International Arbitration Focus: Belt and Road

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Contents

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Welcome

Welcome to the latest issue of Reed Smith's newsletter on international arbitration.

Reed Smith's international arbitration practice is premised on three strands: specific industries, such as energy and natural resources; certain "specialisms" (specific types of arbitration regardless of industry, such as investor-state arbitration); and specific geographic regions in which our lawyers are especially well suited to advise our clients.

There is no better example of these three strands coming together than China's transformational Belt and Road Initiative, which is the focus of this newsletter.

Since its inception in 2013, the Belt and Road Initiative has brought significant and unprecedented economic opportunities across Asia, Europe, the Middle East, and Africa. However, due to the scale and complexity of projects associated with the initiative, such opportunities carry with them the inevitable risk of disputes.

These disputes touch upon a wide range of industries (energy, natural resources, infrastructure, agriculture, etc.), involve a broad array of actors, and have resulted in conflicts of very different natures (international commercial disputes, construction disputes, investor-state disputes, state-to-state disputes, etc.).

Efficient handling of these disputes, which have only been exacerbated by the impact of the Covid-19 pandemic, is therefore vital, with dispute resolution (and, in particular, international arbitration) playing a key role.

This latest issue looks at how some of these disputes have been handled, examines the importance of certain jurisdictions in dealing with them, and looks to the future of the initiative.

We hope you enjoy reading this edition and as always, we welcome your feedback.

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Note from the Editors

The Belt and Road Initiative (BRI), also known as the Silk Road Economic Belt and 21st Century Maritime Silk Road, has been a huge driving force for increasing the flow of capital and goods and services across Asia, Africa, the Middle East and Europe. Since Chinese President Xi Jingping launched the BRI in the autumn of 2013, it has encompassed large-scale, long-term, and capital-intensive infrastructure projects across this geographical area, opening up opportunities for suppliers, contractors and many other stakeholders in and beyond these regions.

Conspicuously absent from this initiative are the United States and U.S.-based companies, which by intention have not been significantly involved in BRI projects. The United States devised its own Asian infrastructure policy during the G7 Summit in June 2021 in a direct response to the BRI initiative and as a means to maintain competitiveness in the region. The Biden administration announced "Build Back Better World" (B3W), which it described as an infrastructure partnership to be led by the United States and major democracies to help narrow the $40+ trillion infrastructure need in the developing world and to offer an alternative, non-BRI source of finance for these projects. However, B3W is several years behind the BRI and has yet to evolve from vision into a concrete plan with results. So for now, all eyes will remain on China, the BRI and its impact on the countries in the region, and such is the focus of this paper.

The opportunities that have been and will continue to be created by the BRI also bring significant risks and, inevitably, disputes between the large number of new stakeholders interacting with each other and coming together for the first time. Risks associated with the BRI require careful management given that BRI projects usually involve cross-border dealings, involving multiple parties from different jurisdictions.

With such a rapid increase in investment between parties of different national origin in a sector that already carries significant inherent risks, it is expected that the BRI will lead to a substantial increase in cross-border, multi-party and multi-contract arbitrations.

In this edition, our international arbitration lawyers offer their insights on the pivotal role that arbitration is likely to play in resolving BRI disputes and, when those disputes inevitably arise, the importance of choosing the right seat of arbitration.

Lucy Winnington-Ingram and Patrick Beale start with a piece on the role of investment arbitration in settling BRI disputes as well as protections afforded to investors under investment contracts with Chinese entities.

Guillaume Aréou, Ana Atallah and **Clément Fouchard** then discuss the economic relationship between China and Western Africa, with a look back at the key BRI achievements and challenges and the current development of the BRI in Western Africa. They expect an increase in the number of arbitration cases as China and Africa continue to promote bilateral investment and trade.

Suzie Savage and **Sultan Seidalin** move on to discuss three key arbitration disputes in connection with the Western Europe – Western China International Transit Corridor project, which shed light on how Kazakhstan-related disputes over BRI infrastructure projects will be resolved.

Kohe Hasan and **Catriona Casha** consider Singapore's offering as a neutral and established arbitration seat, and the alternative dispute resolution methods that Singapore offers for resolution of BRI-related disputes.

Lastly, **Lianjun Li, Eric Lin, Donald Sham, Cheryl Yu** and **Leah Lei** discuss the key considerations when dealing with BRI-related projects and infrastructure disputes. A number of court cases are also discussed to demonstrate the judicial attitude toward certain issues that typically arise from a BRI project.

On behalf of the editorial board of International Arbitration Focus, we hope you enjoy this edition of our newsletter. Please feel free to reach out to the authors with any questions and comments regarding this issue.

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Belt and Road initiatives in ISDS cases

China's Belt and Road Initiative (BRI), announced in 2013, is a development strategy aiming to foster international connectivity across and between six economic corridors, spanning more than 140 countries. Within this, China, BRI participating economies, Chinese state-owned enterprises (SOEs), and other investors invest in local infrastructure projects with the aim of bringing benefits to the local region and improving China's capacity to produce and deliver goods globally. Since the introduction of the BRI in 2013, the World Bank estimates that over US$575 billion has been committed to executed or planned projects. The Asian Development Bank estimates that between 2016 and 2030, US$26 trillion will be required to meet the infrastructure needs of Asia alone.

Projects are generally high-value and involve entities from multiple nations, such as the US$4 billion electrified Addis Ababa – Djibouti Railway, acclaimed for improving the transportation of both people and goods. The World Bank estimates that, as a result of the BRI projects, China's trade volume with BRI nations grew 4 percent annually between 2013 and 2018. Investment into energy (generally gas, oil, and hydropower) and transport sectors continue to be the majority of BRI investments.

Projects of this nature give rise to complex legal challenges, not least the choice of an appropriate dispute resolution mechanism. This article considers the role of investment arbitration in settling BRI disputes.

The availability of international investment agreements for BRI disputes

International investment agreements, such as bilateral investment treaties (BITs) and multilateral investment treaties (MITs), are agreed for the purposes of regulating the foreign direct investment made between foreign investors and host states. China has signed BITs with 130 countries as of October 2020, second only to Germany. In total, 100 countries have signed both a BIT and a BRI cooperation document with China. Chinese government bodies have also supported BITs as a legal instrument for Chinese entities investing in BRI projects abroad; in 2015, the Supreme People's Court issued guidance endorsing international arbitration for the resolution of BRI-related disputes.

Chinese SOEs as claimants

Most BRI projects involve Chinese SOEs as either a counterparty (or its ultimate owner) or a significant investor. This poses challenges for bringing an investment arbitration claim under the ICSID Convention since the opposing state is likely to argue that the SOE does not qualify as "a national of another contracting State" under Article 25(1) of the ICSID Convention since it is exercising state authority.

Importantly for BRI disputes, the tribunal in *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* confirmed that the Chinese SOE in that case was able to initiate an arbitration under the ICSID Convention and Rules because it was not functioning as an "agent of the State" but was acting in its own commercial interest (the so-called Broches Test, formulated by Aaron Broches, the first Secretary-General of ICSID).

It is only the second ICSID decision to consider the application of the Broches test and provides important clarification as regards the standing of SOEs, which will be highly relevant to future BRI investment treaty disputes. In that case, the tribunal confirmed that the relevant test is whether the SOE "functions as an agent of the State in the fact-specific context." Relevant to the tribunal's decision to uphold jurisdiction over the claim was the fact that the SOE had been selected to participate in the project as a general contractor following an open tender, and its bid was selected on its commercial merits.

Jurisdiction in international investment arbitration

A foreign investor seeking treaty protection must first comply with a nationality requirement that the investor be a national of the state party to the investment treaty that is not the host state. In other words, the investor must be either a company incorporated in another state party that is not the host state or a private individual who is a national of that other state party (subject to other requirements as provided by the relevant treaty). Second, foreign investors must have made a qualifying investment in the host state. The term "investment" is broadly defined in investment treaties, generally covering "every type of asset" or "every form of investment" and has been held to include shares or other forms of participation in local companies, real and contractual property rights, intellectual property rights, and bonds and concession contracts, for instance, for the exploitation of mineral or hydrocarbon resources.

Protections afforded to investors under investment agreements with China

Most modern investment agreements contain a suite of minimum rights and protections, including national treatment, requiring that foreign investors be treated no less favorably than local investors who are nationals of the host state, and fair and equitable treatment, which imposes an obligation on the host state to accord fair and equitable treatment to foreign investments, including guarantees of (i) protection against a denial of justice; (ii) procedural fairness, due process, and transparency; (iii) freedom from coercion or harassment; and (iv) protection of the investor's legitimate expectations.

Foreign investors can bring their claims pursuant to the arbitration agreements set out in the relevant BITs or MITs.

