An English lawyer's approach to valuation

13.77 Whilst the law relating to the valuation of distressed entities is well developed in some jurisdictions (for example, the US), in a number of other jurisdictions the issue has received limited judicial attention, if any. In England, the restructuring of MyTravel plc in 2005 brought the issue to the attention of practitioners and the courts alike although the subsequent litigation[24] relating to that case was not determinative. More recently, the English High Court gave a key judgment[25] on valuation issues in relation to the restructuring of the pan-European car wash company, IMO Car Wash. The case concerned a disagreement between senior creditors and mezzanine creditors as to the correct valuation method to be adopted in the context of a restructuring of the leveraged financing for certain companies in the IMO group, to be implemented by way of schemes of arrangement under the English Companies Act 2006.[26]

13.78 In seeking to argue that the proposed schemes of arrangement were unfair (and so should not be sanctioned by the court), the mezzanine creditors needed to establish that they had an economic interest in the companies' business and assets, i.e. that whilst they were not completely 'in the money' they were not completely 'out of the money' either.[27] In so doing, they argued that their valuation (based on a theoretical discounted cashflow (DCF) valuation which regarded the companies as income generating assets to be held over time) was the appropriate valuation. The judge rejected this argument. This was on the basis that the mezzanine debt was contractually subordinated to the senior debt and the intercreditor arrangements, as common in leveraged finance transactions, gave the senior creditors the right to enforce their security unfettered by the claims of the mezzanine creditors. In the absence of a consensual restructuring, such an enforcement was a very likely option and therefore the relevant basis for valuing the companies in this case was the value of the companies' business and assets on a sale in the current market (based on a combination of actual values received during a marketing of the business, an income approach (based on discounted cashflow), a multiples analysis, and a market

[24] *In re MyTravel Group plc* [2004] EWCH 2741 (Ch) and *Fidelity Investments International plc v MyTravel Group plc* [2004] EWCA 1734.

[25] *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).

[26] Part 26 of the Companies Act 2006 provides a statutory 'cram-down' procedure under which a company is able to make a compromise or arrangement with its creditors (or any class of them) provided that a requisite majority of creditors agree (being 75 per cent in value and 50 per cent in number of each class of creditors who vote in favour of the scheme) and the court subsequently sanctions the scheme as fair and reasonable. Once the court sanction is obtained, the scheme will bind all creditors (or, as relevant, all creditors within a particular class) that are a party to the scheme, irrespective of whether they voted in favour of the scheme.

[27] In the IMO case the mezzanine creditors were not actually party to the schemes of arrangement as the schemes did not purport to alter their legal rights. Nonetheless creditors who are not otherwise party to a scheme can still object to it at the court sanction hearing on the grounds of unfairness if the proposed scheme unfairly affects their interests in ways other than affecting their strict legal rights.

comparables approach) and not by reference to the theoretical, DCF-based valuation which the mezzanine creditors espoused and which showed that value 'broke' in the mezzanine debt. The schemes of arrangement were therefore sanctioned by the court and the mezzanine creditors were left, following their implementation, with valueless claims against a holding company in the IMO group.

13.79 The IMO Car Wash case is now frequently cited (by senior creditors and, sometimes, sponsors) to show dissenting junior creditors the 'abyss' in restructuring negotiations concerning English companies or overseas companies which are otherwise able to be subject to an English scheme of arrangement.[28] Whilst the case is no doubt helpful to senior creditors in restructuring negotiations, as with so much case law, it turns on its own facts. In a project finance scenario those facts may well be different, particularly because the enforcement of security is, for the reasons explained below, not a realistic alternative to a consensual restructuring and because the overwhelming focus of project finance investors is, in fact, the prospective future cashflow of the project company and not the market value of its assets. In addition, the approach of courts in other jurisdictions on this important issue is not as clear as it is in the US and, following the decision in the IMO Car Wash case, in England.

The amount of ongoing debt

13.80 In addition to the valuation issue, at the heart of the restructuring negotiations will be a discussion between the relevant parties in relation to the amount and revised economic terms for the restructured company's debt. This will involve an inevitable balancing act between the natural inclination of most creditors[29] to leave as much debt as possible on the company's balance sheet (to avoid too large a write down) whilst at the same time leaving the company with a sustainable debt level going forward, taking into account the revised business plan and Financial Model.

Restructuring agreement and implementation

13.81 As restructuring negotiations are conducted, alliances amongst stakeholders are formalized, and the requisite due diligence is completed, detailed restructuring proposals will begin to emanate from the debtor itself and/or from groups of creditors. In most cases, once the various merits of each of the proposals has been scrutinized

[28] English law provides that any company which can be wound up under the Insolvency Act 1986 can be subject to a scheme of arrangement. Companies which can be wound up under the Insolvency Act include unregistered companies and these include foreign companies provided that certain conditions are satisfied, including that they have sufficient connection with England (*Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch)). Recently, the English High Court approved jurisdiction for a Spanish company to be subject to an English scheme of arrangement (see *Re La Seda de Barcelona SA* [2010] EWHC 1364 (Ch)).

