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**ENGLISH LAW AND
INTERNATIONAL
ARBITRATION FOR
CHINA'S BELT
AND ROAD**



— THOUGHT LEADERSHIP

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Belt and Road Initiative (BRI) projects involve complex contractual arrangements with numerous parties including investors, financiers, consultants and advisers, construction contractors and government or state-owned enterprises. Many projects are both politically and technically challenging. Investors potentially face political instability, project delays, cost overruns and possibly, in the worst case, even project abandonment. With a myriad of different legal and regulatory systems potentially involved in cross-border infrastructure projects, the risks of disputes arising are real.

What are the benefits of using English law for BRI transactions?

For historical and practical reasons, English law is widely used in international transactions across Asia, Africa, the Middle East and Europe. A combination of language, familiarity and acceptability have resulted in English law dominating cross-border investments and projects.

Freedom of contract and parties' intention

English law respects the commercial intention of the parties and enables flexibility when dealing with the developing needs of business such as new technology or novel concepts or structures. The principle of freedom of contract under English law allows parties to agree to whatever terms they want on their transactions, giving effect to what the parties have written in the contractual documentation. This provides certainty for businesses to agree terms and requires strict

compliance. There is no general principle of 'good faith', common in other legal systems, which can override the intentions of the parties.

Risk allocation in multi-party projects

English law has evolved over the last 50 years to enable sophisticated contractual arrangements and, importantly, risk allocation between multiple and diverse parties, including the taking of security over many different types of assets. The certainty which this brings means that international banks are able to facilitate sustainable long-term projects and allow other investors to successfully refinance projects and recycle their capital for use in new ventures.

Market standard documentation

The pre-eminence of London as a centre for international finance has led to the development of market standard, Loan Market Association (LMA) documentation. This enables agreements for

complex projects to be completed efficiently and the inter-creditor requirements of different tiers of creditor to be accommodated without continually re-inventing the wheel. London is also a leading proponent for the development of standard construction and PPP models enabling competitive capital market funding and resulting in the lowest cost of capital for projects.

Consistency and certainty

The use of English law as the governing law across all the contractual arrangements for a project, including the construction contracts, engineering and procurement contracts and financing arrangements, provides synergies and certainty; and where projects fail, the enforcement of security and guarantee arrangements. Since many project contracts will be written in English, the use of English law will reduce the risk of ambiguities in interpretation.

Legal expertise along the Belt and Road

International law firms with extensive experience in complex cross-border investments and infrastructure projects have on the ground experts across China and Asia, particularly in hubs such as Singapore and Hong Kong, meaning that English law advice is readily available. For projects in the China-Pakistan Economic Corridor (CPEC), Dubai is conveniently located and is home to a number of international law firms. And most contractors, engineers, consultants and

financial institutions have an in-house English law capability.

International Arbitration

Neutral forum

Arbitration has long been favoured by commercial parties and financial institutions globally as offering a more neutral forum than national courts for the settling of disputes. International arbitration allows the parties to choose an arbitration forum in a third country rather than submitting the dispute to the legal system and courts of one of the parties.

Selection of arbitrators with relevant experience

International arbitration allows the parties to disputes involving large, complex infrastructure projects to select arbitrators from amongst experts in the appropriate field. Each party can nominate an arbitrator to the panel, with a neutral chairperson. This may be preferable to the mandatory assignment of judges by domestic courts, although this practice could effectively result in a relatively small number of expert independent arbitrators operating under independent non-governmental arbitral institutions resolving the majority of disputes for a particular type of project.

International arbitration hubs along the Belt and Road

Chinese companies are generally receptive to the idea of offshore arbitration in Hong Kong and Singapore. This is reflected in the caseload figures of the

Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (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.

In Hong Kong, the HKIAC, ICC and CIETAC Hong Kong have extensive experience administering arbitrations involving parties from BRI countries in cross-border infrastructure, construction, investment and commercial disputes. In early 2018, the HKIAC launched a BRI Programme to support parties carrying out BRI projects, whilst the ICC launched its BRI Initiative. More recently, Hong Kong became the first jurisdiction to enter into an assistance arrangement with China which will allow parties to apply to Chinese and Hong Kong courts for interim relief to support arbitrations in the two jurisdictions. These developments make Hong Kong an international arbitration venue of choice for parties to BRI projects.

Projects in countries further away from the hubs of Singapore and Hong Kong may prefer to choose more traditional venues such as London, Paris, Zurich, Geneva, Stockholm or New York.

LCIA arbitration

The London Court of International Arbitration (LCIA) is a convenient and well-established hub for dispute resolution for Western hub BRI countries. LCIA shares many of the advantages of HKIAC and SIAC, with which Chinese investors are familiar. Knowledge of the underlying jurisdictions and trusted procedures, makes LCIA an ideal choice.

Confidentiality

Confidentiality is often an important factor for commercial parties involved in high profile projects; arbitration better enables the dispute and its outcome to remain private.

Enforceability of awards

The judgments of foreign national courts can be difficult to enforce through the courts of other jurisdictions. Contrastingly arbitration decisions are enforceable as long as that jurisdiction is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. More than 150 countries have signed up to the Convention.

Support for international arbitration in China

International arbitration is increasingly supported in China with the establishment of the Shenzhen Court of International Arbitration in January 2018 and

the setting up by the Supreme People's Court (SPC) of two international commercial courts in Shenzhen and Xi'an, known collectively as the China International Commercial Court (CICC). The stated intention is to support the resolution of commercial disputes on Belt and Road projects through mediation and arbitration. It is not yet clear whether these initiatives will be more broadly accepted by international parties as neutral venues and the more established arbitral institutions such as HKIAC, SIAC, ICC and LCIA are perhaps more likely to benefit in the short term from growth related to Belt and Road dispute resolution.

Investor disputes resolution

On the investor side, Chinese companies have preferred to resolve disputes with foreign governments with assistance from the PRC government, but in recent 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. In September 2018, CIETAC released its 'Rules on International Investment Disputes', to "adapt to the implementation of the Belt and Road Initiative" and to support outbound Chinese investment.



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