However, a number of BITs that China has concluded are unsuitable for investor-state disputes. First-generation BITs only provide for state-to-state arbitration (with no mechanism for an investor to bring a claim directly) and second-generation BITs only allow for investors to bring claims relating to "the amount of compensation for expropriation."

The aforementioned case of *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* also provides helpful guidance on the interpretation of dispute resolution clauses in second-generation Chinese BITs. In that case, Yemen argued that the tribunal's jurisdiction was limited to disputes as to the calculation of "the amount of compensation" only where there is already admitted liability on the part of the host state. The tribunal disagreed, holding that the BIT had to be interpreted by reference to its context, object, and purpose. Yemen's narrow interpretation of the BIT would create "an internal contradiction whereby the Respondent controls access to the ICSID tribunal even though Article 10 [of the BIT] itself states that the choice between the competent court of Yemen and the ICSID tribunal shall be 'at the choice of the investor.'" Moreover, Yemen would be able to "unilaterally deny a claimant access to an ICSID tribunal simply by refusing to admit some aspect of liability."

The tribunal thus held that this "would lead to an untenable conclusion, namely, that the investor would never actually have access to arbitration unless the Respondent agreed."

Whilst this is helpful for investors seeking to bring a claim under second-generation BITs in the context of an expropriation, investors would still be precluded from bringing claims for other breaches of the treaty.

BRI disputes have given rise to a number of investment treaty disputes, with more expected. In addition to those mentioned above, one other notable case is *Zhongshan Fucheng Industrial Investment Co Ltd v. Federal Republic of Nigeria*. That case concerned an arbitration claim brought by a Chinese company against Nigeria for various breaches of the China-Nigeria BIT. The case involved a dispute between Zhongshan, a Chinese company, and the Ogun state government, the local government of a province in Southwest Nigeria.

The claim concerned the Ogun state's termination of a joint venture agreement for the development and operation of Fucheng Industrial Park within the Ogun Guangdong Free Trade Zone. Zhongshan brought a claim under the China-Nigeria BIT for the expropriation of its investment.

In March 2021, a London-seated tribunal, presided by Lord Neuberger, deemed that the Ogun state government's actions were attributable to Nigeria and amounted to an expropriation of Zhongshan's investment, as well as a breach of the fair and equitable treatment provision in the China-Nigeria BIT. Nigeria was ordered to pay US$55.6 million in damages. Notably, this included compensation for "moral damages," which are not commonly awarded in investment treaty cases. These arose out of the mistreatment of one of the company's employees by the state, which the tribunal described as "an indefensible and serious infringement of his human rights, and a humiliating and frightening experience."

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Francophone Africa

"Likely increase in arbitral disputes as the Belt and Road Initiative continues to pave its way from China to Western Africa"

Relevant law

November 2021 saw the Forum on China-African Cooperation mark its 20th anniversary, with its eighth forum taking place in Dakar.[1] This recent forum offers us a perfect opportunity to not only look back on what has taken place in Africa under the umbrella of the Belt and Road Initiative (BRI) but also look toward what we can expect from Africa-China relations in the future.

Before doing so, it is important to recall a number of relevant points. There is no single BRI model, be it economic or geographical.[2] Similarly, as recently observed by Sarah Grimmer, Secretary-General of the Hong Kong International Arbitration Centre, the sheer diversity of BRI projects makes it difficult to define what constitutes a BRI dispute.[3] Nevertheless, even in the absence of a clearly defined model, it is still possible to analyze the economic relationship between China and various African states, where economic ties can range from "robust" and "solid" to "unbalanced" and "nascent."[4]

This article will focus on the economic relationship between China and Western Africa, beginning with a summary of some of the key achievements and challenges the BRI has faced over the past 20 years in Africa. It will then look at a snapshot of the current status of the BRI in Africa, which can be described as a mixed picture, before finally looking to the future. The future hints toward a more balanced relationship between Africa and China but one that is likely to see significantly more arbitral disputes.

I. BRI in Western Africa: Key achievements and challenges, 20 years on

Over the last two decades, due to the combined effect of Africa's enormous infrastructure needs (in 2018, the African Development Bank estimated the annual infrastructure funding gap at between US$87 billion and US$112 billion[5]) and low domestic investment flow, China has become Africa's biggest economic partner.[6]

In the 1990s, the number of Chinese-funded projects was limited, with approximately 100 projects, representing a modest total amount of US$50 million.[7] From 2007 to 2018, investment developed exponentially, with China granting loans for more than 5,000 projects, amounting to over US$200 billion.[8]

One explanation for this economic boom is the shift from public to private investment. At the dawn of the BRI, most of the Chinese companies present in Africa were state-owned entities (SOEs).[9] Nowadays, private companies represent 70 percent of Chinese investment in Africa,[10] with six of the 10 largest international engineering, procurement, and construction companies operating in Africa being Chinese.[11]

China currently lists 39 African countries on the BRI's official website, which are eligible to BRI funds, ranging geographically from Tunisia to South Africa. While the Chinese government is the principal creditor of only three of these countries (Congo-Brazzaville, Djibouti, and Zambia), China's investments through the BRI cover many projects and can take many different forms. For example, some investments encompass long-term, cross-border, high-value, high-public interest, multi-party, and multi-contract transactions which, in turn, involve entities from countries at different stages of development with various legal, political, and economic systems.[12] Other projects are located in specific countries and take the form of loan framework agreements, which are long-term agreements to finance infrastructure projects through concessional loans (where repayment is guaranteed by mineral resources). A topical example of such a project can be found in the signing in 2017 of a US$20 billion loan framework agreement between China and Guinea,[13] whereby the Republic of Guinea granted bauxite-mining concessions to three Chinese companies.[14] A similar scheme can be found in the Kaléta Hydroelectric Power Plant Construction Project.[15] It is reported by Aiddata[16] that a concessional loan of approximately US$335 million (representing 75 percent of the financing for the construction of the Kaléta Dam) was granted by China Eximbank. In order to repay the concessional loan, a special purpose vehicle, Société de Gestion de Kaléta (Sogeka), was established. Sogeka signed a power purchase agreement with Electricité de Guinée (EDG) and will use the proceeds from the sale of electricity to EDG to facilitate repayments to China Eximbank. When originally created, the Republic of Guinea owned 51 percent of Sogeka's shares. However, it was subsequently obliged to sell its majority shareholding to China Three Gorges Corporation for US$200 million in order to meet another loan agreement signed with China Eximbank.

Since the launch of the BRI, it is clear that China has developed a significant and long-standing economic relationship with African states, primarily through the granting of loans in exchange for natural resources.

II. Snapshot of BRI in Western Africa: A mixed picture

China, which has already invested heavily in Southern and Eastern Africa, continues with its long-term strategy of strengthening its presence on the continent by concluding new partnerships in Western Africa.

For example, in early 2021, the Democratic Republic of Congo (DRC or Congo-Kinshasa) signed a memorandum of understanding (MoU) on the BRI, becoming the 45th African State[17] to join the initiative. Through this MoU, China and the DRC (which is considered to be one of the world's richest countries in terms of natural resources[18]) intend to develop their economic relationship, with the DRC's resources being of obvious strategic importance for China, which has initiated several projects, notably in the hydropower and transport sectors.[19] Among these projects is the Congo River dam, financed by China Eximbank loans and guaranteed by Congolese crude oil.[20]

Notably, however, a couple of months after these developments, the DRC initiated a "review" (meaning renegotiation) of several large pre-BRI mining contracts negotiated in 2008 by then President of the DRC Joseph Kabila. President Kabila bartered Congolese copper and cobalt extracted by the Chinese-Congolese company Sicomines in Katanga in return for the construction of significant infrastructure.[21] According to the Congolese authorities, the review was justified by the fact that the infrastructure projects, to be conducted by two Chinese companies, Sinohydro and China Railway Engineering Corporation, were very far from meeting the Chinese commitments. This example illustrates the increasing complexity of the Africa-China relationship, with African counterparties becoming increasingly more demanding toward China.

As part of its expansion in Western Africa, China also intends to develop its bilateral relationship with the Ivory Coast. This bilateral relationship is quite recent,[22] with only a relatively small number of Chinese investors in 2017. The partnership model still remains to be defined, although China appears to be looking to increase its presence with the launch in June 2021 of the construction of the Raviart irrigation dam.[23]

In addition to the construction of hydropower dams, China has also focused on other sectors, including the transport sector, linking its industrial and energy projects in order to create increased connectivity among its activities. One example of this increased connectivity is the railway between Bamako, Mali's capital, and the port of Conakry in Guinea.[24] Another example is the oil refinery in the North of Sudan, which is located close to the railway line connecting Port Sudan and Dakar Port in Senegal.[25]

Maritime routes are also used by China to transport raw materials, such as copper, cobalt, iron ore, bauxite, coal, and lithium. BRI infrastructure projects are being used by China as an economic tool to export natural resources from Africa to China, allowing domestic Chinese companies to take part in the global Chinese economic development.

