

Construction of the International Commercial Mediation Mechanism under BRI

Lin Jianqun

Guangzhou College of Commerce, Guangzhou, Guangdong, China
linjianqun0225@gmail.com, 137571584@qq.com

Abstract: Countries along the "Belt and Road" route have different national conditions, and the use of traditional dispute resolution methods to resolve international commercial disputes faces difficulties in terms of jurisdiction and application of law. The mediation system has unique cultural advantages and is an efficient and convenient way of dispute resolution. However, the enforceability of settlement agreements reached through mediation is uncertain. In China, the settlement agreement formed through the mediation procedure of commercial mediation institutions does not have the power of enforcement, and its enforcement mainly relies on litigation or arbitration procedures, which is not conducive to the development and improvement of the mediation system. China needs to formulate a unified "commercial mediation law" to give clear legal protection to the validity of settlement agreements made by commercial mediation institutions, including private mediation organizations. At the same time, it is necessary to strictly implement the credit disciplinary system, organically integrate the commercial mediation system with the credit disciplinary system, and promote joint disciplinary action by all parties concerned against executors who have failed to comply with the law.

Keywords: BRI, International Commercial Mediation Mechanism, Voluntarily

1. Introduction

In recent years, China being the world's third largest recipient of foreign direct investment (FDI), has increased its outward direct investment (ODI) in tandem with its opening up policy and "Going out" strategy to spur China's economic and investment integration with the world. The wave of Chinese outward investment flourishing further to the next level, spurred by President Xi Jinping's Belt and Road Initiative (BRI) launched in September and October 2013. (Socio-Economic Research Centre)^[1]

From the perspective of the "Belt and Road Initiative", economic and trade exchanges between various countries have increased, and countries along the "Belt and Road Initiative" route have become the main targets of China's foreign investment. No doubt participating in the construction of the "Belt and Road Initiative" has brought unprecedented historical opportunities to Chinese enterprises and other investors, but the possible risks can not be ignored. Due to political, economic, historical, cultural, religious, and other factors, the investment environment of the countries along the "Belt and Road Initiative" is complex, and the transparency of the rule of law is low, so it is difficult for foreign investors to cope with the complex investment environment, which can easily lead to investment risks. this leads to frequent investment disputes. At the same time, the relief of investment disputes by the countries along the "Belt and Road Initiative" route can not meet the interests of all countries along the route. The traditional leading methods used to resolve investment disputes, such as international arbitration and domestic relief of the host country, have certain limitations. International arbitration is often criticized for favoring private investors, and it is also difficult for investors to use the domestic relief of the host country to protect their rights. Therefore, people from all walks of life have carried out a lot of analysis and exploration around the investment disputes caused by the "Belt and Road Initiative" investment and its settlement mechanism.

In recent years, mediation has been paid more and more attention, whether it is international commercial mediation or mediation procedures as a way to resolve international investment disputes that have appeared in the field of vision of the public. The revision of the mediation procedure rules by (ICSID) of the International Center for the Settlement of Investment disputes and the adoption of the United Nations Convention on International Reconciliation agreements arising from Mediation (hereinafter referred to as the Singapore Convention) promoted by the United Nations Trade Law Commission all reflect the importance of mediation as a way of dispute settlement. In addition,

countries along the "Belt and Road Initiative" route also pay more and more attention to the development of the domestic mediation system. For example, in 2008, the European Parliament and the European Council issued the 2008/5/EC Directive on several issues of Civil and Commercial Mediation, which aims to encourage the application of mediation, promote the use of alternative dispute resolution, and promote friendly dispute resolution. The European Parliament and the European Council require members to implement laws, regulations, and administrative regulations enacted in compliance with this directive by 21 May 2011. Therefore, most EU member states (including the Eastern European countries along the "Belt and Road Initiative" route) began to vigorously develop and improve the domestic mediation system, such as the Hungarian mediation system from scratch, the developing Bulgarian mediation system, and so on. To sum up, the development and improvement of the domestic mediation system of the countries along the "Belt and Road Initiative" also reflects that mediation will be paid more and more attention by all countries, and will play a more important role in the process of dispute resolution in the future.

