BELT AND ROAD PRACTICAL GUIDE

HOW TO RESOLVE DISPUTES ON THE BELT AND ROAD

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Into the Distance by Zhang Xin

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HOW TO RESOLVE DISPUTES ON THE BELT AND ROAD (BRI)

LET'S START AT THE VERY BEGINNING

China Mainland Contractors will have experienced the challenges of resolving BRI disputes first hand over the last ten years. To assist all, we are pleased to share our insights on key questions such as: when to involve infrastructure disputes avoidance lawyers at KWM? And which neutral jurisdictions and arbitration institutions are recommended for BRI related disputes? Read on for our top ten tips first for trying to avoid disputes completely, but when disputes are inevitable, our tips for how to resolve them successfully.

TIP 1 | REVIEW, AND WHERE NECESSARY, TRY TO NEGOTIATE MODIFICATION OF THE CONTRACT'S DISPUTE RESOLUTION CLAUSE

The political, operational and legal risks associated with many BRI projects means disputes have unavoidably emerged. This necessitates the need to pay close attention to dispute resolution clauses, modifying them where required and carefully choosing the seat of arbitration. With BRI disputes in mind, in 2018 the Supreme People's Court launched two branches of the International Commercial Court of China (CICC) - one in Shenzhen to hear disputes arising from the Maritime Silk "Road", and one in Xi'an to hear disputes relating to the overland "Belt" - as a '*one-stop shop*' to focus on dispute resolution for international commercial cases bringing together litigation, mediation and CICC court support for arbitration in one platform.

Parties may have included an arbitration clause in their contract or less often agreed to submit their dispute to arbitration at a later stage. Many commercial parties do however often think that arbitration in the PRC, or in the BRI host country, would be insufficiently neutral or transparent and therefore look elsewhere when considering the legal place of arbitration (seat of arbitration).

Two of the most popular choices of arbitral seat for international and domestic arbitrations, including BRI disputes, are Hong Kong and Singapore. Each of these jurisdictions has major benefits over other seats: they both have a world class pool of arbitrators, modern and forward thinking arbitral institutions, and highly developed arbitration procedural laws and supportive court environment.

Moreover, Hong Kong and Singapore, along with over 90% of BRI countries, are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Accordingly, awards made in Hong Kong and Singapore are enforceable in over 170 countries.

As such, selecting Hong Kong or Singapore as the arbitration seats can be of great benefit to all parties involved.

Each jurisdiction also has some unique benefits, which we set out below.

CHINA MAINLAND-HONG KONG SPECIFIC ARRANGEMENTS

There are a number of arrangements specific to China Mainland-Hong Kong dispute resolution.

First, the 2019 "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings" (the Interim Measures Arrangement) ensures that parties to Hong Kong arbitrations can apply directly to the geographically appropriate Intermediate People's Court for asset, evidence and conduct preservation orders in China Mainland. This is a unique arrangement only available to parties who arbitrate in Hong Kong and also does not cover awards from any other jurisdictions.

In order to apply to the Intermediate People's Court for interim measures, the arbitration must be seated in Hong Kong and administered by certain eligible institutions or permanent offices, for example:

- the Hong Kong International Arbitration Centre (HKIAC)
- China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC)
- ICC Court of Arbitration (ICC - Asia Office)
- South China International Arbitration Center (Hong Kong).

The Interim Measures Arrangement has been a huge success. Since it came into force on 1 October 2019, the HKIAC has processed 133 interim measures applications to the courts of China Mainland, with a total value of assets sought to be preserved from all applications reaching about US$4.3 billion. Parties are increasingly making use of the Interim Measures Arrangement. In 2023 alone, the HKIAC processed 19 applications to 13 different courts of China Mainland, seeking to preserve approximately US$491 million worth of evidence, assets or conduct, of which approximately US$76.1 million worth of assets were then preserved under Mainland Chinese court orders.

Second, on 14 May 2021, China Mainland and Hong Kong entered into a new cooperation arrangement for mutual recognition and assistance in cross-border corporate insolvency (Cross-Border Insolvency Arrangement).

*Any reference to "Hong Kong" or "Hong Kong SAR" shall be construed as reference to "Hong Kong Special Administrative Region of the People's Republic of China".

Under the Cross-Border Insolvency Arrangement, the two jurisdictions will mutually recognize certain types of bankruptcy proceedings and will assist liquidators appointed in the other jurisdiction. This new arrangement will apply to three pilot areas, namely Shanghai, Xiamen and Shenzhen.

Hong Kong liquidators must satisfy the following criteria in applying for recognition and assistance from Mainland courts in the pilot area.

- The liquidated company must have a centre of main interest in Hong Kong for at least 6 months. Factors including place of incorporation, place of principal office, principal place of business or place of principal assets will be considered.
- The liquidated company must have principal assets or place of business in the pilot area.
- The relevant insolvency proceedings must either be a compulsory winding-up, creditor's voluntary winding up or restructuring proceeding initiated by a liquidator and approved by the High Court.

The Cross-Border Insolvency Arrangement is the first time that either China Mainland or Hong Kong has ever established such a mechanism of mutual recognition and assistance in insolvency proceedings with another jurisdiction. As a result, it gives greater assurance for creditors and investors for asset-recovery activities on companies with cross-border features between China Mainland and Hong Kong.

Third, under the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong" (and amended by Supplemental Arrangement signed on 27 November 2020), parties are now allowed to make simultaneous applications to both the Hong Kong Court and relevant China Mainland Court for enforcement of arbitral awards, provided that the total amount recovered from the arbitral award in both jurisdictions does not exceed the amount determined in the arbitral award. This is particularly useful where parties have assets in multiple jurisdictions and reduces the risk that enforcement actions will not be taken forward within the time allowed by law. HKIAC is also the first arbitral institution outside China Mainland to be included in the "One-Stop" Platform for Diversified International Commercial Dispute Resolution (One-Stop Platform) of the China International Commercial Court (CICC). Parties to cases administered by HKIAC meeting certain criteria can now apply directly to the CICC for interim relief and / or enforcement of arbitral awards.