As part of its long-term strategy, China has taken many opportunities to expand its presence in the African continent. The COVID-19 pandemic is no exception and has highlighted China's remarkable ability to jump from one sector to another. Since the pandemic, China has branched out from its initial focus on infrastructure projects to other diverse sectors, such as the health sector. In order to develop this cooperation, China is supporting its pharmaceutical companies in technology transfers toward African states and intends to deepen its cooperation between Chinese and African twinned hospitals.[26]

Notwithstanding that it is ostensibly a global initiative, the BRI has been characterized primarily by China's financing of hundreds of projects in Africa and the establishment of Chinese private companies on the African continent. This begs the question as to whether the relationship will rebalance, and if so, what the consequences of this would be.

III. BRI in Western Africa: Toward a more balanced relationship between Africa and China?

Has the time come where African states will take ownership of the BRI and become drivers of the relationship with China? This appears to be the message sent by the Forum on China-Africa Cooperation Dakar Action Plan agreed last November[27] between the heads of the Chinese delegation, 53 African states, and the President of the African Union. According to this idea, China and Africa agreed to improve the competitiveness of African agricultural products and facilitate access to the Chinese market for small African producers. To achieve this goal, both parties will explore a number of opportunities, including (i) the launch of "e-commerce African hubs" specifically dedicated to African exports into China, and (ii) the expansion of the categories of products from lesser developed countries with whom China has established diplomatic relationships that will benefit from customs exemptions.

In response to criticisms and in order to ensure the sustainability of the BRI in Africa, it appears as though both China and the African states intend to take their economic relationship to the next level, fostering an environment of bilateral investment and trade.

However, this expansion will undoubtedly give rise to disputes. In this context, arbitration is likely to rise exponentially given that it is the preferred means of settling international disputes in Africa and that Chinese counterparties are increasingly using arbitration as claimants.[28]

The choice for arbitration is best demonstrated by the establishment in 2015 of two arbitration centers, the China Africa Joint Arbitration Centre Shanghai (CAJAC Shanghai) and the China Africa Joint Arbitration Center Johannesburg (CAJAC Johannesburg) in cooperation with the Arbitration Foundation of Southern Africa (AFSA), the aim of which is to build a China-Africa joint dispute resolution mechanism. In fact, there are already examples of this in practice, best illustrated by two recent arbitrations initiated pursuant to the 1976 UNCITRAL Rules and the 2005 HKIAC Procedures for the Administration of International Arbitration.[29] This particular dispute concerned the financing of oil exploration and, in particular, the repayment of a loan arising out of an investment made by a Chinese SOE in three deep-water offshore oil blocks, pursuant to a loan agreement and a shareholder loan agreement. The claimant, a Cayman subsidiary of the Chinese SOE, was the lender under each of the two agreements and acquired a 50 percent stake in the joint venture set up to exploit each of the three blocks. The claimant commenced two separate arbitrations against the borrowers and guarantor under each agreement.[30] Although the arbitrations are still ongoing, this serves as a prime example of a BRI-related arbitration case.

Legal issues related to loan agreements are quite common in international arbitration. However, loans such as the one in the aforementioned arbitration, which characterize a BRI project, are definitely specific to the bilateral relationship that has developed between China and Western African states. As the BRI continues to pave its way through the African continent, expanding both geographically and into new sectors, an increase in arbitration cases involving West African parties appears to be an unavoidable by-product.

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Crossing Kazakhstan

Arbitration disputes arising out of the Belt and Road Initiative.

This article considers a number of arbitration disputes that have arisen in relation to the construction of 2,787 km of roads through Kazakhstan as part of the Belt and Road Initiative.

Belt and Road Initiative in Kazakhstan: Reviving the ancient Silk Road

Kazakhstan is a landlocked country located in the middle of the Eurasian continent which historically had trade and cultural communications with other countries by means of an ancient "Silk Road." The original Silk Road gave Kazakhstan access to the countries of the Persian Gulf and the Greater East – an eastern gateway to the markets of China and the entire Asian continent and extending more than 4,000 miles to Europe.[31] The desire to revive the ancient Silk Road had been under discussion in Kazakhstan and the countries of the Central Asian region for over 20 years.

In 2013, the "Silk Road Economic Belt" and the "Maritime Silk Road" initiatives were announced by the Government of the People's Republic of China as part of the "One Belt, One Road" initiative,[32, 33] which subsequently became known as the "Belt and Road Initiative" (BRI). With Kazakhstan's geographic location providing an ideal connection between China and the West, Kazakhstan reiterated its support for the initiative and in 2015, former President Nursultan Nazarbayev, whilst on a visit to China, signed a series of trade agreements and memorandums of understanding.[34]

The two largest BRI projects in Kazakhstan are:

i. The Western Europe – Western China International Transit Corridor

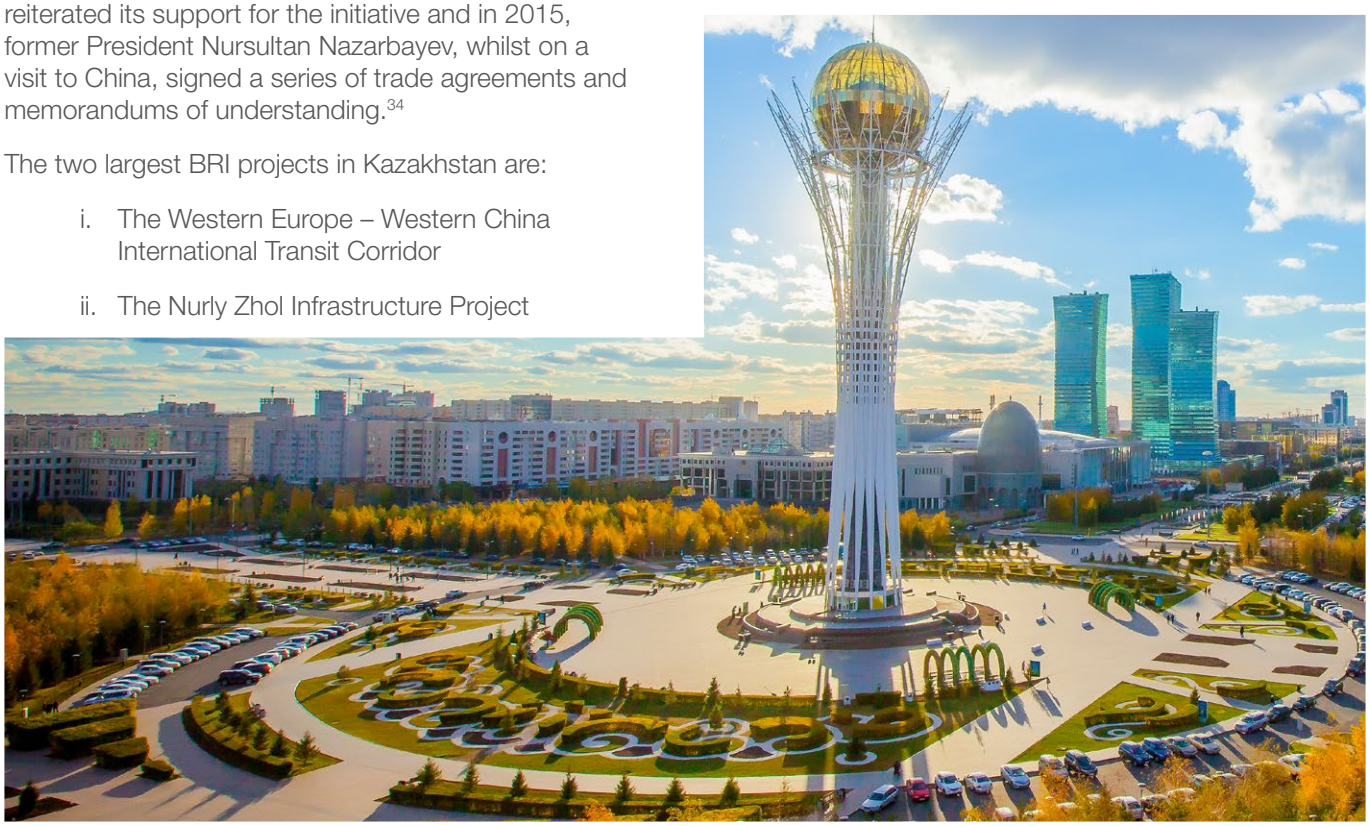
ii. The Nurly Zhol Infrastructure Project

The Western Europe – Western China International Transit Corridor

The total length of the Western Europe – Western China International Transit Corridor project which goes through Kazakhstan is 8,445 km, of which 2,787 km (33 percent) is ascribed to the BRI. The corridor passes through the territories of five Kazakh regions: Aktobe, Kyzylorda, South Kazakhstan, Zhambyl, and Almaty.[35]

