

THE BELT AND ROAD INITIATIVE: DISPUTE RESOLUTION ALONG THE BELT AND ROAD

The Belt and Road Initiative (BRI) is made up of a Silk Road Economic Belt and a 21st Century Maritime Road. It is estimated that US\$5trillion of capital will be required for the infrastructure projects which currently form part of the BRI. The BRI involves countries making up 65% of the world's population and 65 countries.

This growth presents challenges and risks for investors, contractors and other service providers as performance of contracts will be carried in jurisdictions where litigating disputes, recognition and enforcement of court and arbitral awards may be complex.

“HFW has substantial experience in advising on appropriate dispute resolution forums as well as on recognition and enforcement of substantial foreign and foreign related arbitration awards in the PRC.”

Managing disputes and minimising risk

We set out below the options to manage disputes and minimise litigation risk in projects along the Belt and Road.

Hong Kong’s unique position as a BRI disputes resolution centre

Hong Kong is in a unique position in the BRI being a part of China under the “one country two systems” arrangement while at the same time maintaining a separate and independent legal system based on common law.

There already exist arrangements between Hong Kong and the mainland PRC for reciprocal recognition of monetary judgments and final arbitration awards.

Hong Kong is an attractive option for parties based in and outside mainland PRC due to its geographical proximity to many countries along the Belt and Road, its independence, neutrality and international best practices in international dispute resolution.

According to the World Bank in 2016 Hong Kong achieved a points score of 6.32 of a maximum total of 7 points on Judiciary Independence where one is not independent and seven is very independent. Hong Kong’s judiciary continues to be ranked as one of the most independent with its court system classed as highly transparent, being important criteria to consider when negotiating law and jurisdiction clauses, and ultimately enforcement.

Arbitration agreements in BRI contracts

Careful drafting of the law and arbitration clause in a contract, and ensuring it provides for disputes to be resolved by an arbitration institution (referred to as arbitration commissions in the PRC) under their administered arbitration rules or even on an *ad hoc* basis is the first way to minimise the risk of (1) resolving disputes in potentially less favourable local courts on the BRI and/or (2) being unable to enforce an award or judgment once obtained.

The Hong Kong International Arbitration Centre (HKIAC) has specific BRI arbitration clauses and administered arbitration rules to deal with BRI disputes. The HKIAC has extensive experience in dealing with arbitrations involving parties and countries along the BRI. Since the introduction of the HKIAC administered arbitration rules in 2013, the HKIAC has handled 362 cases involving BRI jurisdictions with one third of cases involving a party from the PRC and another party from another BRI country¹.

A substantial number of arbitration cases currently being administered through the HKIAC include those concerning corporate and project finance disputes, construction disputes, and maritime and trade disputes – all of which are the type of matters which will arise out of BRI projects.

The HKIAC enables parties to choose their arbitrator(s), that is they are not limited to arbitrators that are already on a panel or list of arbitrators maintained by the HKIAC.

Hong Kong’s judiciary remains independent and has a pro-arbitration stance. The Hong Kong Arbitration Ordinance (governing arbitration in Hong Kong) clearly sets out the authority and powers the courts have in respect of Hong Kong arbitrations and the rights of appeal from arbitration awards.

Enforcement of Arbitral Awards – recognition under the New York Convention

The New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (the Convention) sets out a mechanism for reciprocal recognition and enforcement of arbitration awards between contracting states.

At the time of writing, 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

Obtaining an award from an arbitration tribunal in a Convention state which is to be enforced in another Convention state will minimise the risks parties may otherwise face in enforcement, and assist in avoiding local law issues relevant to enforcement.

However, there are circumstances in which it will be impossible to avoid

¹ <http://www.hkiac.org/Belt-and-Road/why-hkiac-belt-and-road-disputes>.

becoming subject to local law and the jurisdiction of local courts or tribunals. This is discussed further below.

China's new Belt and Road Courts

On 29 June 2018, the Supreme People's Court (SPC) formally launched two branches of the International Commercial Court of China (CICC), one in Shenzhen and one in Xi'an. It is envisaged that the Shenzhen Court will deal with disputes arising out of the BRI Maritime Road, and that the Xi'an Court will deal with disputes in relation to the overland Belt.

The CICC will deal with the following type of cases:

- International commercial cases where the claim is worth more than RMB300million (approx USD44.8million at current exchange rates) where the parties have agreed to resolve their disputes to the PRC Supreme People's Court (SPC);
- First instance international cases which would have been tried by the Higher People's Court but are referred to the CICC by that court with approval of the SPC;
- First instance international cases with high nationwide significance;
- Applications for preservation orders (such as assets preservation or evidence preservation) in the aid of arbitration proceedings and applications for setting aside or enforcement of international commercial arbitration awards; and
- Any other international commercial cases that the SPC considers appropriate to be heard by the CICC.

An "international commercial case" is defined as any case in which:

- One or other of the parties is a foreign national, company or enterprise or having their residence/place of business outside the PRC;
- The subject matter of the dispute is outside the PRC; or

- The events leading to the commercial disputes occurred outside the PRC.

The aim of the CICC courts is to be a "one stop shop" for dispute resolution for BRI related disputes. At the commencement of a matter the parties will be asked if they wish to arbitrate and or mediate the dispute.

Parties may query the advantage of this mechanism, as often parties who have agreed to arbitrate will often have the option to stay arbitration proceedings for the purpose of seeking to mediate in any event.

Jurisdiction	Reciprocal Enforcement Partners
China	Poland, Romania, Russia, Belarus, Ukraine, Bulgaria, Lithuania, Bosnia and Herzegovina, Kazakhstan, Turkey, Cyprus, Kyrgyzstan, Hungary, Tajikistan, Uzbekistan, Mongolia, Vietnam, Laos, Morocco, Egypt, UAE, Kuwait, and Hong Kong.
Hong Kong	India, Malaysia, New Zealand, Singapore, Sri Lanka, China, Austria, Australia and Israel.

