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Dispute Resolution **“Your tools, and how to use them”**



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Different Dispute Resolution Methods



- Dispute resolution clauses in EPC contracts provide for a final decision by litigation or arbitration (though previous steps – experts, dispute boards – are often specified).
- Litigation is the most formal dispute resolution method. Courts assume jurisdiction by law, not by contract.
- Choice of law and jurisdiction in EPC contracts can determine which courts hear dispute, and what law will apply. Practical tips:
 - Consistency. Avoid asking the courts of one country to apply the law of another jurisdiction.
 - The importance of conferring *exclusive* (not additional) jurisdiction.
 - Problems with local courts. Choose a jurisdiction you trust, where legal practitioners and the judiciary are familiar with issues arising in complex projects.
 - Free movement of judgments in the EU.

Different Dispute Resolution Methods



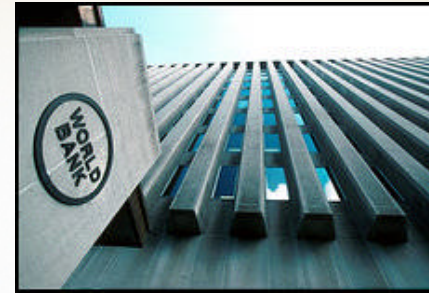
- **Practical tips on choice of law and jurisdiction:**
 - **Pass down choice of law and jurisdiction from the main contract to any subcontract, to preserve the best chance of passing on any claims to subcontractors.**
 - **Choose either litigation or arbitration, but not both.**
 - **And finally: do not forget to make a choice.**
- **A caveat: local courts may not accept a choice of foreign law / jurisdiction where the project is closely connected to their domestic jurisdiction. Example: UAE.**
- **Features of litigation:**
 - **Common law: adversarial approach, disclosure (including harmful documents).**
 - **Civil law: a more inquisitorial role for the judge, disclosure limited to documents you wish to rely on.**

Different Dispute Resolution Methods



- **Arbitration is the main alternative to litigation (less formal and more flexible). It is a popular choice in international projects. It can have the following advantages over litigation:**
 - **Finality. Much less scope of appealing an arbitral award. Right to appeal an error of law can be excluded.**
 - **Choice. Procedural flexibility (speed). Choosing the right decision-maker.**
 - **Confidentiality.**
 - **International acceptance. ICC, UNCITRAL, LCIA awards are well-known.**
 - **Enforcement of arbitral awards under the New York Convention 1958 framework (an international treaty with more than 100 signatory States).**
 - **The UNCITRAL Model Law provides the basis of local arbitration laws in many countries. Local courts should support arbitration.**

Different Dispute Resolution Methods



- Investment treaty arbitrations have become increasingly topical.
- They are “investor vs. State” claims, often governed by the rules of the International Centre for the Settlement of Investment Disputes (“ICSID”). The ICSID framework is based on the Washington Convention 1965, and is affiliated with the World Bank.
- ICSID or investment treaty arbitrations may be possible where:
 - A bilateral investment treaty (“BIT”) is in place between the host State and the investor’s country of origin. This BIT provides for protection of foreign investors, and if necessary arbitration against the State.
 - A qualifying investment is made in the State. Construction or infrastructure projects can qualify.
 - The State has breached its obligations under the BIT (expropriation, nationalisation). A breach by a State entity of the investment contract may not be enough.

Different Dispute Resolution Methods



- **Mediation – an “alternative” dispute resolution method. Not generally provided for in contracts, but a tool to use alongside formal methods.**
- **Consensual. A structured negotiation before a neutral third party. The mediator is not a decision-maker.**
- **A good mediator can assist with expectation management and “reality testing”.**
- **The process is confidential and “without prejudice” (no admissions can be used against a party in another forum).**
- **Any settlement must be agreed between the parties: they retain control over the outcome, but the decision-makers are brought together.**
- **Statistics suggest that mediation can be used successfully. Often, cases that do not settle at the actual mediation are resolved thereafter, the parties having debated and explored their positions with the mediator.**
- **Mediation may take place at the same time as litigation or arbitration.**

A Practical Example

- Many EPC forms favour “tiered” disputed resolution clauses.
- The contract specifies a number of steps before arbitration.
- Example: initial determination by a panel of experts.
- See the Channel Tunnel contract (clause shown on handout).
- Clause 67(1): Features of expert determination:
 - Decision is final and binding, even if obviously wrong (barring fraud).
 - EPC forms tend to specify that the decision of the expert is interim but binding (you have to comply (and pay), but can go to arbitration).
 - Not a judicial process with submissions from both parties as the basis for the decision. Experts can use their expertise – they do not need to listen to the parties.
 - A contractual choice of an expert may bind the parties, even if the expert feels unable to decide.
- A contractual requirement for expert determination binds the parties – it cannot be leapfrogged unilaterally in favour of arbitration.



A Practical Example

- **Clause 67(2) and (3): Disputes are to be referred to arbitration within specified time limits.**
- **Beware: ignoring such a limit may make it impossible to advance a claim.**
- ***Douglas Harper v Interchange Group Ltd* [2007] EWHC 1834: claims that had not been referred to expert determination within a specified period of time could not be advanced in Court.**
- **Other “conditions precedent” should also be complied with. The contract may require notices, or change orders, prior to variations or additional work being carried out. The procedure should be complied with.**
- **The arbitration clause may give the tribunal the power to revisit certifications that would otherwise be final, or to approve payment or claims where conditions precedent were not met. This should be stated expressly.**
- **Consider the ultimate consequences of invoking a dispute resolution mechanism before doing so.**

A Practical Example

- Arbitration is generally final. Under ICC Rules, there is no appeal on a point of law. Otherwise, a limited right of appeal against an error of law may be possible if the seat of the arbitration is England.
- English law makes it difficult to overturn any arbitral award. There must be a serious procedural irregularity (bias, lack of impartiality) or a lack of jurisdiction (no power to make the decision). Most challenges fail.
- Finally, an example: a well-known arbitrator found that a liquidated damages clause (on the handout) was unenforceable as it was a penalty but not a genuine estimate of likely loss caused by the contractor. The Court agreed and upheld the award.