While the grounds of refusal for reciprocal enforcement largely mirror the grounds of refusal to enforce a convention award made under the New York Convention, such application is scarcely refused. Recent case law has also confirmed that parties seeking to enforce Mainland arbitral awards in Hong Kong under the common law system, could be granted relief wider than the terms of the award, including damages or equitable compensation.

SINGAPORE AS A GOOD ALTERNATIVE TO HONG KONG FOR BRI ARBITRATIONS, ESPECIALLY FOR SOUTH-EAST ASIAN BRI PROJECTS

As of 2021, as found by the Queen Mary University of London Survey[1], Singapore, London and Hong Kong rank as the three most popular arbitral seats in the world by a considerable margin. Singapore is home to a number of very prominent international arbitral institutions, including the Singapore International Arbitration Centre (SIAC), the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the Permanent Court of Arbitration (PCA), and the World Intellectual Property Organisation Arbitration and Mediation Centre (WIPO Arbitration and Mediation Centre).

As a seat, not only does Singapore share similar structural characteristics as Hong Kong, it also has the advantage of being perceived as a wholly neutral jurisdiction in a third country, outside of China Mainland and the BRI project host state. As such, it is an exceptionally popular arbitration seat for South-East and South Asian projects.

The Singapore government and judiciary have also demonstrated significant support for the country's arbitration ecosystem. Singapore courts continue to play a minimal role in arbitrations, guaranteeing an efficient resolution process. Recent legislative reforms such as ensuring the confidentiality of related court proceedings and allowing third-party funding and outcome based fee structures, have also promoted and strengthened Singapore's competitive edge in arbitration.

WHAT SHOULD YOUR DISPUTE RESOLUTION CLAUSE HAVE?

A good dispute resolution clause should set out:

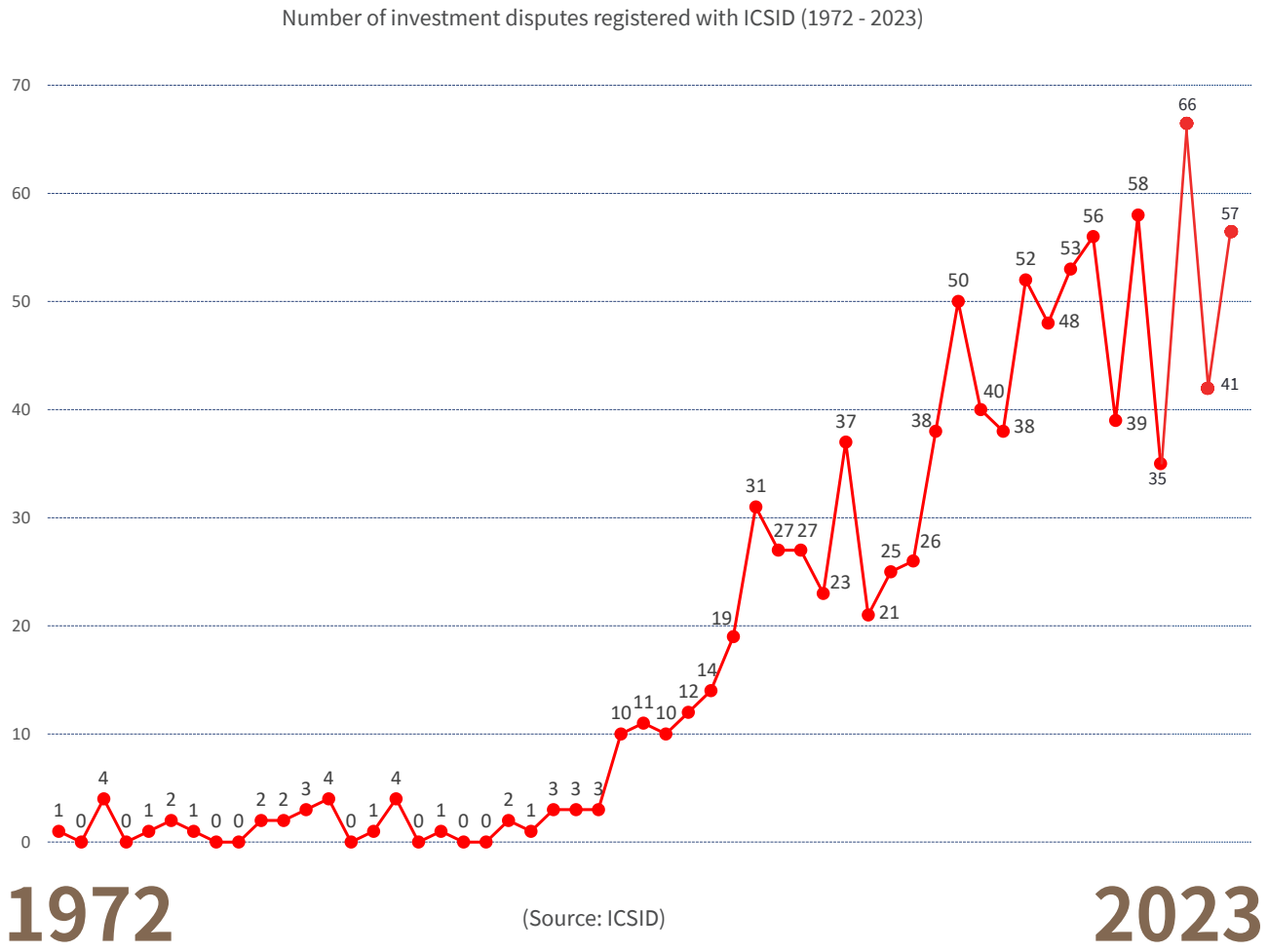
- a clear submission to arbitration;
- a choice of rules and administering institution;
- a choice of arbitral seat;
- the number of arbitrators, one or three;
- the language of the arbitration, which will often be English;
- any necessary pre-arbitration steps, set out in clear language if such steps are mandatory;
- whether the parties consent to joinder of third parties/ consolidation of arbitral proceedings (particularly in relation to multi-contracts, multi-party deals); and
- the applicable law governing the arbitration agreement.

