

澳大利亚律师看《中国贸仲会投资仲裁规则》

As China forges ahead with its ambitious “Belt and Road Initiative” (BRI), it has also adopted a progressive approach towards dispute resolution.

随着“一带一路”倡议的积极推进，中国的争端解决机制也处于不断发展之中。

One of the more prominent developments remains the announcement by the China International Economic and Trade Arbitration Commission (CIETAC) of its new rules governing the arbitration of international investment disputes (Rules) and the CIETAC Investment Dispute Resolution Centre in Beijing (CIETAC IDRC) being established to administer those Rules.

其中最为令人瞩目的新发展之一毫无疑问是中国国际经济贸易仲裁委员会（以下简称“中国贸仲会”）发布的国际投资争端仲裁的新规则，即《中国国际经济贸易仲裁委员会国际投资争端仲裁规则》（以下简称“《投资仲裁规则》”）以及中国国际经济贸易仲裁委员会国际投资争端解决中心（以下简称“投资争端解决中心”）在北京的正式成立，从而使得上述新规则得到更好的管理和应用。

Whilst the primary motivator for the new Rules is to support Chinese companies’ outbound investment in furtherance of China’s BRI, there is also a strong desire to support the independent and impartial resolution of international investment disputes between investors and host countries. To that end, the Rules also provide an alternative for Chinese investors concerned about potential bias in offshore forums due to a lack of understanding of Chinese law and practice. Importantly, the Rules preserve traditional arbitration characteristics such as flexibility, efficiency and economy, whilst incorporating elements of Chinese and international arbitration law and practice.

新规则颁布的首要目的是为了在“一带一路”倡议之下促进中国企业对外投资，但同时也反映出其致力于独立、公正地解决投资者与东道国间国际投资争端的态度。为此，《投资仲裁规则》事实上是对于那些担心外国仲裁庭因对中国法律和实践缺乏了解而造成潜在的司法不公的中国投资者提供了另一种选择。重要的是，《投资仲裁规则》不仅保留了仲裁的传统优点，例如灵活性、效率性和经济性，又同时很好地吸收了有关中国和国际仲裁法律和实践的元素。

These recent developments in the dispute resolution space are widely considered a necessary step. Although international investment arbitration is considered the main way to resolve disputes between investors and host states,¹ no Chinese institution offered its own dispute resolution procedure.

In fact, with many BRI countries devoid of their own investment dispute resolution forum, the Rules are set to become an effective way of “filling the gap” in the area of Chinese international investment arbitration, whilst also serving to develop and promote the international investment arbitration practice in China through effective and expeditious resolution of BRI-related investor claims.

这些投资争端解决的新举措是极为关键的一步。虽然国际投资仲裁已经是公认的解决外国投资者与东道国之间争议的主要途径，¹但直至今日，中国还没有一个机构拥有一套自己的国际投资争端解决机制。事实上，由于多数“一带一路”沿线国家没有自己的投资争议解决仲裁机构，《投资仲裁规则》将有效弥补中国在国际投资仲裁领域的空白，同时也通过有效、迅速地解决“一带一路”沿线投资者的争端来丰富中国国际投资争议仲裁的实践。

Key Characteristics

核心特征

- Wide scope of jurisdiction: the CIETAC Investment Arbitration Rules are designed to regulate both investment treaty arbitrations and investor-state arbitrations, as a contractually agreed dispute resolution mechanism.
- 管辖范围广：作为一个基于合同约定的争议解决机制，《投资仲裁规则》不仅可以管辖投资协议仲裁还可以管辖外国投资者与东道国间的投资仲裁。
- Primacy: all investment cases will be heard by the newly established CIETAC IDRC, but can also be referred and administered by CIETAC’s Hong Kong Arbitration Centre if so agreed (by the parties who choose Hong Kong as the seat).
- 优先性：所有投资案件将由新成立的投资争端解决中心审理，也可由中国国际经济贸易仲裁委员会香港仲裁中心进行仲裁（若各方选择香港为仲裁地）。

1 中国贸易报微信公众号，“在国际投资规则制定方面争取更大话语权——访中国国际经济贸易仲裁委员会副主任兼秘书长王承杰”，2017年9月22日，<https://mp.weixin.qq.com/s/MsuliJB9JAklyv5aCGe3Pg>。

- Panel: arbitrators are to be appointed from a panel that is to be maintained by CIETAC, with deviations from the status quo requiring the approval of CIETAC's chairman. CIETAC will also have scope to scrutinise draft awards and to draw the attention of the tribunal to "certain points" as long as that does not affect the tribunal's independence.
- 仲裁员的选任：仲裁员将从中国贸仲会制定的仲裁员名册中挑选，约定选择名册外的仲裁员需要中国贸仲会主任的确认。中国贸仲会在不影响仲裁庭的独立性的情况下还有权审查裁决的草案，并提请仲裁庭注意“某些要点”。
- Third-party funding: parties may receive third-party funding, although it must be disclosed upfront to the counterparty, arbitrators and CIETAC.
- 第三方资助：各方可以从第三方获得资助，但必须在签署资助协议后毫不延迟地告知对方当事人、仲裁员和中国贸仲会。

Adoption of CIETAC and Its Rules

中国贸仲会及《投资仲裁规则》的适用

Although states are unlikely to renegotiate their bilateral investment treaties (BITs) with China to include CIETAC investment arbitration as a dispute resolution mechanism, there is potential for parties to select CIETAC investment arbitration in future contracts between investors and foreign states, governmental organisations or entities whose conduct is attributable to a state.

虽然各国不太可能就已签订的双边投资条约与中国重新协商，将中国贸仲会的投资仲裁作为争议解决机制；但在将来一方当事人是中国投资者，另一方当事人是其他国家、政府组织或其行为可归责于国家的其他实体为主体的合同中，各方有可能选择中国贸仲会的投资仲裁。

Further, whether the hosting state agrees to name CIETAC in a specific investment agreement (when not a designated or contemplated dispute resolution institution in BITs between states) will depend largely on the negotiating power of the investor, including the Chinese banks or financial institutions providing the funding for the project.

此外，东道国是否同意就某一投资协议采用中国贸仲会作为解决争议的仲裁机构（当其在双边投资协议中并非是国家间指定或预期的争议解决机构），在很大程度上取决于投资者的谈判能力，其中包括中国的银行或为该项目提供资金的金融机构。

We note that there have been few China-related investor-state arbitrations. This is because, historically, these types of disputes have been resolved diplomatically or by direct settlement between the parties. That being so, how the Rules will be adopted in practice remains to be seen. Notwithstanding, given the unprecedented growth in outbound Chinese investment via the BRI, as well as increased Chinese investor awareness of investment treaty rights, we expect that this will likely soon change. We will continue to follow the practical application of the Rules to BRI projects with interest.

我们注意到很少有与中国有关的投资者与东道国间的仲裁。这是因为，从历史上看，此类争端往往通过外交手段或双方直接协商对话来解决。既然如此，《投资仲裁规则》的作用如何进一步发挥需要进一步观察。然而，鉴于“一带一路”倡议的推进，中国对外投资的空前增长且中国投资者权利意识的增强，我们预计这样的情况很快会得到改变。我们也将继续关注“一带一路”倡议背景下中国贸仲会仲裁规则的实际表现。

Contacts

Brendan Reilly

Partner
T +61 8 9429 7611
E brendan.reilly@squirepb.com

Tim O'Shannassy

Associate
T +61 8 9429 7602
E tim.oshannassy@squirepb.com

Ju (Lindsay) Zhu

Partner
T +86 21 6103 6303
E lindsay.zhu@squirepb.com