2. Problem Statement

From 2005 to 2014, there were a total of 33 overseas investment risk cases of Chinese enterprises along the "Belt and Road Initiative" route, designed in 20 countries, mainly concentrated in energy, such as Iran and Russia. Countries rich in mineral resources, as well as social unrest countries such as the Philippines, Myanmar, Syria, Afghanistan, and Vietnam. The number of cases in Iran and the Philippines accounted for 27.3%, and the amount accounted for 56.0%. (China's Foreign Investment Development Report 2017).^[2]

Under the background of the "Belt and Road Initiative", the overseas investment of Chinese enterprises is mainly concentrated in countries with rich social unrest, energy, and mineral resources. the special investment environment of these countries determines that Chinese enterprises are faced with many risks in their foreign investment. such as political risk, legal risk, religious risk, economic risk, and so on. The investment dispute between Chinese investors and the host country is inevitable in the process of "Belt and Road" construction. The vision and action of promoting the joint construction of the Silk Road Economic Belt and the 21st Century Maritime Silk Road mentioned: "China welcomes enterprises from all countries to invest in China and encourages domestic enterprises to participate in infrastructure construction and industrial investment in countries along the route." The international investment under the "Belt and Road Initiative" is two-way, and if the investment disputes under the initiative cannot be resolved reasonably and effectively, it will hurt both foreign and domestic enterprises.

The 15th guiding case involves the identification of personality confusion in affiliated companies. This guiding case fully demonstrates the guiding role of the guiding case in case adjudication and to some extent fills the legal loopholes. In this case, the court mainly relied on the confusion of personnel, business, and finance as the basis for determining "personality confusion". This case further clarifies the basis for determining the "personality confusion" of affiliated companies, as well as the legal consequences that constitute "personality confusion". It is conducive to guiding the company to maintain independence in personnel, finance, business, and other aspects in the process of operation and management, avoiding personality confusion, and thus curbing the abuse of legal personality, independent status of legal persons, and limited liability of shareholders.

Therefore, in the context of the "Belt and Road Initiative" initiative, establishing a set of generally acceptable and feasible international investment dispute settlement mechanisms under the "Belt and Road Initiative" initiative to ensure the healthy operation of international investment, is a necessary basis for the smooth implementation of China's "Belt and Road Initiative" initiative.

A diversified dispute resolution mechanism has been a topic that scholars have been happy to discuss in recent years, in which the research on mediation accounts for a large proportion, but it is rare to focus on commercial mediation and separate analysis, and there are great differences of opinion. Combined with the current hot spot-- the Singapore Convention, the discussion and research is even less. At present, domestic scholars still need to enrich the development of commercial mediation after China accedes to the Singapore Convention. Through the study of the previous academic achievements in commercial mediation and the reflection on the latest comments of experts, scholars, and lawyers, it is found that at present, our country has reached a high degree of agreement on the development and promotion of diversified dispute resolution mechanisms, including commercial mediation, but there are still great disputes on how to develop the specific practice of commercial mediation^[3].

3. Significance of the Research

Commercial mediation, as an important way to resolve commercial disputes, has incomparable procedural and substantive advantages over litigation and arbitration. The promulgation of the Singapore Convention has opened a new chapter in history for commercial mediation to continue to expand its influence in the international community. Under the ancient proposition of legal globalization, under the irreversible situation of economic globalization, the field of human economic communication is increasingly exceeding national boundaries, and commercial cooperation and interest disputes continue to emerge. It is a general trend to promote the application and development of independent commercial mediation in China: first, it is in line with the requirements of the Singapore Convention on state parties and the judicial reform process of diversified dispute resolution mechanisms in contemporary countries. It will help to give full play to the important role of commercial mediation in the period of national transition, give full play to its institutional advantages, and improve the judicial environment of our country. Second, this responds to China's vision of vigorously optimizing the business environment. Commercial mediation's procedural flexibility in dispute resolution, win-win substantive results and outstanding advantages in safeguarding long-term interests determine that it must have lasting vitality and great potential in a diversified dispute resolution mechanism, which provides an important guarantee for China to maintain steady economic growth and harmonious social development in a good social environment^[4].

Foreign mediation has developed rapidly both in practice and in theory. By contrast, we are lagging. At present, there are few discussions on commercial mediation in China. I hope that this article can make a modest contribution to the construction of China's mediation theory and play a due role in the construction of China's commercial mediation system.

