections between the foreign law and the parties or the contract and very readily apply local mandatory rules and public policy to prevail foreign law;⁸⁶ some often do not apply the chosen foreign law unless it is connected to the parties or contracts;⁸⁷ and some generally do not respect party autonomy.⁸⁸ Diversity also exists in the default applicable law, the application and concepts of mandatory rules and public policy, and the law governing contracts with inequality of bargaining power. Besides, in terms of judicial practice, some courts are very inexperienced in applying foreign law and usually will apply local law instead although the foreign law is applicable in paper.⁸⁹ Relying solely on domestic conflicts legislation would not help to improve certainty in cross-border transactions.

(b) Jurisdiction

B&R countries are generally lukewarm towards judicial cooperation in preventing the conflict of jurisdictions. The Hague Choice of Court Convention 2005, which aims to effectively address the conflict of jurisdiction between different courts where an exclusive choice of court clause exists and to facilitate enforcement of judgments delivered pursuant to such a clause, has been ratified by Singapore and Montenegro, and other 11 B&R countries, which are also EU Member States, are bound by the Convention as a result of the EU

⁸⁰ Civil Code of Afghanistan, arts 3–35 (1977).

⁸¹ [Former Yugoslav] Act of 15 July 1982 on the Resolution of Conflicts of Laws with Laws and Regulations of Other Countries in Certain Matters.

⁸² Jordanian Civil Code of 1 August 1976.

⁸³ [Former Yugoslav] Act of 15 July 1982 on the Resolution of Conflicts of Laws with Laws and Regulations of Other Countries in Certain Matters.

⁸⁴ Allen & Overy, Global Litigation Survey, 2015, available at <http://www.allenoverly.com/SiteCollectionDocuments/Global%20Litigation%20Survey%202015.pdf> (visited 26 May 2017).

⁸⁵ For example, Russia, Kazakhstan, Estonia, Latvia, Lithuania, Poland, Czech Republic, Hungary, Romania, Georgia, China, Korea, Bangladesh, Jordan, Israel, UAE, Thailand, Sri Lanka, Singapore, Malaysia and New Zealand.

⁸⁶ For example, Mongolia, Turkmenistan, Iraq, Laos, Macedonia and Indonesia.

⁸⁷ For example, Belarus, Ukraine, Moldova, Bulgaria, Iran, Uzbekistan, Kyrgyzstan, Pakistan, India and Philippine.

⁸⁸ For example, Nepal, Kuwait, Qatar, Saudi Arabia and UAE.

⁸⁹ Such as Kyrgyzstan, Mongolia, Montenegro, Turkmenistan, Uzbekistan and Laos.

ratification.⁹⁰ China and Ukraine also signed the Convention without ratification.⁹¹ If China ratifies this Convention, hopefully the ratification of the B&R hub may encourage more B&R countries to accede this Convention, which would form the basis to provide judicial cooperation in disputes with a valid exclusive choice of court clause.

As to B&R countries not currently bound by the Hague Choice of Court convention, although most would respect choice of court agreements pursuant to their domestic law,⁹² this is not the consistent practice. Some countries do not enforce choice of law agreement choosing either home or foreign courts.⁹³ Some countries are only willing to enforce a jurisdiction clause choosing the home forum, but not a foreign court,⁹⁴ others *vice versa*.⁹⁵ Some countries impose additional requirements for the parties' choice of foreign courts. For example, Azerbaijan requires one of the parties to reside in the chosen forum;⁹⁶ China requires the chosen foreign court to have "practical connections" with the dispute;⁹⁷ Georgia requires one of the parties has domicile, residence or ordinary residence in the chosen forum.⁹⁸ The effectiveness of a home jurisdiction clause is also questioned in some countries. For example, in Indonesia, the court may be reluctant to enforce a home jurisdiction unless they find substantive connections exist;⁹⁹ in India, the parties cannot choose the Indian court by the agreement alone;¹⁰⁰ in Macedonia and Serbia, the court will only take jurisdiction upon agreements if one of the parties has Macedonian citizenship;¹⁰¹ in some countries, the

⁹⁰ Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.

⁹¹ For the status of the Hague Choice of Court Convention, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (visited 23 November 2017).

⁹² Such as Albania, Bahrain, Bangladesh, Bosnia and Herzegovina, Croatia, Czech Republic, Hong Kong, Hungary, Israel, Jordan, Latvia, Lithuania, Mongolia, Montenegro, Myanmar, Poland, Romania, Singapore, Slovakia, Sri Lanka, Tajikistan and Turkey. See the Allen & Overy Survey (n 84 above).

⁹³ For example, Iran, Iraq and Kuwait.

⁹⁴ For example, Egypt, Ukraine and UAE. See Allen & Overy Survey, 143; 330; and 332. Saudi Arabia does not permit the choice of foreign court to derogate home jurisdiction and its position towards a home jurisdiction clause is unclear. See Allen & Overy Survey, 283. In Philippine, the home jurisdiction clause is generally allowed, subject to *forum non conveniens* (*Raytheon International v Rouzie Jr* [GR No 162894, 26 February 2008]), but the choice of foreign court may not be effective unless treaty obligations exist (*Unimasters Conglomeration v CA* [GR No 119657, 7 February 1997; *Santos III v Northwest Orient Airlines* [GR No 101538, 23 June 1992]). See Allen & Overy Survey, 266.

⁹⁵ For example, Moldova, the Code of Civil Procedure of Moldova, arts 460–462.

⁹⁶ Article 450.2 of the Civil Procedure Code of the Republic of Azerbaijan.

⁹⁷ SPC, Interpretation of the Implementation of the Civil Procedure Law of the People's Republic of China, [2015] Fa Shi No 5, art 531.

⁹⁸ Allen & Overy Survey, 156.

⁹⁹ Allen & Overy Survey, 82; 179; and 222.

¹⁰⁰ Allen & Overy Survey, 177.

