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Checklist for settlement of disputes (Liste de contrôle relative au règlement des litiges)

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When you examine or develop an agreement, it is important to thoroughly evaluate the dispute resolution clause. This will determine where and how disputes will be heard. It is important to check with local lawyers that provisions are appropriate and applicable in the relevant jurisdiction. The settlement mechanisms of disputes vary widely. They play a key role in the interpretation and implementation of the careful drafting of the agreement. It is difficult to overstate the importance of such provisions.

* For examples of alternative dispute resolution clauses, go to the section [Examples](#). In addition, the [course on the settlement of disputes in international trade, investment and intellectual property](#), is a course consisting of forty modules that examine the basic characteristics of the recognition and enforcement of foreign arbitral awards under the New York Convention of 1958 (hereinafter called: NYC). The procedures for recognition and enforcement are the final stage of the arbitration when the arbitration award is not executed voluntarily.

Here are the key questions to consider when reviewing or drafting a dispute resolution clause:

1. A court form dedicated to the settlement of disputes it is specified?

To the extent that the law of the agreement may differ from the country in which disputes must be heard, we must not confuse the provisions on applicable law and jurisdiction clauses. A clause on the applicable law is

worded as follows:

- "This agreement is governed by and shall be construed in accordance with the laws of [country]."
- For more information on the clauses relating to the applicable legislation, see the [Checklist](#) on the standard clauses.
- If the contract does not specify any litigation, it is likely that the courts of the host country will have jurisdiction by default. However, this is not always the case and it is to check with a local lawyer.
- Although local courts have jurisdiction default and the parties see no problem, it is best to include a jurisdiction clause which specifies the jurisdiction. The parties do have the ability to attach (subject to local law provisions) in a given jurisdiction (see jurisdiction clauses below).

2. Dispute resolution through

It may be appropriate to include in the agreement of devices that can help the parties reach a mutual settlement of litigation before come to the litigation or arbitration, such as:

- An obligation to escalate issues to the direction of each of the parties to negotiate.
- Mediation (where a neutral third party assists the parties to reach a negotiated settlement).
- A procedure of expertise (when all litigation / financial litigation individuals / techniques are subject to an independent expert for expertise]. Should expertise be enforceable or not? (Even if the contract provides that it must be enforceable, it is possible that it is difficult to apply to the extent that this is strictly a contractual agreement that can not be recognized by the competent courts.) Some devices can be applied analogously arbitration according to the applicable laws.

When drafting interim provisions for settling disputes, it should consider imposing strict time during which each step must be accomplished, with the possibility for some to move to the next stage of the dispute resolution if possible n were not respected, to avoid wasting time at a time that can be critical to the project.

3. Is there an appropriate judicial system to which the parties are willing to submit?

It is recommended to check with a local councilor in the local judicial system, the length of processing applications, the objectivity of the judiciary, its quality and its experience in similar contractual arrangements, the accuracy and monitoring of court proceedings, the cost of litigation as well as the time and costs involved in the enforcement of judgments. A government is likely to want to be subjected to the judicial system. However, a farmer, especially a foreign operator may refuse to submit to a system that is unknown to him and the possibility that local courts are reluctant to rule against government interests. Where they are involved, foreign lenders may also be anxious to avoid local courts. The compromise is usually the following: follow an intermediate procedure of litigation and proceed to arbitration (see point 5 below).

4. If the parties are willing to submit themselves to the courts of a particular jurisdiction:

- The contract should specify. Parties may also wish to identify some courts in the judicial system of the country, for example the commercial courts or an arbitration scheme managed by the courts. The laws that determine which court states of a given situation can be confusing and sometimes contradictory, particularly when a transaction involves different nationals or services in a third country, with several courts able to claim to exercise such jurisdiction.
- To avoid or limit this possibility, the jurisdiction clause can be read:
- "The parties irrevocably submit to the exclusive jurisdiction of the court of []. The courts responsible for the determination of disputes arising from this agreement. "
- This arrangement is called "exclusive jurisdiction clause" and avoids as much as possible that disputes are heard in other jurisdictions. The way these clauses are interpreted in practice can vary. It is

therefore recommended to consult a local attorney.

- Sometimes the parties wish to have flexibility as to the court or, sometimes, a party which has more bargaining power wishes that the other party is linked to a court, while wishing to retain flexibility for itself. In such cases, it may be wise to include a non-exclusive jurisdiction clause, such as "The parties submit to the jurisdiction of the courts of []."
- Another possibility: "Part A submits to the exclusive jurisdiction of the courts of [] the benefit of Part B".
- This can be interesting when it is possible that the enforcement of awards takes place abroad, and when such courts consider that the exclusive jurisdiction clause restricts their ability to enforce the execution (including awards).
- In view of the complexity of the law on non-exclusive jurisdiction clauses, it is best to get the local councils.
- The immunity from jurisdiction and absolute performance: immunity from jurisdiction of a state stems from the belief that it would be inappropriate for the courts of a State to call in another State within its jurisdiction. Consequently, public entities are not subject to the jurisdiction of the courts of another State. The public entity can usually waive this immunity. To the extent it is considered inappropriate for the courts of a state to seize property of another State, it also possess immunity from execution. Generally, it is also possible to waive immunity from execution.