A number of global financial institutions have agreed loans for the project, including the World Bank, which has allocated US$2.125 million – the largest loan in the history of the bank to any country. Including loans from the Asian Development Bank, the European Bank for Reconstruction and Development, and the Islamic Development Bank, the total amount of loans for the project will be US$3.5 billion.[36]

Construction work in Kazakhstan began in 2015 and was close to completion by 2017 when traffic along the entire length of the Western Europe – Western China International Transit Corridor was opened. This project made it possible to transport cargo in three key directions: China to Kazakhstan, China to Central Asia, and China to Kazakhstan to Russia to Western Europe.[37]



The Nurly Zhol Infrastructure Project

The Nurly Zhol Infrastructure Project, announced in 2014, is part of an ongoing national plan for economic stimulus to develop and modernize Kazakhstan's roads, railways, ports, IT infrastructure, and education and civil services. A key objective of Kazakhstan's Nurly Zhol Infrastructure Project is to improve up to 95 percent of local roads by 2025. By 2020, some
75 percent of local roads had undergone improvement works. Since 2015, in connection with the Nurly Zhol Infrastructure Project, Kazakhstan has received more than US$3.9 billion in loans from international financial institutions to construct and reconstruct its national roads.[38] Construction and reconstruction works are scheduled to cover 3,800 km of roads by 2022.[39]

Both projects seek to create conditions to facilitate trade, transit of goods, and the development of reliable transport and logistics infrastructure.
The realization of these projects will have an important effect on the development of a wide range of industries and allow unrestricted trade across the Eurasian continent. It is anticipated that the realization of these projects will also lead to a significant expansion of bilateral cooperation in investment, transport, and tourism.

Arbitration

As noted, the projects in Kazakhstan are largely financed by loans from global financial institutions. The contracts with contractors have a number of features that are characteristic of the procurement procedures established by those financial institutions, including with regard to the resolution of disputes.

Contracts entered into with foreign contractors provided for disputes to be resolved with relevant State bodies by arbitration proceedings held outside of Kazakhstan whereas local Kazakh companies were only entitled to bring disputes through the domestic courts.

Notably, however, in the majority of non-infrastructure project contracts, the Kazakh state authorities rarely agree to the inclusion of an express arbitration clause without the disputes first being taken through the Kazakh courts.[40] This is because the Law of the Republic of Kazakhstan on Arbitration prohibits state authorities from entering into arbitration agreements without the prior consent of the relevant authorized industry body.[41]

While there is no single uniform arbitration clause in the road construction contracts, in general, contractors have opted to resolve disputes in accordance with the rules of the better-known and recognized arbitral institutions, such as the Stockholm Chamber of Commerce, the International Chamber of Commerce of Paris (ICC), the Singapore International Arbitration Centre (SIAC) and *ad hoc* arbitration under the UNCITRAL Rules.

A relatively small number of cases have resulted in international arbitration proceedings. These have involved cases where subcontractors (i) failed to properly fulfill their contractual obligations resulting in the termination of those contracts by the Kazakh party, or (ii) had a dispute with the Republic of Kazakhstan.

Arbitrations brought against the RoK Roads Committee

As at today, at least six disputes arising out of contracts connected with the construction of roads within the framework of the Western Europe – Western China International Transit Corridor project are known to have been determined by tribunals in international arbitration. Three disputes involved the Italian entity JV "Todini Impregilo Kazakhdorstroy" (Todini)[42] – including one that involved another Italian entity, Salini Impregilo (Salini)[43] – while the remaining three disputes involved two Turkish companies: one with Tağyapi Inşaat Taahhüt San. Ve Tic. AS (Tasyapi)[44] and two brought by two construction companies, Doğuş İnşaat ve Ticaret A.Ş and Gulsan Insaat Sanayi Turizm Nakliyat T.A.S. (Doğuş).[45] On average, these arbitrations have lasted two years.

Although commercial arbitrations are intended to be confidential to the parties, a number of the awards from these disputes have been considered by the domestic courts with the result that more information and some of the court decisions are now in the public domain.

The subject matter of these disputes includes claims for the unilateral termination of the contract due to non-fulfillment of conditions of the contract, including the lack of mobilization of equipment and resources in the initial stages (Tasyapi), the reimbursement of costs in connection with the modification of projects and inflation (Doğuş), and the reimbursement of additional costs associated with the extension of the work period (Todini/ Salini).

The Tasyapi dispute

In 2015, Tasyapi entered into three contracts with the Committee of Roads, Ministry of Investments and Development of the Republic of Kazakhstan (RoK Roads Committee), together worth approximately US$50 million, to reconstruct three sections of the Aktobe-Makat road in the western part of Kazakhstan. Each of the three contracts contained a SIAC arbitration clause. Tasyapi originally initiated three separate arbitrations but in December 2017 these were consolidated into one case. The dispute concerned Tasyapi's failure to timely mobilize machinery, equipment, and personnel for the construction of roads in accordance with the terms of the contracts, with the result that the RoK Roads Committee unilaterally terminated the contracts.

In the claim for unilateral termination of the contracts due to non-fulfillment of conditions of the contracts brought by Tasyapi, the tribunal refused to satisfy the claims of contractors and partially satisfied the counterclaims of the RoK Roads Committee.[46]

The tribunal issued its unanimous award in December 2019,[47] finding that Tasyapi had violated its obligations under the terms of the mobilization clause. The tribunal rejected all of the claims in full and partially granted the counterclaims of the RoK Roads Committee. Tasyapi was ordered to pay US$17.8 million in damages for the additional costs incurred by the RoK Roads Committee to appoint replacement contractors, as well as US$1.3 million in legal costs.[48]

On January 24, 2020, Tasyapi unsuccessfully sought to challenge the award on the grounds that it had been prevented from "fully asserting its claims," and, more particularly, from putting forward its factual arguments. The Paris Court rejected the appeal and Tasyapi was ordered to pay the RoK Roads Committee's costs.

The Doğuş dispute

In 2017, Doğuş filed two ICC claims against the RoK Roads Committee, which were then consolidated for US$200 million in connection with the construction of a motorway from Almaty to the Chinese border town of Khorgos. In response, the RoK Roads Committee filed counterclaims for the reimbursement of the costs it incurred to hold a new bidding procedure, the increase in the cost of construction due to inflation, and the inability to operate the entire road due to the unavailability of these sections of the road by the agreed deadline for the whole project.[49]

As reported by *Global Arbitration Review*, the tribunal[50] issued its award on June 1, 2020, in which it declined jurisdiction over the majority of the claims brought by the Turkish construction company, awarding only approximately US$9 million, inclusive of interest, with each party bearing its own costs. The tribunal determined that "**the** contractors did not follow the necessary pre-arbitral steps" and that "the dispute adjudication board was wrong to accept re-referred claims that it had initially failed to rule on by the required deadline."

The Todini dispute

In 2013, the Italian-Kazakh joint venture, Todini,[50] was awarded a contract to construct four sections of the Almaty-Khorgos road as part of the broader BRI.[51] A dispute subsequently arose with the RoK Roads Committee regarding delays to the project, which, in accordance with the rules of the International Federation of Consulting Engineers (FIDIC), was submitted for adjudication to a dispute resolution board (DRB). The DRB issued its decision on April 14, 2017 in favor of Todini, and ordered the RoK Roads Committee to pay US$12 million.
On February 16, 2018, Todini issued an ICC arbitration claim for US$32 million to enforce the decision of the DRB.

On 18 March 2019, the ICC tribunal[52] ruled in favor of the RoK Roads Committee on the basis that "the decision of a [DRB] in favour of [Todini] against [the RoK Roads Committee] was unenforceable as it was rendered outside the time limit provided for in the FIDIC[53] rules."[54]

The arbitral tribunal also dismissed all subsequent claims brought by the claimant against the RoK Roads Committee, and Todini was ordered to pay the RoK Roads Committee's legal costs of US$277,000. Todini, however, refused to voluntarily pay the award with the result that steps were taken to recognize and enforce it in the Nur-Sultan Specialized Inter-district Economic Court.

> "The Ministry of Justice [on behalf of the RoK Roads Committee] managed to convince the court of the correctness of its claims, and as a result, the court supported the claims of the Ministry of Justice in full. Subsequently, "Todini" made an attempt to cancel the determination of the Nur-Sultan SIEC on appeal, but the court of the city of Nur-Sultan refused the applicants' claims. "Todini", as well as following the results of the arbitration dispute, voluntarily did not execute the judicial acts that had entered into legal force, after which their enforcement was organized.
> As a result, US$277,000 were recovered."[55]

It is anticipated that significantly more arbitrations will arise out of the disputes related to the BRI infrastructure construction projects.

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Singapore

A natural hub for BRI disputes.

Singapore is already a preferred seat for international arbitration, with a growing capacity to support the cross-border, multi-contract, and multi-party nature of complex Belt and Road Initiative (BRI) disputes.