¹⁰¹ Allen & Overy Survey, 224; 290.

law is simply unclear and the cases are rarely reported.¹⁰² The effect of a choice of court clause is thus unpredictable.

Furthermore, there is also no regional arrangement preventing concurrent proceedings between two B&R courts. Some countries adopt the discretionary doctrine *forum non conveniens* and decline jurisdiction when they find their jurisdiction inappropriate or inconvenient. These are mainly countries with common law traditions, such as New Zealand, Singapore, Malaysia, Hong Kong, India and Philippines.¹⁰³ But some civil law countries, such as China, have also adopted *forum non conveniens* in their court practice.¹⁰⁴ Anti-suit injunctions that restrain a party from suing in a foreign court are also available in some common law tradition countries or regions, such as Singapore, New Zealand, India and Hong Kong.¹⁰⁵ These common law instruments may be unilaterally used to prevent concurrent proceedings, but they are utilised in limited countries and the discretionary nature of these instruments causes inconsistency and uncertainty. Furthermore, most countries would not unilaterally apply *lis pendens* in favour of a foreign country simply because the foreign court is seized first. In China, it has been explicitly stated in the judicial interpretation that China will not stay jurisdiction simply to prevent concurrent proceedings.¹⁰⁶ Therefore, proper judicial cooperation is largely lacking in jurisdiction and concurrent proceedings are likely to exist between most B&R countries.

(c) International Judicial Assistance

International judicial assistance refers to the court or authority of a country (requested country), upon the request of the competent authority of another country (requesting country), to provide support to conduct certain judicial or official activities in its territory, in order to

¹⁰² Such as Kyrgyzstan, Laos, Malaysia, Russian and South Africa. See Allen & Overy Survey, 206; 208; 229; 280; and 304.

¹⁰³ Tiong Yeo, “Natural Forum and the Elusive Significance of Jurisdiction Agreements” (2005) *Singapore Journal of Legal Studies* 448; Suzana Muhamad Said and Shamsuddin Suhor, “Forum Non Conveniens in the Syariah Court of Malaysia” (2012) 20 *Pertanika Journal of Social Sciences and Humanities* 111. For India, see *Modi Entertainment Network v WSG Cricket Pte* (2003) 2MLJ 98 (SC); *Mayar (HK) Ltd v Owners and Parties* (2006) 1 Supreme 677. For Philippines case, see *Manila Hotel Co v National Labour Relations* [GR No 120077, 13 October 2000], Republic of the Philippines Supreme Court.

¹⁰⁴ SPC of China, Interpretation of the Civil Procedure Law 2017, art 532; Zheng Sophia Tang, “Declining Jurisdiction in Chinese Courts by Forum Non Conveniens” (2015) 45 *HKLJ* 351–372.

¹⁰⁵ For Singapore, see *John Reginald Stott Kirkham v Trane US Inc* [2009] SGCA 32; New Zealand, see *Jonmer v Maltexo* [1996] 10 PRNZ 119; India, see *Cotton Corp of India Ltd v United Industrial Bank Ltd* (1983) 4 SCC 625; Hong Kong, see *Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246 (first anti-suit injunction issued by Hong Kong court).

¹⁰⁶ SPC of China, Interpretation of Civil Procedure Law 2017, art 533, which states that where both the Chinese and foreign courts have jurisdiction, if one party brought the proceedings in the foreign court and the other sued in China, Chinese court could take jurisdiction.

assist the litigation procedure pending in the requesting country. In practice, it primarily includes the assistance provided for service of procedure and taking evidence abroad.¹⁰⁷ This is an area where cooperation is most promising. The Hague Conference on Private International Law has adopted a few judicial cooperation treaties. The Hague Evidence Convention has 61 contracting states,¹⁰⁸ 31 of which are B&R countries.¹⁰⁹ The Hague Service Convention has 72 contracting states,¹¹⁰ 31 of which are B&R countries.¹¹¹ It seems that in terms of judicial assistance in cross-border civil litigation procedure, about half of the B&R countries have shown interest to develop cooperation with other countries and work under the framework of the Hague Conference. Most B&R contracting states of the Hague Evidence Convention and the Hague Services Convention rate the general operation of the Conventions “Excellent” or “Good”.¹¹² If B&R indeed improves regional connectivity and cross-border transactions, other B&R countries would face the natural needs to improve cross-border judicial assistance and would have the motive to join the existing judicial assistance framework. At the moment, some B&R countries that are not contracting members of these Conventions have expressed the interest to accede. For example, New Zealand stated that the work was underway on domestic steps to become a party of the Hague Evidence Convention, which was deferred due to other competing priorities and resource constraints.¹¹³ Malaysia and Vietnam have studied the Evidence Convention and considered the possibility to join.¹¹⁴ Vietnam has also decided to join the Hague Services Convention.¹¹⁵ These two

¹⁰⁷ A broad definition of international judicial assistance also includes enforce foreign judgments. The definition adopted here does not include judgment recognition and enforcement, which generate special issues and is treated separately in the next sub-section. Judicial assistance here only includes judicial supports that relate to litigation procedure.

¹⁰⁸ Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

¹⁰⁹ Albania, Armenia, Belarus, Bosnia and Herzegovina, Bulgaria, China, Croatia, Czech Republic, Estonia, Macedonia, Hungary, India, Israel, Korea, Latvia, Lithuania, Montenegro, Poland, Romania, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, South Africa, Sri Lanka, Turkey, Ukraine, Kazakhstan and Kuwait.

¹¹⁰ Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

¹¹¹ Albania, Armenia, Belarus, Bosnia and Herzegovina, Bulgaria, China, Croatia, Czech Republic, Egypt, Estonia, Macedonia, Hungary, India, Israel, Korea, Latvia, Lithuania, Montenegro, Poland, Moldova, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Sri Lanka, Turkey, Ukraine, Viet Nam, Kazakhstan, Kuwait and Pakistan.

