Let's get things Strait

By **Edward Machin** - 21 August, 2012

A landmark investment pact has seen China offer a range of dispute resolution options to Taiwanese businesses. But some say the agreement doesn't go far enough.

Even if you squint hard enough, it's not quite possible to see China from Taiwan. Separated by less than 85 miles of international waters, Taiwanese businesses have pumped more than USD 120 billion into the Chinese economy since 1980, compared to only USD 300 million the other way.

Yet Taiwan holds virtually no weight in the resolution of disputes arising from investments made either side of the so-called Black Ditch. They take place on the mainland, and the mainland only, meaning Taiwanese parties must run the Chinese litigation gauntlet once relationships sour.

"For investors who are just starting to enter a new place it's natural for them to worry about the quality or performance of the courts," says **Nigel Li**, a partner at **Lee & Li** in Taipei. "And people may have their reasons to have doubts about China."

Following a recent investment protection pact, however, parties from both sides of the strait can have their disputes heard by either a Chinese or Taiwanese arbitral institutions, which can be seated in either jurisdiction.

Finalised on 9 August, the landmark agreement covers disputes between private investors, the governments of each side and between governments and businesses. It also encourages conciliation and mediation as an alternative to arbitration in investor-state disputes, as well as traditional court litigation.

Announcing the deal, the seventeenth between Beijing and Taipei since 2008, Chinese negotiator Zheng Lizhong predicted it would "encourage more mainland investment on Taiwan and give Taiwan investors more room to grow on the mainland."

May Tai, an international arbitration specialist at **Herbert Smith** **(http://www.cdr-news.com//firms/herbert-smith)**, is of a similar view. Calling the pact a "positive development," Beijing-based Tai says it is "likely to facilitate cross-strait investment cooperation, strengthen bilateral economic and cultural ties, and create a better investment climate across the strait."

Practitioners on the island are more upbeat still, with Li being no exception. "I'm very positive about this agreement," he says. "Of course you can always find room for improvement, but this is certainly good enough for now."

Others were less pleased, with Democratic Progressive Party policy director Joseph Wu slamming the negotiators for "fail[ing] to address Taiwanese peoples' needs and expectations." Wu took particular offence to the agreement's arbitration mechanism, which he said was a

“domestic issue” and made Taiwan a “de facto Chinese colony.”

Familiarity breeds contempt

Cross-strait relations have seldom been simple. But while pro-Taiwanese independence sentiments are no longer outlawed and mutual investment has grown in recent years, Beijing is keen to keep its one-China policy at the forefront of regional minds.

So, while this month’s pact saw the PRC acquiesce to both arbitration in Taiwan and by its authorities in China, it rejected Taipei’s requests to include ICC and ICSID as additional dispute resolution forums.

According to **Nils Eliasson**, who leads **Mannheimer Swartling** **(http://www.cdr-news.com//firms/mannheimer-swartling)**’s Asia disputes team, the “dispute resolution mechanism in the agreement is more restrictive than in most other investment treaties.” He contrasts this with the trilateral investment agreement between China, Japan and South Korea, signed in May 2012, which offers investors the choice of ICSID, UNCITRAL or any ad hoc proceedings of their choice.

“The Chinese did not want to go down the path as being perceived as indirectly recognising Taiwan’s sovereignty,” **Sheppard Mullin** partner **James Zimmerman** explains. “Much work and more details are required to fill the gaps, and thus provide Taiwanese investors with a comfort level that their interests will be protected in China.”

It’s hardly a secret that Beijing remains touchy about challenges to its power – the recent CIETAC fall-out (http://www.cdr-news.com/categories/arbitration-and-adr/featured/big-trouble-in-little-china), in which two of the institution’s busiest branches were suspended for dissent, is a chilling case in point. And though China permits both international and foreign institutions to conduct arbitrations in the country, “legally speaking at least,” Li says it is an unspoken secret that they are “neither welcomed nor well-received” by the PRC powers-that-be.

“But this pact offers additional choice, especially for Taiwanese investors,” Li says. “There is now the clear possibility that Taiwan’s arbitral institution – the Chinese Arbitration Association, Taipei or CAA – will be used by parties from the mainland.”

Li knows a thing or two about Taiwanese arbitration, having served as the CAA’s chairman since 2007. (Founded in 1995, the organisation now hears more than 200 cases annually, with an average value of USD 3 million.) “The CAA has maintained a very friendly relationship with CIETAC for many years, and is very well-received by our counterparts in China,” he says.

The CAA is hardly a second-class citizen, either, despite the fact that Taiwan is yet to sign the 1958 New York Convention. Indeed, a general counsel with experience of Asian disputes, speaking on condition of anonymity, says parties often grumble about one aspect of CIETAC’s procedural rules more than any other: the stipulation that, if a panel’s president isn’t accepted by both parties, the institution will make its own selection.

This normally means a local – potentially pro-Chinese – individual, according to the general counsel. “The tribunal thus consists of a majority of local arbitrators and a minority of overseas arbitrators,” the counsel says. “People have suspicions about favouritism from the local community.”

Li is quick to explain that the CAA doesn’t employ such an approach, but, like the ICC, requires the party-appointed arbitrators to select the tribunal chairman. “So in practice it’s more possible to see an arbitrator from a third jurisdiction be appointed, which may look more neutral and enhance faith in the quality of the arbitration,” he says.

Either way, both Li and Fai now advise parties to stipulate the pact's ADR mechanism in their contracts. "It remains to be seen how [the agreement] will work in practice," says Fai. "It is therefore advisable that parties to a cross-strait investment agreement ensure an adequate dispute resolution mechanism, such as providing for arbitration, is adopted in their agreement."

Li reports that visibility of the pact is "high" in Taiwan, and "serves as a reminder to Taiwanese investors that this is an important issue." He adds: "Other than large multinationals, businesses here were often not aware of ADR mechanisms. So the inclusion of private to private dispute resolution is helping investors in the mainland become aware of the options open to them."

For his part, Eliasson says the agreement's dispute resolution provisions are best seen as the start of a gradual development, and that the "details and possible scope of [their] application will be worked out and specified further in continued discussions between China and Taiwan."