

NEGOTIATING ROADBLOCKS? RESOLVING DISPUTES ON THE BELT AND ROAD

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Legal Briefings - By **Justin D'Agostino and Briana Young**

The Belt and Road Initiative, China's ambitious international development strategy, is already increasing trade and stimulating economic growth across Asia and beyond.

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Comprising two main components – the land-based "Silk Road Economic Belt" and the oceangoing "Maritime Silk Road" – the US\$900 billion Belt and Road Initiative spans more than 60 countries and regions, stretching from Asia to Europe via Southeast Asia, South Asia, Central Asia, West Asia and the Middle East. Investment on this scale, particularly when focused on complex cross-border infrastructure, is bound to generate disputes. The question now, as Belt and Road construction and investment gathers momentum, is how dispute resolution linked to this initiative will be balanced between the different methods and providers available, and the extent to which a new model, of "dispute resolution with Chinese characteristics", will be utilised.

A US\$900 BILLION INITIATIVE

Launched in 2013, Belt and Road celebrates its fifth birthday this year. It is generating investment in roads, railways, ports and other facilities, on a scale not seen since the US Marshall Plan re-built Europe after World War II.

Belt and Road looks certain to be the single largest driver of global trade and investment over the next decade. China Development Bank alone has announced allocations of US\$890 billion to fund almost a thousand projects.

Chinese government sources indicate that Chinese firms' M&A activity increased 47% in Belt and Road countries during 2017, contrasting sharply with a 13% decline in deals outside the region.¹ Recently agreed deals include the US\$13 billion Malaysian East Coast Rail Link and a US\$105 million Thai rail contract. The initiative has also created, and will continue to create valuable opportunities for Chinese investors, as well as non-Chinese contractors, financiers and government authorities.

Inevitably, a construction and infrastructure initiative on this scale will generate disputes. Although most Belt and Road projects are still in their early stages, there is evidence that a number have already encountered roadblocks.

Plans for a Chinese-built refinery in Myanmar were shelved in late 2017, after the US\$3 billion project failed to obtain financing. A US\$14 billion dam project in Pakistan was suspended, after the Chinese government allegedly requested an ownership stake and the host refused on grounds of national interest. A proposed China-Laos railway link has suffered a number of setbacks, and Tanzania is reportedly renegotiating a billion-dollar port project with its Chinese and Omani investors.

Complex projects generate complex disagreements. Claims arising from major projects are generally expensive and time-consuming, diverting attention and resource from the projects themselves. More importantly, disputes threaten commercial relationships, often jeopardising the project itself. It is critical that these disputes be resolved quickly, efficiently, and effectively, from both the legal and commercial standpoints.

So far, so obvious. The question occupying dealmakers, policymakers and lawyers is: how to achieve it?

It seems that everyone along the Belt and Road has a view. Given the likely number and quantum of Belt and Road disputes, providers of dispute resolution services have been quick to throw their hats into the ring, emphasising their experience of complex commercial and investment cases alike. Will one achieve dominance, or is there space for a range of courts and institutions to help disputing parties get back on track?

OVER, UNDER OR THROUGH? THE PROS AND CONS OF AN ADVERSARIAL PROCESS

Most Belt and Road disputes will be cross-border. Many will involve at least one Chinese party. Counterparties' legal systems will range from highly sophisticated to largely undeveloped, with varying degrees of political influence. Quantum could be calculated in billions, and there will be inherent political sensitivities. It is essential to find an effective way of resolving differences as they arise. But for disputes so complicated and varied, is there a "one size fits all" method of resolution?

ARBITRATION

For cross-border disputes, international arbitration is the mechanism of choice. Alongside confidentiality and flexibility, it is the ease of enforcement that drives commercial parties to arbitrate. More than 150 states are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.² The Convention establishes a regime for quick and easy enforcement, without re-litigating the dispute on its merits. Enforcing a foreign arbitral award under the Convention is significantly easier than enforcing a court judgment abroad. Arbitral awards are also much more difficult to appeal or overturn.