¹¹² HCCH, *Ibid.*, 26. Only Hungary rates the Hague Evidence Convention “satisfactory” due to the slow response from some contracting states. HCCH, “Synopsis of Responses to the Questionnaire of November 2013 Relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters” Info Doc No 1, May 2014, 27.

¹¹³ HCCH, “Synopsis of Responses to the Questionnaire of November 2013 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters”, August 2014, Doc Info No 2, May 2014, 11.

¹¹⁴ HCCH, *Ibid.*, 11.

¹¹⁵ See the Viet Nam Response to the HCCH Questionnaire of November 2013 relating to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and

Conventions could at least serve as the basis to build the regional judicial cooperation in civil litigation procedure.

Besides the support that assists the foreign court litigation proceedings, international judicial assistance also includes providing equal access to justice to foreign nationals as domestic citizens. Equal access to justice provides the foreign litigants the same access to legal aids as domestic parties, removes the requirements for foreign claimants to pay securities and ensures foreign nationals may not be personally addressed or detained for other purposes when participating in civil proceedings. These are obstacles that would prevent parties from accessing to justice in cross-border scenarios. The third Hague judicial or administrative cooperation convention, the Access to Justice Convention,¹¹⁶ receives interest from fewer countries. This Convention has 28 contracting states, 17 of which are B&R countries.¹¹⁷ It obviously is not as popular as the other two judicial assistance conventions, probably because some countries do not see this Convention could provide added value compared to domestic law, or existing bilateral or multilateral judicial cooperation treaties;¹¹⁸ others may feel it is contrary to public interest to offer legal aids to foreigners. Although the Convention contracting states would provide reciprocal national treatments to each other's citizens, citizens from other B&R countries cannot receive this treatment and may face extra barriers when suing abroad. For example, foreign claimants but not national claimants may still be required to pay securities upon the defendant's request when bringing actions in Croatia,¹¹⁹ Czech Republic,¹²⁰ Hungary,¹²¹ Malaysia,¹²² New Zealand,¹²³ Serbia,¹²⁴ Slovakia¹²⁵ and Russia.¹²⁶

Commercial Matters, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6042&dtid=33> (visited 24 October 2017).

¹¹⁶ Convention of 25 October 1980 on International Access to Justice.

¹¹⁷ Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Macedonia, Latvia, Lithuania, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, Turkey and Kazakhstan.

¹¹⁸ For example, Hungary believes matters governed by this Convention are dealt within in EU law or bilateral agreements. HCCH, "Synopsis of Responses to the Questionnaire of November 2013 Relating to the Hague Convention of 25 October 1980 on International Access to Justice", Info Doc No 3, May 2014, 11.

¹¹⁹ Act of Croatia concerning the Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters (OG of ex SFRY no 43/82, 72/82, OG no. 53/91), arts 82–85.

¹²⁰ Section 11 of the International Private Law of Czech Republic no 91/2012.

¹²¹ Sections 85 and 89 of 1952 on the Code of Civil Procedure (Hungary).

¹²² Order 23, 4.1 of the Rules of Court 2012 (Malaysia).

¹²³ HCCH, "Synopsis of Access to Justice Questionnaire", 18–19.

¹²⁴ Law on Resolving Conflict of Laws with Regulations of Other Countries (Serbia), art 82.

¹²⁵ Article 51 of the Law of Slovakia on Private International Law and Procedure (No 97/1963 OJ).

¹²⁶ Article 398 of the Civil Procedure Code of Russia.

Besides, bilateral judicial assistance treaties also exist. China, for example, has entered into bilateral civil judicial assistance treaties with 23 B&R countries.¹²⁷ All of them provide rules to assist extraterritorial service of proceedings, taking evidence abroad and exempt securities. Croatia has concluded bilateral agreements with Latvia, Lithuania, Russia, Ukraine and Poland.¹²⁸ Latvia has entered into civil legal assistance treaties with Kyrgyzstan, Russia, Moldova, Ukraine, Uzbekistan, Belarus, Estonia, Lithuania and Poland.¹²⁹ Vietnam has entered into bilateral mutual judicial assistance agreements with Slovakia, Russia, China, Hungary, Mongolia, Ukraine, Belarus, Poland, Bulgaria, Laos and Kazakhstan. Bosnia and Herzegovina has concluded bilateral agreements with 18 B&R countries, including Bulgaria, Croatia, China, Czech Republic, Macedonia, Moldova, Mongolia, Hungary, Iraq, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia and Turkey.¹³⁰ It is likely that these bilateral treaties could resolve the difficulty faced by cross-border litigants, at least partially. However, from the long run, many small countries, such as Croatia, may find concluding a large number of bilateral agreements difficult and impractical in terms of both time and available resources.¹³¹ Completely relying on bilateral agreements may also result in a “network” of bilateral agreements and would increase complexity for individuals and, given the content of agreements may differ between each other in details, the conflicts of treaties may also arise, causing difficulties in practice.

(d) Foreign Judgments

The situation probably is worse in terms of recognition and enforcement of foreign judgments. At the international level, only the Hague Choice of Court Convention 2005 addresses the mutual recognition and enforcement of foreign judgments pursuant to a valid exclusive choice of court agreement.¹³² This Convention only applies to 12 B&R countries.¹³³ A large gap is left for cases where there is no valid exclusive choice of court agreement, and where

¹²⁷ China has entered into 34 bilateral agreements in total. See Tang, Xiao and Huo (n 70 above) p 145.

¹²⁸ Eve Jõks, “Some Problems of International Judicial Assistance from an Estonian Perspective” (1999) *Juridica International IV* 80, fn 4.

¹²⁹ D Zivtina, “Comparative Study of ‘Residual Jurisdiction’ in Civil and Commercial Disputes in the EU National Report for Latvia”, 2, available at http://ec.europa.eu/civiljustice/news/docs/study_resid_jurisd_latvia_en.pdf (visited 28 May 2017).