4. Literature Review

4.1 In Terms of "Belt and Road Initiative" Investment

Most domestic scholars' research on "The Belt and Road Initiative" investment is mainly on the legal risk of "Belt and Road Initiative" investment, and the relevant countermeasures put forward are often measures to prevent the risk. For example, the legal guarantee of Chinese Enterprises going out under the Belt and Road Initiative, mainly introduces the current situation, risks, and risk countermeasures of Chinese enterprises' overseas financial investment, engineering, energy, and mineral resources investment. Some scholars and institutions have made detailed reports on the legal risks in the countries along the "Belt and Road Initiative" route, such as the "Belt and Road Initiative National Legal Risk Report" compiled by the China Development Bank, and the "Belt and Road Initiative" National Legal Service and legal risk Guide Handbook compiled by the Judicial Bureau of Nantong City, Jiangsu Province, and the Shanghai University of International Business and Economics. These studies on the Belt and Road Initiative's investment and investment risk are mainly to introduce the risk and advise investors on how to prevent and deal with the risk^[5].

4.2 In Terms of "Belt and Road Initiative" Investment Dispute Settlement

Most domestic scholars study the existing mechanisms for the settlement of investment disputes, especially the arbitration mechanism. For example, Wang mentioned in the "Belt and Road Initiative" Strategic dispute settlement Mechanism whether to establish a new dispute settlement body, the establishment of new dispute settlement rules to resolve investment disputes between countries and investors should be agreed upon by the countries along the "Belt and Road Initiative" route, which is not only conducive to the settlement of disputes. The important thing is to reflect the original intention of the countries along the route. In "on the Construction of Belt and Road Initiative's Investment dispute settlement Mechanism". The local relief of the countries along the route is not enough to fully protect the safety of investors and their funds. At the same time, the international investment arbitration mechanism, as one of the main ways to resolve disputes between investors and countries, is being questioned. It is feasible to construct the "Belt and Road Initiative" investment dispute settlement mechanism. An Analysis of the typical cases of Energy Investment "Enterprise risk Prevention, Control, and dispute Resolution under the" Belt and Road Initiative "Strategy mainly studies the typical arbitration cases of ICSID's energy investment, analyzes the causes of investment disputes and their impact on arbitration awards, so that the arbitration mechanism can be made full use of to properly resolve investment disputes between investors and the host country. "The Sino-Thai practice of Belt

and Road Initiative Investment dispute settlement Mechanism" takes Thailand as an example to introduce the dispute between Chinese investors going to Thailand and the Thai government, using the dispute settlement procedures stipulated in China-ASEAN FTA to introduce in detail the procedures of investment disputes, implementation and the types of disputes applicable to the dispute settlement mechanism in FTA.

4.3 In the Aspect of "Belt and Road Initiative" Investment Dispute Settlement Mediation Mechanism

At present, most of the research on mediation is related to international commercial mediation. For example, the Review of Foreign Commercial Mediation cases mainly introduces and comments on the mediation process of international commercial disputes. The mediation of investment disputes is mainly put forward by various scholars in the study of diversified investment dispute settlement mechanisms. "Belt and Road Initiative" initiative of the improvement of international investment dispute settlement-- and on the status and system construction of mediation system under the background of pluralistic dispute settlement, "thinks that mediation should be one of the diversified dispute resolution methods to improve the international investment dispute settlement of" Belt and Road Initiative ". Of course, it also includes special research on the mediation mechanism of "Belt and Road Initiative" investment disputes. For example, "Research on the mediation mechanism of investment disputes of" Belt and Road Initiative ". Based on the empirical study of the investment dispute cases and the arbitration cases of the countries along the" Belt and Road Initiative "route, we can see that the investment risk of the" Belt and Road Initiative "countries is high. However, as the main way, international investment arbitration has some defects, and the investment mediation mechanism has certain advantages in resolving "Belt and Road Initiative" investment disputes^[6].

4.4 On the Advantages of Mediation in Dispute Settlement

In the view that the development of commercial mediation should be promoted, the low cost of commercial mediation in dispute settlement includes the cost of time and money (the litigation procedure will consume huge resources in the process of discovering the truth itself), the non-antagonism of the status of the parties and the forward-looking maintenance of long-term interests. The high participation and confidentiality of the will of the parties and the convenience and informality of the procedure are several reasons that scholars generally put forward when discussing how to speed up the development of commercial mediation. Other scholars have better combined the characteristics of commercial disputes with the psychological activities of business subjects in the face of disputes and put forward original opinions on why mediation is so popular in the commercial field. For example, some scholars demonstrate in detail that the important reason for the pursuit of commercial mediation lies in its pursuit of basic values in pursuit of benefits, which coincides with the commercial subject as a rational economic man to maximize benefits as the goal of all actions, and the civil legal relationship gives the commercial subject a broad space for autonomy of will. It can give up, exchange, and trade rights and obligations based on comprehensive consideration of the balance of interests. In the process of dispute resolution, cost control is the first essence of business subjects, and to a certain extent, giving up rights and interests and making compromises are more in line with their business rationality. Some scholars agree in their works that the autonomy of mediation contributes to the thoroughness of dispute resolution, and the thoroughness of dispute resolution ensures the self-discipline of the parties to fulfill their obligations promptly^[7].

