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Belt and Road Disputes and the Enforcement of Arbitration Awards

By Guilherme Amaral and Luis Peretti – July 21, 2021

In October 1865, Sir Robert Hart, a former British diplomat, wrote to Empress Dowager Cixi expressing his opinion that China should desperately seek progress through investments in mining, the telegraph, the telephone, and especially in railways. The reaction of Empress Cixi's advisors was harsh towards Hart's suggestions: "They deface our landscape, invade our fields and villages, spoil our feng-shui, and ruin the livelihood of our people."

150 years later, with the Belt and Road Initiative (BRI), China became the main advocate of the progress it once criticized. Also called "One Belt, One Road", the BRI is a bold plan to invest between US$1 and 8 trillion to connect over 65 countries that represent over 60 percent of the global population and 30 percent of the world's gross domestic product. As of January 2021, 140 countries had joined the BRI from different regions.

Conventionally, the BRI refers to the terrestrial belt linking China to Central and South Asia and onward to Europe, and the maritime road linking China to the nations of Southeast Asia, the Gulf Countries, North Africa, and Europe. Yet, China indicates a non-conventional BRI implicating Latin America as a "natural extension" of the Maritime Silk Road. Over the last decade, Latin America has been the second destination of Chinese investments.

Besides the Memorandums of Understanding (MOUs), which are not legally binding, there are multiple forms by which countries and institutions may join the BRI (treaties, co-operation agreements, arrangements, etc.). This flexibility enables the interaction between players without specific guidelines establishing a uniform dispute resolution method within the BRI. The Chinese investments may entail local investments, multiple forms of contracts, concessions, loans, insurances, etc. Naturally, disputes may arise from these complex relationships.

This article analyses the role of the main types of international dispute resolution mechanisms when it comes to settling BRI disputes and, more specifically, what the challenges are that might arise in the enforcement of awards related to such disputes.

Different Types of Dispute Resolution Mechanisms

The BRI's MOUs usually stipulate friendly consultations to resolve potential disputes. Yet, parties involved in BRI projects are not bound by this policy.

On June 16, 2015, the Supreme People's Court (SPC) published its judicial policy describing mechanisms for a sound legal environment in the BRI. As of 2017, the court fomented so-called "one stop shop" (一站式) dispute resolution centers for BRI matters. On January 23, 2018, a joint committee of the Chinese Communist Party and the State Council issued an opinion about the Belt and Road International Commercial Dispute Resolution Mechanism evoking the principles of multilateral negotiations between BRI jurisdictions (efficiency, party autonomy,

and diversified dispute resolution) and announced the establishment of two international commercial courts in China for cross-border commercial disputes (Shenzhen and Xi'an municipalities).
While this all-encompassing "one stop shop" is not fully established, BRI disputes may also be referred to BRI-oriented mediation institutions, international commercial courts, commercial arbitration, and investment arbitration.

Mediation. Mediation has been playing a much more important role in China than it has in Western jurisdictions. In part, it is attributed to Confucian philosophy and cultural values, which focused on the virtues of harmony and moderation. However, the main factor is pragmatic, as, in an international or decentralized settings, it may be challenging to find an established authority with jurisdiction over all the involved parties so as to resolve a dispute.

Mediation becomes particularly interesting in this context since 46 jurisdictions signed the United Nations Convention on International Settlement of Agreements Resulting from Mediation (the Singapore Convention), which basically (1) requires local courts to enforce settlements reached through mediation, and (2) allows a party to avail itself of a mediated settlement to prove that the matter already has been resolved. The Singapore Convention has already 40 signatories among the BRI jurisdictions.

International commercial courts. Another area where BRI has prompted made-to-measure solutions is that of commercial litigation, especially through the two new international commercial courts (CICC) established in Shenzhen, Guangdong Province, and Xi'an, Shaanxi Province.

Yet, the CICCs barely can be considered a competitor to international arbitration because besides having English as the procedural language of choice, they have no foreign judges and only Chinese law-qualified lawyers can represent the parties.

Similar structures were also established in Dubai, Qatar, Singapore, Abu Dhabi, and Kazakhstan. All of which are markedly influenced by English common law and sometimes led by British professionals.