[29] As noted in para. 13.23 above, some creditors may favour a more significant write-down of debt than others, particularly those creditors whose motivations are based around a 'loan-to-own' strategy.

and the impact on each stakeholder analysed, a consensus will begin to emerge around one or two proposals. Generally speaking, those protagonists who build a consensus around a particular restructuring proposal will place a premium on the proposal being implemented on a consensual basis. The reasons for this are that a non-consensual process will generally be more costly to implement (as it will likely involve some form of formal court involvement or cram-down procedure such as a scheme of arrangement as referred to in paragraph 13.77 above) and that any non-consensual process will carry an inevitable litigation risk in respect of the parties who are objecting to the particular proposal and implementation process. Whilst there are exceptions, most project finance restructurings are concluded on a fully consensual basis and therefore without recourse to a formal insolvency, the courts, and/or a 'cram down' process.

13.82 However, in circumstances where it is not possible to obtain the consent of each relevant party, those advocating a particular proposal which has sufficient consent amongst the stakeholders may have to make use of some form of insolvency process or statutory compromise or cram down to ensure that dissenting parties are bound to the agreement which the majority parties have made. The form of this will vary from jurisdiction to jurisdiction. Where there are dissenting stakeholders to a proposal which otherwise has broad consent from the stakeholders, it will be crucial to develop a fully worked out, credible alternative implementation mechanic (often referred to by practitioners as 'Plan B'). In the ordinary course, the approach will be to demonstrate to dissenting stakeholders the way in which 'Plan B' can be made to work in detail in order to convince them that the proposal can be implemented without their consent and hence why they should proceed on a consensual basis with the restructuring consideration that they are being offered as part of a consensual deal. The aim being to avoid the costs, execution, and litigation risk that actual implementation of 'Plan B' may entail.

Restructuring documentation

13.83 The documentation for the agreed restructuring will vary depending on the nature of the restructuring. Where it takes the form of a relatively simple covenant re-set, it will most likely be documented by a straightforward amendment and restatement agreement which will amend and restate the relevant existing financing documents. The documentation for a more fundamental restructuring, such as a debt for equity swap, will be significantly more complex, time-consuming, and expensive.

13.84 Where the restructuring is complex and there may be a number of steps to go through over a period of time in order successfully to complete the restructuring, it is common for the consenting parties to enter into a detailed restructuring and 'lock-up' agreement. This document will perpetuate the standstill period for the period of time necessary to implement the restructuring and will include

an agreement on the detailed steps necessary to complete the restructuring. Where there are dissenting creditors, the restructuring agreement will usually be drafted in a way which allows for the implementation of the restructuring on a non-consensual basis, whilst leaving the door open for non-consenting stakeholders to agree to the restructuring on a consensual basis if they accede to the restructuring/lock-up agreement by a certain date. Often the restructuring agreement will be drafted to incentivize non-consenting or apathetic stakeholders to accede by a certain date by making clear that there will be 'step-downs' in the restructuring consideration they will receive as time elapses and, where the restructuring has to be implemented on a non-consensual basis, making clear that the dissenting stakeholders will receive nothing. The restructuring/lock-up agreement will also often prevent creditors from trading their debt during the restructuring implementation period or allow them to do so only if the transferee agrees to be bound to the form of restructuring set out in the restructuring agreement.

Restructuring Options

Introduction

13.85 Whilst each restructuring will be unique, the options generally available in a restructuring scenario can be broadly categorized as below.

Extension/amendment

13.86 At its simplest, a restructuring may consist of a re-setting of financial covenants, usually on the basis that they are 'loosened' for a period of time to accommodate the actual or projected underperformance compared with the original base case for the financing. A covenant re-set may be coupled with a rescheduling of indebtedness such that its maturity is extended but the overall principal debt burden remains the same (or is potentially increased by amending some of the cash pay debt so it is payment in kind, in order to reduce the immediate interest burden on the borrower). The *quid pro quo* for this flexibility by the creditors will often be increased pricing for the debt (if this is sustainable considering the overall debt capacity of the company) and/or the payment of a restructuring consent fee. In addition, a quid quo pro for any financial covenant 'loosening' will often be increased covenant restrictions on the company (for example, restrictions on the movement of cash or the payment of dividends).

13.87 An extension and amendment process may occur before, but in anticipation, of an actual event of default. Sponsors may be prepared to take remedial steps prior to the occurrence of an actual event of default in order to try and protect their investment. Lenders may also be motivated to renegotiate covenants to avoid having to report non-performing loans on their books.

13.88 This covenant re-set process has become a common feature of the restructuring of a number of the highly leveraged buy-outs which took place between 2005 and 2007

and has been labelled by some as 'extend and pretend' or 'delay and pray', the implication being that this form of restructuring is merely a temporary fix and will inevitably require some form of more fundamental restructuring at a later stage.

Additional equity and/or priority creditor financing

13.89 In addition to covenant re-sets and maturity extensions as described above, the 'price' for the creditors' consent to the amendments may be the provision of new equity by the sponsors to fund the liquidity requirements of the revised business plan. In addition, in certain circumstances existing creditors or new investors may be prepared to provide additional financing (usually on a super priority basis). In certain cases, what may start out as a potential restructuring turns into a refinancing, in which all of the existing creditors are refinanced by new investors.

