

DISPUTE RESOLUTION – CHECKLIST AND SAMPLE WORDING

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.

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”.
For more information on Governing Law clauses, see the Checklist on boilerplate clauses.
- 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.

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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, whilst 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.

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- 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

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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, the international law firm, Lovells, has produced an online guide - <http://www.lovells.com/Arbitration/Introduction.aspx>). For more on ICSID, the International Center for Settlement of Investment Disputes, go to <http://icsid.worldbank.org/ICSID/FrontServlet>

- 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 choose 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-party 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.

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- 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.

EXAMPLE OF AN ALTERNATIVE DISPUTE RESOLUTION CLAUSE: -

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Negotiations

The Parties will attempt in good faith to resolve any dispute or claim arising out of or in relation to this Agreement through negotiations between a director of each of the Parties with authority to settle the relevant dispute. If the dispute cannot be settled amicably within fourteen (14) days from the date on which either Party has served written notice on the other of the dispute then the remaining provisions of this Clause [] shall apply.

Arbitration

In the event of a dispute between the Owner and the Operator (other than a matter to be resolved pursuant to Clause []) concerning the interpretation of any provision of this agreement or the performance of any of the terms of this Agreement, such matter or matters in dispute shall be finally settled: -

- a. under [the Rules of Conciliation and Arbitration of the International Chamber of Commerce];
- b. by three arbitrators, one appointed by each Party, and the third, who shall be the chairman, selected by the two appointed arbitrators and failing agreement by the [Chairman of the International Chamber of Commerce];
- c. the language of the arbitration shall be English; and
- d. the place of the arbitration shall be [].

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Joinder [relevant when agreement forms part of a suite of agreements]

If any dispute to be referred to arbitration under this agreement (other than a matter to be resolved pursuant to Clause []) raises issues which are, in the opinion of the Owner, substantially the same as or connected with issues raised in a dispute (a "related dispute") between any of the following entities (and their successors in title and assigns):

- the Contractor;
- any Subcontractor;
- any of the counterparties to the Project Contracts;

which has already been referred to arbitration in accordance with arbitration provisions substantially the same (mutatis mutandis) to this clause then:

- (a) the dispute under this contract shall be referred to the arbitrators appointed to determine the related dispute; and
- (b) the arbitrators shall have power to make such discretions and awards in the same way as if the rules of [RELEVANT COURTS] as to joining one or more defendants or third parties or consolidating actions were applicable to the Parties and to the arbitrators

or, if the dispute under this Agreement has already been referred to arbitration under this clause, then any related dispute may be joined or consolidated with the dispute under this Agreement.

Referral to the Expert (may be appropriate for technical/ financial matters)

The following provisions shall apply between the Parties with respect to any matter, difference or dispute which this Agreement provides is to be referred to an Expert:

- (a) Where any matter is referred to an Expert in accordance with this Clause [], the Expert shall be appointed by the Parties, or in default of agreement upon such appointment within seven (7) days of a Party notifying the other Party of its decision to refer the matter to an Expert, an Expert appointed by
 - (i) [] in relation to disputes of a primarily technical nature; or
 - (ii) [the President of the Institute of Chartered Accountants in [COUNTRY]] in respect of all other matters.Failing agreement between the parties as to the nature of the dispute, the Expert shall be appointed by the [President for the time being of the Institute of Chartered Accountants in [COUNTRY]].
- (b) The Expert will resolve or settle such matter or dispute in such matter as he shall in his absolute discretion see fit. The Expert shall be requested to reach his decision within thirty (30) days of the matter being referred to him. Any decision of the Expert shall be final and binding on the Parties.
- (c) The cost of the Expert in settling or determining such matter or dispute shall be borne equally by the Parties unless the Expert otherwise determines.

THIS DOCUMENT HAS BEEN PREPARED FOR THE PURPOSES OF THE
PPP IN INFRASTRUCTURE RESOURCE CENTER FOR CONTRACTS, LAWS AND REGULATIONS.
IT IS A CHECKLIST FOR GENERAL GUIDANCE PURPOSES ONLY AND SHOULD
NOT BE USED AS A SUBSTITUTE FOR SPECIFIC LEGAL ADVICE FOR A PROJECT.

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Performance to Continue During Dispute

Performance of this Agreement shall continue during arbitration proceedings or any other dispute resolution mechanism pursuant to Clause []. No payment due or payable by the Owner or the Operator shall be withheld on account of a pending reference to arbitration or other dispute resolution mechanism except to the extent that such payment is the subject of such dispute.