¹³⁰ More information of bilateral judicial cooperation treaties between B&R countries can be found on the HCCH website, available at <https://www.hcch.net/en/states/authorities>.

¹³¹ Jõks (n 128 above).

¹³² Hague Choice of Court Convention 2005 Ch III.

¹³³ They are Singapore and 11 other B&R countries which are EU Member States, because this Convention was ratified by the EU on behalf of its Member States. See Section 3(b).

one of the parties is the resident of a non-contracting state of the Hague 2005 Convention. The gap covers the majority of cases between B&R countries.

Other multilateral judgment conventions also exist. For example, the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996 facilitates reciprocal recognition and enforcement of foreign judgments between six GCC countries, all of which are also B&R countries.¹³⁴ The Riyadh Arab Agreement for Judicial Cooperation 1983 helps free circulation of judgments among 20 Arabian countries, 12 of which are involved in the B&R.¹³⁵ Both work to make judgments generally enforceable among those signatories, subject to a few common conditions. However, these Conventions can hardly be made broadly applicable to other B&R countries, because some rules are largely Islamic law based, which are not common practice in countries with different culture, religion and tradition. Article 30(1) of the Riyadh Arab Agreement provides that recognition and enforcement would be declined if it could contradict the principles of Islamic law or the constitution and *ordre public* of the requested country. The principles of Islamic law in economic activities may be largely different from common practice in non-Islamic countries. For example, the principle of *riba* prevents charging interests for loans,¹³⁶ which may render most judgments enforcing banking loans unenforceable. There is also a record of the general excessive use of the public policy defence by GCC or Riyadh countries.¹³⁷

Bilateral agreements may help at some levels. For example, China has entered into 23 bilateral treaties in international judicial cooperation which facilitates mutual recognition and enforcement of civil judgments with B&R countries.¹³⁸ However, a clear drawback of bilateral agreements is diversity and lack of consistency. Although these agreements generally require the contracting states to recognise and enforce each other's civil judgments, subject to a few exemptions, the detailed requirements may differ between different treaties. Differences usually exist in the public policy defence. For example, in the China–Poland Treaty, recognition and enforcement of foreign judgments may be denied if the recognition and enforcement may infringe the principle of law or public policy of the requested

¹³⁴ Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE.

¹³⁵ Jordan, Bahrain, Saudi Arabia, Syria, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, UAE and Yemen.

¹³⁶ MN Siddiqi, *Riba: Bank Interest and the Rationale of Its Prohibition* (Jeddah, Saudi Arabia: Islamic Research and Training Institute, 2004) pp 37–38; N Bremer, “Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries” (2016) 37 *McGill Journal of Dispute Resolution* 37, 41.

¹³⁷ Bremer (n 136 above) p 42.

¹³⁸ Poland, Mongolia, Romania, Russia, Turkey, Ukraine, Belarus, Kazakhstan, Egypt, Kyrgyzstan, Tajikistan, Uzbekistan, Vietnam, Laos, Lithuania, Bulgaria, Thailand, Hungary, Singapore, Korea, UAE, Kuwait and Bosnia and Herzegovina.

country.¹³⁹ This refusal ground does not exist in the Treaty with Mongolia,¹⁴⁰ Romania,¹⁴¹ Bosnia and Herzegovina.¹⁴² The same defence is rephrased in China–Russia Treaty as that the application to recognise and enforce judgments may be refused if recognition and enforcement may harm sovereignty, security and public policy of the requested country.¹⁴³ The phrase of “sovereignty and security” in the China–Russia Treaty is more precise and is considerably narrower than the scope of “principle of law” in the China–Poland Treaty. In the China–Kuwait Treaty, recognition may be refused if the judgment is contrary to the law of the requested country, or is contrary to the constitutional principle, sovereignty, security and public policy.¹⁴⁴ It is unclear how “being contrary to the law of the requested country” is interpreted, ie, whether it should refer to the general principle of law or the specific legal rules.

Furthermore, different rules also exist as to the competence/jurisdiction defence. It is normal that the application to recognise and enforce foreign judgments may be refused if the requesting court has no jurisdiction pursuant to the law of the requested country, for example, the China–Romania Treaty provides that the court of origin should have jurisdiction “pursuant to the law of the requested country”.¹⁴⁵ That means if Chinese court is asked to enforce the Romanian judgments, the Romanian court should have jurisdiction under Chinese law, and *vice versa*. The similar rule is also provided in the China–Poland and Mongolia Treaties.¹⁴⁶ However, the China–Russia Treaty provides that the application can only be rejected on the competence ground if the requested court has exclusive jurisdiction over this dispute in its law.¹⁴⁷ This requirement is substantively narrower than the one provided in Poland, Romania and Mongolia treaties. Furthermore, special jurisdiction rules for the mutual recognition and enforcement purpose have been provided in some treaties,¹⁴⁸ which means that if the court of origin wants the judgment to be enforced in the other contracting state, it should take jurisdiction pursuant to the treaty rules instead of domestic jurisdiction rules.

¹³⁹ Agreement between the PRC and Poland on Legal Assistance in Civil and Criminal Matters 1987, art 20(6).

¹⁴⁰ Agreement between the PRC and Republic of Mongolia on Judicial Assistance in Civil and Criminal Matters 1989, art 18.

¹⁴¹ Agreement between the PRC and Romania on Judicial Assistance in Civil and Criminal Matters 1991, art 22.

¹⁴² Agreement between the PRC and Bosnia and Herzegovina on Judicial Assistance in Civil and Commercial Matters 2012, art 23.

¹⁴³ Agreement between the PRC and Russia in Civil and Criminal Matters 1992, art 20(5).

¹⁴⁴ Agreement between the PRC and Kuwait on Judicial Assistance in Civil and Commercial Matters 2007, art 21(3).

