

VI. Settlement of disputes

A. General remarks

~~1. 1.~~—An important factor for the implementation of ~~privately financed infrastructure projects~~ PPPs is the legal framework in the host country for the settlement of disputes. Investors, contractors and lenders will be encouraged to participate in projects ~~in countries where~~ when they have the confidence that any disputes arising out of contracts forming part of the project will be resolved fairly and efficiently. By the same token, efficient procedures for avoiding disputes or settling them expeditiously will facilitate the exercise of the contracting authority's monitoring functions and reduce the contracting authority's overall administrative cost. In order to create a more hospitable climate for investors, the legal framework of the host country should give effect to certain basic principles, such as the following: ~~domestic and~~ foreign firms should be guaranteed access to the courts under substantially the same conditions ~~as domestic ones~~; parties to private contracts should have the right to choose ~~foreign law as~~ the law applicable to their contracts; foreign judgements should be enforceable; and there should be neither unnecessary restrictions ~~nor legal impediments to access to the use of~~ non-judicial dispute ~~prevention and~~ settlement mechanisms ~~nor legal impediments for the creation of facilities for settling disputes amicably outside the judicial system.~~

~~2. 2.~~—Privately financed infrastructure projects PPPs typically require the establishment of a network of interrelated contracts and other legal relationships involving various parties. Legislative provisions dealing with the settlement of disputes arising in the context of these projects must take account of the diversity of relations, which may call for different dispute settlement methods depending on the type of dispute and the parties involved. The main disputes may be divided into three broad categories:

(a) *Disputes arising under agreements between the ~~concessionaire~~ private partner and the contracting authority and other governmental agencies.* In most civil law countries, the ~~project agreement~~ PPP contract is governed by administrative law (see chap. VII, "Other relevant areas of law", paras. 24-27), while in other countries the agreement is in principle governed by contract law as supplemented by special provisions developed for government contracts for the provision of public services. This regime may have implications for the dispute settlement mechanism that the parties to the ~~project agreement~~ PPP contract may be able to agree upon. Similar considerations may also apply to certain contracts entered into between the ~~concessionaire~~ private partner and governmental agencies or government-owned companies supplying goods or services to the project or purchasing goods or services generated by the infrastructure facility;

(b) *Disputes arising under contracts and agreements entered into by the project promoters or the ~~concessionaire~~ private partner with related parties for the implementation of the project.* These contracts usually include at least the following: (i) contracts between parties holding equity in the project company (e.g. shareholders' agreements, agreements regarding the provision of additional financing or arrangements regarding voting rights); (ii) loan and related agreements, which involve, apart from the project company, parties such as commercial banks, governmental lending institutions, international lending institutions and export credit insurers; (iii) contracts between the project company and contractors, which themselves may be consortia of contractors, equipment suppliers and providers of services; (iv) contracts between the project company and the parties who operate and maintain the project facility; and (v) contracts between the ~~concessionaire~~ private partner and private companies for the supply of goods and services needed for the operation and maintenance of the facility;

(c) *Disputes between the ~~concessionaire~~ private partner and other parties.* These other parties include the users or customers of the facility, who may be, for example, a government-owned utility company that purchases electricity or water from the project company so as to resell it to the ultimate

Formatted: Indent: Before: 0 cm, First line: 0 cm, Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 1 cm + Indent at: 1.64 cm

users; commercial companies, such as airlines or shipping lines contracting for the use of the airport or port; or individual persons paying for the use of a toll road. The parties to these disputes may not necessarily be bound by any prior legal relationship of a contractual or similar nature.

B. Disputes between the contracting authority and the ~~concessionaire~~ private partner

~~3. 3. Disputes between the contracting authority and the concessionaire private partner are those that arise during the period of time, with a number of enterprises participating in the construction and in the operational phases. Also, these projects usually involve governmental agencies and attract a high level of public interest. These circumstances place emphasis on emphasize the need to have mechanisms in place that avoid as much as possible the escalation of disagreements between the parties and preserve their business relationship; that prevent the disruption of the construction works or the provision of the services; and that are tailored to the particular characteristics of the disputes that may arise.~~

~~4. 4.—Some of the main considerations particular to the various phases of implementation of privately financed infrastructure projects PPPs are discussed in this section. The settlement of the concessionaire's private partner's grievances in connection with decisions by regulatory agencies has been considered in the context of the authority to regulate infrastructure services (see chap.-I, "General legislative legal and institutional framework", paras. 51-53)-...). The settlement of disputes arising during the process of selecting a concessionaire private partner (that is, pre-contractual disputes) has also been dealt with earlier in the Guide (see chap. III, "Selection of the concessionaire Contract award", paras. 127-131)-...).~~

1. General considerations on methods for prevention and settlement of disputes

~~5. 5.—The issues that most frequently give rise to disputes during the life of the project agreement PPP contract are those related to possible breaches of the agreement during the construction phase, the operation of the infrastructure facility or in connection with the expiry or termination of the project agreement PPP contract. These disputes may be very complex and they often involve highly technical matters that need to be resolved speedily in order not to disrupt the construction or the operation of the infrastructure facility. For these reasons, it is advisable for the parties to devise mechanisms that allow for the choice of competent experts to assist in the dispute resolution process.~~

~~6. 6.—With a view to achieving the objectives mentioned above, project agreements PPP contracts often provide for composite dispute-settlement clauses designed to prevent, to the extent possible, disputes from arising, to foster reaching agreed solutions and to put in place efficient dispute settlement methods when disputes nevertheless arise. Such clauses typically provide for a sequential series of steps starting with an early warning of issues that may develop into a dispute unless the parties take action to prevent them. When a dispute does occur it is provided that, the PPP contract may typically require the parties should to exchange information and discuss the dispute with a view to identifying a solution. If the parties they are unable to resolve the dispute themselves, then either party may require participation of an independent and impartial third party to assist them to find an acceptable solution. In most cases, adversarial dispute settlement mechanisms are only used when the disputes cannot be settled through the use of by such conciliatory methods.~~

~~7. 7.—However, there may be limits to the parties' freedom to agree to certain dispute prevention or dispute settlement methods: one such limit may arise from the subject matter of the dispute; another limit may in some legal systems arise from the governmental character of the contracting authority. In some Some legal systems, have traditionally limited the traditional position has been that ability of the Government and its agencies may not to agree on certain dispute settlement methods, in particular,~~

arbitration. ~~This position has often been restricted to matters that, depending on the subject matter of the contract. In some countries, this limitation has been~~ does not apply to public enterprises of industrial or commercial character, which, in their relations with third parties, act pursuant to private law or commercial law.

