

ICC Guidance Notes on

Resolving Belt and Road Disputes using Mediation and Arbitration

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Belt and Road transactions come in all shapes and sizes. China's flagship initiative will continue to generate everything from simple, one-off facility arrangements to large-scale, long-term infrastructure projects with highly complex financing requirements. The number of parties will vary, as will their respective levels of sophistication. However, the vast majority of Belt and Road transactions (and disputes) will be cross-border. Typically, they will involve at least one Chinese, and one non-Chinese party.

In cross-border, cross-cultural situations like these, it is essential to resolve disputes using a method that is not only appropriate to the nature of the dispute, but also acceptable to all the disputing parties. While Western parties often resort to adjudicative—but contentious—methods (arbitration or litigation), Chinese parties frequently prefer a less adversarial approach.

There is no “one size fits all” approach to Belt and Road disputes. However, in most cases, mediation is a highly effective tool.

Mediation is used throughout the world. Its popularity is growing, as commercial parties recognise mediation's power to resolve disputes more quickly, more amicably, and less expensively than litigation or arbitration.

In Asia, where parties' overall relationships are typically valued more than any single contract between them, mediation is particularly popular. This can be stand-alone mediation, or mediation as part of a “mixed mode” or “escalation” process, with provision for arbitration if mediation does not succeed.

For Chinese parties, the overriding objective when resolving a dispute is generally to preserve the commercial relationship, on a basis that both sides can accept. In China, agreeing to mediate indicates a desire to put the relationship back on track. As a facilitative process, mediation assists the parties to achieve this, with minimal conflict. Chinese judges and arbitrators routinely suggest mediating disputes that come before them, rather than pursuing the adversarial process to the end (and, by implication, terminating the relationship). This is frequently successful – either at settling the whole dispute, or narrowing the issues to be arbitrated or litigated.

As Belt and Road disputes typically have at least one Chinese party, we recommend that mediation always be considered for Belt and Road disputes. Ideally, this will happen at the contract drafting stage. Parties should discuss the types of disputes that are likely to arise, and how they would like to resolve them.

As in most commercial transactions, it is important to include a final and binding (“adjudicative”) method of resolving disputes. For cross-border Belt and Road disputes, international arbitration is the method of choice, principally because it produces final and binding awards that are enforceable in 150+ countries worldwide, including almost all Belt and Road jurisdictions.

However, parties who provide for mediation at an early stage can often avoid arbitration altogether.

Although a stand-alone procedure, mediation can be combined with other dispute resolution procedures as part of a tiered dispute resolution process. Increasingly, mediation is considered as a useful - and even an indispensable - first step in situations where parties are keen on reaching a solution that upholds their mutual business or contractual interests. It can also be used once arbitration has commenced if parties wish to seek a settlement.

The ICC has provided conciliation services since 1922 and mediation services since 2001. ICC offers established Mediation Rules, Guidance Notes, and Clauses for mediation (either by itself, or together with negotiation, litigation or arbitration). ICC mediations are overseen by the ICC International Centre for ADR, which is the only body empowered to administer proceedings under the ICC Mediation Rules. The Centre's experience and expertise help to ensure that proceedings progress efficiently, transparently, and fairly, and are respectful of the parties' wishes.

The Centre has been administering mediations since 2001. Since then, we have witnessed a steady increase in the number of cases. In 2020, 112 parties from 39 countries worldwide were involved in ICC mediations, highlighting the international applicability of the ICC rules and services. 2021 was a record year for international commercial mediation at the ICC with 149 companies having used the Centre's services—a 33% increase on 2020.

Different clauses will be suitable for different transactions, so it is important to seek expert advice when drafting.

In Belt and Road transactions where parties want to provide for mediation, followed by arbitration if no settlement is reached, they should consider using ICC's Clause D. This creates an obligation to mediate before arbitration may be commenced. Alternatively, parties may preserve an option to mediate before arbitrating, by including Clauses A or B.

Generally, ICC mediation is conducted by an independent mediator, who is independent and impartial of the parties and has no previous involvement in the dispute. Alternatively, the parties may agree that a member of the arbitral tribunal can act as mediator.

Where the parties reach a mediated settlement during an arbitration, it may be recorded in the form of an arbitral award by consent in order to assist with enforcement.

Parties will also be able to enforce certain cross-border mediated settlements under the 2019 Singapore Convention on the Enforcement of Mediation Settlements, even where they are not concluded in the course of an arbitration.