THE ROLE OF MEDIATION IN THE RESOLUTION OF BELT AND ROAD INITIATIVE DISPUTES

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Legal Briefings

China’s Belt and Road Initiative (BRI) has gained huge momentum, with governments, companies and lawyers keen to maximise the many opportunities it presents. The resolution of disputes arising from the BRI is no exception. The sheer complexity and scale of Belt and Road projects is prompting a welcome review of dispute resolution processes, with a view to resolving Belt and Road disputes more quickly and amicably, ideally in a confidential and enforcement-friendly environment.

Recent developments suggest that the BRI presents an opportunity for less formal procedures, like mediation, to flourish and enter the mainstream. Indeed, four key Belt and Road jurisdictions – China, Hong Kong, Singapore and Malaysia – have been promoting mediation in the context of Belt and Road disputes. Whilst mediation is not expected to usurp arbitration as a favoured dispute resolution process, it is likely to gain more traction and be used as a precursor to arbitration. Possibly, over time, it could become the preferred process in its own right.

We summarise the key developments involving China, Singapore, Malaysia and Hong Kong below.

LATE 2015

China and Hong Kong were quick to identify the potential role for mediation in Belt and Road disputes. The collaborative efforts of the China Council for the Promotion of International Trade (CCPIT), the China Chamber of International Commerce Mediation Center (CCOIC) and the Hong Kong Mediation Centre resulted in the establishment of the Mainland-Hong Kong Joint Mediation Centre (MHJMC). This collaboration enjoyed strong support from Hong Kong’s Department of Justice. MHJMC was established foreseeing the drastic surge in cross border trade and commercial disputes that would follow once the BRI gained momentum.
JANUARY 2016 - JULY 2017

The International Academy of the Belt and Road (IABR), the first research institution for the BRI, was founded in January 2016. IABR comprises experts in law, economics, finance, investment, politics and international relations from around 30 countries along the Belt and Road. At a series of forums and meetings, IABR developed the idea of the use of a universal Belt and Road dispute resolution clause entailing mediation first, followed by arbitration should the dispute not settle. In July 2017, the Blue Book on the Dispute Resolution Mechanism for the Belt and Road was published. This represents the joint efforts of IABR's panel of academics and experts on dispute resolution, from common law and civil law countries. It proposes a Belt and Road Dispute Resolution Center to hear disputes and a universal dispute resolution clause mandating mediation, then arbitration.

SEPTEMBER 2017

Hong Kong further expressed its appetite to embrace mediation as an intrinsic Belt and Road dispute resolution tool at Hong Kong's Second Belt and Road Summit on 11 September 2017. The Secretary for Justice introduced the dispute resolution session, where a number of proposals were discussed, including:

• eBRAM.hk, which stands for ‘Belt & Road Arbitration and Mediation’ and involves the development of a secure, internet-based mediation, arbitration and dispute resolution platform tailored to big infrastructure projects.
• the potential creation of a bespoke Belt and Road arbitral tribunal and mediation centre in Hong Kong, with specialists trained to resolve – through mediation and/or arbitration – Belt and Road disputes.

China and Singapore used the International Mediation Summit held in Hangzhou on 18/19 September 2017 as an opportunity to support mediation as an alternative path to avoiding the need for formal dispute resolution proceedings. The Singapore International Mediation Centre (SIMC) and the CCPIT / CCOIC agreed a Memorandum of Understanding (MOU) to cooperate on assisting businesses to resolve cross-border disputes arising out of the Belt and Road. The two mediation centres will help (a) Chinese companies investing in Singapore (33% of its investment in Belt and Road countries); (b) Singapore companies investing in China (85% of the total inbound investment from Belt and Road countries); and (c) companies investing in other markets under the Belt and Road.
The MOU requires the SIMC and CCOIC to:
• cooperate in the promotion of international commercial mediation through joint lectures, conferences and seminars;
• promote each other’s mediators and mediation-related services; and
• recommend the use of mediation facilities at Maxwell Chambers in Singapore and the CCOIC building in Beijing, China.
The MOU is assisted by the countries’ agreement on 21 August 2017 to cooperate on legal and judicial matters.

China and Malaysia also took steps to forge greater ties in the context of mediation and the BRI. At the same summit in Hangzhou, the Bar Council Malaysian Mediation Centre and the CCPIT/CCOIC signed a Memorandum of Understanding and a Cooperation Agreement to establish the Malaysia-China Business Mediation Centre.
THE CASE FOR MEDIATION

Formal legal frameworks for conducting mediation already exist in many Belt and Road countries. It is readily embraced in China, where there is a cultural premium on consensus-driven dispute resolution. Institutional mediation services are provided by various centres across Asia. However, mediation is still not as common in Asia as in other parts of the world. For example, in Europe (within the Belt and Road), mediation is more widely embraced. Indeed, we may see a further uptick in mediation usage as the EU Parliament recently adopted a Resolution on the implementation of the EU Mediation Directive (2008/52/EC), containing recommendations aimed at further increasing the use of mediation in civil and commercial cross-border disputes throughout the EU.

Where mediation is less frequently deployed, as in Asia, this may be due to a limited understanding amongst commercial parties of what mediation actually is, why it works, and how and when best to use it. Given the (a) timelines; (b) costs; and (c) bespoke nature of Belt and Road projects, mediation could be particularly useful given its:

- **Flexibility and informality**: whilst many mediations follow a broadly standard template, the procedure is flexible and can be adapted to the needs of the parties in dispute.