4.5 On the Implementation of International Commercial Settlement Agreements

First of all, about the concept of "settlement agreement". According to the Model Law on International Commercial Mediation (hereinafter referred to as the Model Law) and the Singapore Convention (hereinafter referred to as the Convention), it refers to "the settlement of the dispute reached by both parties at the end of the mediation procedure". This definition is inconsistent with the provisions of the settlement agreement in China's "People's Mediation Law" and the "Civil Procedure Law". The relevant provisions of our country are consistent with the concept of "mediation agreement". The "mediation agreement" in the Model Law and the Convention is a way for the parties to dispose of their litigation rights, which refers to the agreement that both parties voluntarily choose to settle the dispute using mediation. Domestic scholars deal with these two concepts in two ways^[8].

The first kind does not distinguish between a mediation agreement or settlement agreement and is

directly referred to as a "mediation agreement" according to the legal provisions of our country when studying and implementing issues, such as "opportunities, challenges and path Choices for the Development of Belt and Road Initiative" Commercial Mediation in China, and so on.

The second one distinguishes mediation agreement from settlement agreement, using the same concepts as the Model Law and the Convention, such as the principle and practice of ADR edited by Fan Yu, the study of legal issues of International Commercial Mediation edited by Yin Li, and the study of International Commercial Mediation and settlement in the Construction of Belt and Road Initiative by Qi Zhuang. The main issues studied in this paper are the improvement of China's commercial mediation under the Convention and the landing of the Convention in China. To be consistent with the expression of the Convention, the following content of this paper adopts the expression of "settlement Agreement". Secondly, on the implementation of the settlement agreement. The purpose of the implementation of the settlement agreement is to realize the benefits that can be obtained by the other party according to the agreement using enforcement when one party refuses to perform the obligations determined by the agreement, so the analysis of the effectiveness of the settlement agreement is the basis for studying the implementation of the settlement agreement. Regarding the effectiveness of the settlement agreement, scholars generally believe that it has a contractual effect, that is, once the agreement is reached, it produces the effect equivalent to the contract between the two parties, and the parties should perform it by the agreement. Anglo-American contract law also holds that the settlement agreement is binding on the contract, but some scholars point out that the effect of the settlement agreement lies between the civil contract and the judgment and the arbitral award. Some scholar believes that the settlement agreement has a contractual effect, makes a detailed analysis of the substantive law effect of the settlement agreement, and thinks that the settlement agreement has a particularity, so there is a dilemma in endowing it with executive force. On this basis, the author proposes to formulate a unified commercial mediation method and stipulate the effectiveness standard of the settlement agreement concerning the effective elements of the civil contract, and the court's review of the settlement agreement should not be too strict. As long as the content of the settlement agreement is in line with the law and does not violate the mandatory provisions or public order and good customs, it should be implemented. The Comparative Analysis of the Judicial confirmation procedure of the Mediation Agreement and the relevant legal guarantee Mechanism by Wang Guozheng and Liu Xieci makes a comparative study on the implementation of settlement agreements stipulated by the law in our country at present. The author also compares judicial confirmation with agreed guarantee, agreed civil liability, litigation, and arbitration, and draws the conclusion that judicial confirmation has unique advantages in the implementation of settlement agreement. At the same time, it is pointed out that there are still some problems in the judicial confirmation system of settlement agreements, such as startup and procedure, and points out that it needs to be improved.

5. Conclusion

The "Belt and Road Initiative" investment dispute and the importance of applying mediation to solve the "Belt and Road Initiative" investment dispute when the existing investment dispute settlement methods are insufficient. The level of the rule of law varies greatly among the countries along the "Belt and Road Initiative" route, and the specific legal systems and subjects of each country are also numerous and complicated. Countries mainly regulate the settlement of investment disputes through bilateral investment protection agreements. The investment dispute settlement methods stipulated in bilateral investment agreements are mainly consultation, host country relief, and international investment arbitration, but the existing investment dispute settlement methods have congenital deficiencies and acquired limitations. Mediation, as one of the traditional ways to resolve investment disputes, has been re-valued by the international community, and the concept of mediation coincides with the purpose of the "Belt and Road Initiative". Therefore, it is of practical significance to attach importance to and apply mediation to resolve "Belt and Road Initiative" investment disputes in this context.

