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Arbitration In Asia: One Belt, One Road

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Commentary

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and
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[Editor's Note: Brendan J. Reilly is a partner and Tim O'Shannassy is an associate at global law firm Squire Patton Boggs. Brendan has more than 20 years' experience resolving international disputes, appearing for parties in court, mediation and arbitration proceedings, including those involving ICC, HKIAC, SIAC, CIETAC and UNCITRAL arbitral rules. Tim is a member of the International Dispute Resolution Group, specializing in providing advice on major construction, engineering and infrastructure projects. Both are resident in the firm's Perth, Australia office. Any commentary or opinions do not reflect the opinions of Squire Patton Boggs or LexisNexis®, Mealey Publications. Copyright © 2018 by Brendan J. Reilly and Tim O'Shannassy. Responses are welcome.]

Introduction to Belt and Road Initiative

Announced in 2013 by President Xi Jinping, a new double trade and investment corridor is set to open channels between China and over 60 markets, ranging across Central Asia, the Middle East and Europe. "One Belt, One Road" (**OBOR**) is laying the foundations for a series of massive infrastructure projects, ranging from high-speed railways to ports and airports, bringing them into China's economic orbit. The land ('Belt') and maritime routes ('Road') encompass China's most ambitious economic diplomacy project, with comparisons being drawn to the *European Recovery Plan*, which helped rebuild Western European economies after the end of World War II.

China is currently leading over US\$900 billion worth of cross-border infrastructure projects under this initiative, with the aim of increasing regional connectivity and stimulating trade. The OBOR initiative has encouraged

Chinese outbound investment in large-scale energy, rail, road and telecommunications infrastructure projects. Most projects are led by large Chinese state-owned entities (**SOEs**) in partnership with China's policy banks, and with funding from China's Silk Road Fund Co. Ltd.

Although unlikely to benefit from the direct investment, Australian companies will benefit through what the Chinese government has termed the "three-way handshake", whereby Chinese and Australian businesses partner on projects.

Arbitration in OBOR Projects

Given the size and complexity of OBOR projects, it is likely that a number of them will result in disputes. Early indications are that international arbitration will be the preferred means of dispute resolution.

Seats of Arbitration for OBOR Projects

China International Economic and Trade Arbitration Commission (**CIETAC**) is China's oldest and one of the world's busiest arbitration institutions. We note that to coincide with the implementation of the OBOR initiative, on 1 October 2017, the International Investment Arbitration Rules of the China International Economic and Trade Arbitration Commission (Rules) came into force. The Rules are designed to regulate both investment treaty arbitrations and investor-State arbitrations.

Hong Kong plays a vital role in the initiative by bridging countries in the region together. The establishment of China International Economic and Trade Arbitration Commission Hong Kong (**CIETAC HK**)

is a recognition by CIETAC of Hong Kong's importance in the region. To that end, China's Supreme People's Court has already foreshadowed the attraction of the Hong Kong International Arbitration Centre (HKIAC) for the conduct of OBOR arbitrations.

Hong Kong currently enjoys an autonomous legal system and companies familiar with common law and the English arbitration system will find Hong Kong particularly attractive as a seat or governing law. Hong Kong is already the major dealmaking hub for Chinese businesses looking to exploit opportunities overseas. The Hong Kong Government is promoting the territory as the go-to jurisdiction for parties looking to meet their Chinese counterparties half-way.

One of the greatest advantages of arbitration is the enforceability of awards. OBOR disputes will involve Chinese parties, which means that enforcement may take place in mainland China and against Chinese assets. We know that HKIAC and Hong Kong-based awards have a strong enforcement rate, by virtue of the 1999 Arrangement Concerning Mutual Enforcement of Arbitral Awards between Hong Kong and China. Hong Kong is also a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards by virtue of China's accession.

Further, Hong Kong's modern arbitration legislation, bilingual functioning and judicial independence make it a logical destination for hosting OBOR arbitrations. Foreign parties can also take comfort in the fact that the Hong Kong courts have enforced awards against Chinese SOEs.

Similarly, the Singapore International Arbitration Centre (SIAC) is in a geographically convenient location and supported by a physical, legal and political infrastructure that, like Hong Kong, is sophisticated, skilled and of high integrity.

Conclusion

Asia is transforming into a global, internationalised arbitration market, with the continued harmonisation of practices and procedures. Fuelled by an increasing demand for arbitral administration services because of the OBOR initiative, we expect to see progressive enhancements in the convergence of Chinese and international arbitration law, practices and norms.

Australian businesses can benefit from OBOR projects. For peace of mind, participants should seek experienced legal counsel when dealing with a contract's arbitration provisions, such that disputes are resolved in a commercial and efficient manner. ■

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