Arbitration is well-known and widely-used throughout the international business community. This is particularly the case in China-related transactions, where foreign parties are reluctant to submit to the Chinese courts, and vice versa. By contrast, both Chinese and non-Chinese parties are usually comfortable with the arbitral process. As a result, most cross-border deals provide for disputes to be arbitrated. This is especially true in the construction, infrastructure and maritime sectors, which are the principal focus of Belt and Road.

For disputes so complicated and varied, is there a "one size fits all" solution?

Arbitration institutions, including the Court of Arbitration of the International Chamber of Commerce (**ICC**), Singapore International Arbitration Centre (**SIAC**), Hong Kong International Arbitration Centre (**HKIAC**), and many more are encouraging Belt and Road deals to adopt their rules. As world-class dispute resolution providers, all are well-placed to resolve these disputes between commercial parties. Regional institutions, including Malaysia's KLRCA and Seoul's KCAB, are similarly positioning themselves to attract Belt and Road disputes.

Recognising the potential for Belt and Road disputes between investors and states, including claims under bilateral investment treaties, these institutions are also boosting their investment arbitration credentials. Both SIAC and the China International Economic and Trade Arbitration Centre (**CIETAC**) released investment arbitration rules in 2017, for example, with CIETAC also establishing a dedicated Investment Dispute Resolution Center in Beijing, although it has not yet heard an investment dispute.

Hong Kong, Singapore, Kuala Lumpur and Seoul are all attractive seats for Belt and Road arbitrations, though by no means the only choices.

Yet arbitration has its drawbacks. Arbitrating complex disputes can be time-consuming and expensive. It is also adversarial, which can make it difficult - or impossible - to maintain the commercial relationships on which the project's success relies. Many Asian cultures, in particular, prefer less confrontational methods of resolving disagreements.

MEDIATION

An increasingly popular alternative is mediation. China has a longstanding culture of mediating disputes, as do other Asian countries. Beyond Asia, users of dispute resolution services are also demonstrating a preference for alternatives to litigation and arbitration, which are perceived as expensive and detrimental to commercial relations.

A non-adversarial process, mediation facilitates negotiated settlements and focuses on preserving business relationships. It is faster than arbitration, confidential, and less costly.

Key players have been quick to emphasise mediation's advantages. In September 2017, the Singapore International Mediation Centre (**SIMC**), and the China Council for the Promotion of International Trade China Chamber of International Commerce Mediation Center (**CCOIC**) agreed to cooperate in assisting businesses to resolve cross-border Belt and Road disputes using mediation.

Ms Ng Chai Ngee, SIMC Board Member, noted "As the Belt and Road takes off and cross-border commercial transactions grow, there will also be a corresponding increase in disputes. Mediation provides an avenue for these disputes to be resolved quickly, cost efficiently and amicably, in a way that preserves relationships and is consistent with Asian values that both Singapore and China share."³

Hong Kong has also signaled its support for mediating Belt and Road disputes. The Department of Justice is developing eBRAM.hk, a secure online arbitration and mediation tool, tailored to large infrastructure projects under the Belt and Road. At a Hong Kong government Belt and Road Summit in October 2017, delegates discussed a bespoke Belt and Road arbitral and mediation centre, as well as a model Belt and Road dispute resolution clause providing for mediation, then arbitration.

SIAC, HKIAC, CIETAC, ICC and more have long offered mediation in addition to, or instead of, arbitration. They have tried and tested rules and processes, long track records, and panels of experienced mediators. All are well placed to offer these services to Belt and Road parties.

Overall, we anticipate that mediation will play a growing role in resolving Belt and Road disputes over the life of the initiative.

DISPUTE RESOLUTION "WITH CHINESE CHARACTERISTICS"

As the driving force behind Belt and Road, China will surely influence dealmakers' decisions on dispute resolution. Mainland officials have repeatedly indicated their support for a "hybrid" method, combining mediation and arbitration, with the courts playing a role as well.

Last summer, the Hong-Kong based think-tank International Academy of the Belt and Road published a proposed "*Dispute Resolution Mechanism for the Belt and Road Initiative*"; the so-called "*Blue Book*".