~~8. 8.~~ Limitations to the freedom to agree on dispute settlement methods, including arbitration, may also relate to the legal nature of the ~~project agreement.PPP contract~~. Under some civil law systems where ~~project agreements.PPP contracts~~ are regarded as administrative contracts, disputes arising thereunder may need to be settled through the judiciary or through administrative courts of the host country. Under other legal systems, similar prohibitions may be expressly included in legislation or judicial precedents directly applicable to ~~project agreements.PPP contracts~~, or may be the result of established contract practices, usually based on legislative rules or regulations.

~~9. 9.~~ For countries that wish to ~~allow them~~ make use of non-judicial methods, including arbitration, for the settlement of disputes arising in connection with ~~privately-financed infrastructure projects.PPPs~~, it is important to remove possible legal obstacles and to provide a clear authorization for domestic contracting authorities to agree on dispute settlement methods. The absence of such legislative authority may give rise to questions as to the validity of the dispute-settlement clause and cause delay in the settlement of disputes. If, for example, an arbitral tribunal finds that the arbitration agreement has been validly concluded despite any subsequent defence that the contracting authority had no authorization to conclude it, the question may reappear at the recognition and enforcement stage before a court in the host country or before a court of a third country where the award is to be recognized or enforced.

2. Commonly used methods for preventing and settling disputes

~~10. 10.~~ The following paragraphs set out the essential features of methods used for preventing and settling disputes and consider their suitability for the various phases of large infrastructure projects, namely, the construction phase, the operational phase and the post-termination phase. Although the ~~project agreement.PPP contract~~ usually provides for composite dispute prevention and dispute settlement mechanisms, care should be taken to avoid excessively complex procedures or to impose too many layers of different procedures. The brief presentation of selected methods for dispute prevention and dispute settlement methods contained in the following paragraphs is intended to inform legislators about the particular features and usefulness of these various methods. It should not be understood as a recommendation for the use of any particular combination of methods.

(a) Early warning

~~11. 11.~~ Early warning provisions may be an important tool to avoid disputes. Under these provisions, if one of the parties to a contract feels that events that have occurred, or claims that the party intends to make, have the potential to cause disputes, these events or claims should be brought to the attention of the other party as soon as possible. Delays in making these claims are not only a source of conflict, because they are likely to surprise the other party and therefore create resentment and hostility, but they also render the claims more difficult to prove. For that reason, early warning provisions typically require the claiming party to submit a quantified claim, along with the necessary proof, within an established time ~~period~~. To make the provision effective, a sanction is frequently included for non-compliance with the provision, such as the loss of the right to pursue the claim or an increased burden of proof. In infrastructure projects, early warning frequently refers to events that might adversely affect the quality of the works or the public services, increase their cost, cause delays or endanger the continuity of the service. Early warning provisions are therefore useful throughout the duration of an infrastructure project.

(b) Partnering

12. Another tool that is used as a means of dispute avoidance is partnering. The object of partnering is to create, through mutually developed formal strategies and from the outset of a project, an environment of trust, teamwork and cooperation among all key parties involved in the project. Partnering has been found to be useful to avoid disputes and to commit the parties to work efficiently to achieve the goals of the project. The partnering relationships are defined in workshops attended by the key parties to the project and usually organized by the contracting authority. At the initial workshop, a mutual understanding of the concept of partnering is established, goals for the project for all the parties are defined and a procedure to resolve critical issues quickly is developed. At the conclusion of this workshop, a "partnering charter" is drafted and signed by the participants, signifying their commitment to work jointly towards the success of the project. The charter usually includes an issue resolution procedure designed to determine claims and resolve other problems, beginning at the lowest possible level of management and at the earliest possible opportunity. If a solution is not reached within a given time frame, the issue is raised to the next level of management. Outsiders to the project are only called in if no agreement by the people responsible for the project is achieved.

(c) Facilitated negotiation

13. The purpose of this procedure is to aid the parties in the negotiation process. The parties appoint a facilitator at the commencement of the project. His function is to assist the parties in resolving any disputes, without providing subjective opinions on the issues, but rather coaxing them into analysing thoroughly the merits of their cases. This procedure is specially useful when there are numerous parties involved who would find it difficult to negotiate and coordinate all the differing opinions without such facilitation.

(d) Conciliation and mediation

14. The term "conciliation(d) Mediation and conciliation

12. The term "mediation" is used in the *Guide* as a broad notion referring to proceedings in which a person or a panel assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. ~~Conciliation~~Mediation differs from negotiations between the parties in dispute (in which the parties would typically engage after the dispute has arisen) in that ~~conciliation~~mediation involves independent and impartial assistance to settle the dispute, whereas in settlement negotiations between the parties no third-person assistance is involved. The difference between ~~conciliation~~mediation and arbitration is that ~~conciliation~~mediation ends either in the settlement of the dispute agreed by the parties or it ends unsuccessfully; in arbitration, however, the arbitral tribunal imposes a binding decision on the parties, unless they have settled the dispute before the award is made. In practice, such ~~conciliation~~mediation proceedings are referred to by various expressions, including "mediationconciliation". Nevertheless, in the legal tradition of some countries, a distinction is drawn between conciliation and mediation to emphasize the fact that, in conciliation, a third party is trying to bring together the disputing parties to help them reconcile their differences, while mediation goes further by allowing the mediator to suggest terms for the resolution of the dispute. However, the terms "~~mediation~~" and "~~conciliation~~" and "~~mediation~~" are used as synonyms more frequently than not.