Singapore and the BRI

Singapore was one of the first countries to publicly support the BRI, and it continues to do so with its long-standing and developing economic and cultural relationship with China. Singapore is acutely aware of the benefits that the BRI will bring, not only to Singapore but to Asia as a whole, by way of deeper trade relationships and greater investments.

Singapore's Prime Minister, Lee Hsien Loong, set out Singapore's four-pronged participation in the BRI at the Second Belt and Road Forum for International Cooperation in 2019: infrastructure connectivity, financial connectivity, third-party collaboration, and professional and legal services. As such, Singapore's role as a facilitator of legal services in relation to BRI projects is pivotal to Singapore's overall contribution.

Singapore's unique ecosystem

Singapore is easily accessible and geographically well placed in the heart of Asia, with close proximity to Hong Kong and Mainland China and a network of established global trade routes connecting 600 ports in over 120 countries.

Singapore's strategic position as a major maritime, financial, and legal center was enhanced by the 2015 joint launch of the Chongqing Connectivity Initiative with China. This has continued to strengthen Singapore's financial connectivity with China despite the COVID-19 pandemic and further connects Singapore to 234 ports and 92 regions across Southeast Asia and Western China by way of the International Land-Sea Trade Corridor.

Infrastructure, particularly energy and transport, remained the focus of the BRI in 2021. As an international trading hub, Singapore is already set up to support the regional development of projects, and the disputes that will inevitably flow from their sale and purchase, construction, financing, and operation. Singapore has a reputation for being one of the world's most business-friendly environments, and it has naturally built a professional class of specialists spanning a range of sectors.

These specialists have the collective technical knowledge to successfully manage and navigate such disputes, whether as experienced lawyers or trade and industry experts.

Singapore as an arbitration seat

It is not difficult to understand why arbitration has already proven to be a favored dispute resolution mechanism for BRI disputes – the ability to resolve issues flexibly against several parties in a single, confidential forum is vital. From a Chinese perspective, arbitration is less susceptible to the possible protectionism of local courts.

Arbitral awards are globally enforceable thanks to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). This reassures parties that a finding in their favor should not require endless litigation. Singapore is a stable and reputable arbitration seat and a signatory to the New York Convention. In 2021, Singapore ranked jointly with London as the most popular arbitral seat in the world, and the preferred seat in Asia-Pacific.[56] It provides a truly neutral arena for parties across the globe to resolve their disputes efficiently without any perceived "home-court advantage" and with minimal disruption to their commercial working relationship.

The Singapore International Arbitration Centre (SIAC) ranked as the preferred arbitral institution in Asia-Pacific in 2021, and the second most popular in the world.[57] Between 2010 and 2020, new case filings at SIAC increased more than five times, with a record number of 1,080 case filings in 2020 worth US$8.49 billion. Chinese, Indian and U.S. parties are top foreign users and strongly contribute to the caseload.

SIAC administered 98 percent of its 2020 cases. A key selling point for parties is that SIAC scrutinizes arbitral awards before publication. This enhances their enforceability by reducing the risk that the award will be remitted or set aside. It also offers expedited procedures and early dismissal of claims in order to reduce costs and time spent on smaller or straightforward matters. One of the main draws of arbitration is a party's ability to select its own arbitrator. SIAC's arbitrator panel totals 588 arbitrators, of which 306 are affiliated with 20 of the 143 BRI states. SIAC has already assisted in cases that demonstrate some of the typical features of BRI disputes, with 64 percent of new claims in 2020 comprising of trade disputes, and 94 percent being international in nature.

In addition to SIAC, the Singapore Chamber of Maritime Arbitration provides a maritime arbitration framework specifically tailored to the players in the maritime industry, with accompanying specialized rules and a distinguished panel of arbitrators experienced in the full spectrum of vessel-related disputes.

By developing ties with Chinese arbitration centers, Singapore is simultaneously taking steps to advance China and Singapore's cooperation in international commercial arbitration. For example:

1. In August 2019 The Beihai Arbitration Commission (BAC) opened its first international center, the Beihai Asia International Arbitration Centre (BAIAC) in Singapore in August 2019. The BAIAC focuses on small and medium-sized cross-border commercial and investment disputes that arise from the BRI. The BAIAC's distinguishing factor is its emphasis on BAC's Chinese arbitration characteristics and solutions that are blended with Singapore's practical and advanced arbitration practices. For instance, the BAIAC has available a panel of mediators for instruction, mirroring the common mixed mediation and arbitration procedures found in China. This allows parties to opt for a uniquely new type of Chinese-oriented arbitration and increases their confidence in the successful enforcement of any award in China.

2. SIAC and the Shenzhen Court of International Arbitration entered into a memorandum of understanding (MoU) on August 24, 2018 to promote international arbitration as the preferred method of resolving international disputes, particularly in the BRI context.

National arbitral legislation

As an UNCITRAL Model Law jurisdiction, Singapore's arbitration laws are progressive and regularly updated in order to incorporate global best practices and jurisprudential developments. For instance, in 2021, Singapore became the first jurisdiction to expressly legislate for the enforcement of awards and orders made by emergency arbitrators. It is also leading the way in third-party funding regulations and, in 2017, it legislated to make third-party funding agreements legal and enforceable for international arbitrations and related court proceedings and mediation. This allows parties to manage the risks of financing often costly BRI disputes that can preclude companies from arbitration as the funding agreements transfer the high cost and risk of pursuing a claim off the company's books and onto the financier.

Singapore's national arbitral legislation provides the parties with a good sense that any award will be final. There are no grounds to appeal, and courts are traditionally pro-arbitration and in favor of minimal curial intervention. This finality may push many parties to mediated settlements. Regardless, narrow grounds still exist to provide for the judicial review or setting aside of an award when necessary. Recent trends in the remittance of awards to the courts for review show that arbitrators will be held accountable for their awards.

Mixed-mode mechanisms: Mediation as a supplement to arbitration

In many countries, arbitration remains a default choice. However, mediation is ingrained in Chinese dispute resolution culture. The appetite for other dispute resolution mechanisms without the perceived costs and inefficiencies of arbitration is increasing, particularly in relation to lower-value disputes. China has often implemented mixed-mode mechanisms in order to preserve the commercial relationship between parties and promote a conciliatory approach.

Singapore has seized this opportunity, promoting mediation's separate advantages and complement to the arbitral process:

1. The Singapore International Mediation Centre (SIMC) launched in November 2014. At the 2019 China-Singapore International Commercial Dispute Resolution Conference in Beijing, the SIMC and China Council for the Promotion of International Trade signed an MoU to set up an international panel of mediators. This comprises experienced dispute resolution professionals from a range of BRI countries who are specifically trained in the business and dispute resolution culture of BRI jurisdictions and are supported by complementary rules and procedures.
2. SIAC and SIMC introduced their Arb-Med-Arb Protocol in 2014, which allows parties who have entered into an arbitration agreement and/or commenced arbitration to refer their dispute to mediation prior to or during arbitration proceedings. Settlement of the dispute via mediation then allows the mediated settlement to be recorded as a consent award, which is accepted as an arbitral award and therefore generally enforceable.
3. In September 2020, the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) entered into force, and 54 countries have since signed on, including the United States, China, India, and South Korea. The Singapore Convention seeks to facilitate and increase the enforceability of international mediated settlement agreements. To date, only six countries, excluding China, have ratified the Singapore Convention. As such, it is fledgling in comparison to its arbitral counterpart, the New York Convention. Nonetheless, the Singapore Convention marks the increasing global demand for enforcement mechanisms in alternative dispute resolution and another viable option for parties to cross-border transactions.

Conclusion

The success of the BRI hinges upon both the upward development of the Chinese economy and continued investor confidence. Arbitration will continue to take center stage as a robust and well-established dispute resolution procedure that can effectively, efficiently, and impartially resolve disputes arising between investors and states alike. Singapore's pro-arbitration and innovative legal regime, entrenched logistical facilities, and strong Chinese language capabilities make it a strong contender to become a center of arbitration for BRI disputes.

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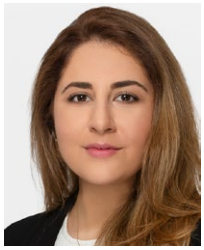

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Asia/China

Overview of BRI-related dispute resolution mechanisms

I. Introduction

The Belt and Road Initiative (BRI) is one of the largest investment projects in history, involving countries across Asia and Africa. According to the most recent statistics, China has signed over 200 collaboration agreements.[58] As recently as February 2022, Chinese foreign minister Wang Yi also indicated that China is open to the United States participating in BRI.[59] The sheer scale of BRI generates enormous business opportunities, as well as increasing the risk of disputes that require careful management.