Sale/foreclosure/security enforcement

13.90 Following the occurrence of an event of default, creditors always have the theoretical option of enforcing their security either as a means to sell the relevant assets/companies to a third party purchaser (in the hope that a third party purchaser will be prepared to pay an amount sufficient to discharge the existing debt) or as a means to take control of the company themselves.

13.91 As a rule, lenders generally, and project finance lenders in particular, will be loathe to enforce their security unless they have lost all confidence in the directors/the sponsors. In a project finance context if creditors are nonetheless seriously contemplating an enforcement of security it will usually be with a view to taking actual control of the project as opposed to selling it to a third party. This is because the fundamental economic assumptions upon which project financing is arranged is by reference to the project asset's cashflows and not the market price of those assets (which may not be enough to repay the debt in full). An enforcement strategy will therefore usually be designed with a view to the creditors taking control of the project in order to preserve the project's existing or expected cashflows as their ultimate source of full repayment.

Debt for equity swap

13.92 In certain circumstances, usually where specialist distressed funds have purchased a financially distressed company's debt, the creditors may agitate for a fundamental balance sheet restructuring of a company whereby their debt claims are converted, either partially or in full, into equity in the restructured entity. The economic motivation is to use their position in a company's debt to force a restructuring on favourable terms which will lead to a large return in a relatively short time frame on the equity they acquire in the restructured entity. This was the strategy followed by a number of distressed debt funds in relation to the restructuring of the Drax power station in 2003. The strategy was successful and a number of the funds involved made very large returns as wholesale electricity prices rose from their all-time low in

2002 and the company was subsequently listed on the London Stock Exchange in 2005. In other circumstances, a debt for equity swap may be, whilst not the creditors' favoured outcome, the only realistic way in which creditors can attempt to preserve their value if the debt burden on the company is fundamentally unsustainable and there is no market for the asset or near term refinancing options.

13.93 The implementation of a debt for equity swap can either be done on a consensual basis or a non-consensual basis. Where it is done on a non-consensual basis, it will usually involve some form of security enforcement or facilitating insolvency process. Debt for equity swaps are significant undertakings and will involve a whole range of considerations, including a detailed tax analysis (as the release of debt claims typically crystallizes a taxable gain for the company released), detailed negotiations around the form of the new shareholders' agreement that will be needed (including drag and tag rights and other minority shareholder protections and corporate governance generally), and, depending on the identity of the converting creditors, the size of their shareholdings, and their other interests, competition law issues.

Project finance limitations on creditors' options

13.94 In a project finance scenario, creditors' options are circumscribed by certain features (as described below) of project financing which mean that, in most cases, a project finance restructuring will consist of amendments, covenant re-sets and maturity extensions as opposed to some of the more fundamental balance sheet restructurings where creditors swap their debt claims for equity or otherwise become owners of the project.

(1) As noted above, project finance is fundamentally a cashflow finance, as opposed to an asset finance, technique and creditors make their assessment of whether they will be repaid by reference to the cashflow generating ability of the project's assets, not the underlying value of the collateral/the balance sheet of the borrower. As a result, creditors may have no option but to give the project borrower the covenant or other flexibility it needs to complete and operate the project, in order to generate the revenues upon which the creditors' chances of full repayment will ultimately depend.
(2) Even if creditors are minded to enforce their security because they have lost faith in the borrower and/or its sponsors, there can often be limited market appetite for the large-scale, capital-intensive infrastructure assets which are typically financed in the project finance market. As a result, even if the creditors have the inclination and ability to conduct an efficient security enforcement (as to which see paragraphs 13.99–13.105 below), it may mean there are no buyers for the assets in question or that the only buyers will be opportunistic infrastructure investors who will be unwilling to pay full value.
(3) A project's contractual infrastructure and, in the case of sensitive infrastructure and other 'public interest' assets, governmental licensing/concession arrangements

will mean that an aggressive creditor restructuring strategy based around some form of unilateral enforcement or other security right, will be less likely to work than it would in the case of, for example, the corporate restructuring of a retail or manufacturing company.

Creditors' rights under project finance documents

13.95 The starting point for the creditors' assessment of their options when a project company experiences signs of financial distress will be their contractual rights under the existing financing documents. The nature of the contractual rights which the creditors may have at any particular time will depend on when the distress first manifests itself in a project's development, construction, and operation cycle.

Defaults during development/construction

13.96 As a general matter, drawings under credit facilities for a project during the development and construction phase of a project tend to be highly regulated and each drawing will be conditional on standard and project-specific conditions precedent. The project specific conditions precedent are often in the form of construction milestones and can be subject to independent verification, for example, for each draw down, the lenders' technical adviser is required to confirm that completion/commencement of operations is on target for a certain date. In addition, drawings will be contingent on the standard requirements that there be no outstanding event of default. This 'draw-stop' therefore gives creditors the option to prevent 'throwing good money after bad' if they are still contractually committed to lend funds immediately prior to the event of default. In practice, however, without access to funds to ensure completion, a project may be doomed and so, unless the creditors have recourse to some form of contingent equity support or completion guarantee, a draw-stop may serve no useful purpose other than crystallizing a loss for creditors. However painful or unpalatable it may be to lend into a structure which has defaulted on the terms originally bargained for, the continued provision of funds to finance completion of the project may present creditors with the best opportunity for eventual repayment.