In it, the Academy proposes a unified dispute resolution clause, procedure and "Belt and Road Dispute Resolution Center" for commercial, trade and investment disputes. The proposed mechanism would require negotiation, then mediation, and finally arbitration if no negotiated settlement were reached.

In September 2017, China's Supreme People's Court (**SPC**) released proposals for a Belt and Road International Commercial Court,⁴ to provide parties in Belt and Road countries with "fair, efficient and low-cost one-stop legal services". It was thought at the time that China might have modelled its proposed tribunal on Singapore's International Commercial Court or the Dubai International Finance Centre Court, but no further detail was revealed.

On 23 January 2018, at a meeting chaired by President Xi Jinping, the Chinese Communist Party formally adopted the "Opinions on Establishing Belt and Road Dispute Resolution Mechanisms and Institutions". At the time of writing, the Opinions have not been published, but they reportedly contain plans for China to establish a system to resolve commercial, trade and investment disputes that arise under the Belt and Road.

The Party's stated goal is to protect the lawful rights and interests of Chinese and foreign individuals equally, and to create a stable, fair and transparent business environment. China has also said it will seek to work with existing international dispute resolution resources and services.

Following this announcement, Chinese media reported that China intends to establish three international commercial courts to handle Belt and Road disputes. The three courts will be located in Shenzhen, Xi'an and Beijing. The Shenzhen court will be responsible for handling cases relating to the Maritime Silk Road countries and the Xi'an court will handle cases relating to the Continental Silk Road countries. The court in Beijing will serve as "headquarters", although there is no indication what this means in practice.

Further reports suggest that the SPC is working with Silk Road countries to establish a Belt and Road International Disputes Management Center in Xi'an, to provide negotiation, mediation and arbitration services and maintain close cooperation with the Chinese courts.

In addition, it is reported that the China Council for the Promotion of International Trade (**CCPIT**) is working with foreign industrial and commercial associations to establish a new dispute prevention and resolution institution. The new institution will operate as a non-governmental international organisation and will provide dispute prevention, mediation and arbitration services tailored to the needs of Belt and Road countries.

Until the Opinions are published, it is difficult to be sure how these plans will play out in practice. In the meantime, China's international approach and focus on collaboration with existing dispute services providers are encouraging.

It is too early to say how much traction China's proposals will gain, versus the offerings of established international institutions.

It is also unclear whether, and to what extent, Chinese parties will be encouraged to adopt the proposed mechanism. Given their likely negotiating power, however, it is likely that this form of "dispute resolution with Chinese characteristics" will at least be on the table when discussing Belt and Road deals.

BELT AND ROAD OR NOT?

There is no official method of designating a Belt and Road project, nor published list of the Initiative's projects.

Belt and Road is an umbrella term to describe inbound and outbound investments across a nominated region. Even the list of Belt and Road countries is the subject of debate.

Whatever the strict parameters of the Belt and Road, it looks certain to result in a surge of investment into and out of China, and a consequent surge in disputes. It seems that, for the time being at least, there will be almost as many ways to resolve Belt and Road disputes as there are Belt and Road jurisdictions.

The market may eventually produce a preferred method, or even two, although in our opinion it is unlikely that a single forum will dominate.

In the meantime, parties and their advisors must keep abreast of the options, so they can select the most appropriate method for their particular transaction. A road block isn't always insurmountable.

BELT AND ROAD PROJECTS



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[Read more on Belt and Road Projects](#)

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1. http://english.gov.cn/news/top_news/2018/01/30/content_281476030661728.htm
 2. A number of Belt and Road jurisdictions, including Timor-Leste, Yemen, Turkmenistan, Iran, and the Maldives, are not party to the New York Convention. Enforcing arbitration awards in these jurisdictions will depend on local laws and court procedures, and may be less straightforward. Parties to transactions involving any non-New York Convention territory should take specialist advice to ensure their dispute resolution provisions are suitable. It remains an option to enforce against assets in any New York Convention jurisdiction, to the extent they can be located.
 3. <https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-...>
 4. Literally, "tribunal"

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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