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Dispute Resolution, Handshake

Dispute Resolution Systems

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It is important to understand what forms of legal redress will be available to the various parties involved in an infrastructure project. Foreign investors will be generally nervous about relying on a legal system that they do not understand and/ or know. The awarding authority will want to ensure that costs are kept low, that resolution of disputes is as local and efficient as possible.

Judicial System

The following need to be considered to determine whether the court system of the host country is a suitable venue for resolution of disputes between the contracting parties, and also for the wider group of stakeholders such as customers:

- The court system of a country may be inefficient and slow, with the potential for delaying the project extensively.
- The court system may be expensive and corrupt, often disadvantaging the poor or other individuals seeking redress. Should a court be established to consider low value disputes?
- The judiciary may also not be deemed to be sufficiently independent from the government to make the private operator comfortable that just redress will be available.
- There may be a separate administrative law and administrative court for dealing with disputes with government entities? If this is the case, how accessible is this administrative court to individual contractors, in particular where foreign contractors are involved? Is there a heavy burden of proof on the person bringing the claim? Are there limitations on the form of redress that can be sought (such as limitations on levels of damages that can be awarded against the public entity).
- How easy is it to enforce judgments in the jurisdiction?

Does the awarding authority benefit from “sovereign immunity” and so immune from prosecution and enforcement? If so, can the authority:

- waive such immunity under contract,
- agree not to invoke such immunity and/ or
- acknowledge that actions taken under the project agreement do not constitute sovereign acts.

For more on this, click on Sovereign Immunity.

Non-judicial Dispute Resolution Options

If redress through the court system is not available/ is limited or, particularly in the case of foreign investors, is undesirable, there may be other mechanisms available at law or by contract:

Arbitration

Arbitration has certain advantages over courts:

- the parties choose their tribunal;

- arbitration can offer greater assurance of a fair and competent decision, involving arbitrators with appropriate expertise;
- parties can appoint people with appropriate specific skills, including experts other than lawyers;
- arbitration proceedings can be more flexible - for example it is possible to have a documents only arbitration with no oral hearing;
- a final decision can often be reached more quickly because the right to appeal an award may be narrower than the right to appeal a judge's decision.

International Arbitration

Is it possible to take the dispute to international commercial arbitration? International commercial arbitration is possible if national laws allow it, and those that do permit disputes to be resolved by independent third party arbitrators in a neutral location thereby facilitating foreign investment in a project. In some cases, however, national laws require that disputes be resolved either within the host country or using the national courts (particularly if the parties are local).

Even if arbitration is allowed, a government body may not be permitted at law to agree in a contract to submit itself to arbitration.

In some countries, the courts may be able overrule or refuse to enforce a foreign arbitral award. Enforcement of foreign arbitration decisions is required by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which 137 countries have signed. It is therefore important to check whether the host country is a signatory to the Convention before contemplating arbitration. If not, it will need to be considered whether there is an arbitration law in place providing similar protections.

The International Centre for the Settlement of Investment Disputes (ICSID) is a leading institution on the settlement of investor- state investment disputes. 153 states become members of ICSID by ratifying the ICSID convention. Member states have access to ICSID services and must agree to enforce ICSID decisions. States have also agreed to ICSID as a forum for investor-State dispute settlement by law or by contract, or through bilateral and multilateral investment treaties. Further information may be found at the ICSID website .

For more information and guidance on drafting of Arbitration Clauses, click on Dispute Resolution Checklist .

Domestic Arbitration

If domestic arbitration is being proposed for resolution of disputes, it is important to determine whether there has been experience of domestic arbitration in construction disputes and whether there is any expertise in the country to draw on when appointing arbitrators – infrastructure projects are a very specific area and so a knowledge base of projects and access to arbitrators with understanding of the underlying issues is important. An option would be to allow choice of arbitrators by the parties and that foreign arbitrators could be appointed even where the arbitration is to be domestic. It will be necessary to check whether the countries laws permit this. If not, it may be necessary to amend the law.

Other Forms of Dispute Resolution

Infrastructure projects often provide for other methods of dispute resolution.

High level negotiations - contracts often provide that the first point of dispute resolution should be negotiation between key, senior employees of each party. The theory is that these parties are likely to see the bigger picture of the on-going relationship and so be ready to come up with solutions. These arrangements

are usually only intended to be to filter the serious disputes from less serious ones – they are therefore not sufficient as standalone arrangements and other forms of dispute resolution should be followed if they fail. They also depend on each party coming to the table. They have the advantage of being fast, low cost, flexible as to solutions and within the control of the parties.

Mediation – this involves negotiation with the help of a neutral third party. The mediator's role is to facilitate negotiations without expressing a view on either party's position. It has the advantages of conventional negotiation, but can help parties move away from entrenched positions and reach solutions more easily. Any settlement is recorded in an enforceable contract, when the settlement becomes binding. It is a non-binding procedure controlled by the parties and can prove useful in disputes relating to infrastructure projects.

Independent Expert Determination - A popular method of resolution of disputes involving technical questions is the opinion of an independent expert or panel of experts. The decision may be binding or not, depending on how the contract is drafted. It has the advantage of being relatively low cost, fast and simple. Issues of enforcement and whether the courts can intervene to overrule a decision in the host country will need to be considered.

For more on alternative dispute resolution procedures, click on Dispute Resolution Checklist or see Mediation Essentials.

Choice of Law

The choice of law governing a contract determines the applicable law with regard to whether arbitration is permitted. Assuming the law of the contract permits arbitration clauses, the contracting parties usually can then select the forum, procedures, and controlling law for the arbitration.
It is not uncommon for the project documents and finance documents to be governed by separate jurisdictions, particularly where international financial institutions are involved. Reconciling differences in dispute resolution provisions between the project contracts is thus an important concern when seeking investors and structuring the deal.

Further Reading

Dispute Resolution in the telecommunications sector: current practices and future directions - Sector Specific Practice.

Dispute Resolution Checklist and Sample Wording - Dispute resolution mechanisms vary dramatically, and are key to how the careful drafting you use in the agreement will be interpreted, and whether it will be enforceable.

IFC Dispute Resolution Toolkit - This toolkit provides practical guidance on how consensus-based alternatives to adjudication can help prevent, resolve, and reduce the negative impact of corporate governance disputes and consequently contribute to improving corporate governance practices, strengthening investor confidence, and supporting business continuity.

Dispute Settlement in International Trade, Investment and Intellectual Property Course. This course consists of some forty modules and surveys the basic features of the recognition and enforcement of foreign arbitral awards under the New York Convention of 1958 (hereinafter: NYC). The recognition and enforcement proceedings constitute the final stage of any arbitration whenever the arbitral award is not executed voluntarily.

Increasing Access to Justice in Fragile Settings - This report explores the paths to increase access to justice in Fragile and Conflict-Affected Situations (FCS).

Related Content

- **Laws and Regulations**
- **PPP Legal Foundations - Further Reading**
- **Legislation and Laws - General and Sector Specific**
- **Regulatory Systems and Sector Overview**
- **Country Profiles**

Additional Resources

- Example of an Alternative Dispute Resolution Clause
- Renegotiation, Government Step-in rights, Termination, and Dispute Resolution
- When progress can’t wait mediate

Subsections

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Dispute Resolution Mechanisms

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Example of an Alternative Dispute Resolution Clause: Hall Government Office

Example of an Alternative Dispute Resolution Clause

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Dispute Resolution Checklist: Meeting

Dispute Resolution Checklist

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Technology

Renegotiation, Government Step-in rights, Termination, and Dispute Resolution

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