¹⁴⁵ China–Romania Treaty, art 22(2).

¹⁴⁶ China–Mongolia Treaty, art 18(2); China–Poland Treaty, art 20(1).

¹⁴⁷ Article 20(2).

¹⁴⁸ China–Bosnia and Herzegovina Treaty, art 24; China–Kuwait Treaty, arts 18 and 19.

The above example shows that although bilateral treaties may in principle remove the legal obstacles to enforce foreign judgments rendered by the court of a contracting state, multiple bilateral treaties would lead to complexity and confusion. They may also increase the compliance cost where the potential traders may have to spend extra efforts to learn those rules to truly predict the potential risk of entering into cross-border transactions with partners from multiple countries. The situation would become more complicated in the region with 69 countries, where the network of treaties between those countries could make a labyrinth for individuals and practitioners. Furthermore, some B&R countries, such as Thailand, have not entered into any international treaties facilitating enforcement of judgments.¹⁴⁹ For those countries, it would be difficult to take the first move to enter into such an agreement which is not traditionally accepted.

In cases where no treaty obligations exist, the only resort will be national law of the requested country. Unfortunately, national law on recognition and enforcement of foreign judgments is underdeveloped in most B&R countries. Some countries allow foreign judgments to be enforced in principle, subject to certain conditions, such as the court of origin should have jurisdiction, the judgment is final, due process is respected, the judgment is not irreconcilable with the local procedure, local judgments or other judgments already recognised and enforced in the requested country, and the judgment is not contrary to public policy of the requesting country.¹⁵⁰ However, this practice is not adopted by most B&R countries. In the absence of treaties, reciprocity remains an important precondition to enforce foreign judgments in many B&R countries.¹⁵¹ But the concept of reciprocity differs between countries. Some may adopt

¹⁴⁹ Allen and Overy Survey, 319.

¹⁵⁰ Armenia (Civil Procedure Code art 2476); Belgium (Private International Law Code art 25); Bulgaria (art 404 of the Code of Civil Procedure); Estonia Code of Civil Procedure ss 621–622; China Hong Kong, Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) s 4; Latvia (arts 636–6445 in the Civil Procedure Code); Lithuania (Code of Civil Procedure art 811); China Macau (Civil Procedure Code arts 1199 and 1200); Macedonia (Law on Private International Law; see T Deskoski, “New Macedonian Private International Law Act of 2007” (2008) X *Yearbook of Private International Law* 441, 458); New Zealand; Poland (Code of Civil Procedure arts 1145 ff); Singapore; Slovakia; South Africa.

¹⁵¹ Azerbaijan (see IBP Inc, *Azerbaijan: Business and Investment Opportunities Yearbook*) (Washington: International Business Publications, Vol 1, 2016) p 150; China (CPL, 281; Supreme Court CPL Interpretation art 544); Bangladesh Code of Civil Procedure ss 13 and 44; Bahrain (Civil and Commercial Procedure Law art 252); Belarus; Croatia; Hungary; Israel; Iraq; Jordan; Kazakhstan; Korea (art 217 of the Civil Procedure Act); Kuwait (art 199, Civil and Commercial Procedure Law); Malaysia; Moldova (Civil Procedure Code art 470); Oman (Civil and Commercial Procedure Law art 352); Pakistan (ss 13 and 44A of the Civil Procedure Code); Philippines; Qatar (Civil and Commercial Procedure Law art 383); Russia; Serbia; Saudi Arabia (art 11 KSA-EL); Slovenia; Ukraine; UAE.

de jure reciprocity;¹⁵² some assume reciprocity exists in all cases, unless proved otherwise;¹⁵³ other countries may still rely on *de facto* reciprocity to enforce judgments.¹⁵⁴

The law of some B&R countries is unclear in this point. For example, in Russia, the court may presume reciprocity unless proved otherwise, or require evidence to prove *de facto* reciprocity indeed exists.¹⁵⁵ Oman, on the other hand, would treat reciprocity not established if the law of the other country provides more restrictive terms to enforce foreign judgment.¹⁵⁶ In UAE, although the law has made the enforcement possible based on the reciprocity prerequisite, the Dubai *Court of Cassation* in practice provides very restrictive interpretation and makes reciprocity only possible by treaty.¹⁵⁷ The courts of other emirates, however, may interpret differently and the uncertainty exists.¹⁵⁸ In Vietnam, foreign judgments, in theory, can be enforced on the reciprocal basis, upon consulting the Ministry of Justice and the Ministry of Foreign Affairs, but practitioners are not aware of any successful cases.¹⁵⁹ And in Saudi Arabia, there is still debate on whether reciprocity can be established other than by treaty.¹⁶⁰ Foreign judgments cannot be enforced in Indonesia, Laos, Mongolia, Nepal, Tajikistan, Thailand, Turkmenistan and Uzbekistan in any circumstances and can only be used as evidence in the new trial of the same disputes in the local court.¹⁶¹

4. Improve Judicial Cooperation in the B&R Region

(a) International Approach

The current juridical cooperation in B&R countries is established in a piecemeal, inconsistent and unsystematic manner and needs improvement. The international approach is to fully utilise the existing international framework. The Hague Conference has adopted a large number of international conventions; some have received support from a large number of B&R countries.¹⁶² Indeed, some countries have not yet joined the Hague conventions, but the main reason usually is the lack of resources or the existence of other priorities, instead of

¹⁵² Article 252 of the Bahrain Civil and Commercial Procedures Act. Bremer (n 136 above) pp 43–45.

¹⁵³ Montenegro, Serbia. See Allen & Overy Survey, 240; 290.

¹⁵⁴ Such as Chinese legal practice. See Tang, Xiao and Huo (n 70 above). But post the commencement of B&R, China has relaxed its reciprocity requirements. See *Kolmar Group AG Case* (2016) Su Yi Xie Wai Ren No 3 and Nanning Declaration 2017 art 7. For more details, see Section 4.

