

Seoul IDRC Lecture Series: “Arbitration in the Time of One Belt One Road”

By Jaemin Jeon, SeungMin Lee and Arie Eernisse

Sarah Grimmer, the Secretary-General of the Hong Kong International Arbitration Centre (“HKIAC”), delivered a lecture entitled “Arbitration in the Time of One Belt One Road” at the Seoul International Dispute Resolution Center (“Seoul IDRC”) on 28 April 2017. The event was co-hosted by Seoul IDRC, the Korean Commercial Arbitration Board (“KCAB”) and the Korean Council for International Arbitration, and was sponsored by Shin & Kim, Herbert Smith Freehills and HK45. The lecture was followed by a lively discussion by eminent panel members Seungwha Chang, professor of law at Seoul University; Doo-Sik Kim, senior partner and head of international disputes team at Shin & Kim; and Joongi Kim, professor of law at Yonsei University.

The event shed light on the potential impact on international arbitration of the One Belt One Road (“OBOR”) initiative – China’s massive overseas investment drive unveiled in late 2013 by President Xi Jinping.

OBOR’s far-reaching economic impact

Secretary-General Grimmer began her lecture with a description of OBOR and its potentially enormous impact on the global economy in general. To summarize some of her key points, she explained that OBOR’s geographical reach stretches well beyond the ancient Silk Road trade routes to which the initiative’s name alludes and includes both land and maritime routes that connect vast areas of Asia, Europe and Africa. While the plan was launched with 65 jurisdictions in mind, more will undoubtedly be added to the list.

Broadly speaking, OBOR will encourage Chinese outbound investment, most often through loan financing and large-scale infrastructure projects that target resource and energy development. OBOR will also improve China’s access to resources in markets abroad, increase demand for its exports, help to internationalize the China’s Renminbi currency and, importantly, secure suppliers for energy resources through the development of new pipe lines in Central Asia and Eastern Europe. At the same time, OBOR is expected to help spur economic growth in developing countries.

China has established the so-called “Silk Road Fund,” and it has now received US\$40 billion from various sources. Funding will also come from, among others, the Asia Infrastructure Investment Bank (“AIIB”), a multilateral development bank launched in 2015 that includes Korea among its members and reportedly has capital of US\$100 billion. Many capital-intensive projects are currently underway.

Arbitration-related challenges arising from OBOR

Secretary-General Grimmer emphasized that the jurisdictions within OBOR’s reach include a diverse array of legal traditions: common law, civil law, Islamic law and hybrid systems of law. In addition, OBOR projects are underpinned by a diverse array of contracts: guarantee agreements, shareholder agreements, loan agreements, financial agreements, government-to-government bond agreements and so on. The disputes that arise among OBOR project partners and others

affected by such projects will be large and complex and will often involve conflicting national interests with a strong public element. While there will be an “absolute demand” for international arbitration across Asia in cities like Hong Kong, Seoul and Singapore, if certain arbitration hubs are better at innovating and accommodating the needs of arbitration parties than others, they will improve and increase their case load at the expense of the slower movers.

To rise to the challenges to come, national legislatures will have to implement strong legislation that keeps up with the times and arbitral institutions will need to adapt by, for example, (i) creating innovative, cohesive and comprehensive rules related to multi-party and multi-contract arbitration and consolidation, (ii) hiring linguistically talented staff to help administer cases in languages other than English, (iii) maintaining a strong pool of bilingual arbitrators. As Ms. Grimmer pointed out, the need for such adaptation will be particularly strong in Hong Kong, considering all of the China-related arbitration proceedings that are seated there and the potential increase in the volume of disputes that will arise from OBOR projects.

Given that Chinese entities, whether private or state-owned, will usually be parties to OBOR-related contracts, enforcement of awards in China will also naturally be a concern for non-Chinese parties. Ms. Grimmer struck an optimistic tone, explaining that the situation is “improving.” However, issues remain with delay and uncertainty among parties awaiting a final decision and being unsure of whether a case has been sent up from an intermediate court to the Supreme People’s Court. Another issue is state immunity for state-owned enterprises, and Hong Kong courts are currently addressing such issues in closely watched cases.

On the investment arbitration front, Ms. Grimmer

stressed the importance of monitoring the evolution of China’s treaty regime. In the OBOR project-driven climate, China will further expand and modernize its network of bilateral investment treaties (“BITs”), multilateral investment treaties and free trade agreements. Many of China’s investment agreements are first generation treaties negotiated before 1998 that have protectionist elements and do not provide for a broad right to arbitrate. As more and more OBOR projects come on board and China seeks to replace outdated treaties with new ones, tricky issues of succession and jurisdiction will have to be answered.

OBOR’s impact on South Korea in particular: the panelists’ view

Secretary-General Grimmer’s lecture was followed by commentary on the potential impact of OBOR on Korea in particular from the three panelists introduced above.

Mr. Doo-Sik Kim expressed the view that OBOR will tend to benefit Chinese companies more than Korean companies, especially with the current souring of bilateral relations due to political concerns. For Korean companies to gain from OBOR, the normalization of Korean-Chinese relations will be essential, because most of the international projects that Korean companies will be involved in are likely to be backed by Chinese funds and ultimately controlled by the government of China regardless of where such projects take place.