13. 15. ~~Conciliation~~Mediation is being practised increasingly in various parts of the world, including in regions where it was not commonly used in the past. This trend is reflected, inter alia, in the establishment of a number of private and public bodies offering ~~conciliation~~mediation services to interested parties. The ~~conciliation~~mediation procedure is usually private, confidential, informal and easily pursued. It may also be quick and inexpensive. The ~~conciliation~~mediator may assume multiple roles and is in general more active than a facilitator. He or she may frequently challenge the parties'

position to stress weaknesses that usually facilitate agreement and, if authorized, may suggest possible settlement scenarios. The procedure is generally non-binding and the ~~conciliator's/mediator's~~ responsibility is to facilitate settlement by directing the parties' attention to the issues and possible solutions, rather than passing judgement. This procedure is particularly useful when there are many parties involved and it would therefore be difficult to achieve an agreement by direct negotiations.

~~14. 16.~~ If the parties provide for ~~conciliation/mediation~~ in the ~~project agreement/PPP contract~~, they will have to settle a number of procedural questions in order to increase the chance of a settlement. Settling such procedural questions is greatly facilitated by the incorporation into the contract, by reference, of a set of ~~conciliation—~~rules such as the UNCITRAL Conciliation Rules.¹ Other sets of ~~conciliation/mediation~~ rules have been prepared by various international and national organizations.

(e) Non-binding expert appraisal

~~17. This is a procedure where a neutral third party is charged with providing an appraisal on the merits of the dispute and suggested outcome. It serves as a "reality check" showing the contesting parties what the possible outcome of the more expensive and usually slower binding procedures such as arbitration or court proceedings would be. This procedure is useful where the parties have difficulty in communicating because their positions have become entrenched or where they do not see clearly the weaknesses of their positions or the strengths of the other party's positions. A non-binding expert appraisal is usually followed by negotiations, either direct or facilitated.~~

(f) Mini-trial

~~18. This procedure assumes the form of a mock trial in which site-level personnel of each party make submissions to a "tribunal" composed of a senior executive of each party and a third neutral person. After the submissions, which are typically to be made within predetermined time periods, the executives enter into a facilitated negotiation procedure with the assistance of a neutral person, to try to reach an agreement taking advantage of the issues that have been elucidated during the "trial". Counsel for the parties are frequently present and are useful in identifying the relevant issues. The purpose of the mini-trial is to inform senior executives of the issues involved in the dispute and to serve as a reality check of what the outcome of a real trial might be.~~

(g) Senior executive appraisal

~~19. This procedure is similar to the mini-trial but it is less adversarial and uses a more consensus-oriented approach. The procedure begins with the presentation of short position papers by each party, followed by short responses. At an "appraisal conference" headed by a facilitator, a senior executive from each of the parties makes brief oral presentations elucidating the issues submitted in the position papers or other points raised by the parties or the facilitator. This conference is followed by a negotiation meeting, chaired by the facilitator, with a view to reaching an agreement. Both the mini-trial and the senior executive appraisal tend to be less of a strong reality check than the non-binding expert appraisal and therefore less likely to motivate difficult decisions in the absence of commercial pressure to do so.~~

¹ For the official text of the *UNCITRAL Conciliation Rules*, see *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106 (*Yearbook of the United Nations Commission on International Trade Law*, vol. XI, 1980, part one, chap. II, sect. A (United Nations publication, Sales No. E.81.V.8)). The UNCITRAL Conciliation Rules have also been reproduced in booklet form (United Nations publication, Sales No. E.81.V.6). Accompanying the Rules is a model conciliation clause, which reads: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force". The use of the UNCITRAL Conciliation Rules was recommended by the General Assembly in its resolution 35/52 of 4 December 1980.

(h) Review of technical disputes by independent experts

~~15. 20.~~ During the construction phase, the parties may wish to consider providing for certain types of dispute to be referred to an independent expert appointed by both parties. This method may be of particular use in connection with disagreements relating to technical aspects of the construction of the infrastructure facility (for example, whether the works comply with contractual specifications or technical standards).

~~16. 21.~~ The parties may, for instance, appoint a design inspector or a supervisor engineer, respectively, to review disagreements relating to the inspection and approval of the design, and the progress of construction works (see chap. IV, “~~Construction and operation of infrastructure: legislative PPP Implementation: legal framework and project agreement PPP contract~~”, paras. ~~69-79~~...). The independent experts should have expertise in the designing and construction of similar projects. The powers of the independent expert (such as whether the independent expert makes recommendations or issues binding decisions), as well as the circumstances under which the independent expert’s advice or decision may be sought by the parties, should be set forth in the ~~project agreement PPP contract~~. In some large infrastructure projects, for instance, the advice of the independent expert may be sought by the ~~concessionaire private partner~~ whenever there is a disagreement between the ~~concessionaire private partner~~ and the contracting authority as to whether certain aspects of the design or construction works conform with the applicable specifications or contractual obligations. Referral of a matter to a design inspector or to a supervising engineer, as appropriate, may be particularly relevant in connection with provisions in the ~~project agreement PPP contract~~ that require prior consent of the contracting authority for certain actions by the ~~concessionaire private partner~~, such as final authorization for operation of the infrastructure facility (see chap. IV, “~~Construction IV, “PPP Implementation: Legal Framework and operation of infrastructure: legislative framework and project agreement PPP contract~~”, para. ~~78~~...).

~~17. 22.~~ Independent experts have often been used for the settlement of technical disputes under construction contracts, and the various mechanisms and procedures developed in the practice of the construction industry may be used, mutatis mutandis, in connection with ~~privately financed infrastructure projects PPPs~~. However, it should be noted that the scope of disputes between the contracting authority and the ~~concessionaire private partner~~ is not necessarily the same as would be the case for disputes that typically arise under a construction contract. This is so because the respective positions of the contracting authority and the ~~concessionaire private partner~~ under the ~~project agreement PPP contract~~ are not fully comparable with those of the owner and the performer of works under a construction contract. For instance, disputes concerning the amount of payment due to the contractor for the quantities of works actually performed, which are frequent in construction contracts, are not typical for the relations between contracting authority and ~~concessionaire private partner~~, since the latter does not usually receive payments from the contracting authority for the construction works performed.