¹⁵⁵ Allen and Overy Survey, 281.

¹⁵⁶ Bremer (n 136 above) p 52.

¹⁵⁷ Bremer (n 136 above) p 60; Allen & Overy Survey, 333.

¹⁵⁸ Bremer (n 136 above) p 60.

¹⁵⁹ Allen & Overy Survey, 341.

¹⁶⁰ Bremer (n 136 above) p 57.

¹⁶¹ Allen & Overy Survey, 179; 208; 239; 248; 317; 319; 326. Article 220 of the Economic Procedure Code of the Republic of Tajikistan.

¹⁶² Both the Hague Services Convention and Evidence Convention have ratified by 31 Contracting States from B&R countries. See the survey in Section 3(c).

substantive barriers, such as conflict with domestic law, foreign policy or public interest.¹⁶³ These barriers are not difficult to remove. Although with scarce resources governments can only care about those issues that are classified “priorities”, the government priority is likely to change according to the change of circumstances.¹⁶⁴ The more frequent and intensive cross-border relations that are supposed to be supported by the B&R initiative would likely to make cross-border judicial cooperation one of the priorities. It may generate governmental interest to join not only these popular judicial assistance conventions but also more recent initiatives on choice of court agreements and the future judgments projects.¹⁶⁵ Furthermore, although 30 B&R countries are not Hague Conference members, the increased opening-up brought by the B&R initiative may encourage them to become a member, or they still could sign individual judicial cooperation conventions as non-members.¹⁶⁶

The weakness is that the existing conventions are generally limited in scope and conservative in content. However, the Hague Conference is working hard to fill the existing gaps. For example, the Hague Conference is currently resuming the judgment project and is likely to adopt a more comprehensive convention governing judgment enforcements falling out of the scope of the 2005 Choice of Court Convention. The new judgment convention is expected to be completed by the mid of 2019, which will provide a new instrument to assist judicial cooperation in B&R countries.

(b) Bilateral Approach

¹⁶³ HCCH, “Synopsis of Responses to the Questionnaire of November 2013 Relating to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters”, August 2014, Doc Info No 2, May 2014, 11.

¹⁶⁴ The changing circumstances leading to the change of national policy and priority in international relation has been discussed in various law and development and international relation papers. See, for example, RM Czarny, *Sweden: From Neutrality to International Solidarity* (Springer, 2018) (discuss how the political and geopolitical transformations in Europe lead to the change of foreign policy of Sweden from neutrality to solidarity); D Todic and D Dimitrijevic, “Priority Goals in International Co-operation of the Republic of Serbia in the Field of Environment and Sustainable Development” (2014) 14 *International Environmental Agreements* 163 (discuss how EU integration of Serbia reshapes Serbia’s environmental priorities).

¹⁶⁵ There have been recent reports of Palestine and Malaysia reducing the level of involvement in B&R project primarily due to the concern of growing debt and political challenges of big infrastructure projects. See the critical report “Is China’s Belt and Road Working? A Progress Report from Eight Countries” *Nikkei Asian Review*, available at <https://asia.nikkei.com/Spotlight/Cover-Story/Is-China-s-Belt-and-Road-working-A-progress-report-from-eight-countries> (visited 17 November 2018). However, it does not suggest a failure of B&R, or these countries lose interests in the overall commercial opportunities it could provide. Even with challenges faced by big infrastructure projects, the B&R would still help improve the openness and cross-border interactions in the region. See, eg, “Belt and Road Initiative in Five Years”, available at <https://www.telegraph.co.uk/news/world/china-watch/business/belt-and-road-initiative-five-year-achievements/> (visited 22 November 2018) (provide data of B&R achievement by September 2018); Sarah Chan, “The Belt and Road Initiative: Implications for China and East Asian Economies” (2017) 35 *Copenhagen Journal of Asian Studies* 52 (provide data and analyse the impact of B&R initiative in the region).

¹⁶⁶ For example, Pakistan is not a member of the Hague Conference, but a contracting party of the Service Abroad Convention and Child Abduction Convention.

The second approach encourages countries to conclude more bilateral and mini-lateral judicial cooperation agreements. This would work particularly well in areas not covered by any international conventions or in areas where the individual state does not want to make commitment to unnecessary enlargement of cooperation or to the rest of the world.¹⁶⁷ Some developing countries may prefer to take a cautious approach by opening their doors to selected countries, which makes their judicial cooperation more under control.¹⁶⁸ However, bilateral agreements could not provide a comprehensive framework for the regional judicial cooperation and would not assist the grand B&R initiative to achieve its full potential. It would also be inefficient for countries to enter into too many bilateral conventions. The potential “conflict of treaties” problem will continue to exist. It is suggested that joining the existing international framework as the optimal option, and bilateral or mini-lateral agreements could be relied on to fill the gap of the international framework or to facilitate more special or close connections with specific countries.

(c) National Approach

Nothing prevents individual countries from updating and modernising their domestic law to facilitate cross-border judicial cooperation. Individual countries could adopt more comity and cooperation-oriented approach, by removing unnecessary barriers to apply foreign law, providing practical assistance to foreign proceedings, and providing more reasonable requirements in recognising and enforcing foreign judgments. In the absence of agreements at the international level, unilateral improvement of domestic law would act effectively to improve cross-border judicial cooperation at the region, even without collaboration of other countries. However, the quality, consistency and timeframe of domestic law reform usually cannot be guaranteed.

(d) Regional Approach

The best approach is the regional approach, which largely relies on the role of China. China plays a leading role as the coordinator and investor in the B&R instead of a supervision

¹⁶⁷ Many researchers notice the tradition of some countries to prefer bilateral rather than multilateral cooperation in international relationship. See T Webster, “Bilateral Regionalism: Paradoxes of East Asian Integration” (2007) 25 *Berkeley Journal of International Law* 434; E Nadelmann, “Unlandering Dirty Money Abroad” (1986) 18 *Inter-Am L Rev* 33, 74 (analysing why some states prefer bilateral to multilateral treaties in exchange of evidence); HL Buxbaum, “Territory, Territoriality, and the Resolution of Jurisdictional Conflict” (2009) 57 *Am J Comp L* 631, 672 (comments on the United States’ preference for bilateral and ad-hoc cooperation in anti-trust regulation).

