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China's Belt and Road initiative: Opportunities but some risks!



China's Belt & Road Initiative (BRI), now heading into its 7th year, is a hugely ambitious undertaking by China and participating nations; with the aim of greatly improving regional connectivity, facilitating trade and mutual understanding in the regions. As the International Monetary Fund (IMF) puts it, the “BRI has great potential for China and participating countries. It could fill large and long-standing infrastructure gaps in partner countries, boosting their growth prospects, strengthening supply chains and trade and increasing employment.” With so much work to be done, opportunities for commercial parties from China and the rest of the world are plentiful.

However, with increased cross border transactions comes the higher risk of disputes occurring. Parties to an agreement to a BRI project are most likely to hail from different countries, raising further difficulties regarding lack of familiarity with foreign laws and regulations, along with other customs of the land. We highlight the areas of risk that commercial parties may face, and how to navigate these risks with the guidance of experts and professionals; and indeed if disputes do arise, how to be best placed to resolve them.

What are the risks?

BRI projects will inevitably be challenging for Chinese parties both politically and technically. Depending on the economic and political stability of the host state, BRI investments may be subject to risks in relation to security, laws, regulations, local customs and attitudes among other concerns. In relation to the law alone, pertinent to contract forms, the Belt and Road meanders through legal regimes of common law, civil law, continental law, Islamic law and other hybrid systems. This is before factoring in the cross border complexities of BRI transactions. Other considerations may include strict compliance with environmental and workplace laws, forcing Chinese contractors to negotiate with labour unions and local communities. An example can be seen with the Hambantota Port in Sri Lanka, where the locals made their feelings clear with

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How to mitigate these risks?

The best and simplest way of mitigating these risks is to seek professional advice and guidance. Professional services firms are able to help the commercial parties to navigate in unfamiliar territories where the business is based. Law firms can oversee compliance with local regulations such as labour and tax requirements; they will be able to work on contracts and insurance, business structure, as well as undertaking crucial due diligence on the country and business prospects. Local partners are also important for success. They are able to provide a real understanding of the culture of the territory.

Another factor which needs to be kept in mind is that success in one country does not necessarily mean success in another. Therefore, to build a genuine global business, professional services and local partners are imperative.

When disputes arise, why choose International Arbitration?

■ Unfamiliar courts and unfamiliar Law

When cross border disputes arise, parties may face the daunting prospect of attending legal proceedings in a foreign court or be governed by foreign laws of another jurisdiction. Several questions will need to be answered, for example, what is the applicable law? Will the decision be enforced abroad? Will the court be impartial? These are risks which are particularly pertinent for commercial dealings spanning multiple jurisdictions.

■ Arbitration agreement

Arbitration has more often than not been favoured by commercial parties globally for settling disputes. International arbitration allows for parties to disputes involving large, complex infrastructure projects to select arbitrators from amongst experts in the appropriate field. Each party can nominate an arbitrator to the panel, with a neutral chairperson. For the parties to the dispute, this would be preferable to the mandatory assignment of judges by domestic courts.

Therefore, clarity in drafting of the arbitration clause in a contract is important. A contracting party needs to ensure that it provides for disputes to be resolved by an arbitration institution under their administered arbitration rules or even on an ad hoc basis. This way, the risk of resolving disputes in potentially less favourable local courts on the BRI and/or being unable to enforce an award or judgment once obtained, are minimised.

Chinese companies are known to be open to arbitrations being held in the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC).

In January 2017, the Singapore International Arbitration Centre (SIAC) released updated arbitration rules and new SIAC Investment Arbitration Rules, with the intent on attracting BRI related investment disputes. In

English (en) the Court of Arbitration of the International Chamber of Commerce (ICC) set up a Belt and Road



■ Overcoming home court advantage

The main aspect of obtaining a court judgement for a party to a dispute is to gain a fair and unbiased decision. A contractor will not want to find itself facing judges in the land of the other side to the dispute. Firstly, the law will be unfamiliar and the other side will have significant advantage in understanding the law. Secondly, in some countries with a reputation of corruption in the legal system, a foreign contractor will not be confident of a fair hearing. Therefore, it is important to include within the contract an Arbitration Agreement Clause, specifying a neutral location for the settlement.

■ Confidentiality of disputes

Litigation is generally conducted in open court where the public is permitted to attend. The existence of disputes, crucial business information and adverse findings can all be made available to the public through court litigation.

The confidential nature of arbitration ensures that all information will remain between the parties. Preserving confidentiality will not only safeguard the reputation of the parties, but also protect the parties' business/trading from being affected by any ongoing dispute.

■ Enforcement of decisions

The 1958 New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (The Convention) specifies that arbitration awards made in a signatory's jurisdiction should be enforceable in another signatory's jurisdiction. With 159 contracting-parties to the Convention, commercial parties can be confident about enforcing an arbitral award in these states as long as the selected seat of arbitration is a signatory to the Convention. This is an advantage over the enforcement of court judgements, which depends on the mutual recognition of judgements between states and usually requires legislation. Furthermore, processes for enforcing foreign court judgements may vary significantly in different countries, therefore posing difficulties for parties seeking enforcement. When drafting the arbitration clause of a commercial contract, parties must ensure that the seat of arbitration chosen is also a signatory to the New York Convention. For an overview, 92% of countries on the BRI are signatories to the Convention. However, the following countries involved in BRI projects are not signatories to the Convention: Ethiopia, Iraq, Maldives, Timor-Leste, Turkmenistan, Yemen.

Make the right choice

The Belt and Road Initiative is a historic venture in establishing and strengthening multinational trade corridors. It is an initiative that will improve economic connectivity and cooperation between two-thirds of the world's population, and opportunities for contractors need to be taken. It is not without risk for those companies that are investing in and working on BRI projects. The risks include political risks, foreign investment restrictions, tax, local employment and environmental laws among many others. However, the price of a successful business foray onto the Belt and Road is very much worth competing for. And for a project to be successful it is important for the preparations to be thorough in order to mitigate the risks

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Agreement clause into the contract will go a long way in achieving that. For the Belt and Road initiative is a long journey, and there needs to be longevity in relationships between parties.

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