(i) Dispute review boards

~~18. 23.~~ ~~Project agreements PPP contracts~~ for large infrastructure projects often establish permanent boards composed of experts appointed by both parties, possibly with the assistance of an appointing authority, for the purpose of assisting in the settlement of disputes that may arise during the construction and the operational phases (referred to in the *Guide* as “dispute review boards”). Proceedings before a dispute review board can be informal and expeditious, and tailored to suit the characteristics of the dispute that it is called upon to settle. The appointment of a dispute review board may prevent misunderstandings or differences between the parties from developing into formal disputes that would require settlement in arbitral or judicial proceedings. In fact, its effectiveness as a tool for avoiding disputes is one of the special strengths of this procedure, but a dispute review board may also serve as a mechanism to resolve disputes, in particular when the board is given the power to render binding decisions.

~~19. 24.~~ Under the dispute review board procedure, the parties typically select, at the outset of the project, three experts renowned for their knowledge in the field of the project to constitute the board.

These experts may be replaced if the project comprises different stages that may require different expertise (that is, different expertise will be required during the construction of the facility and during the later administration of the public service), and in some large infrastructure projects more than one board has been established. For example, one dispute review board may deal exclusively with disputes regarding matters of a technical nature (e.g. engineering design, fitness of certain technology, compliance with environmental standards) whereas another board may deal with disputes of a contractual or financial nature (regarding, for instance, the amount of compensation due for delay in issuing licences or disagreements on the application of price adjustment formulas). Each board member should be experienced in the particular type of project, including experience in the interpretation and administration of ~~project agreements~~PPP contracts, and should undertake to remain impartial and independent of the parties. These persons may be furnished with periodic reports on the progress of construction or on the operation of the infrastructure facility, as appropriate, and may be informed immediately of differences arising between the parties. They may meet with the parties, either at regular intervals or when the need arises, to consider differences that have arisen and to suggest possible ways of resolving those differences.

~~20. 25.~~ In their capacity as agents to avert disputes, the members of the board may make periodic visits to the project site, meet with the parties and keep informed of the progress of the work. These meetings help identify any potential conflicts early, before they start festering and turn into full-fledged disputes. When potential conflicts are detected, the board proposes solutions, which, given the expertise and prestige of its members, are likely to be accepted by the parties. Referral of a dispute triggers an evaluation by the board, which is done in an informal manner, typically by discussion with the parties during a regular site visit. The board controls the discussion, but each party is given a full opportunity to state its views, and the dispute review board is free to ask questions and to request documents and other evidence. The advantages of conducting hearings at the job site, soon after the events have occurred and before adversarial positions have hardened, are obvious. The board then meets privately and seeks to formulate a recommendation or a decision. If the parties do not accept these proposals and disputes do arise, the board, if authorized to do so by the parties, is in a unique position to solve them expeditiously because of its familiarity with the problems and contractual documents.

~~21. 26.~~ Given their usually long duration, many circumstances relevant to the execution of ~~privately financed infrastructure projects~~PPPs may change before the end of the concession term. While the impact of some changes may be automatically covered in the ~~project agreement~~PPP contract (see chap. IV, “~~Construction PPP Implementation: Legal Framework and operation of infrastructure: legislative framework and project agreement~~PPP contract”, paras. 126-130...) there are changes that might not lend themselves easily to inclusion in an automatic adjustment mechanism or that the parties may prefer to exclude from such a mechanism. It is therefore important for the parties to establish mechanisms for dealing with disputes that may arise in connection with changing circumstances. This is of particular significance for the operational phase of the project. Where the parties have agreed on rules that allow a revision of the terms of the ~~project agreement~~PPP contract following certain circumstances, the question may arise as to whether those circumstances have occurred and, if so, how the contractual terms should be changed or supplemented. With a view to facilitating a resolution of possible disputes and avoiding a stalemate in case the parties are unable to agree on a contract revision, it is advisable for the parties to clarify whether and to what extent certain contractual terms may be changed or supplemented by the dispute review board. It may be noted, in this context, that the parties might not always be able to rely on an arbitral tribunal or a domestic court for that purpose. Indeed, under some legal systems, courts and arbitrators are not competent to change or supplement contractual terms. Under other legal systems, courts and arbitrators may do so only if they are expressly so authorized by the parties. Under yet other legal systems, arbitrators may do so but courts may not.

~~22. 27.~~ The law governing arbitral or judicial proceedings may determine the extent to which the parties may authorize arbitrators or a court to review a decision of the dispute review board. Excluding such review has the advantage that the decision of the dispute review board would be immediately final and binding. However, permitting such a review gives the parties greater assurance that the decision will be correct. Early clauses on dispute review boards did not provide that their recommendations

would become binding if not challenged in arbitral or judicial proceedings. In practice, however, the combination of the persuasive force of unanimous recommendations by independent experts agreed by the parties has led both contracting authorities and project companies to accept the recommendations voluntarily rather than litigate or arbitrate. Recent contract provisions on dispute review boards usually provide that a decision of the board, while not immediately binding on the parties, becomes binding unless one or both parties refer the dispute to arbitration or initiate judicial proceedings within a specified period of time. Apart from avoiding potentially protracted litigation or arbitration, the parties often take into account the potential difficulty of overcoming what might be regarded by the court or arbitral tribunal as a powerful recommendation, inasmuch as it had been made by independent experts familiar with the project from the outset and was based on contemporaneous observation of the project prior to, and at the time of, the dispute having first arisen.

