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Dispute Resolution Checklist

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When reviewing or drafting an agreement, it is important to take a careful look at the dispute resolution clause. This will determine where and how disputes will be heard and it is important to ensure that the provisions are appropriate and enforceable in the relevant jurisdiction by checking with local lawyers. 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. It is hard to overstate the importance of such provisions.

For examples of an alternative dispute resolution clause, visit Examples. Also, the Dispute Settlement in International Trade, Investment and Intellectual Property Course is a course that 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.

Listed below are key questions that should be considered when reviewing or drafting a dispute resolution clause:

1. Is any form of jurisdiction for dispute resolution specified?

Do not confuse governing law clauses with jurisdiction clauses as the law of the agreement may differ from the country within which disputes are to be heard. A governing law clause is worded as follows: -

- “This agreement is governed by and shall be construed in accordance with [Country] law”.
- If no dispute resolution is specified, it is likely that the host country courts will have jurisdiction by default – but this is not always the case and should be checked with local counsel.
- Even if this is the case, and the parties are happy to be subject to jurisdiction of the local courts, it is better to include a jurisdiction clause specifying the jurisdiction, because the parties have the ability to bind themselves (subject to local law provisions) to one specified jurisdiction (see jurisdiction clauses below).

2. Interim dispute resolution

It may be appropriate to include mechanisms in the agreement that may help the parties to come to a mutual resolution of a dispute before it is escalated to litigation or arbitration, such as: -

- a requirement that issues are raised to senior management of each party for negotiation;
- mediation (where a neutral third party facilitates the parties to reach a negotiated settlement);
- expert determination [where all/ specific technical/ financial disputes are referred to an independent expert for determination]. Should the determination be binding or non-binding? (Even if the contract states that it is to be binding, it may be difficult to enforce as it is a strictly contractual arrangement that may not be recognized by the relevant courts). Some mechanisms may be able to be enforced in a similar way to arbitration, depending on the relevant laws.

In drafting interim dispute resolution provisions thought should be to imposing strict timeframes within which each stage is to be completed, with the opportunity for a party to move to the next stage of dispute resolution if the timeframes are not respected, so as to avoid wasting time at a juncture that may be critical to the project.

3. Is there a court system which is appropriate and the parties are willing to submit to?

Local advice should be taken on the local court system, length of time for processing claims, objectivity of judiciary, quality of the judiciary and whether it has had experience of similar contractual arrangements, whether the procedures of the court are clear and are followed, the cost of litigation and the time and cost involved in enforcing judgments. A government party is likely to want to be subject to its court system but an operator, particularly a foreign one, may be unwilling to subject itself to an unfamiliar system and the potential that local courts will be loathe to rule against government interests. Where foreign lenders are involved they may also be anxious to avoid local courts. The compromise is usually to follow an interim dispute resolution procedure and then proceed to arbitration (see 5 below).

4. If the parties are willing to submit to courts in a specific jurisdiction:

- The contract should specify this They may also wish to identify particular courts within the country’s court system, for example commercial courts or an arbitration mechanism administered by the courts. The laws determining what jurisdiction applies to a particular situation can be confusing and sometimes conflicting, particularly where a transaction involves different nationals or services being provided in a third country, with several courts being able to claim jurisdiction.
- To avoid or limit this possibility, the jurisdiction clause could be worded as follows:
- “The parties irrevocably submit to the exclusive jurisdiction of [ ] Courts for the determination of disputes arising under this contract”.
- This provision is called an “exclusive jurisdiction clause” and goes as far as possible to prevent disputes being heard in other jurisdictions. How these clauses are interpreted in practice may vary and so local counsel should be consulted.

- There may be instances where the parties wish to have flexibility as to jurisdiction or where one party with greater negotiating power wishes the other party to be bound as to jurisdiction, while wanting to maintain flexibility of jurisdiction for itself. In such cases a non-exclusive jurisdiction clause may be appropriate, such as, 'The parties submit to the jurisdiction of [ ] Courts'.
- A variation would be “For the benefit of Party B, Party A submits to the exclusive jurisdiction of [ ] courts”.
- This may be of interest where enforcement of awards may occur abroad, and where such courts view an exclusive jurisdiction clause as restrictive of their ability to enforce award (in particular arbitration awards).
- The law around non-exclusive jurisdiction clauses is complex and local advice should be sought.
- Sovereign immunity to jurisdiction and execution: A state's immunity to jurisdiction results from the belief that it would be inappropriate for one state's courts to call another state under its jurisdiction. Therefore, state entities are immune from the jurisdiction of the courts of another state. This immunity can generally be waived by the state entity. A state will also have immunity from execution, as it is deemed to be improper for the courts of one state to seize the property of another state. Immunity from execution may also generally be waived.