[1] Queen Mary University of London International Arbitration Survey 2021 Adapting arbitration to a changing world.

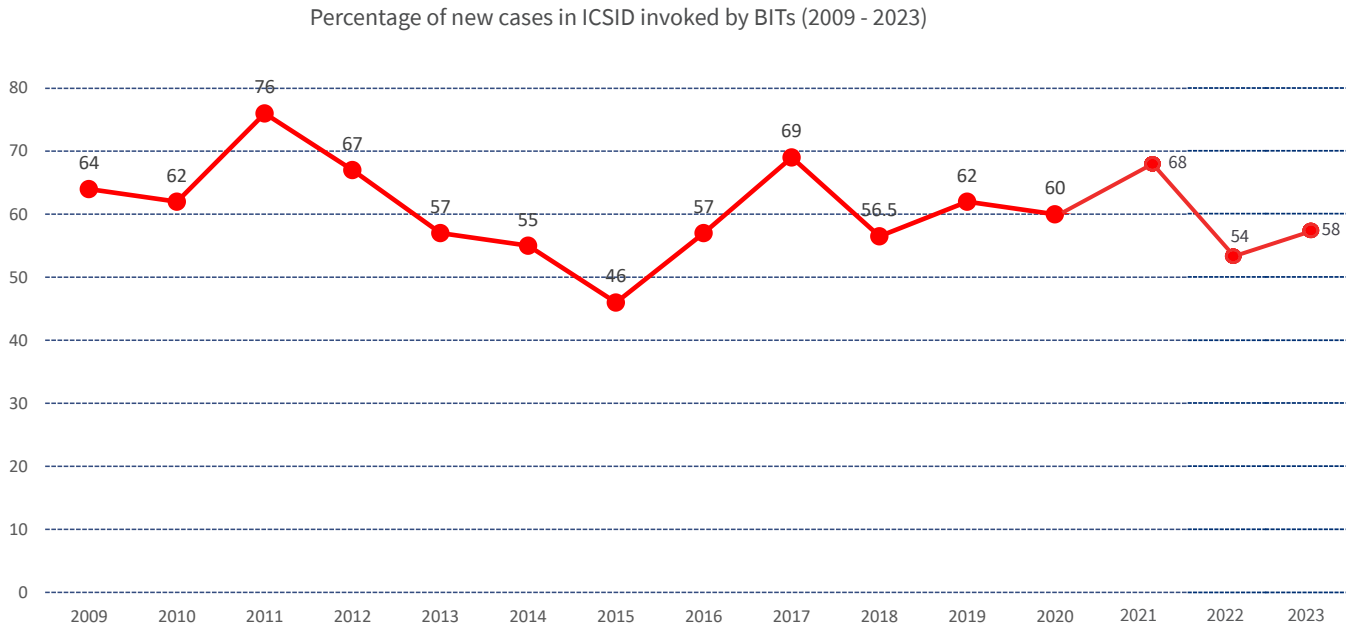
TIP 2 | STRUCTURE YOUR DEAL TO AVAIL YOURSELVES OF INTERNATIONAL TREATY PROTECTION

As of 2024, there are 100 Bilateral Investment Treaties (BITs) in force between China Mainland and BRI nations as well as several Multilateral Investment Treaties (MITs). These allow investors to bring claims against BRI governments should their treaty-prescribed substantive investor rights be breached. Of these BIT-contracting states, over 70 are parties to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also referred to as the Washington Convention), which facilitates international enforcement of arbitration awards between signatories.

The International Centre for Settlement of Investment Disputes (ICSID) is one of the major international institutions administering international investment disputes.



(Source: ICSID)



(Source: ICSID)

Investment treaties typically provide several investment protections, including:

- Fair and Equitable Treatment: the obligation not only to foster a stable, predictable investment environment, but also to act fairly and transparently, extending to how investors are treated in the host state's legal system through "Most Favorable Nation" clauses;
- Compensation for expropriation or nationalization of investor's assets (be it direct or indirect), and the prohibition of such acts unless for a public purpose;
- Full protection and security, which provides the positive obligation to protect investment by the exercise of reasonable care;
- Non-discrimination in taxes, fines, penalties, licenses, permits and visa restrictions; and
- "Umbrella clauses", which incorporate into the BIT, by reference, obligations entered into between a host state and investors in other contracts.

It is necessary both to fall under the definition of 'investment' and be viewed as a qualified 'investor' for the purposes of the various investment treaties in order to be protected by them.

Typically, the definition of 'investment' is broad and non-exhaustive, encapsulating both the primary investment, as well as the collateral elements such as loans – indeed, the loans themselves may be considered distinct investments. In order to be viewed as a qualified 'investor', one must typically be nationals of a contracting state, but not nationals of the host state.

To determine the nationality of the investor, some treaties look to the place of incorporation, while others look to the place from which substantial control of investments is directed. Hong Kong investors should especially ensure that they qualify as a national of the PRC. BRI investors should choose the optimal investment structure from the beginning and engage lawyers at an early stage, as an investor may not be able to apply to certain dispute tribunals should they try to structure an investment after a dispute.

One should of course check if the treaty they wish to make use of is actually in force, as well as the host BRI countries' history of dealing with investor claims. For some treaties, the guaranteed protections within may be applied to investments made prior to the enactment of the treaty, and may survive for a certain period after termination of the treaty.

Examples of recent disputes arising from BIT

Ping An Life Insurance v Belgium

The dispute concerns two Chinese BITs – one in 1986 and one in 2009 between China and the Belgian-Luxembourg Economic Union. While the 2009 BIT grants access to ISCID arbitration, the one in 1986 had not contemplated such option. Since the dispute crystalised before 2009, the Tribunal ruled that the more extensive remedies under the 2009 BIT were not available to the pre-existing disputes. This case highlights the significance of the respective BIT terms when determining any protections available to BIT investors.