In our experience, the majority of disputes over BRI infrastructure projects arise between owners and contractors, or between contractors and sub-contractors, in respect of issues such as delays and the scope of construction projects. BRI infrastructure projects have a long project life cycle and involve complicated financing arrangements and parties from multiple countries with varying legal systems. Therefore, the risk of disputes must be properly managed in order for parties to benefit from BRI opportunities. In this article, we give a brief overview of mechanisms for resolving disputes over BRI infrastructure projects and an update on recent cases relating to BRI disputes.

II. Key issues when dealing with BRI project disputes

Role of government in relevant dispute resolution

Many BRI infrastructure projects involve substantial investments by Chinese parties in the host states. Local government authorities sometimes play an important role in such projects by, for example, securing loans advanced to local entities through sovereign guarantees. Where disputes arise, unlike those between private entities, diplomatic consultation between the states involved is at times the first stage of the dispute resolution process, but this may not be expressly provided for in the underlying commercial contracts.

Sovereign immunity

Government participation in BRI projects may give rise to the issue of sovereign immunity. The legal position on sovereign immunity varies across different jurisdictions. A growing number of countries have embraced the doctrine of restrictive sovereign immunity, whereby the immunity of a sovereign state is limited to claims in connection with its sovereign conduct and does not extend to its commercial matters or commercial assets. In other words, in the event of disputes over BRI projects, sovereign states may be sued in those countries. On the other hand, in a number of absolute sovereign immunity jurisdictions, notably China (including Hong Kong, see *Democratic Republic of Congo v. FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95),[60] sovereign states still enjoy strict immunity in all circumstances, unless it has been waived. Where strict immunity applies, this may severely hinder the ability of BRI participants to commence legal proceedings against a state in those jurisdictions.

Difficulties in taking of evidence

The main sources of factual evidence in dispute resolution are documentary evidence, the testimony of factual witnesses and expert evidence. It is important for parties to be proactive in preserving crucial evidence at an early stage of the dispute resolution process. Moreover, BRI parties should appreciate the differences between various BRI jurisdictions in the procedure for taking evidence. By way of example, one of the main differences between common law and civil law is the role of adjudicators in conducting proceedings. Judges in civil law jurisdictions tend to be inquisitorial and take a more active role in making inquiries and conducting proceedings, whereas an adversarial system is adopted in common law jurisdictions. Where arbitration is adopted as the dispute resolution mechanism, the IBA Rules on the Taking of Evidence in International Arbitration, which reflects a blend of common law and civil law approaches to taking of evidence and provides a mechanism for dealing with matters such as presentation of evidence and the conduct of evidentiary hearings, may be adopted in order to bridge the gap between different legal systems for cross-border disputes.

Difficulties in enforcement

In the case of BRI infrastructure disputes, the importance of enforcement in foreign jurisdictions cannot be overstated. It is often the case that most of the losing party's assets are located outside the place where the court judgment is handed down or the seat of the arbitration. While parties to a BRI project can opt for litigation in the domestic courts, there is no international convention or formal mechanism under the BRI framework governing enforcement of foreign court judgments. In other words, enforcement of court judgments in BRI jurisdictions in respect of BRI-related disputes depends on whether the relevant jurisdictions have signed cooperation agreements allowing for reciprocal enforcement of court judgments, as well as the attitude and approach of the local courts to enforcement of foreign judgments. By contrast, arbitration awards are enforceable in the vast majority of BRI jurisdictions by virtue of their ratification of the New York Convention, with limited exceptions (see below). The New York Convention imposes obligations on contracting states to recognize and enforce arbitral awards issued in a contracting state, subject to a number of limited grounds for resisting enforcement.

Investment treaties

Parties to BRI projects should also check whether there is an investment treaty between their country of incorporation and the host state. Investment treaties provide a mechanism for bringing claims directly against the host state and provide for certain investment protections including fair and equitable treatment and a prohibition against unlawful expropriation. If an investment treaty is in place and the investments in question fall within its scope, the aggrieved party may consider having a dispute resolved through investment treaty arbitration.

In a recent arbitration case (*Zhongshan Fucheng Industrial Investment Co. Ltd. v. Federal Republic of Nigeria*), the arbitral tribunal held that the actions taken by Nigeria violated the investment treaty entered into between China and Nigeria and damaged substantial investments in Nigeria made by Chinese investors.

III. Choice of dispute resolution method and the potential risks

Litigation

In BRI disputes that are usually multi-jurisdictional in nature, court litigation means that the dispute will likely be adjudicated in the home country of one of the contracting parties, creating a perception of bias in favor of that party, especially when there are legitimate concerns as to the impartiality of judges and the unfamiliar legal system and court rules. BRI parties, particularly governments and state-owned enterprises, may also be resistant to disclosure of their sensitive information about BRI projects in open court, where the general public may have access to the proceedings. Furthermore, local courts may not have sufficient experience in adjudicating disputes involving foreign law and arising from the complexity of BRI construction projects, which give rise to thorny technical issues.

Arbitration

In addition to the ease of enforcement, another main advantage of arbitration over court litigation is that parties have greater autonomy to determine the arbitral procedure. For example, they can select a neutral seat for the arbitration. Popular seats include Hong Kong, Singapore, London, Paris and Geneva. It is also possible for parties to appoint a panel of arbitrators with expertise in the subject matter of the underlying contract, in order to ensure that the tribunal is capable of addressing technical issues arising from BRI projects. Confidentiality of the proceedings also makes arbitration an attractive choice for BRI parties. However, it should be remembered that arbitration awards are not universally enforceable. A few BRI participants, notably Turkmenistan and Yemen, are non-signatories to the New York Convention.

IV. Choice of arbitration seat and arbitrator – why Hong Kong?

Hong Kong is considered by many BRI participants as an ideal arbitration seat. Its unique status – a special administrative region of China enjoying a high degree of autonomy in most areas – has allowed it to develop a stable, independent common law system, which is distinct from the PRC legal system and is safeguarded by eminent judges. The domestic legislation governing arbitration in Hong Kong is based on the UNCITRAL Model Law and is therefore aligned to international practice. More importantly, Hong Kong courts adopt a pro-arbitration approach in dealing with arbitration cases (see *KB v. S and Others* [2015] HKCFI 1787), offering certainty and predictability and assuring BRI parties that Hong Kong arbitral awards will in most cases be enforced by the Hong Kong courts as a matter of course.

Due to its geographical proximity to mainland China and excellent transport connections to most BRI countries, it is natural that Hong Kong is a very attractive arbitration seat for Chinese parties to BRI projects, especially when the counterparties are hesitant about resolving BRI disputes in mainland China. In particular, disputes over BRI infrastructure projects usually span multiple jurisdictions and involve thorny technical issues. There are few prominent arbitration venues in the world that rival Hong Kong, which boasts a large pool of commercial and legal professionals who are bilingual (in English and Chinese) and have vast experience in dealing with Chinese and non-Chinese parties as well as a deep understanding of different legal and cultural backgrounds, making them well positioned to advise on complex disputes relating to BRI projects.

Apart from the independence and neutrality of its legal system, the relative ease with which arbitral awards in Hong Kong can be enforced in mainland China is attractive to non-Chinese parties to BRI projects. After China resumed sovereignty over Hong Kong in 1997, the New York Convention ceased to apply as between mainland China and Hong Kong. Hong Kong and mainland China have entered into an agreement concerning mutual enforcement of arbitral awards and subsequently a supplemental agreement to establish a mechanism for reciprocal enforcement of arbitral awards. The arrangement applies to arbitral awards made under the Arbitration Ordinance (Cap. 609) (which include ad hoc arbitral awards). There is an excellent record of enforcement of Hong Kong arbitral awards in mainland China. For example, in November 2020, China's Supreme People's Court and the Department of Justice of Hong Kong jointly released 10 notable cases evidencing mutual enforcement of arbitral awards.[61]

More significantly, in April 2019, mainland China and Hong Kong signed an arrangement concerning mutual assistance in court-ordered interim measures in aid of arbitral proceedings, allowing parties to a Hong Kong arbitration to apply to mainland courts for interim relief.[62] Under the arrangement, parties to arbitrations that are seated in Hong Kong and administered by qualified Hong Kong arbitration institutions may apply to mainland courts for interim measures, namely property preservation, evidence preservation and conduct preservation. Of the 52 decisions issued by mainland courts of which Hong Kong International Arbitration Centre (HKIAC) is aware, 48 granted the applications for preservation of assets.[63]

V. Notable cases involving BRI project disputes

In light of the confidential nature of arbitration proceedings, most of the published decisions relating to BRI are court cases. Nevertheless, court cases are a good indication of how courts and arbitral tribunals deal with issues arising from BRI. In this section, two PRC court cases on BRI projects dispute will be discussed.