5. The parties may prefer to submit disputes to arbitration:

- What is arbitration? – it is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound.
- Some factors to be considered when evaluating whether arbitration is appropriate include:
- Arbitrability of issues (some issues cannot by law be arbitrated, such as maritime law in US – local law should be checked);
- Execution of awards (arbitration is just a contractual mechanism, but most countries have arbitration laws that will allow the awards to be recognized by the courts and enforced);
- Local arbitration courts? The local party may have a preference for local arbitration [see 6 below];
- Sovereign immunity to jurisdiction often waived automatically if arbitration is chosen, but this needs to be verified with local lawyers.

6. If the parties choose arbitration, parties will need to consider and state in their agreements:

- Whether to include a formal interim procedure, e.g., negotiation/ mediation;
- Whether some or all disputes should be submitted to an independent expert, whose decision is binding, unless disputed by a party, and to what extent such a contractual decision will be enforced by local courts, or do they need to be formalized by an arbitrator;
- Whether domestic or international arbitration is appropriate. If domestic arbitration is being considered, the parties should consult local counsel – asking similar questions to those for the court system. It will also be important to understand whether an arbitral award in the local country can be overturned by the courts;
- If an international arbitration is chosen, whether institutional or ad hoc arbitration is appropriate. An agreement specifying institutional arbitration will incorporate the rules of one of the recognized arbitral institutions and will be conducted under the aegis of that arbitral institution to assist the parties with appointment of arbitrators, their removal and other administrative tasks (excluding UNCITRAL which has no administrative body and therefore some other institution can be named for these purposes). For an ad hoc arbitration, the arbitration agreement may specify its own rules, or adopt the arbitration rules of a trade or industry association or, for international arbitrations, the UNCITRAL rules. (For a summary of each of the main international arbitral courts and the pros and cons of institutional and ad hoc arbitration, see International Comparative Legal Guide to: International Arbitration. The World Bank Group also has an institution that administers investment disputes specifically between investors

and states, called the International Center for Settlement of Investment Disputes (ICSID).For more on ICSID, go to the International Center for Settlement of Investment Disputes.

- The "seat" or formal place of arbitration (this may end up being a hot topic). The potential cost of holding the arbitration in a third party country (and having to fly parties and witnesses there), such as Singapore or London, will need to be outweighed against the risk of non-objective decisions and/or lack of competent arbitrators to chose from (this can be overcome to some extent by specifying that arbitrators are not from either party's country). The seat of arbitration can also be key to accessing enforcement of awards under one of the international treaties such as the UN Convention on the Recognition Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention) discussed below.
- Number of arbitrators – it is advisable to specify an odd number to avoid stalemate.
- Type of arbitrators – are specific attributes or qualifications going to be required (avoid making them too restrictive as this could make it difficult or impossible to appoint suitable arbitrators)?
- Manner of appointment of arbitrators, and if it is an ad hoc arbitration, an appointing authority.
- Nature of arbitrators – exclude certain nationalities for third arbitrator?
- The language of the arbitration.
- The scope of the agreement to arbitrate – should it cover all matters, or should some issues be first referred to an independent expert?
- Specify the governing law of the arbitration.
- Advice should be sought as to whether a foreign arbitral award will be recognized in a country where a party is seeking to enforce the award. If the Country is a signatory to the New York Convention, or where there is a reciprocal enforcement of judgments treaty, then this should be the case. A waiver of appeal of decisions of the tribunal should be drafted in consultation with local lawyers.
- Consider joinder or consolidation of disputes if it is a multi-parti or multi-contract situation (so that the same issues do not have to be heard in different fora, etc.)
- Consider a waiver of sovereign immunity (jurisdiction and execution) if a sovereign state or agency is involved (see sample wording on Sovereign Immunity Checklist).

The parties should not:

- Assume that arbitration is the best option for all disputes.
- Assume all jurisdictions are supportive of arbitration.
- Blindly adopt an arbitration clause without examining the rest of the agreement(s).
- Combine a jurisdiction clause with an arbitration clause.
- Choose more than one governing law or seat.
- Choose arbitration rules that are inconsistent with the arbitration clause without specifying that such rules are being amended, by agreement.
- Assume that "split clauses" allowing one party to have option to arbitrate or litigate while the other party can only litigate are valid in all jurisdictions – they can lead to confusion and in most cases should be avoided.
- Name individuals as arbitrators in the agreement (at least without a default mechanism) in case they are unwilling or unable to act.
- Assume arbitration will be confidential. If parties want confidentiality, provide for it expressly.
- Agree to arbitrate in a country which is not a party to the New York Convention.
- Agree to an ICSID arbitration clause without taking specialist legal advice – the mechanism is limited to disputes between contracting states and nationals of other contracting states.

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