Commercial arbitration. Although international courts provide an alternative, the enforcement framework provided by the New York Convention (NYC) ensures that arbitration remains the privileged vehicle for resolving BRI disputes. 118 out of the 138 BRI jurisdictions have ratified this Convention, which allows and sets the conditions for the enforcement of foreign arbitration awards.

Commercial arbitration has become a bedrock for investment in China with a wave of modernization that started in 1978. The roots of domestic arbitration in China stem from the early 50s when the government actively promoted arbitration and mediation as the

means for resolving domestic economic disputes. The Chinese Arbitration Law was updated in 2017 and consistently is complemented by SPC's pro-arbitration stance. As a result, China has a well-developed arbitration infrastructure and market, and Chinese courts have shown deference to arbitrators' decisions. Currently, more than 90 percent of foreign-related contracts rely on arbitration.

Not surprisingly, international arbitral institutions have been increasingly catering to BRI disputes and offering specialized services.

Investment arbitration. BRI projects can also benefit from investment treaties that deal with potential disputes, and they usually do. 111 BRI jurisdictions are currently parties to the 1956 Washington Convention on the settlement of investment disputes. Some countries have made investment treaties with investor-state dispute settlement (ISDS) provisions, thus raising to at least 116 the number of BRI jurisdictions that allow investment arbitration.

To some extent, the relevance of treaties for BRI projects hinges on China's commitments, which can be regrouped into three different generations of bilateral investment treaties (BITs): Until 1998 China offered limited protection only allowing disputes concerning the amount of compensation for expropriation; from 1998 to 2007, new treaties included a broader scope for arbitration consent; then in 2007, it ushered the third generation of BITs (these often made with BRI jurisdictions) with broad consent to arbitrate and more detailed provisions.

The network of relevant ISDS arrangements expands even wider than the BRI jurisdictions. Many Latin American states have signed BITs with China. An important exception is Brazil, which has no investment arbitration arrangements with China, and yet is its largest partner in the region (55 percent of all Chinese investment in Latin America over the past 10 years).

In line with this trend, SIAC and CIETAC both introduced investment arbitration rules in 2017, the Beijing Arbitration Commission (BAC) did so in 2019, and in that same year, the Shenzhen Court of International Arbitration (SCIA), while also aiming at investment disputes, adopted Guidelines for the Administration of Arbitration under the United Nations Commission on International Trade Law Arbitration Rules.

Challenges to the Enforcement of Arbitration Awards

Even though commercial and investment arbitrations stand out as reliable tools to settle BRI disputes, the enforcement of arbitral awards is not exempt from difficulties.

The enforcement of arbitration awards in BRI jurisdictions is guaranteed by treaties and other arrangements. And yet it still faces challenges stemming from the various and fleeting definitions for public policy among the many jurisdictions, especially regarding public bodies and state-

owned entities (SOEs), which are the forerunners of BRI projects. Such issues raise challenges for the enforcement of arbitral awards due to the likelihood of sovereign immunity.

Treaties and enforcement arrangements. The enforcement of court judgments can be rendered difficult due to the lack of a consistent web of enforcement treaties or a global framework.

Until 2017, 36 countries had signed bilateral treaties for judicial assistance and the mutual recognition of judgments with China, 21 of them are BRI members.

On September 12, 2017, China signed the Hague Choice of Court Convention, which was not yet ratified by Congress. Even judgments from Hong Kong, Macau, or Taiwan are subject to a review for recognition and enforcement as foreign judgments. On the other hand, Singapore entered into special arrangements for money judgments with several BRI jurisdictions.

Unlike court judgments, arbitral awards can be carried out in BRI jurisdictions through the NYC. Hong Kong stands out as a major arbitration hub, after an agreement (2001) where Honk Kong's arbitration awards can be enforced as domestic awards on mainland China. It allows the parties to benefit from expedited enforcement in China with Hong Kong's court system. The Macau Special Administrative Region also benefits from an arrangement regarding the enforcement of interim measures and awards.

Another common feature of enforcement arrangements securing BRI projects is the offer of local government backing through government-guaranteed bonds. It is reported that in Djibouti, where China installed its first (and only) military base abroad, 68 percent of its public debt consists of government-guaranteed debt of public enterprises, 77 percent of which is held by China's EximBank, which is directly under China's State Council.

Public policy. The large infrastructure projects that are a BRI staple usually attract great public interest.