Our perspective

To manage disputes and minimise litigation associated with infrastructure, maritime, or logistics projects along the Belt and Road, contracts should include a clear and enforceable law and arbitration or court jurisdiction clause providing for a place of arbitration in a jurisdiction which is a party to the New York Convention OR in a jurisdiction with a reciprocal enforcement arrangement if litigation is preferred.

The establishment of the CICC does not deal directly with the issue of enforcement of judgments in foreign jurisdictions. Further, cases which are not directly connected with China cannot be heard by the CICC. It remains to be seen how successful the CICC is as a "one stop shop" for efficient resolution of commercial disputes relating to BRI projects.

How we can help

HFW has substantial experience in advising on appropriate dispute resolution forums as well as on recognition and enforcement of substantial foreign and foreign related arbitration awards in the PRC. HFW's sector focused practice

Recognition of Court Orders - reciprocal arrangements between China, Hong Kong and other BRI jurisdictions

Following on from that, in the event that parties have obtained a judgment in a BRI country compared to arbitration, recognition of court judgements is generally considerably more challenging.

The table below sets out the other BRI countries which China and Hong Kong have reciprocal arrangements with for the recognition and enforcement of court judgments:

areas of Shipping and Logistics, Construction, Aviation, Commodities and Insurance (both in terms of disputes, contract negotiations and finance) are aligned with the requirements of companies operating on the BRI.

HFW is proud to have been an exhibitor at the Hong Kong Belt and Road Summit on 28 June 2018.²

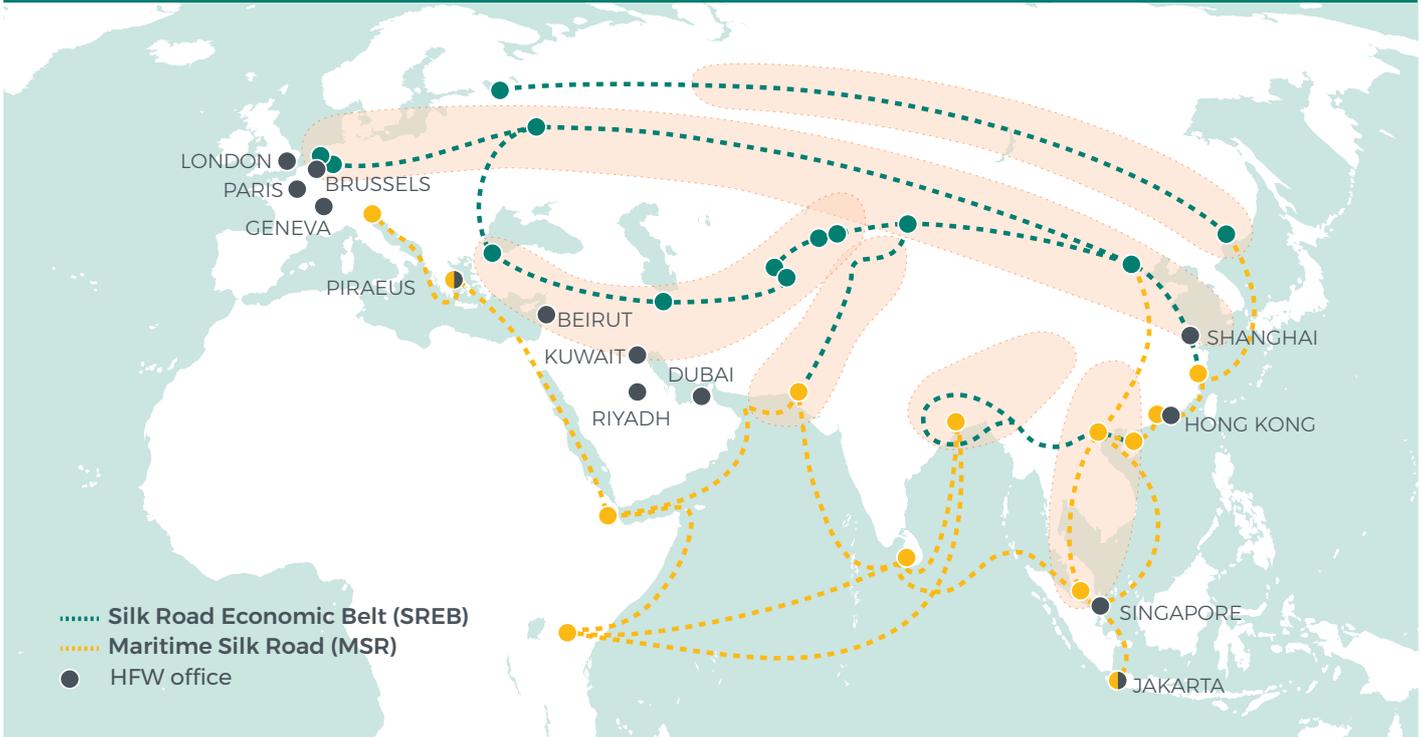
About the author

Catherine Smith is a Senior Associate within HFW Hong Kong's Shipping practice and has been based in Hong Kong for more than 10 years. She is a qualified lawyer in England & Wales, Hong Kong, and also in her native Scotland. Catherine has extensive experience in international arbitration in Hong Kong and the mainland PRC representing clients in HKIAC, LMAA, CIETAC, SIAC, and ICC arbitrations. Catherine has also successfully enforced foreign and foreign related arbitration awards against PRC based parties.

This article was produced with the assistance of HFW trainee Jack Metherallseen.

² <http://www.beltandroadsummit.hk/en/index.html>.

The Belt and Road initiative



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