TIP 3 | CAREFULLY SELECT THE ARBITRATORS

Most infrastructure project dispute resolution clauses specify the appointment of three arbitrators; one from the claimant and one from the respondent, as well as a chairman chosen by the two arbitrators. The choice of three, while resulting in a more costly process, safeguards against the possibility of an unfair award. Certain protocols also allow lawyers to interview prospective arbitrators before they are appointed, and before they select a chairperson. The composition of the actual tribunal, be it composed of lawyers or specialists, local or international, or any combination thereof, is critical to the success of the arbitration, and should be decided in the context of the case in mind.

Parties should give consideration as to which arbitrators would be most suitable and well versed given the sector or industry in which the dispute takes place and their views on any relevant developments in the sector. Aside from industry knowledge and experience, arbitrators should have necessary procedural knowledge.

Ensuring the independence of an arbitrator is of paramount importance. Under many arbitration rules, there will be guidelines on conflicts of interest. This will likely require arbitrators to make a declaration when accepting appointment that he / she does not have any conflicts of interest with either party to the arbitration. Increasing attention is also being paid to repeat appointments and gender diversity in arbitral appointments and proceedings. King & Wood Mallesons is a signatory to the Equal Representation in Arbitration pledge: arbitrationpledge.com

TIP 4 | RECORDS, RECORDS,RECORDS

Broadly, there are two categories of records: joint or public documentation and internal documentation, both of which can make or break an arbitration. The former includes correspondence, minutes of regular meetings, records of deliveries, payments, daily site activity diaries and photographs. Letters must be sent on a regular basis recording problems and making claims. Internal documentation can take the form of personal and detailed diaries kept by different project participants, as well as emails. Typically, in an arbitration, both internal and joint documentation is disclosable, so long as it is relevant to issues in dispute in the case.

As such, proper record keeping is key. It is crucial to have a user-friendly document management system in place to facilitate the proper production of evidence. Parties should adopt internal policies to ensure that there is a “paper trail” of the records. This is particularly important when signs of a dispute arise. Having a document system in place will also prevent unnecessary delay during the course of arbitration.

TIP 5 | COMPLY WITH PRE-ARBITRATION REQUIREMENTS

Pre-arbitration requirements can often be seen in arbitration clauses. Parties typically agree to try different methods of dispute resolution such as negotiation or mediation before they proceed to arbitration. This is known as a "multi-tiered dispute resolution". With these types of clauses in place, it is important that pre-arbitration requirements are complied with before arbitration is commenced otherwise parties may risk one side challenging the validity of arbitration.

This issue came up in a recent Hong Kong Court of Final Appeal decision in, C v D [2023] HKCFA 16. In this case, the dispute resolution clause prescribed that parties shall attempt in good faith to resolve the dispute by negotiation with written notice issued to their counterparty. If the dispute cannot be resolved within 60 business days of the party's request, then it shall be referred to the HKIAC for arbitration. The tribunal construed that the negotiation requirement was satisfied by D and C's objection to the tribunal's jurisdiction was rejected and an arbitral award was ordered. C then sought to set aside the arbitral award before the Court for lack of jurisdiction of the Tribunal.

The Court distinguished admissibility from jurisdiction. Jurisdiction refers to the power of the tribunal to hear a case, whereas admissibility refers to whether it is appropriate for the Tribunal to hear it. The Court held that it was for the arbitral tribunal to decide whether the dispute resolution procedure has been complied with to satisfy pre-arbitral steps as a matter of admissibility of the claim. Admissibility is a matter for which the tribunal has the final say. The finding was upheld by the Court of Appeal and Court of Final Appeal.

C v D highlights the importance of clear and precise drafting of dispute resolution clauses and the need to comply with pre-arbitration requirements where parties have agreed to do so.

TIP 6 | DON'T RUSH IMMEDIATELY TO THE LOCAL LAWYERS

To resolve BRI disputes successfully, you should always have an international law firm as team leader, with lawyers who are familiar with the specific type of BRI project being undertaken. Unfortunately, BRI participants often go first to local lawyers, who may not have enough experience with international, commercial or investment treaty arbitration or otherwise are not specialist subject experts in the particular sector.

The international law firm should lead the designing of a disputes strategy and liaise with local lawyers and opposing counsel, including discussing the protocols of their arbitration.

The international law firm (e.g. KWM) will:

- consider the availability of arbitrators;
- recommend a costs protocol; and
- help appoint a suitable tribunal.

As the arbitration progresses it will:

- request the arbitrators to convene procedural meetings;
- address the appropriate location for oral hearings;
- consider whether a fast track route is appropriate;
- advise on any interim relief measures; and
- consider potential settlement options if needed.

Before the hearing it will:

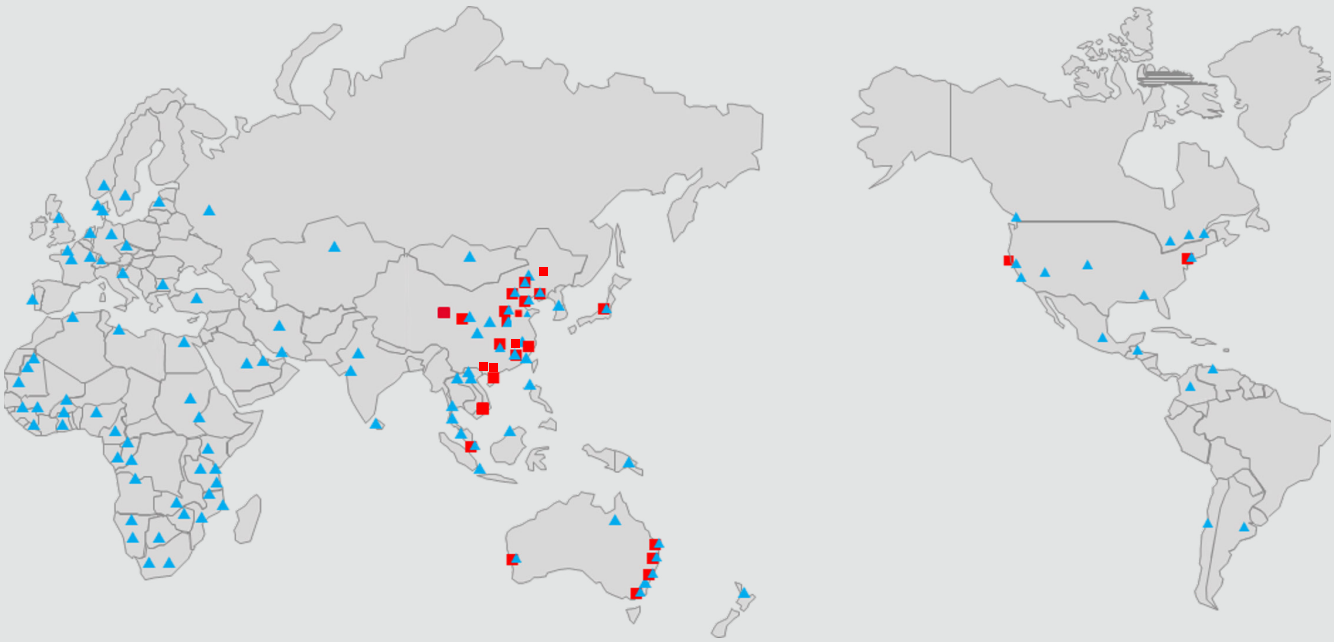
- identify the issues to raise in the hearing;
- encourage experts to meet; and
- limit the length of written submissions, if appropriate.

At the hearing it will consider:

- dividing time during the oral hearing between the parties on a "chess clock" basis to facilitate efficient use of time;
- saving time and cost by utilising video conferencing for non-lengthy or non-crucial witnesses; and
- avoiding witnesses testifying about the same facts.

INTERNATIONAL ARBITRATION

Where we have experience



* Based on the cooperation agreement between King & Wood Mallesons China (KWM China) and Eversheds Sutherland (International), we are able to further extend our global reach to the UK, Europe, Middle East, Africa.

King & Wood Mallesons offices ■

Locations of relevant experience ▲

TIP 7 | CHOOSING WHEN TO SETTLE YOUR DISPUTES

Remember to involve your international lawyers from the start, long before a potential dispute occurs, to save lost time and additional legal costs later.

As with all disputes, settlement should always remain the preferred option for resolving BRI disputes. The aim should be to settle the case early, for an amount which accords with a realistic view of prospects, and before any hearing takes place. However, parties sometimes rush to initiate a settlement at the very beginning, proposing sweeping concessions, and downplaying their position.

When it comes to settlements, timing is crucial. Strategies include:

- Selecting an appropriate time to propose formal mediation and selecting a mediator with legal, cultural and industry knowledge; and
- When making settlement offers, examining pressure points and analysing changes in circumstance, finding out what your opponent is seeking and their underlying interests.

Dispute resolution clauses sometimes require mediation before arbitration. Where a clause is silent about mediation, a BRI participant is free to propose it any time. The other party is free to agree or refuse.

A key benefit to mediation is that it can preserve business relations and save parties from the rigours of a full-scale arbitration.

The international law firm team leader can advise:

- when parties should propose mediation, be it before or during the arbitration; and
- who the mediators should be, be they arbitrators or a third party.

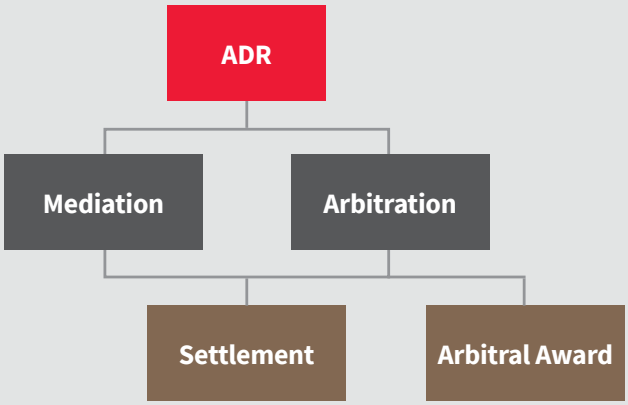
They should also decide if the arbitration should be postponed during mediation, or even if the arbitrators should be informed that mediation is taking place.

Singapore Convention on Mediation

The Singapore Convention on Mediation (Singapore Mediation Convention) opened for signature on 7 August 2019 and currently 57 countries have signed, including China. 14 parties have ratified the Singapore Mediation Convention as at August 2024. The Singapore Mediation Convention not only recognizes mediation as a viable dispute resolution option, but also provides for enforcement of international mediated settlement agreements in a similar way to arbitral awards under the New York Convention. Under the Singapore Mediation Convention, parties are able to apply directly to the courts of party States which have also ratified the Singapore Mediation Convention, to enforce settlement agreements resulting from mediation as if they were court judgments or arbitral awards. This effectively provides reassurance that cross-border mediation results will be enforced quickly across borders, instead of having first to sue or arbitrate on the settlement agreement in new proceedings (which is the traditional method by which settlements are enforced) and then enforce the resulting judgment or award.

At the time of writing, Hong Kong is yet to become a signatory to the Singapore Mediation Convention. It also remains to be seen whether agreements entered into between Hong Kong and China Mainland will satisfy the "international requirement" under the Singapore Mediation Convention. However, this might be catered for by a future special arrangement between Hong Kong and China Mainland on mutual enforcement of mediated settlement agreements.

It is important to involve international lawyers as early as possible in a case, to advise on the enforcement of the international arbitral award or foreign judgement.



TIP 8 | CAREFULLY CONSIDER HOW TO CONDUCT THE ARBITRATION

Unlike court litigation, the arbitral proceedings are conducted according to choices made by the parties before and during the arbitration i.e. by selecting a certain set of arbitral rules. An international law firm specialising in infrastructure and disputes should be the team leader in any BRI arbitration to guide such choices. The conduct and procedure of the arbitration largely depends on the chosen rules. Although most major institutional rules have many similar features, there are still particular discrepancies of which parties should be aware.