23. 28. Although this occurs very rarely, the parties may agree to make the board's decision final and binding. It should be noted, however, that despite the parties' agreement to be bound by the board's decision, under many legal systems, the decision by the dispute review board, while binding as a contract, may not be enforceable in a summary proceeding, such as a proceeding for the enforcement of an arbitral award, since it does not have the status of an arbitral award. If the parties contemplate providing for proceedings before a dispute review board, it will be necessary for them to settle various aspects of those proceedings in the project agreement PPP contract. It would be desirable for the project agreement PPP contract to delimit as precisely as possible the authority conferred upon the dispute review board. With regard to the nature of their functions, the project agreement PPP contract might authorize the dispute review board to make findings of fact and to order interim measures. It may specify the functions to be performed by the dispute review board and the type of issues with which they may deal. If the parties are permitted to initiate arbitral or judicial proceedings within a specified period of time after the decision is rendered, the parties might specify that findings of fact made by a dispute review board are to be regarded as conclusive in arbitral or judicial proceedings. The project agreement PPP contract might also obligate the parties to implement a decision by the dispute review board concerning interim measures or a decision on the substance of specified issues; if the parties fail to do so, they will be considered as having failed to perform a contractual obligation. Regarding the duration of the board's functions, the project agreement PPP contract may provide that the board will continue to function for a certain period beyond the expiry or termination of the project agreement PPP contract, in order to deal with disputes that may arise at that stage (for example, disputes as to the condition of and compensation due for assets handed over to the contracting authority).

(j) Non-binding arbitration Dispute adjudication boards

~~29. This procedure is sometimes used when less adversarial methods such as facilitated negotiation, conciliation or dispute review board procedures have been unsuccessful. Non-binding arbitration is conducted in the same manner as binding arbitration, and the same rules may be used except that the procedure ends with a recommendation. The procedure contemplates that the parties will proceed directly to litigation if the dispute is still unresolved under non-binding arbitration. Those who choose this procedure do so (a) if they have reservations about the binding nature of arbitration; or (b) as an incentive to avoid both arbitration and litigation, arbitration because it would seem redundant to go through the same procedure twice and litigation because of its length and cost.~~

24. The parties select the adjudicator or panel of three adjudicators. In the case of a panel, each party will nominate one adjudicator for the approval of the other party, and after consulting these two adjudicators, the parties will agree upon the third adjudicator who will act as the chairperson of the dispute adjudication board. When selecting the adjudicator, the parties rely on several factors. These normally include the adjudicator's representations on the adjudicator's experience in the work in which the contractor is to carry out under the contract, the adjudicator's experience in the interpretation of contract documentation, and the adjudicator's fluency of the language for communications stated in the project agreement. The appointment of the adjudicator is personal and the adjudicator usually has to warrant and agree to be impartial and independent, and is obliged to disclose any fact or circumstance

which might appear inconsistent with his/her impartiality and independence to the parties.

25. Parties to the dispute adjudication agreement can challenge the appointment of the adjudicator for lack of independence notwithstanding any disclosure made or not made by the adjudicator. The party challenging the appointment may refer the alleged lack of independence to an appointed institution provided for in the project agreement, or if considered necessary or prudent, refer the matter to an independent professional person or body to review and assess the challenge. If the person or body is of the opinion that the adjudicator is no longer independent pursuant to the dispute adjudication agreement, the said adjudicator should be removed and the appointed institution should without delay appoint a new adjudicator. Costs for such a challenge are usually shared between the parties.

26. An adjudicator is furthermore subject to several general obligations. Typical obligations include the adjudicator having no interest financial or otherwise in the project, not previously having been employed as a consultant or otherwise by either party, having disclosed any previous involvement professionally or personally with the project or employer, amongst other obligations that may be agreed between parties and provided for in the dispute adjudication agreement. In some cases, parties can also agree to waive certain obligations, e.g. not previously employed as a consultant or otherwise by either party, if such information was disclosed in writing to the other party.

27. Similarly, parties are themselves subject to general obligations under the dispute adjudication agreement as well. These obligations can include terms stating that either party will not request advice from or consultation with the adjudicator regarding the project agreement, otherwise than in the normal course of the dispute adjudication board's activities under the project agreement and the dispute adjudication agreement, or when both parties jointly agree to refer a matter the dispute adjudication board pursuant to the project agreement. Furthermore, parties usually undertake to each other that the adjudicator will not be appointed as an arbitrator in any arbitration under the project agreement, be called as a witness to give evidence for any arbitration under the project agreement, nor be liable for any claims or anything done or omitted in the discharge or purported discharge of the adjudicator's functions, unless the act or omission is shown to be in bad faith. Parties also normally hold the adjudicator harmless against and from claims where the adjudicator is relieved from liability, and usually agree to jointly and severally indemnify the adjudicator. If the adjudicator is required to make a site visit and attend a hearing, the referring party will also be required to provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the adjudicator.

28. Remuneration of the adjudicator can be set out in the dispute adjudication agreement too. Normally, the dispute adjudication agreement will state the currency for the adjudicator's remuneration, the retainer fee, the daily fee, payment for reasonable expenses including necessary travel, and any applicable taxes. The retainer fees and daily fees are provided in detail and parties can agree to have these fees fixed for a specific period. Parties are also required to make payment promptly and adjudicators are expected to submit invoices with sufficient description of activities performed. The dispute adjudication agreement also allows parties to arrange how payment of the adjudicator should be made. If parties cannot agree on the sum of the adjudicator, the appointing entity or official named in the project will decide, and if the adjudicator is not paid within a specific time after submitting a valid invoice, the adjudicator may elect to suspend his/her services without notice or resign his/her appointment by giving a valid notice.

29. The adjudicators of the dispute adjudication board are also required to follow specific procedural rules set out in the dispute adjudication agreement. These procedural rules state what the dispute adjudication board is required to do at site visits such as timing, agenda and regularity; it is further required to become and remain acquainted with the progress of the project and of any actual potential problems or claims. Furthermore, these rules also detail what the parties are expected to do during a hearing or claim, including furnishing to the dispute adjudication board one copy of all documents that the dispute adjudication board may request, copying the other party in all communications between the dispute adjudication board, and if the board comprises three persons, to send copies of requested documents to all three persons.

