

C L I F F O R D

C H A N C E



**BELT AND ROAD
DISPUTE RESOLUTION
FROM A CHINESE
PERSPECTIVE**



— THOUGHT LEADERSHIP

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WHEN GOOD PROJECTS GO BAD – DISPUTE RESOLUTION ALONG THE BELT AND ROAD

Since its launch in 2013, the Belt and Road Initiative (BRI) has driven billions of dollars' worth of ambitious infrastructure projects across nearly seventy countries. Chinese companies, in particular state-owned enterprises investing abroad, consider the potential rewards to be worth the risks – risks that include political unrest, project delays, cost overruns and project abandonment. BRI encompasses countries and territories with significant political and economic risks, and the types of projects (in particular, their large scale and the deep involvement of government or state-owned enterprises of the host state) further enhance the risks.

Chinese companies are giving increasing thought as to how best to protect their interests as BRI gathers pace. Previously, Chinese companies were mainly concerned with defending potential claims from foreign investors in relation to inbound investments.

However, the increase in the level and scope of outbound investment (especially in light of BRI) has led Chinese companies to give careful thought to various dispute resolution alternatives as they make their investments.

The arbitration highway

In the early years, Chinese companies often did not pay close attention to dispute resolution clauses in their offshore investment or construction contracts. Many simply accepted what their foreign business partners proposed – usually arbitration or court proceedings in the foreign company's home jurisdiction.

Once Chinese outbound investors gained more experience in cross-border dispute resolution, they learned how better to exploit their negotiating power. As such, Chinese outbound investors and contractors now seek to retain more control over where the dispute should be fought if offshore projects go wrong. Unsurprisingly, commercial arbitration is the most popular choice for Chinese companies investing in BRI jurisdictions, thanks to the global enforcement mechanism provided for under the New York Convention. Major arbitration institutions (such as HKIAC and ICC) have launched special commissions and committees to discuss how best to capture opportunities arising from BRI.

Although Chinese companies often begin negotiations by proposing PRC onshore arbitration (for example, at CIETAC, SHIAC or BAC), they are now generally receptive to the idea of offshore arbitration in Hong Kong and Singapore. This is reflected by the caseload figures of HKIAC and SIAC. In both 2015 and 2016, Mainland China was ranked as the second largest source of parties (behind Hong Kong) at HKIAC, and the third largest (behind Singapore and India) at SIAC. When foreign counterparties propose non-Asian seats, Chinese companies try to push back more frequently than before, especially if they are in a strong bargaining position, in order to take advantage of the geographical and cultural proximity.

Similarly, the Chinese government and Chinese investors have gradually altered their approach towards investor-state disputes. The Chinese government used to tend to deal with foreign investors' claims through amicable negotiation or diplomatic communications, but in a recent case lodged by a Korean investor (Ansung Housing Co., Ltd), the PRC government for the first time proactively defended itself, and successfully convinced the tribunal to dismiss the case in March 2017.

On the investor side, Chinese companies were previously perceived as reluctant to sue foreign governments (being discouraged by the PRC government from doing so) and preferred to resolve disputes with foreign governments with assistance from the PRC government. Nonetheless, in the past few years, Chinese investors (including a few state-owned enterprises) have started to bring treaty claims to seek to recover losses

in relation to outbound investments. This trend has also driven Chinese arbitration institutions to explore opportunities in this sphere. Notably, in September 2017, CIETAC released its 'Rules on International Investment Disputes,' which were stated by CIETAC to "adapt to the implementation of the Belt and Road Initiative" and to support outbound Chinese investment.

The litigation freeway

Notwithstanding the popularity of commercial arbitration, the Chinese judiciary has not ignored that more traditional form of dispute resolution – litigation.

Traditionally, PRC courts were seen as relatively conservative in enforcing foreign judgments. While the PRC Civil Procedure Law permits enforcement of foreign judgments based on either multinational or bilateral treaties, or the principle of reciprocity, the PRC courts had hardly ever enforced judgments from a jurisdiction which did not have a bilateral enforcement treaty with the PRC.

In June 2015, there was a move away from this position when the PRC Supreme People's Court (SPC) published an opinion on judicial support for the Belt and Road Initiative which, among other things, stated that PRC Courts would take proactive steps to promote enforcement of foreign judgments based on reciprocity. The opinion even went so far as to say that PRC Courts may consider making the first move in providing judicial assistance to parties from countries with which the PRC does not yet have a judicial assistance treaty in order to establish a relationship of reciprocity.

This positive move was soon reflected in judicial practices. In December 2016, the Nanjing Intermediate Court enforced a

Singapore court judgment based on the principle of reciprocity, taking into account that the Singapore High Court had previously enforced a PRC court judgment. This case was included in the second set of Belt and Road-related model cases published by the SPC, which commented that this decision "will strongly promote judicial assistance practices as regards recognition and enforcement of civil and commercial judgments among Belt and Road countries." Then, in June 2017, the Wuhan Intermediate Court also applied the principle of reciprocity to enforce a California judgment.

It is also notable that in September 2017, the PRC signed the Hague Convention on Choice of Court Agreements, which provides an international framework for the mutual recognition and enforcement of court judgements. While China has not yet ratified the Hague Convention and it is therefore not yet binding on the PRC, the PRC Ministry of Foreign Affairs has indicated that it intends to make the Hague Convention binding as soon as possible (to date, the Hague Convention has been ratified by all EU Member States (excluding Denmark), Mexico and Singapore).

These developments seem designed to facilitate the enforcement of Chinese court judgments in other jurisdictions, in particular along the Belt and Road. Earlier this year, it was reported that the SPC would set up three international commercial courts – in Beijing, Xi'an and Shenzhen – dedicated to dealing with Belt and Road disputes. It remains to be seen what model these international commercial courts will adopt. For example, whether they will engage non-Chinese judges in the same way as the Singapore International Commercial Court engages judges from outside Singapore, how they will function in practice and what types of disputes they will target.

What's next?

With Chinese companies increasingly exploiting the opportunities offered by BRI, the most appropriate form of dispute resolution mechanism is being given active consideration in boardrooms across the PRC. Chinese negotiators are now more savvy about issues such as the relative merits of arbitration compared with litigation and the choice of arbitral seats.

In addition, Chinese courts are losing some of their traditional reserve about enforcing foreign judgments, and there are policy initiatives afoot to ease the recognition and enforcement of court decisions across Belt and Road countries. It may take some years for disputes to play out, but Chinese government and companies are putting in place the mechanisms necessary to smooth the path for cross-border dispute resolution in Belt and Road projects.



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