One example would be confidentiality. Generally speaking, arbitral proceedings are kept confidential, compared to court proceedings which are held in public. As some examples of different approaches, the rules of the ICC do not contain any express confidentiality provisions (parties may nevertheless agree to keep arbitral proceedings confidential), but by contrast, the HKIAC and SIAC Rules prescribe confidentiality requirements.

Arbitral institutions adopt different fee structures. Some institutions (e.g. SIAC) base charges on the amount in dispute consideration, whilst others (e.g. LCIA) charge on a flat hourly rate basis. The HKIAC allows the parties to choose between the two approaches, most parties tend to opt for charges on a flat hourly basis.

Durations of arbitrations will also differ between arbitral institutions. Some institutions provide a deadline for arbitral tribunals to prepare their awards (e.g. SIAC – the tribunal must submit the draft award to the SIAC Register not later than 45 days from the date on which it declared the proceedings closed. HKIAC Administered Arbitration Rules 2024 (2024 HKIAC Rules) introduced a hard-stop date for the close of proceedings no later than 45 days from the last directed substantive oral or written submissions.) More information on the changes introduced in the 2024 HKIAC Rules is available here: https://www.kwm.com/hk/en/insights/latest-thinking/now-in-force-updated-hkiac-administered-arbitration-rules-2024.html

Further, some arbitral institutions provide for fast- track arbitration or summary disposal. For example, CIETAC in its 2015 Rules provides for a mechanism of summary procedure; and the updated CIETAC Arbitration Rules 2024 also include an early dismissal procedure. HKIAC in its 2018 Rules introduced a mechanism for early determination (included in the 2024 HKIAC Rules too). SIAC also has a summary dismissal procedure, introduced in its 2016 Rules. Parties should take this into consideration when choosing their institutions, especially when they want to have flexibility over adopting fast-track procedures. This is particularly advantageous for disputes involving smaller claims.

TIP 9 | THIRD-PARTY FUNDING AND OUTCOME RELATED FEE REFORM

In any modern arbitration, it is necessary to consider funding of legal fees. Traditionally, parties have had to fund fees entirely themselves. Nowadays, further options are available to parties.

THIRD-PARTY FUNDING

Third-party funding (TPF) is where a professional funder, who is not a party to an arbitration, provides funds to a party to pay for legal fees, in exchange for a financial benefit, which would typically be an agreed return.

Hong Kong

TPF legislation for arbitration was introduced in Hong Kong in February 2019 when Part 10A of the Arbitration Ordinance (Cap. 609) came into operation. It allows a third-party funder who does not have an interest recognized by law in the arbitration to provide funding for the arbitration.

A third-party funder must not seek to influence the funded party or its lawyers to give control of the arbitration to the funder except to the extent permitted by law, or take steps that cause the funded party to breach their professional code of conduct or seek to influence the tribunal. The funder also has a duty to disclose information about the funding.

Singapore

Singapore introduced new legislation to permit TPF in 2017 by the Civil Law (Amendment) Bill which came into effect on 1 March 2017. Subsidiary legislation was also introduced to regulate the third-party funders.

In 28 June 2021, Singapore has taken a further step to extend their scope of TPF framework to include (i) domestic arbitrations and associated court proceedings; (ii) Singapore International Commercial Court (SICC) proceedings and related appeals; and (iii) mediations related to any of the above.

OUTCOME RELATED FEE STRUCTURES

An outcome related fee structure (ORFS) is an arrangement where there is an agreement between the lawyers and their client under which the lawyers advising their client on contentious proceedings receive a financial benefit (i.e. success fee, contingency fee) in the event that the client is successful in the case.

Hong Kong

The new ORFS legislation came into full operation on 16 December 2022 in Hong Kong under Part 10B of the Arbitration Ordinance. The new legislation allows lawyers to enter into three types of ORFS agreements with clients for arbitration and arbitration-related court proceedings:

Conditional fee (CFA)	If the case fails, the client pays nothing (no win, no fee) or only the usual or discounted fees (no win, low fee), during the course of the matter. If the case succeeds, the client pays for the legal services rendered plus an agreed uplift.
Damages-based (DBA)	If the case fails, the client pays nothing (no win, no fee). However, if the case succeeds, the client pays an agreed proportion of the financial benefit awarded to / recovered by the client (DBA Payment)
Hybrid damages-based (Hybrid DBA)	If the case fails, the client pays only the usual / discounted fees during the course of the matter (no win, low fee). If the case succeeds, the client pays for the legal services rendered plus a DBA Payment.

Singapore

In May 2022, Singapore also reformed their conditional fee arrangement regime through the enactment of the Legal Professional (Amendment) Act 2022 and Legal Profession (Conditional Fee Agreement) Regulations 2022. Lawyers in Singapore are permitted to enter into conditional fee arrangements regarding domestic and international arbitrations, Singapore International Commercial Court proceedings, and any related court and mediation proceedings. However, it is important to note that damages-based contingency fees are still not permitted.

TIP 10 | ENFORCEMENT ACROSS SOUTH AND SOUTH EAST ASIA

BRI disputes are, by their very nature, going to be cross-border. There is an increasing need to enforce arbitral awards from Hong Kong and Singapore in China and in other South and South-East Asian countries. In this section, we set out key jurisdiction specific tips on the enforcement of arbitral awards, and cultural factors to take into account when conducting arbitration.