30. The procedural rules also state how the hearing on disputes will be conducted and how ambiguity and errors of fact or principle arising from the dispute adjudication board should be treated. For instance, if there are errors of fact or principle and if the adjudicators of the dispute adjudication board agree that the decision contained errors of fact or principle within a stipulated period, the dispute adjudication board must advise the parties of the error and issue an addendum to its decision in writing. In the case of an ambiguity, a similar procedure applies. If either party believes that the decision contains an ambiguity, that party may seek clarification from the dispute adjudication board, and within a stipulated period of receiving such a request, the dispute adjudication board should respond with a copy to the party. If the dispute adjudication board is of the opinion that the decision did contain an error or ambiguity, it may correct its decision by issuing an addendum to its original decision.

31. The powers of the dispute adjudication board are provided in the procedural rules. Normally, the dispute adjudication board is allowed to adopt an inquisitorial procedure, refuse admission to hearings or audience at hearings to any persons other than representatives of either party, and to proceed in the absence of any party who the dispute adjudication board is satisfied received notice of the hearing. However, it should be noted that such powers could be limited depending on the agreement made between the parties. Other powers of the dispute adjudication board include but are not limited to establishing the procedure to be applied in deciding a dispute, deciding on the dispute adjudication board's jurisdiction and scope of any dispute referred to it, amongst other powers as may be agreed between parties.

32. During any hearing concerning the merits of any arguments advanced by the parties, the dispute adjudication board should not express any opinions. The dispute adjudication board should also convene in private after a hearing in order to have discussions and prepare its decision and should endeavour to reach a unanimous decision. If this is not possible, a decision should be made by a majority of the adjudicators who may require the minority adjudicator to prepare a written report for submission to the parties. Lastly, in a panel of three adjudicators, an absent adjudicator may not prevent the other two adjudicators from making a decision unless the parties do not agree to this arrangement, and if the absent adjudicator is the chairman and he/she instructs the other adjudicators to not make a decision.

33. Parties are able to terminate the adjudicator through various mechanisms, such as by providing the notice of termination to the adjudicator in accordance with the dispute adjudication agreement, or if the adjudicator fails to comply with the dispute adjudication agreement. In these termination situations, both parties must agree to the termination for it to be valid. An adjudicator may also terminate his participation in the dispute adjudication board if either party fails to comply with the dispute adjudication agreement. However, if the adjudicator does not comply with any of the obligations described in the dispute adjudication agreement, the said adjudicator will not be entitled to any fees or expenses and may be required to reimburse parties for any fees and expenses received for proceedings or decisions that are rendered void or ineffective by the adjudicator's failure to comply. In the event of any dispute or claim arising from the breach, termination or invalidity of the dispute adjudication agreement, parties can agree to settle such disputes or claims by institutional arbitration. Arrangements on the appointment of the arbitration institution, the arbitrator, or the rules of arbitration can be agreed beforehand by parties in the dispute resolution agreement.

34. The role of the dispute adjudication board is not limited only to disputes referred to it through the formal dispute adjudication board mechanism. A dispute adjudication board can also assist to resolve issues jointly referred by the parties. The parties can request the dispute adjudication board to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the parties during the performance of the project agreement. Informal assistance can take place during meetings, site visits, or otherwise, as long as both parties are present at the meeting unless otherwise agreed. However, in such informal meetings, parties are not bound to act upon any advice given during such informal meetings, and the dispute adjudication board is not bound to any future dispute resolution process and decision by any views given during the informal assistance process.

35. Project agreements that use dispute adjudication boards as the preferred form of dispute resolution will normally state that the decision of a dispute resolution board to be final and binding in nature. In

some project agreements, there are provisions for the right by either party to lodge a notice of dissatisfaction or similar notice within a given period. Upon the lapse of the given period, this decision by the dispute adjudication board will become final and binding. If such notice of dissatisfaction has been given, then parties are required to attempt to settle the dispute amicably; if they fail to settle the dispute amicably, they can commence arbitration to resolve it. However, the arbitration proceedings can commence on the last day of the given period for a party to lodge a notice of dissatisfaction even if no attempt to settle the dispute amicably was made, so long as parties agree otherwise to the immediate commencement of the arbitration.

(k) Arbitration

30. In recent years, arbitration

36. Arbitration has been used increasingly for settling disputes arising under ~~privately financed infrastructure projects~~ PPPs. Arbitration is typically used both for the settlement of disputes that arise during the construction or operation of the infrastructure facility and for the settlement of disputes related to the expiry or termination of the ~~project agreement~~ PPP contract. Arbitration, ~~often in a country other than the host country~~, is preferred, and in many cases required, by private investors and lenders, ~~in particular foreign ones~~, since arbitral proceedings may be structured by the parties so as to be less formal than judicial proceedings and better suited to the needs of the parties and to the specific features of the disputes likely to arise under the ~~project agreement~~ PPP contract. The parties can choose as arbitrators persons who have expert knowledge of the particular type of project. They may choose the place where the arbitral proceedings are to be conducted. They can also choose the language or languages to be used in the arbitral proceedings. Arbitral proceedings may be less disruptive of business relations between the parties than judicial proceedings. ~~The proceedings and arbitral awards can be kept confidential, while judicial proceedings and decisions usually cannot.~~ Furthermore, the enforcement of arbitral awards in countries other than the country in which the award was rendered is facilitated by the wide acceptance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.² The possibility of keeping the arbitration proceedings confidential – as opposed to judicial proceedings which are by nature generally accessible to the public – was an additional reason commonly invoked in the past to justify the parties’ choice arbitration. In recent years, however, there has been a growing trend towards transparency on investor-State dispute settlement, which is encouraged by the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the “Rules on Transparency”),³ adopted in 2013 and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the “Mauritius Convention on Transparency”).⁴

37. 34. With regard, in particular, to infrastructure projects involving foreign investors, it may be noted that a framework for the settlement of disputes between the contracting authority and foreign companies participating in a project consortium may be provided through adherence to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.⁵ The Convention, which has thus far been adhered to by ~~134~~ 153 States, established the International Centre for the Settlement of Investment Disputes (ICSID). ICSID is an autonomous international organization with close links to the World Bank. ICSID provides facilities for the ~~conciliation~~ mediation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID ~~conciliation~~ mediation and arbitration is voluntary. However, once the parties to a contract or dispute have consented to arbitration under the ICSID Convention, neither can withdraw its

² See United Nations, *Treaty Series*, vol. 330, No. 4739, reproduced in the *Register of Conventions and Other Instruments concerning International Trade Law*, vol. II (United Nations publication, Sales No. E.73.V.3).