5. It is possible that the parties prefer to submit their disputes to arbitration:

- What is arbitration? This is a legal technique for resolving disputes outside the courts, where litigants refer to one or more persons (the "arbitrators" or "arbitral tribunal") and agree to be attached their decision (the "award").
- Here are some factors to consider when evaluating whether arbitration is appropriate:
- Arbitrability issues (the law prohibits certain issues to be arbitrated, as maritime law in the US; check local laws).
- The enforcement of awards (arbitration is simply a contractual arrangement but most countries have arbitration laws allow the courts to recognize and enforce awards).
- local arbitration courts? The local part may prefer a local arbitration [see point 6 below].
- Absolute immunity is often automatically canceled if the arbitration is chosen, but you should check with local lawyers.

6. If the parties choose arbitration, they should consider and include the following items in their agreements:

- Or may not include a formal intermediate procedure, such as negotiation or mediation.
- Deciding Whether some or all of the disputes to an independent expert whose decision is binding, unless it is challenged by a party, and how such a contractual decision will be enforced by local courts, or the need to formalization by an arbitrator.
- The relevance or otherwise of the national or international arbitration. If the national arbitration is contemplated, the parties should consult a local lawyer and ask questions similar to those for the judiciary. It will also be important to understand that the courts may set aside an award in the local country.
- If international arbitration is chosen, the relevance of institutional arbitration or ad hoc. An agreement specifying institutional arbitration will incorporate the rules of a recognized arbitration institutions and will be placed under the aegis of the arbitral institution to assist the parties to appoint arbitrators, to retire and make of other administrative tasks (except UNCITRAL has no administrative body, so another institution may be designated for this purpose). As part of an ad hoc arbitration, the arbitration agreement may specify its own rules or adopt the arbitration rules of trade industry association, or in the context of international arbitration, the UNCITRAL rules. [To read a summary of each of the major international arbitral tribunals and the advantages and disadvantages of institutional arbitration and ad

hoc, the international law firm Lovells wrote " [International Comparative Legal Guide to: International Arbitration 2016](#) (International comparative legal Guide to: International arbitration 2011)]. To learn more about the ICSID, visit the [International Centre for Settlement of Investment](#).

- The "seat" or official place of arbitration (which end up being a sensitive subject). The potential cost associated with the conduct of the arbitration in a third country (and the displacement of the parties and witnesses at this point), such as Singapore or London, will outweigh the risk of non-objective decisions and / or the lack of qualified arbitrators to choose (it is possible to overcome this, to some extent, stating that arbitrators are not from the country of one of the parties). The seat of arbitration may also play a key role in the enforcement of sentences in accordance with an international treaty such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "Agreement New York ") detailed below.
- The number of arbitrators: it is advisable to specify an odd number to avoid difficulties.
- The type of referees: the particular characteristics or qualities will they be needed? (Avoid excessive restriction of opportunities to the extent that it could make it difficult or impossible to designate appropriate referees).
- The method of appointment of arbitrators, and if there is an ad hoc arbitration, an appointing authority.
- The nature of the referees: exclude certain nationalities to the third umpire?
- The language of the arbitration.
- The scope of the agreement to arbitrate: should it cover all issues or issues they must first be dealt with by an independent expert?
- Specify the law governing the arbitration.
- It is recommended to obtain information about whether a foreign arbitral award will be recognized in a country where a party seeks to enforce the award. This should be the case if the country has signed the New York Convention, or if there is a reciprocal enforcement of judgments treated. The abandonment of court decisions of the Boards shall be developed in consultation with local lawyers.
- Consider joining or consolidation of litigation if circumstances or contracts with several parties (so that the same problems do not have to be heard in different courts, etc.).
- Consider abandoning absolute immunity (jurisdiction and enforcement) a sovereign State or organization is involved (see sample wording in the Checklist of sovereign immunity).

7. The parties must not:

- Assume that arbitration is the best option for all disputes.
- Assume that all courts in favor of arbitration.
- blindly adopt an arbitration clause without examining the rest of / agreement (s).
- Associate a jurisdiction clause in an arbitration clause.
- Select more than one applicable law or more than one seat.
- Choose arbitration rules incompatible with the arbitration clause without specifying that these rules are modified by agreement.
- Assume that the "split clauses" (divided clauses), which allow one party to have the choice between arbitration and litigation while the other party may only go to litigation are valid in all jurisdictions: they can be confusing and, in most cases, should be avoided.
- Designate, in the agreement, individuals as referees (at least without default device) in case they are not willing to do or are unable.
- Assume that the arbitration will be confidential. If the parties wish it to be, they should state so explicitly.
- Accept that arbitration take place in a country that is not subject to the New York Convention.
- Accept an ICSID arbitration clause without first obtaining legal advice from an expert: the device is limited to disputes between Contracting States and nationals of other Contracting States.