CULTURAL CONSIDERATIONS AND JURISDICTIONAL TIPS ON ENFORCEMENT	
Hong Kong	• Hong Kong courts are generally supportive of arbitration except in limited situations. Arbitral awards whether domestic or foreign are enforceable in the same manner as a judgment of the Court but requires the leave of the court. • For enforcing foreign arbitral awards, the arbitral award must be in either English or Chinese. If not, it is necessary for the award to be translated into either English or Chinese and certified by an official or sworn translator. • Parties seeking to take advantage of the mutual recognition and enforcement of arbitration awards between Hong Kong and China need to be aware that there are different time limits for applying to enforce arbitration awards in Hong Kong and China. In Hong Kong, the limitation period is 6 years from the date on which the other party fails to fulfil its obligation under the award. For China, the corresponding limitation period is 2 years. Enforcement proceedings may now be conducted simultaneously in Hong Kong and Mainland China. • The Interim Measures Arrangement, as well as other China-Hong Kong specific arrangements give Hong Kong unique advantages as a seat for arbitration. Assets frozen by interim measures can be used for enforcement after an award is granted.
China	• There is a 2 year limitation period for enforcing arbitration awards in China. • When seeking a guarantee from a Chinese company or an individual, the guarantee must be registered with the China Mainland authority (SAFE). Otherwise, it may be difficult to enforce such a guarantee in China. • For documents that are not in Chinese, ensure these are translated and notarised as soon as possible. • Maintain good communications with the Chinese Courts. For asset preservation, PRC Courts have a comprehensive database to assist in locating bank accounts and details which can assist in asset tracing. • For domestic arbitral awards, a party can directly apply for enforcement with the intermediate people's court where the defendant resides or the assets are located. If certain conditions are met, a competent intermediate people's court may direct a court at a lower level to exercise jurisdiction. For foreign arbitral awards, a party should apply for both recognition and enforcement of the award with an intermediate people's court where the defendant resides or the assets are located. There are special rules applicable to applications for the recognition and enforcement in China Mainland of arbitral awards made in Hong Kong, Macao and Taiwan. As of 29 January 2024, a broader scope of civil / commercial judgments may be enforced on a reciprocal basis between China Mainland and Hong Kong[2] .
Singapore	• Singapore is a pro-arbitration jurisdiction. The Singapore Courts have consistently applied a policy of minimal curial intervention and the scope for judicial intervention in arbitration proceedings is narrowly circumscribed. • That said, a losing party may seek to delay the enforcement of an arbitration award in Singapore seated arbitrations by applying for the award to be set aside by the Singapore courts on the basis of natural justice. While most applications are unsuccessful (with only a few succeeding each year) this will delay the enforcement of the award. • If parties wish to use a neutral seat outside of China Mainland and Hong Kong, Singapore is an excellent choice.

[2] Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region as signed on 18 January 2019. Read information available here: https://www.kwm.com/hk/en/insights/latest-thinking/implementation-of-mainland-hong-kong-reciprocal-enforcement-arrangement.html

CULTURAL CONSIDERATIONS AND JURISDICTIONAL TIPS ON ENFORCEMENT	
Malaysia	• Malaysian Courts are reluctant to interfere with arbitral awards. The grounds for setting aside are limited and similar to those in Singapore. Legislative amendments are pending to allow third-party funding of arbitration and amend arbitration law provisions concerning recognition and enforcement of awards in line with UNCITRAL Model Law. • Be careful when appointing an arbitrator with expert knowledge in industry related disputes. Arbitrators in Malaysia are allowed to use both their personal knowledge and expertise in determining a dispute. • Beware of a losing party seeking to delay enforcement by applying for an award to be set aside or challenging enforcement on unmeritorious grounds.
India	• It is very popular for Indian parties to choose arbitration in Singapore for their disputes with foreign parties. • The Supreme Court of India has recently ruled that Indian parties may choose an arbitral seat outside of India in their contract even if the subject matter of their contract is situated in India. It was held that allowing parties to choose a foreign seat is not contrary to public policy. • If a foreign seat is chosen, ensure that the country of the seat is a New York Convention signatory which has been gazetted by the Central Government of India as awards are only recognized and enforced from countries that have been formally notified in the gazette. • Be aware of different limitation periods for enforcing Indian seated arbitrations and foreign seated arbitrations in India: for India-seated arbitrations, there is a 12-year limitation period to enforce the award as if it were a decree of the court; and for foreign-seated arbitrations there is a 3 year limitation period to apply for recognition and enforcement from when the right to apply accrues (Government of India v. Vedanta Limited and Ors. Civil Appeal No. 1385 of 2020).
Japan	• Japanese courts generally take a pro-arbitration stance. Japan is a signatory to the New York Convention, which facilitates the enforcement of awards rendered in other contracting states. Further, an award rendered in a non-contracting state may be enforced in Japan if it satisfies the requirements of Arbitration Law No. 138 of 2003. Long awaited amendments to arbitration law in Japan came into force on 1 April 2024, at the same time as the Singapore Convention. • Foreign arbitral awards are enforceable in Japan in the same manner as any Japanese court judgments. However, where the foreign award is not in Japanese, a Japanese translation will need to be obtained.
South Korea	• South Korea has encouraged the use of arbitration to resolve disputes between domestic parties and the Korean Courts are supportive of the arbitral process and will only refuse to enforce an arbitral award if one of the grounds for refusal under the Korean Arbitration Act, which are identical to Article V of the New York Convention, exists. • Interim relief is available from both courts and arbitral tribunals and parties can make a choice de-pending on the circumstances of the case. However, the types of interim measures available to arbitral tribunals are more diverse and tribunals can order interim measures such as temporary injunctions, asset preservation orders or disclosure orders. • A party cannot delay arbitration proceedings by filing an anti-arbitration injunction application before the Korean Courts (although this has yet to be tested in court). • Yet, the Korean Courts take a firm stance against parties who attempt delaying tactics. For example, there have been instances where respondents have challenged arbitral awards on the ground that the proceedings were commenced in the wrong arbitral institute. Such challenges were rejected by the Korean Courts on the basis that they were not raised during the arbitration proceedings and belatedly raised to set aside the arbitral awards.