- **Confidentiality**: anything said or done or any documents created for the purpose of the mediation are “without prejudice” and, except in very limited circumstances, cannot be relied upon in subsequent litigation or arbitration.

- **Time and cost saving potential**: most mediations can be set up within days or weeks; once agreement has been reached to mediate and appoint a mediator. Relatively little further organisation and coordination is usually required. Most mediations last a day or less.

- **Range of potential outcomes**: parties to mediation can agree to creative solutions beyond the powers of the courts or arbitral tribunals (which are generally limited to money damages, specific performance and injunctions). These might include the provision of services, payments in kind, apologies or any other business solution the parties can agree.

- **Business relationship preservation**: due to the conciliatory nature of the process. The focus is on the parties’ overall interests as opposed to their legal rights. Business relationships, external commercial pressures, reputational issues or personal emotions can be taken into account.

- **Success rate**: many mediations result in settlement, either on the mediation day or shortly afterwards. Even when mediations are “unsuccessful”, in that a settlement is not achieved, the process allows parties to focus on the issues in dispute and consider the true economic costs and risks to them. It can also provide an opportunity to re-establish lines of communication which are often broken as the dispute escalates.

- **Enforcement**: A mediated settlement agreement is a contract and can be enforced in court should one party recant on the bargain. There is scant evidence that parties renege on a settlement struck at mediation. That said, some jurisdictions, including the EU and Singapore, have introduced legislation and procedures to provide greater enforceability of mediated settlement agreements. Further, UNCITRAL is looking to develop a New York Convention-style instrument to ensure that mediated settlement agreements are enforceable worldwide in a manner similar to arbitral awards.
HOW WILL MEDIATION DEVELOP UNDER THE BRI?

The size and nature of the Belt and Road lends itself to potential disputes as Chinese companies encounter problems with their investments, in particular, as many Belt and Road investments will involve developing economies with unfamiliar statutory and regulatory systems. Further, inherent political sensitivities will make the avoidance and effective resolution of Belt and Road disputes essential. Arbitration has many benefits as a tool for formal dispute resolution between businesses such as flexibility, confidentiality and enforceability of formal awards. However, mediation offers a clear alternative path to avoid the need for formal dispute resolution proceedings.

Mediation is also a ready companion to technology-driven dispute resolution. Online Dispute Resolution (ODR) has the capacity fundamentally to change the way disputes are resolved and it is interesting to note that a number of the mediation-related proposals for the BRI involve internet-based processes. This is perhaps a natural progression: ADR seeks to move the dial away from formal processes and tribunals like litigation and arbitration. ODR takes this a stage further, by moving dispute resolution from a fixed to a virtual place. The tailoring of private and secure online platforms for Belt and Road disputes certainly has potential. It would overcome the inherent issues posed where parties are located in numerous jurisdictions and the cost of physical hearings is therefore expensive and logistically difficult. However, parties will likely first have to overcome their fear of the unknown as ODR is a fairly new concept.

Ultimately, the rate of infrastructure projects being concluded under the Belt and Road may in practice outpace the harmonisation of Belt and Road dispute resolution provisions in underlying contracts. Unless there is a 'tone from the top' (through the Chinese government via the Silk Road Fund for example) indicating a preference for the use of mediation for Belt and Road disputes, we are likely to see mediation continue to develop incrementally. IABR’s proposals should be kept under review, however, as this is the closest indication yet of a harmonised contractual dispute resolution regime.

COMMENT

The commitments of China, Hong Kong, Singapore, Malaysia and other countries through IABR, highlight the benefits and availability of mediation for Belt and Road disputes. Parties involved in Belt and Road investments should consider adopting mediation as part of a multi-tiered dispute resolution framework to try, where possible, to resolve disputes amicably at an early stage and on their own terms.

Global Head of Disputes Justin D’Agostino noted that: “As the Belt and Road initiative gains pace, Asia will see a corresponding increase in cross-border investment and infrastructure disputes”. “On projects of this scale, disputes are inevitable, but what we’re seeing is more and more companies looking for ways to resolve disputes in a more efficient and cooperative way”. Justin also explained that “Asia, in particular through Hong Kong, Singapore and Malaysia, has extensive connections with world-class arbitrators, mediators and legal professionals, giving companies the opportunity to effectively avoid and manage the legal risks arising from Belt and Road initiatives.”

For further information, please contact Alastair Henderson, Managing Partner – Southeast Asia, May Tai, Managing Partner, Greater China, Daniel Waldek, Senior Associate, Anita Phillips, Professional Support Consultant, or your usual Herbert Smith Freehills contact.

Herbert Smith Freehills is at the forefront of ADR developments globally. See our ADR hub for commentary on the growth of mediation in Asia and elsewhere, including our role in the Global Pound Conference. Our toolkit, “Improving Conflict Management: Enhance the way your organisation uses
Alternative Dispute Resolution”, is intended to help in-house counsel use mediation more effectively, thereby reducing their underlying disputes portfolios. Please contact Anita Phillips in the first instance if you have any questions regarding the toolkit or would like help in implementing it within your organisation.

Belt and Road hub

1. For background on ADR in Asia, specifically in Indonesia, Singapore and Hong Kong, see our publications here.

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