³ For the official text of the *Rules on Transparency*, see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, Annex I. The Transparency Rules have also been reproduced in booklet form. The use of the Transparency Rules was recommended by the General Assembly in its resolution 68/109 of 16 December 2013.

⁴ Adopted by the General Assembly in its resolution 69/116 of 10 December 2014. Entered into force on 18 October 2017, United Nations No. 54749 (for the status and official text of the *Mauritius Convention on Transparency*, see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html).

⁵ United Nations *Treaty Series*, vol. 575, No. 8359.

Formatted: body text +6, Indent: Before: 0 cm, First line: 0 cm, Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 1 cm + Indent at: 1.64 cm

consent unilaterally. All ICSID members, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. The consent of the parties to ICSID arbitration may be given with regard to an existing dispute or with respect to a defined class of future disputes. The consent of the parties need not, however, be expressed in relation to a specific project; a host country might in its legislation on the promotion of investment offer to submit disputes arising out of certain classes of investment to the jurisdiction of ICSID and the investor might give its consent by accepting the offer in writing.

~~38. 32.~~ Bilateral investment agreements may also provide a framework for the settlement of disputes between the contracting authority and foreign companies. In these treaties, the host State typically extends to investors that qualify as nationals of the other signatory State a number of assurances and guarantees (see chap. VII, “Other relevant areas of law”, paras. ~~4-6~~...) and expresses its consent to arbitration, for instance, by referral to ICSID or to an arbitral tribunal applying the UNCITRAL Arbitration Rules.^{4,6}

(i) Sovereign immunity

~~33.~~

~~39.~~ The legislator may wish to review its laws on sovereign immunity and, to the extent considered advisable, clarify in which areas contracting authorities may or may not plead sovereign immunity. When arbitration is allowed and agreed upon between the parties to the ~~project agreement~~ PPP contract, the implementation of an agreement to arbitrate may be frustrated or hindered if the contracting authority is able to plead sovereign immunity, either as a bar to the commencement of arbitral proceedings or as a defence against recognition and enforcement of the award. Sometimes the law on this matter is not clear, which may raise concerns with the interested parties (for instance, the ~~e concessionaire~~ private partner, project promoters and lenders) that an agreement to arbitrate might not be effective. In order to address such possible concerns, it is advisable to review the law on this topic and to indicate the extent to which the contracting authority may raise a plea of sovereign immunity.

~~40. 34.~~ In addition, a contracting authority against which an award has been issued may raise a plea of immunity from execution against public property. There is a diversity of approaches to the question of sovereign immunity from execution. For example, under some national laws immunity does not cover governmental entities when engaged in commercial activities. In other national laws a link is required between the property to be attached and the claim in that, for example, immunity cannot be pleaded in respect of funds allocated for economic or commercial activity governed by private law upon which the claim is based or that immunity cannot be pleaded with respect to assets set aside by the State to pursue its commercial activities. In some countries, it is considered that it is for the Government to prove that the assets to be attached are in non-commercial use.

~~41. 35.~~ In some contracts involving entities that might plea sovereign immunity, clauses have been included to the effect that the Government waives its right to plead sovereign immunity. Such a consent or waiver might be contained in the ~~project agreement~~ PPP contract or an international agreement; it may be limited to recognizing that certain property is used or intended to be used for commercial purposes. Such written clauses may be necessary inasmuch as it is not clear whether the conclusion of an arbitration agreement and participation in arbitral proceedings by the governmental entity constitutes an implied waiver of sovereign immunity from execution.

⁶ The official text of the UNCITRAL Arbitration Rules, as revised in 2010, is reproduced in *Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), Annex I (Yearbook of the United Nations Commission on International Trade Law, vol. XLI, 2010, part one, chap. I, sect. A, Annex I (United Nations publication, Sales No. E.13.V.8))*. The UNCITRAL Arbitration Rules, as revised in 2010, have also been reproduced in booklet form (United Nations, New York, 2011). Accompanying the Rules is a model arbitration clause, which reads: “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. The use of the UNCITRAL Arbitration Rules was recommended by the General Assembly in its resolution 65/22 of 6 December 2010.

(ii) *Effectiveness of the arbitration agreement and enforceability of the award*

~~36.~~

The effectiveness of an agreement to arbitrate depends on the legislative regime where the arbitration takes place. If the legislative regime for arbitration in the host country is seen as unsatisfactory, for instance, because it is found to pose unreasonable restrictions on party autonomy, a party might wish to agree on a place of arbitration outside the host country. It is therefore important for the host country to ensure that the domestic legislative regime for arbitration resolves the principal procedural issues in a manner appropriate for international arbitration cases. Such a regime is contained in the UNCITRAL Model Law on International Commercial Arbitration.⁵

(1) Judicial proceedings

~~43.~~ ~~38.~~ As indicated earlier, there are legal systems where the settlement of disputes arising out of agreements related to the provision of public services is a matter of the exclusive competence of the domestic judiciary or administrative courts. In some countries, governmental agencies lack the power to agree to arbitration, except under specific circumstances (see paras. ~~7-9~~), while in other legal systems the parties have the freedom to choose between judicial and arbitral proceedings.