CULTURAL CONSIDERATIONS AND JURISDICTIONAL TIPS ON ENFORCEMENT	
Indonesia	• Where there is an Indonesian counterparty, the parties should execute a version of the contract in the Indonesian language to avoid the risk of the contract being held invalid and unenforceable by the Indonesian Courts. It is best to execute the Indonesian and foreign language versions of the contract simultaneously. • It is generally difficult to obtain interim measures in Indonesia or to enforce interim measures ordered by international tribunals. As such, for contracts of significant value, parties should try to obtain security at the point of contracting rather than rely on interim measures. • In order to enforce an arbitral award, it must be registered by the arbitral tribunal with the Court. Local awards have to be registered within 30 days of their issuance with the District Court. International awards have to be registered at the Central District Court at Jakarta and there is no time limit to do so. New regulation issued by the Indonesian Supreme Court is anticipated to encourage faster enforcement[3]. • After an award is registered, it is common for the losing party to start proceedings to challenge recognition of the award. If so, courts will stay the registration until proceedings are resolved which could take years.
Vietnam	• Vietnam can be a difficult jurisdiction for the enforcement of foreign awards as many judges in the local courts do not have sufficient expertise in arbitration. • The award creditor has a 3 year limitation period to file the application for enforcement at the local court where the debtor resides or has assets for enforcement. • Common arguments used in Vietnam to prevent enforcement include not having notice of the proceedings and that the person who signed the contract did not have the authority to sign the contract. • Be careful of which disputes are arbitrable. For example, disputes over land ownerships are not arbitrable under Vietnamese law. • Interim measures ordered by international tribunals are generally not enforceable in Vietnam (as there is no domestic ground for the enforcement). Tribunals may face legal proceedings under Vietnamese law if they wrongfully grant interim measures. Amendments to the current arbitration law are being considered.
Thailand	• Enforcement of arbitral awards between commercial parties has improved in Thailand as the award creditor can file proceedings to enforce the award in the IP and International Trade Court in Bangkok. • If a counterparty is related to the State, any enforcement against the State requires cases to be submitted to the administrative court in Thailand which is more difficult. • Ensure that notice provisions are added into the arbitration agreement since it is not uncommon for Thai parties to not appear in arbitration proceedings and argue that they did not receive notice of the arbitration.
Philippines	• Enforcement of arbitral awards in the Philippines is usually straightforward, except for construction cases. • For construction cases, there is a Construction Industry Arbitration Commission (Commission) which has exclusive jurisdiction over all construction related disputes in Philippines. The jurisdiction is granted by law and cannot be precluded by any arbitration agreement, as long as one party voluntarily submits the dispute to the Commission. This can result in parallel arbitration proceedings if the parties have agreed to a different arbitral procedure in the contract. • The Philippines Supreme Court confirms that enforcement of arbitral awards whether domestic or international can be refused on public policy grounds.[4]
Dubai	• A decree came into force in September 2021, abolishing two arbitral bodies, Emirates Maritime Arbitration Centre (EMAC) and Dubai International Financial Centre's Arbitration Institute (DAI), and transferring their rights and obligations to the Dubai International Arbitration Centre (DIAC). • All arbitration agreements concluded prior to 20 September 2021 by which parties have agreed to arbitrate under the DIFC-LCIA or EMAC rules will be effective and DIAC shall substitute the abolished centres unless parties have agreed otherwise. If parties have commenced the arbitration under DIFC-LCIA or EMAC rules, the arbitral tribunal shall continue to hear the case before them under the same arbitration rules.

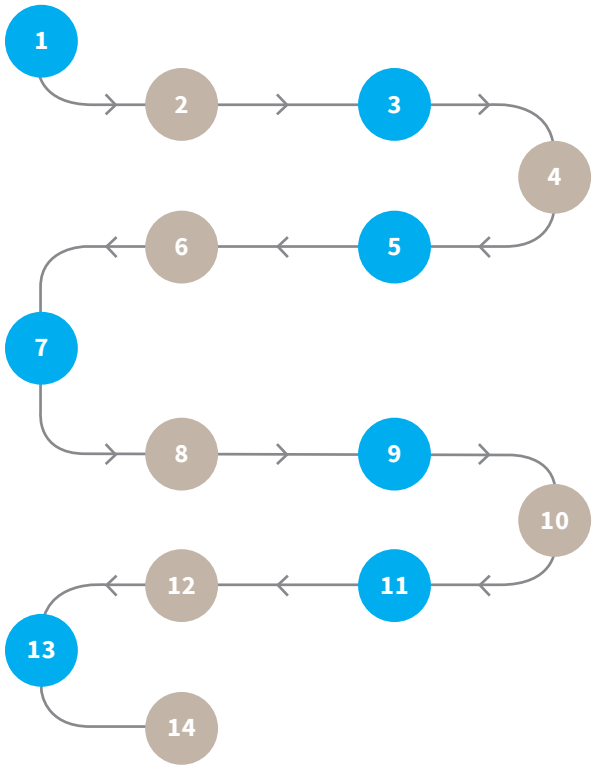
[3] Regulation of the Supreme Court of the Republic of Indonesia No.3 of 2023.

[4] Rule 19.10 Special Rules of Court on Alternative Dispute Resolution. Maynilad Water Services Inc. v. National Water and Resource Board, et al. G.R. No. 202897/G.R. No. 206823/G.R. No. 207969.

ARBITRATIONS - THE STEPS

The handling of these longer arbitrations can be something of a long and winding road.

Each of the following steps should be handled by the international legal adviser as team leader, working in conjunction with the local lawyers.



1. Arbitration Agreement
2. Commencing arbitration
3. Emergency Arbitrator / Asset preservation
4. Appoint arbitral tribunal
5. Joinder / Consolidation
6. 1st hearing for directions
7. Pleadings
8. 2nd hearing for directions
9. Discovery
10. Factual witness statements
11. Expert reports
12. Hearing
13. Award
14. Enforcement

CONCLUSION

Overall, dispute resolution concerns achieving an optimum result for our clients – be that in terms of winning a contentious case or reaching an amicable settlement. Each situation is unique requiring a robust and well thought out strategy and an organized team which understands the dynamics of international disputes. We hope that our top ten tips have provided insight into how to deal with BRI problems, so as to encourage high quality legal services rendered from PRC-based lawyers, supporting the expansion of PRC companies' BRI ventures and the globalisation of the PRC's economy.

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