13.97 If creditors do determine, however, to 'draw-stop' a project borrower, the event of default upon which they base that 'draw-stop' needs to be clear and unambiguous. The dangers for creditors in draw-stopping a loan on the basis of an event of default which the borrower is able to argue has not in fact occurred is that creditors may be held responsible for the losses consequential upon incorrectly calling an event of default and denying the borrower funds when it was otherwise contractually entitled to them.

Defaults during operations

13.98 When a project has reached an operational phase, the occurrence of an event of default will usually act as a dividend 'blocker' so that the sponsors will be unable,

whilst the event of default subsists, to access any further distributions from the project. Another common restriction relates to the project company's freedom with respect to the project accounts and creditors will have a greater say under the relevant accounts agreement in respect of the movement of funds and how monies in the project accounts are used or invested. Typically, following the occurrence of an event of default, the accounts agreement will provide that the project company's day-to-day ability to manage the revenue cash waterfall is curtailed and all payments become subject to approval by the intercreditor agent and/or the account bank acting on behalf of the lenders.

Enforcement of security

13.99 As explained in Chapter 11, project financings depend fundamentally on a robust security package. Security will usually be on an all asset basis and will include security over the shares in the project company. The transaction security will often cover a number of jurisdictions and hence be governed by a variety of laws depending on the location of the relevant assets. Despite receiving an extensive security package, project finance creditors will typically consider the enforcement of that security as a last resort in a financially distressed situation. The principal reasons for this are summarized below.

Jurisdiction risk

13.100 Notwithstanding the extensive nature of the security as described in the various security documents at the time the transaction was originated, in practice, particularly in emerging markets, there will be significant concerns, taking into account costs, timing, and process, as to the actual effectiveness of the security in a practical enforcement scenario.

13.101 Whilst English lawyers are used to the extensive 'self-help' remedies available to secured creditors including the appointment of an administrative receiver in certain circumstances,[30] as explained in Chapter 12, civil law jurisdictions generally do not (a) allow for the all asset embracing composite debenture which English

[30] Under English law, whilst the Enterprise Act 2002 removed the ability of secured creditors in most cases to appoint an administrative receiver in respect of security entered into after 15 September 2003, project finance lenders retain the ability to appoint administrative receivers in certain circumstances pursuant to the project finance exception contained in s 72(E) of the Insolvency Act 1986. This provides that an administrative receiver can be appointed in respect of a 'project company' if the project is a 'financed' project and includes 'step-in rights'. A project is financed if, under an agreement relating to the project, a project company incurs or, when the agreement is entered into, is expected to incur, a debt of at least £50 million for the purposes of carrying out the project. A project has 'step-in rights' if a person who provides finance in connection with the project has a conditional entitlement under an agreement to assume sole or principal responsibility, or make arrangements, for carrying out all or part of the project. See the Court of Appeal decision in *Cabivision v Feetum* [2005] EWCA Civ 1601 for a discussion of the project finance exception. In this judgment the Court of Appeal made clear that the right to appoint administrative receivers could not, *per se*, constitute step-in rights.

lawyers will be familiar with or (b) permit the availability of 'self-help' remedies for secured creditors, meaning that security enforcement can be a time-consuming, expensive, and uncertain process, often subject to the vagaries of court procedure and timetables.

Project contract risk

13.102 A project company's key and most valuable assets usually consist of (a) a particular concession or licence to develop the asset being financed and (b) rights under the various project contracts. Taking this into account, enforcement of security is often a blunt instrument because:

(1) the enforcement of that security (or the taking of it in the first place) will be subject to, in the case of state granted concessions or licences, the approval of the relevant minister or public authority granting the concession/licence; and
(2) an enforcement resulting in a sale to a third party is likely to trigger change of control provisions in the key project contracts and licences/permits which the project company has.

13.103 As explained in Chapter 11, direct agreements, a particular feature of project and construction finance, are designed to mitigate this risk by enabling creditors effectively to 'step into the shoes' of the project company and thereby they provide a right for the creditors to assume both the project company's rights and its obligations.

13.104 In a distressed scenario, the practical use of direct agreement needs to be carefully considered, particularly if the project company is to undergo some form of insolvency event as part of a restructuring. As noted in Chapter 12, direct agreements are founded on an Anglo-American legal tradition and a number of commentators have pointed to the fact that in other jurisdictions, with a less creditor friendly tradition/philosophy, the utility of direct agreements in those jurisdictions, particularly following the actual insolvency of the project company, may be compromised.[31] Generally this is because the rights of the debtor under a project contract are considered to be fundamental assets of the debtor's estate on its insolvency and provisions which purport, at the option of certain secured creditors, automatically to transfer those rights to another entity can be challenged on a variety of grounds (see paragraphs 12.177–12.178 in Chapter 12 for further analysis of this in a civil law context).

13.105 Even in an English law context, there are grounds upon which other, unsecured creditors of a project company which undergoes an administration or liquidation could seek to challenge the transfer of rights provided for under a direct agreement.

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[31] See, for example, Sabina Axelsson, 'Project Finance and the Efficiency of Direct Agreements under Swedish Law: The Treatment of the Debtor's Contracts in Bankruptcy', Spring 2006, available at <http://gupea.ub.gu.se/bitstream/2077/1891/1/200636.pdf>.