In China, changes in economic planning may once have excused public companies from performing their contracts. However, nowadays there is an effort to develop a rule of law (依法治国) system and the spirit of legal modernization that followed the reform and opening-up (改革**开放**). It can be perceived through the enforcement of arbitral awards and the level of prestige that Chinese courts accord to the NYC.

A device used for that purpose is the SPC's centralized prior report and review system that benefits arbitrations. Under this system, a lower court cannot refuse to enforce an arbitration award without prior leave and authorization from a higher court. The public policy exception is seldom applied. In March 2020, a Beijing judiciary study highlighted a pro-arbitration stance recognized among Chinese courts.

Still, the public policy concept can be an issue in BRI jurisdictions due to their legal and cultural diversity. The breadth of this concept may challenge the enforcement of awards.

Contracting with states and sovereign immunity. Despite the legal framework available for the enforcement of arbitral awards, the fact that BRI projects often involve public bodies gives rise to the issue of sovereign immunity.

Under public international law, the equality between states and the exercise of exclusive territorial jurisdiction implies that state agents in a foreign territory normally have immunity before local courts and agencies.

During the 20th century, that classical doctrine had to be restricted due to the increasing states' business activities. The relative immunity distinguishes acts of sovereign states (acts *jure imperii*), which are protected by sovereign immunity, from private or commercial acts (acts *jure gestionis*).

This distinction was adopted by a United Nations Convention in 2004. This treaty enters into force once it attains the thirtieth ratification (not yet achieved), and 20 of the BRI countries have signed it. Yet, China reportedly stated that having signed the convention does not change its position towards maintaining absolute immunity. Of the BRI jurisdictions, Singapore and Malaysia have taken the path to restrictive immunity.

Regarding Chinese SOEs, asserting sovereign immunity is not a mere conjecture. Within BRI jurisdiction, the sovereign immunity argument may arise by the fact that the Chinese State-owned Assets Supervision and Administration Commission (SASAC) is playing an increased role in controlling the shareholders of Chinese state-owned companies.

In the case *TNB Fuel Services Sdn Bhd v. China Coal National Coal Group Corporation* before the High Court of Hong Kong, China Coal challenged a charging order in 2016 to allow the attachment of shares held by China Coal in a Hong Kong company to enforce an arbitration award. The case involved the doctrine of Crown immunity under Hong Kong law and the "control test," which delves into whether China Coal had independent management powers and was free of government involvement in its daily business operations. The decision relied on a letter stating that the SOE was an independent entity carrying out business on its own, and consequently not entitled to assert crown immunity.

This issue is relevant in both commercial and investment arbitrations. Among other applicable provisions, article 54 of the Washington Convention stipulates that contracting parties must "enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State," whereas article

55 disclaims the applicability of the "law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

Conclusion

Before the unification of China, the King Hui of Qin, nurtured ambitions towards the territory of current Sichuan, the Ba and Shu kingdoms. After establishing regular diplomatic relations with the Shu monarch, the King of Qin invited the neighboring ruler to visit his domains. To impress his counterpart, he ordered that five stone cows be carved in natural form and had their hindquarters decorated with gold. Coveting this treasure, the King of Shu asked them as a gift. The Qin sovereign assented but retorted that the gold-producing cows could not be carried through the narrow mountain pathways linking the two countries. He then offered to build a suitable road through the mountains towards the hardly accessible territory of Shu. The gullible King of Shu accepted the gift without realizing that this road would serve Qin's armies to overtake his dominion. The story of the stone cattle road (石牛道), as an infrastructure project that lured neighbors into servitude, well describes the concerns of BRI detractors.

Yet, it must be pointed out that the current connectivity of our global economy stands in stark contrast with the world of 316 BC when the stone cow road was built. King of Qin's "project" was unidirectional. The BRI projects are not. All sides benefit from the wise investments made, and from the increased business opportunities that are bridged by the BRI. As commentators have posited.

This vision is likely to be achieved through the massive commitment of resources that are already in place, but also thanks to the legal framework that is now available; one which provides sufficient tools to organize business ventures and make contracts enforceable. As China goes global, Chinese concerns are increasingly disseminated throughout the signatory countries of the NYC, motivating both the idealist and BRI member countries to abide by international norms and agreements while developing new business ventures worldwide.

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