The re-emphasis on mediation is not only in line with the development trend of the times but also related to its application space to the investment dispute of the "Belt and Road Initiative". The unique advantages of mediation itself and the new development of mediation rules are also gradually expanding the applicable space for the settlement of "Belt and Road Initiative" investment disputes. However, in dealing with investment disputes, mediation, as a traditional way, is rarely applied because of its limitations. Although it is flexible and convenient, it is difficult to implement. Therefore, in today's context, although mediation is valued, it is in an awkward position. It is necessary to make a more perfect design of mediation rules applicable to investment disputes to increase their application

and give full play to the advantages of mediation. It is pointed out that at the present stage, we mainly rely on the existing mediation rules to resolve "Belt and Road Initiative" investment disputes, and when the conditions are more ripe, we will build a new "Belt and Road Initiative" international mediation center for investment disputes to supplement the existing investment dispute mediation rules. To make more use of mediation to resolve "Belt and Road Initiative" investment disputes, thoroughly resolve the disputes between investors and the host country in a more friendly way, promote the further stability of friendly and cooperative relations between countries, and promote the development of "Belt and Road Initiative".

Commercial mediation is increasingly becoming a common means of international commercial dispute resolution because of its unique advantages in resolving disputes substantively and efficiently and maintaining friendly relations. In the face of the growing and diversified demand for commercial dispute resolution in countries along the Belt and Road, the State has issued the Opinions on the Establishment of International Commercial Dispute Resolution Mechanisms and Institutions for the Belt and Road, which provides a great opportunity for the development of commercial mediation in the Belt and Road. The timely introduction of the Opinions on the Establishment of International Commercial Dispute Resolution Mechanisms and Institutions for the "Belt and Road" by the State has provided great opportunities for the development of commercial mediation. However, it is undeniable that the development of "Belt and Road" commercial mediation is still facing many practical challenges. The only way to effectively deal with the development of "Belt and Road" commercial mediation is to reshape the basic concepts and principles of "Belt and Road" commercial mediation with the guidance of "common cause, common construction, and sharing" as the direction, and to cultivate modern international commercial mediation organizations, establish a professional team for international commercial mediation, clarify the enforcement mechanism of commercial mediation agreements, and build a credit system for international commercial mediation. "It is only by fostering modern international commercial mediation organizations, establishing a professional team for international commercial mediation, clarifying the enforcement mechanism for commercial mediation agreements, and building a credit system for international commercial mediation that we can effectively address the challenges of developing commercial mediation in the context of the Belt and Road initiative.

References

- [1] Chan, Peter. "China's Grand Mediation Strategy for Social Stability: A Study on Out-of-Court Mediation Procedures"[J]. *Revista de Processo Com-parado*, 2017, 6(3): 81-111
- [2] Dress, Tobi. "International Commercial Mediation and Conciliation", in *Loyola of Los Angeles [J]. International and Comparative Law Review*, 1988, 10(3):569-582
- [3] Liu, Huichun. "Evolution of Arbitration System Under the China FTZ Template"[J]. *World Scientific*, 2018, 1(3):1-26
- [4] Liu, Huichun. "Analysis of Indian Conciliation System" [J]. *Legal System and Society*, 2019, 1(1): 20-21
- [5] Shi, Jingxia and Dong, Nuan. "The Construction of Investor-State Dispute Settlement Mechanism under 'The Belt and Road' Initiative"[J]. *Wuhan University International Law Review*, 2018, 3: 1-24
- [6] Vukovi. "International Mediation as a Distinct Form of Conflict Management" [J]. *International Journal of Conflict Management*, 2014, 25(1): 61-80.
- [7] Wang, Guiguo. "On the Dispute Resolution Mechanism of the Belt and Road"[J]. *Chinese Law Science (Digest)*, 2017, 6(1): 56-71
- [8] Wang, Qian and Gao, Jinhan. "An Exploratory Study of the Establishment of Dispute Settlement Mechanisms for RCEP [J]. *Legal System and Society*, 2018, 2(1):134-152