~~44.~~ ~~39.~~ Where it is possible for the parties to choose between judicial and arbitral proceedings, the contracting authority may see reasons for leaving any dispute to be resolved by the courts of the host country. Those courts are familiar with the law of the country, which often includes legislation specifically concerned with the ~~project agreement~~ PPP contract. Furthermore, the contracting authority or other governmental agencies involved in the dispute may prefer local courts because of the familiarity with the court procedures and the language of the proceedings. It may also be considered that, to the extent ~~project agreements~~ PPP contracts involve issues of public policy and the protection of public interest, State courts are in a better position to give them proper effect.

~~45.~~ ~~40.~~ However, such a view by the contracting authority may not be shared by prospective investors, financiers and other private parties. These parties may consider that arbitration is preferable to judicial proceedings because arbitration, being to a larger degree subject to the agreement of the parties than judicial proceedings, is in a position to resolve a dispute more efficiently. Private investors, in particular foreign ones, may also be reluctant to submit to the jurisdiction of domestic courts functioning under rules unfamiliar to them. In some countries it has been found that allowing the parties to choose the dispute settlement mechanism helped to attract foreign investment for the development of its infrastructure.

~~46.~~ ~~41.~~ In considering whether any dispute should be resolved in judicial proceedings or whether an arbitration agreement should be entered into, where such choice is permitted under the applicable law, factors typically taken into account by the parties include, for example, their confidence that the courts competent to decide a dispute will be unbiased and that the dispute will be resolved without inordinate delay. The efficiency of the national judicial system and the availability of forms of judicial relief that are adequate to disputes that might arise under the ~~project agreement~~ PPP contract are additional factors to be taken into account. Furthermore, in view of the highly technical and complex issues involved in infrastructure projects, the parties will also consider the implications of using arbitrators selected for their particular knowledge and experience as compared with domestic courts, which may lack specific knowledge or experience in handling the technical questions in the area where the dispute arose. Another consideration may be the ~~confidentiality of arbitration proceedings~~, relative informality of arbitral procedures and the possibly greater flexibility arbitrators may have in awarding appropriate remedies, all of which may be beneficial for preserving and developing the long-term relationship implicit in ~~project agreements~~ PPP contracts.

C. Disputes between project promoters and between the ~~concessionaire~~ private partner

and its lenders, contractors and suppliers

42.

47. Domestic laws generally recognize that in commercial transactions, in particular international ones, the parties are free to agree on the forum that will settle in a binding decision any dispute that may arise between them. In international transactions, arbitration has become the preferred method, whether or not it is preceded by, or combined with, ~~conciliation~~mediation. Contracts between the ~~concessionaire~~private partner and lenders, contractors and suppliers in connection with infrastructure projects, are generally considered as commercial agreements. Accordingly, the parties to those contracts are usually free to choose their preferred dispute settlement method, which in most cases includes arbitration. Lenders, however, although in most cases favouring arbitration for the settlement of disputes arising out of the ~~project agreement~~PPP contract (and increasingly also for disputes between different lenders), often prefer judicial proceedings for the settlement of disputes between them and the ~~concessionaire~~private partner arising out of loan agreements. Where arbitration is the preferred method, the parties will typically wish to be able to select the place of arbitration and to determine whether or not any arbitration case should be administered by an arbitral institution. Host countries wishing to establish a hospitable legal climate for ~~privately financed infrastructure projects~~PPPs would be well advised to review their laws with respect to such commercial contracts so as to eliminate any uncertainty regarding the freedom of the parties to agree to dispute settlement mechanisms of their choice.

D. Disputes involving customers or users of the infrastructure facility

48. 43. Depending on the type of project, the ~~concessionaire~~private partner may provide goods or services to various different persons and entities, such as, for example, government-owned utility companies that purchase electricity or water from the ~~concessionaire~~private partner so as to resell it to the ultimate users; commercial companies, such as airlines or shipping lines contracting for the use of the airport or port; or individuals paying for the use of a toll road. The considerations and policies regarding the settlement of disputes arising out of those legal relationships may vary according to who the parties are, the conditions under which the services are provided and the applicable regulatory regime.

49. 44. In some countries, public service providers are required by law to establish special simplified and efficient mechanisms for handling claims brought by their customers. Such special regulation is typically limited to certain industrial sectors and applies to purchases of goods or services by customers. Statutory requirements for the establishment of such dispute settlement mechanisms may apply generally to claims brought by any of the ~~concessionaire's~~private partner's customers or may be limited to customers who are individual persons acting in their non-commercial capacity. The ~~concessionaire's~~private partner's obligation may be limited to the establishment of a mechanism for receiving and dealing with complaints by individual consumers. Such mechanisms may include a special facility or department set up within the project company for receiving and handling claims expeditiously, for instance by making available to the customers standard claim forms or toll-free telephone numbers for voicing grievances. If the matter is not satisfactorily resolved, the customer may have the right to file a complaint with a regulatory agency, if any, which in some countries may have the authority to issue a binding decision on the matter. Such mechanisms are often optional for the consumer and typically do not preclude resort by the aggrieved persons to courts.

50. 45. If the customers are utility companies (such as a power distribution company) or commercial enterprises (for instance, a large factory purchasing power directly from an independent producer) who freely choose the services provided by the ~~concessionaire~~private partner and negotiate the terms of their contracts, the parties would typically settle any disputes by methods usual in trade contracts, including arbitration. Accordingly, there may not be a need for addressing the settlement of these disputes in legislation relating to ~~privately financed infrastructure projects~~PPPs. However, where the ~~concessionaire's~~private partner's customers are government-owned entities, their ability to agree on dispute settlement methods may be limited by rules of administrative law governing the settlement of

disputes involving governmental entities. For countries that wish to allow the use of non-judicial methods, including arbitration, for the settlement of disputes between the ~~concessionaire~~ private partner and its government-owned customers, it is important to remove possible legal obstacles and to provide a clear authorization for those entities to agree on dispute settlement methods (see paras. 7-9;...).