In theory, such a transfer could be subject to a challenge by a liquidator or administrator as a transaction at an undervalue under section 238 of the Insolvency Act 1986 or as a preference under section 239 of the Insolvency Act 1986. In addition, English law, in common with civil law jurisdictions, does have an anti-deprivation principle which provides that, as a matter of public policy, assets which are not otherwise subject to an *in rem* right cannot be the subject of an arrangement where they are constituted as part of a debtor's property but are subject to being taken away in the event of the debtor's insolvency.[32] The application of this principle in each particular case will depend on the facts and the drafting of the relevant contract being challenged as contrary to the principle.[33]

[32] Per Cotton LJ in *Ex parte Jay, In Re Harrison* (1880) 14 Ch D 19 at 26: 'there cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to someone else, and be taken away from his creditors.'

[33] See *Perpetual Trustee Company Ltd v BNY Corporate Trustee Services Ltd* [2009] EWCA Civ 1160 for a recent discussion of the application of the anti-deprivation principle under English law.

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14

DISPUTE RESOLUTION IN PROJECT FINANCE TRANSACTIONS

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Introduction

14.01 Dispute resolution mechanisms in the project finance context are a means of enforcing the allocation of risks among a project's many participants—sponsors, lenders, contractors and subcontractors, service providers, off-take-purchasers, and others. To the extent that a dispute resolution mechanism is swift, flexible, reliable, final, and enforceable, the project's intended allocation of risks can be maintained. This chapter identifies various dispute resolution mechanisms that are available to project participants and discusses their suitability for the maintenance of a project's intended risk allocation.

(1) Paragraphs 14.02–14.24 address the options, which are predominantly contractual, for the resolution of disputes about commercial risks. It examines two regimes for dispute resolution that are commonly specified in project finance contracts: litigation in national courts and international arbitration.
(2) Paragraphs 14.25–14.51 address options for the resolution of disputes about political risk. It describes the main political risk factors that cross-border projects frequently face, explains the traditional means by which project participants have addressed political risks, and sets forth how bilateral and multilateral investment protection treaties (and to a lesser extent domestic investment legislation) have provided additional options to protect participants over the past two decades.
(3) Paragraphs 14.52–14.62 address enforcement of arbitral awards and judgments. One of the main advantages of choosing international arbitration instead of litigation in national courts is that arbitral awards are more readily enforceable in a large number of jurisdictions. The section describes the main enforcement mechanisms for international arbitration awards, as well as how national court judgments can be 'domesticated' and relied upon in foreign jurisdictions.
(4) Paragraphs 14.63–14.97 provide a 'toolkit' for drafting dispute resolution provisions to achieve participants' goals. It also describes 'multi-tiered' dispute resolution, which may include, for example, referring a technical dispute to an expert to assist in settlement of the dispute before turning to litigation or arbitration. Finally, the section describes options that may be useful to protect participants once they become engaged in disputes.

Disputes Involving Commercial Risk

14.02 Major international projects invariably face commercial risks. These risks typically are allocated in separate agreements between the various project participants. This section focuses on how the resolution of disputes may be affected by the contractual selection of either litigation or arbitration. There are three subparts: (a) identification of commercial risks for which dispute resolution provisions are

frequently invoked in project finance transactions, (b) identification of features of the litigation and arbitration frameworks that may be of particular relevance in project finance transactions, and (c) analysis of how the choice of litigation or arbitration may affect the resolution of commercial risks.

Commercial Risks that Frequently Result in Project Disputes

14.03 As described in more detail in Chapter 4, international projects inevitably face a number of risks that generally fall into categories, such as:

(1) completion risk, including delays, cost overruns and technology risks;
(2) offtake or revenue risk;
(3) operating risk;
(4) supply risk;
(5) currency risk;
(6) environmental and social risk;
(7) *force majeure* events; and
(8) participant risk.

14.04 Generally, project risks are assigned to the stakeholder in the project that is best able to manage the relevant risk or are allocated as much as possible to risk-absorbing third parties, such as insurers. It is a basic, but important, point that a party's preferences with regard to dispute resolution mechanisms will vary depending upon the risks allocated to it. A project participant bearing little or no project risk, but having significant payment risk—such as a subcontractor, or a material or service provider, and in some circumstances lenders—may prefer a fast, public dispute resolution mechanism to obtain rights to satisfy payment obligations as quickly as possible, no matter the impact on the overall project. In contrast, a project participant with significant project risk likely will prefer a private dispute resolution mechanism that postpones the payment of money as long as possible.