¹⁶⁸ See VK Aggarwal, “Bilateral Trade Agreements in the Asia-Pacific”, in V Aggarwal and S Urata (eds), *Bilateral Trade Agreements in the Asia-Pacific* (New York: Routledge, 2006) Ch 1 (explains the bilateral trade agreements from the economic perspective).

power to harmonise the law.¹⁶⁹ The B&R initiative suggests that China intends to play as a rule-maker to lead the formation of international arrangement, instead of a rule-taker to simply comply with the existing arrangement.¹⁷⁰ However, it is unrealistic for China to lead the conclusion of the formal regional conventions to harmonise choice of law, jurisdiction, judicial assistance and enforcement of judgments rules. On the one hand, there is no institution in the B&R region to facilitate the regional harmonisation.¹⁷¹ On the other hand, the regional conventions may overlap with the existing international conventions and cause conflict and confusion. China would better lead in an indirect and informal way and may promote the regional judicial cooperation by playing as a role model, as a facilitator, as a dispute resolution centre and as a sign-poster.

As a role model, China could actively participate in the formal legislation in cross-border judicial cooperation by ratifying international conventions, concluding bilateral treaties or updating domestic law. As the hub of the B&R initiative, China's activity and cooperation may form an example and encourage other B&R countries to follow the similar path.¹⁷² China has already signed the Hague Choice of Court Convention in 2017 which shows a big step forward. Chinese Supreme Court has also announced the plan to conclude more bilateral or multilateral agreements with B&R countries to resolve the problem of conflict of jurisdiction and parallel proceedings.¹⁷³ Domestic judicial practice has demonstrated relaxation of some principles that used to act as barriers to judicial cooperation. For example, although reciprocity is still a precondition to enforce foreign judgments in China, Chinese courts are more ready to find reciprocity with foreign countries. In 2015, the Chinese Supreme Court suggests that China may proactively facilitate the formation of reciprocity with other B&R countries by offering judicial assistance to those countries first if those

¹⁶⁹ It has been observed by commentators that China intends to deepen economic and trade relationship with other Eurasian countries, but is reluctant to establish cooperative mechanism. M Suzuki, "A Rational Approach to the Study of International Relations in Asia" in M Suzuki and A Okada (eds), *Games of Conflict and Cooperation in Asia* (Springer: Tokyo, 2017) p 3.

¹⁷⁰ Chao Xi, "From Rule-Taker to Rule-Maker: China's Changing Roles in Global Banking Regulation" in F Weiss and A Kammel (eds), *The Changing Landscape of Global Financial Governance and the Role of Soft Law* (Leiden: Brill, 2015) 312 ff; HS Gao, "China's Ascent in Global Trade Governance" in C Deere-Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge: Cambridge University Press, 2011) p 153 ff; S Kennedy and S Cheng (eds), *From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance* (2012), available at <https://www.ictsd.org/sites/default/files/research/2012/10/the-growing-role-of-chinese-in-global-governance.pdf> (visited 24 Jan 2019).

¹⁷¹ See the comparison between B&R and EU, *supra* Section 2(a).

¹⁷² China has been named the role model for many Asia and Africa countries to follow. See B Simfendorfer, *The New Silk Road* (New York: Palgrave Macmillan, 2011) p 92; Y Wei and YN Balasubramanyam, *Foreign Direct Investment: Six Country Case Studies* (Cheltenham: EEL, 2004) p 55.

¹⁷³ SPC, "Several Opinion on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts" (SPC Belt and Road Opinions), [2015] Fa No 9 (最高人民法院关于人民法院为“一带一路”建设提供司法服务和保障的若干意见) art 6.

countries would promise to act reciprocally in the future.¹⁷⁴ In 2016, Nanjing Intermediate People's Court recognised and enforced Singaporean judgments based on the fact that Singaporean Court had enforced a Chinese judgment in one occasion.¹⁷⁵ In 2017, Wuhan Intermediate Court recognised the existence of reciprocity between the United States and China for the first time, given the US courts have enforced Chinese judgments in the past.¹⁷⁶ This judgment shows a laudable attitude towards a more friendly and cooperative judicial cooperative scheme.

As a facilitator, China could lead fostering mutual understanding and common interest and principles between B&R countries which would indirectly contribute to the collaborative judicial practice without formal legislative process. For example, a joint declaration was approved at the second China–ASEAN Justice Forum in 2017 (Nanning Declaration), which recognised the necessity to reduce parallel proceedings and to mutually recognise and enforce judgments.¹⁷⁷ The Nanning Declaration also encourages flexible interpretation of domestic law to recognise the presumed reciprocity principle. It suggests that in the absence of precedents that refused to enforce judgments of the requesting countries based on the lack of reciprocity, it is presumed that reciprocal relationship between the two countries exists. The presumed reciprocity doctrine would largely remove the conventional deadlock of the reciprocity doctrine and works in a positive manner to improve enforcement of foreign judgments in the region without the change of domestic law. Chinese Supreme Court also suggests draft sample judicial cooperation agreements to help B&R countries to enter into cooperation.¹⁷⁸

As a dispute resolution centre, China has established two International Commerce Courts (CICC) in Shenzhen and Xi'an, respectively.¹⁷⁹ The CICC are specialised tribunals to adjudicate important foreign-related commercial disputes to serve the objective and purpose of the B&R.¹⁸⁰ Simplified rules are adopted in terms of proving foreign law,¹⁸¹ admitting

¹⁷⁴ SPC Belt and Road Opinions art 6.