Professor Joongi Kim said that the influence of OBOR will ultimately result in a high tide just for HKIAC or a rising tide that will benefit other institutions as well. For the rising tide scenario to occur, he stressed that KCAB must try to develop some of the innovations discussed by Secretary-General Grimmer and also put in place mechanisms to handle investment arbitration cases. Meanwhile, Korea may be able to attract Chinese investors to incorporate

in Korea to benefit from Korea's relatively modern BITs with various countries (instead of China's first generation BITs with those countries).

Professor Seungwha Chang emphasized that developing countries stand to gain a lot from OBOR, but they will first need to develop their legal infrastructure and Korean legal practitioners can engage in capacity building for civil law-based OBOR countries. Audience member Joao Ribeiro, head of the UNCITRAL Regional Centre for Asia and the Pacific, reported that such efforts are already under way and encouraged further engagement.

KCAB's China connection

In line with expectations, the statistics show that Chinese parties have a substantial impact on the KCAB's overall business. A detailed breakdown of KCAB's international disputes involving Chinese parties can be seen in the table below. Although the total number of the KCAB's international disputes involving a Chinese party has decreased somewhat in the last couple of years, in 2016, roughly one in five of KCAB's international cases involved a Chinese party

(12 of 62 total cases). In addition, Korean law firms are receiving more and more inquiries regarding potential cases related to China.

Types of KCAB International Disputes Involving a Party from China

	2012	2013	2014	2015	2016
Payment	2	8	9	4	4
Contractual Interpretation	2		1	5	
Delayed or Cancelled Shipment	6	2	4	2	3
Product Quality	5	19	5	1	3
Other	2				2
Total	17	29	19	12	12

Recognizing the importance of OBOR and the potential opportunities it brings for Korea, KCAB has invested significant effort into expanding its presence in the China market in recent years. For example, KCAB opened a Shanghai Office in December 2016 and conducted three roadshows in China in the same year. KCAB plans to continue devoting efforts to the China market in 2017 and in the years to come.



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Jae Min Jeon is a partner at Shin & Kim and member of the firm's International Dispute Resolution Practice Group. Mr Jeon has represented major corporate clients in international commercial arbitration cases and multi-jurisdictional litigations arising out of cross-border M&A transactions and in-bound and outbound investments.

Prior to joining Shin & Kim, Mr Jeon served as a public-service judge advocate at the Ministry of Justice for three years, representing the Korean government in various types of civil and administrative court proceedings.

Mr Jeon is a graduate of Seoul National University and a member of the bars of Korea, New York and California. Mr Jeon also completed an LLM at Stanford University and worked as an international associate in the Hong Kong office of Linklaters. He is a native Korean speaker and is fluent in English.



SeungMin Lee
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SeungMin Lee is a partner at Shin & Kim and a member of the firm's International Dispute Resolution Practice Group. Ms Lee has provided advocacy for Shin & Kim's major clients in arbitration cases under the rules of ICC, LCIA, SIAC, HKIAC, KCAB and UNCITRAL.

Ms Lee is the Regional Ambassador for Korea to the HK 45 of the HKIAC and Regional Representative for Korea to the Young International Arbitration Group of the LCIA. Ms Lee is also a member of the Korean Advisory Board of the International Bar Association (IBA) and an active member of the Korean Bar Association. Ms Lee is regular contributor to various international-arbitration-related publications.

In the past, Ms Lee has also served as the National Representative for South Korea of the Young Lawyer's Committee of the IBA. Ms Lee was seconded by Shin & Kim to serve as a registered foreign lawyer at Oon & Bazul LLP in Singapore in 2016 and as counsel to the LCIA Secretariat in 2010.

A graduate of Seoul National University and member of the Korean bar, Ms Lee recently completed an LLM at the National University of Singapore. She speaks native Korean and is fluent in English.



Arie Eernisse
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Arie Eernisse is a foreign attorney in the international dispute resolution practice group at Shin & Kim. Mr Eernisse has advocated on behalf of a diverse array of Korean and foreign clients in arbitration matters governed by the rules of the KCAB, ICC, HKIAC, SIAC and other institutions. Mr Eernisse has been involved in disputes about post-M&A issues, sale of goods, resource exploration, construction, financial investments, intellectual property, military and defence procurement, tortious conduct and more. He also has experience in international mediation.

Mr Eernisse is actively involved in the Korean international arbitration community. He has contributed to various publications on arbitration in Korea, has participated in a lead role in a KCAB arbitration simulation video project and has acted as a moot court arbitrator and coach for pre-Vis and FDI Moot competitions. He won the first runner-up prize in the 2016 Young SIAC essay competition.

Prior to joining Shin & Kim, Mr Eernisse served as a law clerk to a federal judge at the US Court of International Trade in New York City. At Duke University School of Law, he was a staff editor of the Duke Journal of Comparative & International Law and was co-chair of both the Business Law Society and the International Law Society.