14.05 Each type of commercial risk can give rise to disputes. The most significant disputes, in terms of claim value, typically arise when substantial project risks materialize, such as when a project cannot achieve commercial operation or does so belatedly,[1] or when a concessionaire and a governmental contracting authority

[1] Examples of such disputes reported by the American Lawyer 2009 Arbitration Scorecard are (1) *German Federal Ministry of Transport, Building and Housing v Toll Collect GbR (Germany), DaimlerChrysler Financial Services AG (Germany), and Deutsche Telekom AG (Germany)*, a US$7.6 billion dispute with regard to lost revenues and contractual penalties for the Toll Collect consortium's alleged delay in constructing and operating a high-tech toll-collection system for heavy trucks on German highways; (2) *Thai-Lao Lignite (Thailand) Co., Ltd. v Government of Laos*, a US$3 billion dispute relating to an alleged breach of a Build-Operate-Transfer contract to operate a mine and build a power generation facility in Laos to transmit power to Thailand; and (3) *AREVA-Siemens Consortium (France/Germany) v Teollisuuden Voima Oyj (Finland)*, a US$2.8 billion dispute arising from the

disagree on material payment terms once the project enters commercial operation.[2] But seemingly smaller disputes can balloon, particularly when they arise during the development phase. For example, a subcontractor may pull out of a project over a payment dispute with the turnkey contractor, and this in turn could jeopardize the completion of the project. Thus, even when an underlying dispute is comparatively small, its effects—depending in part upon the availability of viable dispute resolution mechanisms to prevent endangering the project at large—may not be.

The Choice between Litigation and Arbitration

14.06 Fundamentally, commercial disputes can be resolved in one of two legal frameworks: by means of litigation in national courts (of the host state or some other state) or by means of international arbitration. Although there are other dispute resolution mechanisms discussed below that can be used either alone or in conjunction with litigation or arbitration, the enforcement mechanisms in place throughout the world generally allow for enforcement of only court judgments or arbitral awards. Thus, to the extent that a dispute is not resolved through settlement, it will likely be resolved by the courts or in arbitration, if it is to be resolved at all.

14.07 This reality is reflected in project agreements. Project agreements contain either a forum selection clause (also referred to as a 'jurisdiction clause' if the parties have selected litigation as their preferred method of dispute resolution),[3] or an arbitration

delayed construction of a nuclear power plant in Finland, between the Finnish utility Teollisuuden Voima and a Franco-German construction consortium.

[2] Examples of such disputes reported by the American Lawyer 2009 Arbitration Scorecard are (1) *Anadarko Algeria Company LLC (US) v Sonatrach (Algeria)*, a US$18 billion dispute with regard to a long-term production sharing agreement, in connection with changes in 2005 and 2006 to the Algerian hydrocarbons law affecting the payment terms of the production sharing agreement; (2) *Yemen Exploration & Production Company (US) v Republic of Yemen*, a US$9.3 billion dispute with regard to the extension of an oil production agreement; and (3) *Metro Rail Transit Corporation Limited (Hong Kong) v Republic of the Philippines*, a US$2.2 billion dispute arising out of a 1997 agreement between Metro Rail Transit Corporation and the Philippines over the building, leasing, operation, and transfer of a light rail system in the greater Manila area.

[3] Forum selection clauses became a viable choice in contracts involving parties in or with contacts with the US after *M/S Bremen v Zapata Off-Shore Co.*, 407 US 1 (1972), which recognized the validity of such clauses. The validity of forum selection clauses was confirmed thereafter in *Scherk v Alberto-Culver Co.*, 417 US 506 (1974) and *Carnival Cruise Lines, Inc. v Shute*, 499 US 585 (1991), among other cases. In Europe, international forum selection clauses involving one or more parties domiciled in a country that is a member of the EU (excluding Denmark) are generally enforceable. (Council Regulation 44/2001EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 23 ('If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.').)

clause if the parties desire to submit their disputes to arbitration.[4] A forum selection or jurisdiction clause permits or requires parties to pursue claims in one or more national courts which the parties, typically, designate. An arbitration clause embodies the parties' agreement to submit disputes to final and binding determination by non-governmental decision-makers.[5] The framework for resolution of project-related disputes through litigation, like the framework for the same through arbitration, has key features that may bear upon both the ultimate outcome of a dispute and the effect of the dispute resolution process on the project.

Litigation in national courts

14.08 The framework for litigation varies from country to country. If the parties choose a litigation framework to resolve their disputes, it is important to look at each specific jurisdiction in order to understand how a dispute may be treated. The litigation framework discussed below is drawn largely from a common law perspective; it refers to key civil law jurisdictions and concepts when appropriate.

14.09 When a dispute is litigated, the plaintiff (or 'claimant') must serve a complaint or other initial document on the defendant. Depending in part upon the jurisdiction, this document can contain a great deal of information, or comparatively little, about the parties' dispute.[6] The manner in which a document initiating suit may be filed is frequently subject both to the civil procedure rules of the court in which the suit is to be filed, as well as to international agreements.[7] Once this document is

[4] See generally Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, Kluwer Law International, 2010).

[5] See Nigel Blackaby, Constantine Partasides, Alan Redfern, et al., *Redfern and Hunter on International Arbitration* § 1.02 (5th edn, Oxford University Press, Oxford 2009) (hereinafter 'Redfern and Hunter').

[6] In the US, cases (other than fraud cases) generally require well-pleaded facts that allege a plausible claim for relief. See *Ashcroft v Iqbal* 129 S Ct 1937, 1940 (2009). In England and Wales, a concise written statement of the facts relied upon by the claimant must be provided to the defendant within fourteen days of the claim being served (Part 16.4 of the Civil Procedure Rules 1998) and there are specific provisions as to other information which must be provided in the case of certain types of disputes. Civil law systems generally require more detail. See, for example, German ZPO §253; see also Baumbach, Lauterbach, Albers, et al., *Zivilprozessordnung* (68th edn, 2010) 934–53 (requiring specific requests and basis for the requests to be stated at the complaint stage as a matter of German law); compare Serge Guinchard (ed.), *Droit et Pratique de la Procedure Civile* (2004) 353–84 (requiring that the first pleading must identify specific facts with exhibits as well as legal argumentation supporting the requested relief).