¹⁷⁵ *Kolmar Group AG Case* (2016) Su Yi Xie Wai Ren No 3. The Singaporean case is *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.

¹⁷⁶ *LIU Li v TAO Li and Tong Wu*, Hubei Province Wuhan Intermediate People's Court, (2015) E Wuhan Zhong Minshang Wai Chu Zi No 000026 (申请人刘利与被申请人陶莉、童武申请承认和执行外国法院民事判决一案民事裁定书, 湖北省武汉市中级人民法院, (2015)鄂武汉中民商外初字第 00026 号).

¹⁷⁷ Article 7 of the Nanning Declaration.

¹⁷⁸ SPC Belt and Road Opinions art 6.

¹⁷⁹ SPC, "Regulations on Several Issues concerning Establishment of China International Commerce Court", Fa Shi [2018] 11 (最高人民法院关于设立国际商事法庭若干问题的规定, 法释〔2018〕11号). Strictly speaking, these "courts" are tribunals of the SPC, but since the official website calls them "courts", this article uses the official translation of the name.

¹⁸⁰ See the Preface of the SPC "CICC Regulations", *Ibid*.

foreign evidence¹⁸² and using electronic filing system¹⁸³ to provide convenience to the parties. The geographic locations of the two courts also demonstrate the Chinese ambition: Shenzhen locates in Guangdong–Hong Kong–Macau Greater Bay Area and acts as the pivot of maritime silk road. Xi’an has intensive commercial interactions with Central and Eastern Europe. This is an important leap towards becoming an international commercial litigation centre to provide certainty and reliability to private parties in B&R countries. China’s increasingly active and supportive role in international judicial cooperation treaties, including signing the Hague Choice of Court Agreement, updating domestic law, fostering Nanning Declaration would all support the CICC and cross-border effects of CICC proceedings in other B&R countries. However, in order to become a regional dispute resolution centre, China need to continuously improve its law and judicial practice, and may need to tackle the language barriers to some foreign parties, for example, by considering using English as an acceptable language in trial.¹⁸⁴

As a sign-poster, China could provide comprehensive database on the local law of B&R countries, which would work as a sign-post for individuals and companies to predict the legal consequences of their cross-border activities. In 2017, All China Lawyers’ Association launched the *Legal Environmental Report on the Belt and Road Countries*.¹⁸⁵ This Report covers comprehensive information on the legal system and environment of 43 B&R countries, including the law and regulations on investment, trade, labour and employment, environmental protection, intellectual property rights and dispute resolution.

The regional approach is consistent with the nature and characteristics of the B&R initiative, informal, flexible and China-led. It is recognised that the effect of this approach depends on the response of other B&R countries. It is too early to provide empirical data on the impact of the regional approach. However, there have already been some positive responses to the Chinese leadership, from Singapore’s enforcement of Chinese judgments to the ASEAN countries’ informal declaration to relax domestic restrictions to enforce foreign judgments. Furthermore, as B&R initiative, the regional approach focuses on mutual benefits and gives China the role of facilitating these benefits. Other countries’ act is passive and voluntary,

¹⁸¹ *Ibid.*, foreign law can be proved by multiple means, including providing the foreign law and its interpretation by the parties, Chinese or foreign experts, foreign law research institutes, international commercial experts, central administration of countries having judicial assistance agreement with China, Chinese embassy in the foreign country, foreign embassy in China and other reasonable means: Article 8.

¹⁸² Evidence written in English does not need Chinese translation: Article 9.

¹⁸³ Article 18.

¹⁸⁴ Germany and Belgium, for example, use English in international courts, in order to become the dispute resolution centre in EU.

¹⁸⁵ Beijing: Peking University Press, 1st ed., 2017.

which is more easily acceptable by participating countries. While some political concerns on China's influence remain,¹⁸⁶ the nature of judicial cooperation in civil and commercial matters mainly relates to private rights and individuals' economic interests and will not generate significant political worries.

5. Conclusion

It is concluded that the success of B&R depends not only on the perspective of countries involved but also on the motivation and incentives of individuals and companies who directly utilise the infrastructures and participate in investment, trade, transactions and finance facilitated by the B&R initiative. Protection of individual's rights and ensuring access to justice in cross-border civil and commercial matters is inevitable to remove legal obstacles to individuals. A comprehensive judicial cooperation framework does not exist in the region. Judicial cooperation between B&R countries is achieved partially through international treaties, partially by bilateral agreements between two individual countries and mostly through unilateral domestic law. The *status quo*, therefore, is extremely complicated, largely piecemealed and hardly effective and predictable.

The situation may be improved by encouraging B&R countries to utilise existing international judicial cooperation conventions, enter into more bilateral agreements and modernise domestic law. However, all these approaches have their pros and cons. The best approach proposed by this article is the regional approach informally led by China. At the current stage, many B&R countries are involved in a more passive manner and waiting to see what might happen next. It is also understood that many countries in the Central and West Asia would not be an active investor though they may benefit from the initiative by other means.¹⁸⁷ It is China that has initiated this ambitious project and it would be China to take the pioneering role to promote judicial cooperation and assist the smooth progress of the project. Although China may not have to lead the establishment of regional judicial cooperation institutions, China at least could help to ease practice by improving its own legal practice to set up examples for other Eurasian countries, encouraging mutual understanding and adopting common principles through informal declarations or memorandum, improving the functioning of the CICC's and providing information and technical supports.

¹⁸⁶ See works referred to in note 165.

¹⁸⁷ Daniel Linotte, "Poverty in Central Asia" (2002) 13 *Helsinki Monitor* 167; Richard Pomfret, "The Economic Future of Central Asia" (2012) 19 *Brown Journal of World Affairs* 59; Meena Roy, "Afghanistan and the Belt and Road Initiative: Hope, Scope, and Challenges" (2017) 24 *Asia Policy* 103.