Shanghai Jiexi International Freight Forwarding Co., Ltd. v. Chongqing Road Engineering Group Co., Ltd. (2016) Hu Min Zhong No. 4

This case is one of the Representative Cases Involving BRI Initiative (Third Batch) recently released by the PRC Supreme People's Court.[64] By way of background, one of the parties, Chongqing Road Engineering Group Co., Ltd., succeeded in an overseas bid for construction of the Amrān-Adan highway in Yemen in 2014.

In this case, the plaintiff, Shanghai Jiexi International Freight Forwarding Co., Ltd. signed a carriage contract with the defendant Chongqing Road Engineering Group Co., Ltd., under which the plaintiff agreed to handle the shipment of 161 vehicles and equipment on behalf of the defendant from the port of Shanghai in China to the port of Hodeidah in Yemen. The cargoes involved were to be used in the construction of the Amrān-Adan highway undertaken by the defendant. After the cargoes arrived at the discharging port and were successfully delivered, the defendant failed to make the payment as agreed. The defendant relied on the war in Yemen, the country where the destination port was located, and sought to invoke the concept of "force majeure event" to exempt liability.

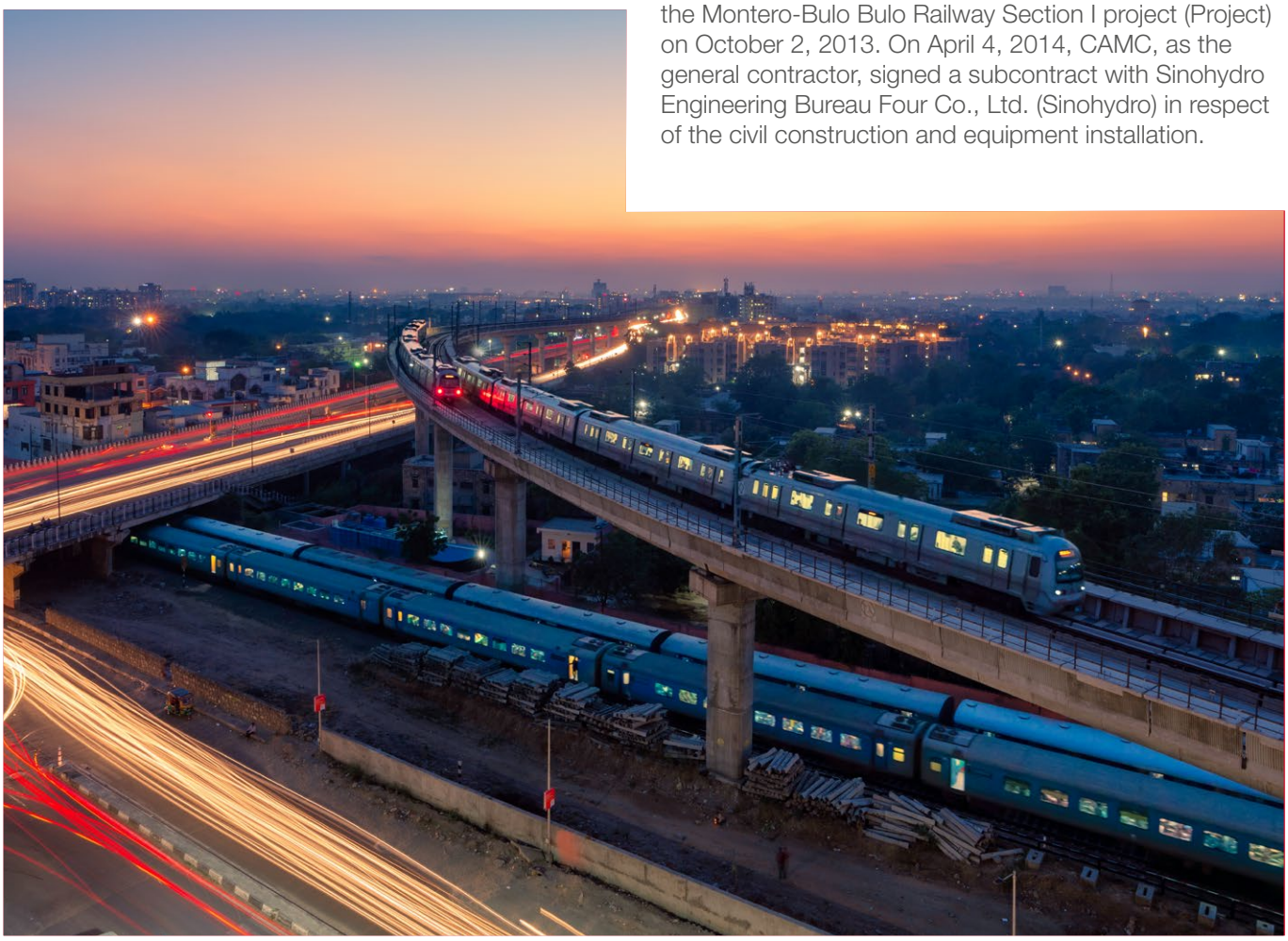
The court held that the war in Yemen only affected the highway construction project. In such circumstances, it was not reasonable for the defendant to be relieved of its payment obligations to the plaintiff because it could not receive payment from the affected construction project.

Although this case only involved a freight dispute and was not directly related to a construction project, it shows some of the issues that may arise in disputes over BRI construction projects. BRI countries have different political, economic, legal and cultural backgrounds. During the process of investment, cooperation and construction, political issues, wars, strikes, natural disasters and other force majeure events or other unpredictable changes will inevitably arise. It is therefore crucial that the parties define their respective responsibilities and apportion risk in order to properly protect their interests.

China CAMC Engineering Co., Ltd. v. Sinohydro Engineering Bureau Four Co., Ltd. (2019) Zui Gao Fa Min Zhong No. 349

As noted above, BRI infrastructure projects usually have long project life cycles and involve complicated financing arrangements. Independent guarantees, which are also known as demand guarantees, are an important financial tool to ensure the completion of such infrastructure projects as they can ensure that the recipient receives payment on demand, subject to the demand being in compliance with the terms and conditions set out in the relevant contract. By considering the facts of this case, PRC courts seized jurisdiction over the dispute. This case also reveals PRC courts' attitude to independent guarantees where fraud is alleged, and this could guidance for future judicial practice.

China CAMC Engineering Co., Ltd. (CAMC) signed a general construction contract with the Bolivian owner for the Montero-Bulo Bulo Railway Section I project (Project) on October 2, 2013. On April 4, 2014, CAMC, as the general contractor, signed a subcontract with Sinohydro Engineering Bureau Four Co., Ltd. (Sinohydro) in respect of the civil construction and equipment installation.



Upon the application of Sinohydro, the Xining Railway Branch of China Construction Bank (CCB) issued an advance payment guarantee and a performance guarantee (the Guarantees) to CAMC, which were independent guarantees. The Guarantees stated that upon receiving a written notice of claim from CAMC asserting that Sinohydro had failed to perform its obligations under the contract, CCB would unconditionally repay all agreed amounts within seven working days. CAMC was not required to submit any supporting documents.

The Bolivian owner terminated the contract on November 3, 2015. In the same month, CAMC issued a written notice of claim to CCB and CCB then issued a demand notice to Sinohydro accordingly. Sinohydro brought an action against CAMC, arguing that CAMC's service of notice constituted fraud and that payment under the Guarantees should therefore be postponed.

The Higher People's Court of Qinghai Province (the first instance court) rejected Sinohydro's claim. Sinohydro then appealed to the PRC Supreme People's Court (SPC). However, the SPC dismissed its appeal, affirming the decision that CAMC's demand did not constitute fraud. The SPC also held that CAMC, as the beneficiary, did not need to prove that the amount it claimed was the amount payable under the underlying relationship, and its full demand under the Guarantees did not constitute a fraudulent demand. Also, when an advance payment guarantee does not contain a clear reduction clause, the beneficiary's act of claiming the full amount under the advance payment bond should not be considered as an abuse of the right to claim payment and therefore should not be regarded as fraud. This case serves as an important reference for the handling of similar cases in practice.

VI. Conclusion

The choice of an appropriate dispute resolution mechanism is at the heart of proper risk management for BRI infrastructure projects. Due to its numerous advantages, arbitration is understandably the preferred method of dispute resolution for many BRI stakeholders.

In light of the complex nature of BRI infrastructure projects, parties should be mindful of the pros and cons of different dispute resolution mechanisms and are advised to seek legal advice on the most suitable mechanism at an early stage of the negotiation process as this can go a long way toward successful recovery of damages in the event of a dispute.