[7] See Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Convention captures different approaches to service of pleadings in common law and civil law jurisdictions. See also generally Philipp A. Buhler, 'Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview' (2002) 27 Tul Mar LJ 1; Charles B. Campbell, 'No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention' (2010) 19 Minn J Int'l L 107; Kenneth B. Reisenfeld, 'Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure' (1990) 24 Int'l L 55.

properly filed and served, judicial relief is available at least as a matter of principle. For example, courts can order attachments of property at a very early stage.[8] The availability of preliminary relief at an early stage is a significant benefit if the dispute in question requires fast action. This comes at a cost, however, because the judge with the ability to act immediately is assigned, not chosen by the parties based on relevant experience, insulation from political pressures, or other attributes.

14.10 Litigation is perceived as the dispute resolution mechanism that tends to provide quick provisional remedies and strict, literal enforcement of loan documents. For example, most jurisdictions make summary judicial procedures available to resolve cases in which the legal sufficiency of claims or defenses can be assessed at an early stage.[9] Summary procedures can be an efficient way to resolve business disputes involving, for example, questions of contractual interpretation without a heavy factual component. This benefit may be overstated in the project context, however, because project disputes frequently involve complicated factual issues that cannot be resolved through summary procedures.[10]

14.11 Most jurisdictions provide their courts with at least some ability to compel the disclosure of documentary evidence and the testimony of witnesses. In the US, broad discovery is permitted in civil litigation, with a range of pre-trial discovery methods available to each side pursuant to the US Federal Rules of Civil Procedure

[8] See, for example, NY CPLR § 6200 et seq. (permitting a New York court to grant an order of attachment in any action where the claimant has demanded and would be entitled to a money judgment against the defendant); see also *Mareva Compania Naviera S.A. v Int'l Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509 at 510 (CA 1975) ('If it appears that [a] debt is due and owing—and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment—the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him [from] disposing of those assets.') (Given statutory force in England and Wales by the Supreme Court Act 1981, s 37(3).) See also Part 25 of the Civil Procedure Rules 1998 (England and Wales).

[9] In the US, motions to dismiss for insufficiency of the underlying legal theory can be made at the outset of the case, and motions for summary judgment may be made prior to trial for failure of proof. See, for example, Fed R Civ P 12(b)(1) (motion to dismiss for lack of subject-matter jurisdiction); Fed R Civ P 12(b)(2) (motion to dismiss for lack of personal jurisdiction); Fed R Civ P 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); Fed R Civ P 56 (motion for summary judgment); NY CPLR § 3211 (listing grounds for motions to dismiss); NY CPLR § 3212 (motion for summary judgment); see generally 2 *Moore's Federal Practice* (3rd edn, Matthew Bender) § 12; 11 *Moore's Federal Practice* (3rd edn, Matthew Bender) § 56. In England and Wales, the Court has the ability to give summary judgment against a claimant or defendant on whole or part of a claim if (1) there is no reasonable prospect of that case (or part of it) succeeding and (2) there is no other compelling reason why the case should proceed to a full trial (Part 24.2 of the Civil Procedure Rules 1998). Less formal rules available in civil law jurisdictions may permit the judge, in certain circumstances, to dismiss a complaint on its face. Schlesinger, et al., *Comparative Law* (1988) 417.

[10] In a number of jurisdictions, a claim for a certain sum of money may not necessitate even a complaint. For example, under New York law, when an action is based upon an instrument for the payment of money only, the claimant may serve a summons, a notice of motion for summary judgment, and supporting papers in lieu of a complaint. See NY CPLR §3231.

and state procedural laws.[11] Depositions, or sworn oral examinations prior to trial, for example, can be taken of not only the opposing side, but also of non-party witnesses.[12] Other jurisdictions, although they make compelled disclosure of evidence possible to various extents, do not allow such broad 'US-style' pre-trial discovery. In England and Wales, parties are under a duty to disclose documents to their opponents as part of the litigation process. The documents to be disclosed are essentially those documents on which a party will rely and any documents which could support or adversely affect either party's case.[13] In Singapore, discovery is generally allowed by order of the court, and the scope of document discovery is similar to that provided for under English law.[14] Nevertheless, documents that are indirectly relevant, such as documents that have the potential to lead to the discovery of directly relevant evidence, are not typically discoverable in England and Wales[15] or Singapore.[16] In Germany, no party is under any obligation to make documents and other materials available to the other side in the absence of a specific statutory basis.[17] In France, it is possible to obtain disclosure of such documents that are 'indispensable to the discovery of the truth of the matter' where the underlying information cannot otherwise be obtained.[18]

14.12 A judgment rendered by a court is typically subject to appeal, which serves as a check on the legal correctness of the initial determination and may contribute to rigorous determinations and discourage compromise rulings.[19] Once appeals are exhausted (whether by determination or because the time in which an appeal must

[11] See, for example, Fed R Civ P 30 (depositions); Fed R Civ P 33 (interrogatories); Fed R Civ P 34 (requests for document production); Fed R Civ P 36 (requests for admission); NY CPLR § 3102 (listing disclosure devices); see generally 7 *Moore's Federal Practice* (3rd edn, Matthew Bender) §§ 30, 31, 32, 33, 34, 35, 36.