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5. R. Vollgraaff and N. Thukwana, "AfDB Seeks to Plug Africa $170 Billion Infrastructure Needs," *Bloomberg*, May 8, 2018, (https://www.bloomberg.com/news/ articles/2018-05-08/afdb-seeks-funds-to-plug-africa-170-billion-infrastructure-gap).
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7. O. Marbot, "Chine-Afrique: l'irrésistible ascension des investisseurs privés chinois," *Jeune Afrique*, February 27, 2022.
8. A. Faujas, "Chine-Afrique: Pékin ne prête plus qu'au compte-gouttes," *Jeune Afrique*, February 12, 2022.
9. O. Marbot, "Chine-Afrique: l'irrésistible ascension des investisseurs privés chinois," *Jeune Afrique*, February 27, 2022.
10. O. Marbot, "Chine-Afrique: l'irrésistible ascension des investisseurs privés chinois," *Jeune Afrique*, February 27, 2022.
11. "Dance of the lions and dragons – How are Africa and China engaging, and how will the partnership evolve?" McKinsey & Company, June 2017, p. 24.
12. For two recent examples, see (i) the Addis Ababa – Djibouti Railway, a Chinese-built 756-kilometer electric railway connecting Ethiopia to the Gulf of Aden, which began operation in January 2018, becoming Africa's first electrified transboundary line and opening new trade markets for Djibouti and Ethiopia; and (ii) the new 120-kilometer section of the standard gauge railway between Nairobi and Naivasha (Kenya launched cargo operations in December 2019), which cost US$1.5 billion and was funded by the Export-Import Bank of China.
13. For additional information on this loan framework agreement, signed on September 5, 2017, see https://china.aiddata.org/projects/64352/.
14. Namely the State Power Investment Corporation, the Aluminum Corporation of China Ltd., and the China Henan International Cooperation Group.
15. For additional information on this loan granted by China Eximbank, see https://china.aiddata.org/projects/53003/.
16. *Ibid.*
17. "Belt and Road Initiative – The view from Africa," *CMS*, 2021, p. 10.
18. Congo-Kinshasa has 70 percent of the world's coltan reserves, approximately a third of the world's cobalt and diamond reserves, and 10 percent of the world's copper reserves. For more information, see https://en.imsilkroad.com/p/318876.html.
19. See https://www.ide.go.jp/English/Data/Africa_file/Manualreport/cia_10.html.
20. See https://www.ide.go.jp/English/Data/Africa_file/Manualreport/cia_10.html.
21. The agreement initially provided for the construction of public buildings and roads for US$9 billion, an amount renegotiated in 2009 to US$6 billion. According to press reports, the promised works include more than 3,500 km of roads, as many kilometers of railways, road infrastructure in Kinshasa, 31 hospitals with 150 beds and 145 health centers, 2,000 social housing units in the capital and 3,000 housing units in the provinces, as well as two modern universities ("RDC – Chine: contrats miniers contre infrastructures, des annonces… à la réalité," *Jeune Afrique*, September 15, 2021, (https://www.jeuneafrique.com/1232674/economie/rdc-chine-contrats-miniers-contre-infrastructures-des-annonces-a-la-realite/)).
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23. I. Magoum, "Côte d'Ivoire: Power China lance la construction du barrage d'irrigation de Raviart," *Afrik 21*, June 22, 2021. See https://www.afrik21.africa/cote-divoire-power-china-lance-la-construction-du-barrage-dirrigation-de-raviart/.
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26. As an illustration, China announced at the end of 2021 that it will deliver another one billion doses of COVID-19 vaccines to Africa (having already delivered 200 million doses) and that Chinese companies are encouraged to invest no less than US$10 billion in the continent over the next three years.
27. Forum sur la coopération sino-africaine – Plan d'Action de Dakar (2022-2024), November 30, 2021. See https://www.fmprc.gov.cn/fra/wjdt/gb/202112/t20211202_10461196.html.
28. S. Grimmer, "Challenges and solutions of Belt & Road disputes," March 2, 2022.
29. The HKIAC appears to be one of the most preferred arbitral institutions for the settlement of BRI disputes.
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Crossing Kazakhstan

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42. It is understood that Salini withdrew from the arbitration when it sold its claim to Todini (https://reports.salini-impregilo.com/en/2014-fy/directors-report/operating-performance-geographic-region/kazakhstan).

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45. "Kazakh road authority beats bulk of ICC claim," August 23, 2021 (https://globalarbitrationreview.com/kazakh-road-authority-beats-bulk-of-icc-claim); *Doğuş İnşaat ve Ticaret A.Ş and Gulsan Insaat Sanayi Turizm Nakliyat T.A.S. v. Committee of Roads of the Ministry of Investment and Development of the Republic of Kazakhstan*, case no. 22877/MHM/HBH (C-22878/MHM).

46. The tribunal was chaired by British barrister Ian Pennicott QC, sitting with Swiss arbitrator Paolo Patocchi and French arbitrator Valéry Denoix de Saint Marc.

47. "Kazakhstan defeats SIAC claim over road project," Global Arbitration Review, February 25, 2020 (https://globalarbitrationreview.com/article/kazakhstan-defeats-siac-claim-over-road-project).

48. The Doğuş ICC tribunal was chaired by Argentine Guido Santiago Tawil. The contractors appointed the UK's Cyril Chern while Kazakhstan nominated American arbitrator Jeffrey Hertzfeld.

49. "Kazakh road authority beats bulk of ICC claim," *Global Arbitration Review*, August 23, 2021 (https://globalarbitrationreview.com/kazakh-road-authority-beats-bulk-of-icc-claim).

50. *Ibid.* At the time the contract was awarded, Todini and Impregilo were both part of Italian construction group Salini Impregilo. In 2016, Todini was sold for €50 million to a company owned by prominent Kazakh businessman Orifjan Shadiev.

51. "Impregilo SpA: The Salini Impregilo Group wins new projects in Latin America, Asia and Africa for a total value of about € 770 mln," *Market Screener*, July 15, 2013 (https://www.marketscreener.com/quote/stock/WEBUILD-S-P-A-160071/news/Impregilo-SpA-The-Salini-Impregilo-Group-wins-new-projects-in-Latin-America-Asia-and-Africa-for-a-17103338/): "In Kazakhstan, Impregilo and Todini, in a joint venture with local company Kazakhdorstroy, have been awarded the contract for the construction of four lots of the Almaty to Khorgos motorway. The project, promoted by the Minister of Transport and Communications of the Republic of Kazakhstan, has a total value of about €295 million (Todini and Impregilo's shares are respectively 34% and 33%)."

52. "Kazakhstan defeats ICC claim over road project," *Global Arbitration Review*, August 12, 2019 (https://globalarbitrationreview.com/article/kazakhstan-defeats-icc-claim-over-road-project. The tribunal was chaired by German-Iranian Niuscha Bassiri, UK arbitrator John Redmond, and New York-based arbitrator Eli Robert Mattioli.

53. FIDIC contracts adopt a multi-tier dispute resolution process. The process usually provides, as a first step, for disputes to be submitted for adjudication before an engineer or a dispute board. If one (or both) of the parties is dissatisfied, a period is allowed for "amicable settlement." If the parties are not able to settle the dispute during the amicable settlement period, the final stage is to proceed to arbitration. FIDIC contracts provide, as a default position, that ICC arbitration rules should apply in the arbitration of disputes arising from the contract. (https://www.thenbs.com/knowledge/a-brief-introduction-to-fidic-contracts).

54. "Kazakhstan defeats ICC claim over road project," *Global Arbitration Review*, August 12, 2019 (https://globalarbitrationreview.com/article/kazakhstan-defeats-icc-claim-over-road-project).

55. "Kazakhstan recovered 277 thousand dollars from the Italian construction company Todini," *Hola News*, April 30, 2021 (https://holanews.kz/news/125798/?amp=1).

Singapore : A natural hub for BRI disputes

56. See 2021 International Arbitration Survey by Queen Mary University of London and White & Case.

57. See 2021 International Arbitration Survey by Queen Mary University of London and White & Case.

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58. List of countries that have signed cooperation documents with China on the BRI, https://www.yidaiyilu.gov.cn/xwzx/roll/77298.htm.

59. "China Invites The United States To Join The Belt And Road Initiative," March 3, 2022, Silk Road Briefing, https://www.silkroadbriefing.com/news/2022/03/03/china-invites-the-united-states-to-join-the-belt-and-road-initiative/.

60. "Investors Investing in One Belt One Road," HKIAC, https://www.hkiac.org/content/investors-investing-one-belt-one-road.

61. Ten notable cases evidencing mutual enforcement of arbitral awards between Hong Kong and the mainland, Supreme People's Court of PRC, https://www.court.gov.cn/zixun-xiangqing-275321.html.

62. Mainland China and Hong Kong signed arrangement concerning mutual assistance in interim measures in aid of arbitral proceedings, Supreme People's Court of PRC, https://www.court.gov.cn/shenpan-xiangqing-149552.html.

63. PRC-HK Interim Measures Arrangement: Frequently Asked Questions, HKIAC, https://www.hkiac.org/Arbitration/interim-measures-arrangement-faqs.

64. https://www.court.gov.cn/zixun-xiangqing-347711.html.

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