[12] See, for example, Fed R Civ P 45 (subpoena to facilitate non-party discovery); NY CPLR § 3102 (subpoenas to compel disclosure listed among disclosure devices); 9 *Moore's Federal Practice* (3rd edn, Matthew Bender) § 45.

[13] Part 31.6 of the Civil Procedure Rules 1998.

[14] Tan Chuan Thye and John Choong, 'Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment' (2005) 1(1) Asian International Arbitration Journal 49–50.

[15] Parties may apply for specific disclosure of classes of documents that fall outside the scope of standard disclosure: Part 31.12 of the Civil Procedure Rules 1998.

[16] Tan Chuan Thye and John Choong, (2005) 1(1) Asian International Arbitration Journal 49–50.

[17] Klaus Peter Berger, 'The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction' (2009) 25(2) Arbitration International 226.

[18] Serge Guinchard (ed.), *Droit et Pratique de la Procedure Civile* (2004) 678–82.

[19] The manner in which appeal is taken and the grounds upon which it can be taken vary significantly from jurisdiction to jurisdiction. For example, in the US a court can review a jury verdict for sufficiency of evidence, a trial court's findings of fact for clear error, and a conclusion of law for clear error. See, for example, 19 *Moore's Federal Practice* (3rd edn, Matthew Bender) § 206. In Germany, on the other hand, appeals typically arise if there has been legal error or if facts established by the appeals court following the relevant appellate procedure justify a different result. Baumbach, Lauterbach, Albers, et al., *Zivilprozessordnung* (68th edn, 2010) 1599–705. An appellate court in England and Wales will allow an appeal if the decision was 'wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court'. Civil Procedure Rules 1998, Part 52.11(3).

be brought has expired) a judgment is final in the jurisdiction in which it was issued. If a party does not voluntarily satisfy an adverse judgment and assets are not available in the jurisdiction in which the judgment was made, the judgment may need to be enforced abroad. Enforcement against assets abroad, however, may be far from straightforward or quick, as discussed below.

14.13 Litigation is conducted in accordance with laws, rules, and practices appropriate for a wide range of disputes, and judges are public officials. Dispute resolution by means of litigation thus often lacks flexibility.[20] As a practical matter, it is not possible for project participants to specify the manner in which litigation will be conducted to the same extent as they can in arbitration, which may be customized to suit the parties' preferences and the project's particular circumstances. If project participants specify litigation as a means of dispute resolution, their most important choice may be of a particular judicial system that offers key attributes attractive to them under the circumstances, such as the presence or absence of a mechanism for the speedy resolution of issues. Accordingly, lenders in cross-border project financings historically have preferred access to courts in either their home jurisdictions or in financial hubs, such as New York, London, or Hong Kong.[21]

Arbitration

14.14 Arbitration often is said to have several advantages over national court litigation.[22] For example, arbitration traditionally has been described as offering quick and efficient resolution of disputes and lower legal fees.[23] In actual experience, however, arbitration can be just as expensive (sometimes more so) and lengthy as litigation (sometimes more so), especially in complex disputes in which parties and their counsel press for extensive proceedings and exchanges of evidence.[24]

14.15 Arbitration undoubtedly is more flexible than litigation. Arbitration exists by virtue of parties' consent.[25] Parties are free to choose from a large variety of institutions

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[20] Litigation is not entirely inflexible. For example, parties can waive their right to a jury trial.

[21] See, for example, Christophe Dugué, 'Dispute Resolution in International Project Finance Transactions' (2001) 24 Fordham Int'l LJ 1064, 1072.

[22] See generally Paul D. Friedland, *Arbitration Clauses for International Contracts* (2nd edn, JurisNet LLC, 2007); Redfern and Hunter at 34.

[23] See, for example, UNCITRAL, Travaux Preparatoire, New York Convention, Doc. No. E/2822/Add.3 – *General Considerations by the United States Chamber of Commerce and the International Institute for the Unification of Private Law*, at 2 ('The Chamber of Commerce of the United States strongly advocates arbitration as a desirable and economic method of settling disputes in international trade, and recommends the inclusion of properly drawn arbitration clauses in foreign trade contracts.').

[24] See Redfern and Hunter at 35–36; see also William W. Park, 'Arbitration of International Contract Disputes' (1983) 39 Bus L 1783 ('Hard tasks take a high toll, and arbitration thus may become a long and costly process.').

[25] W. Michael Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication' (1996) 258(9) Academie de Droit International, Recueil des Cours 39 ('Insofar as a legal system enables legal actors to conclude a private contract with respect to future behaviour, it should encounter no theoretical problem with allowing

and rules, or *ad hoc* arbitral proceedings pursuant to rules of the parties' own design, to which they can submit disputes.[26] Arbitral proceedings can be tailored by contract to modify these rules and to meet the particular needs and circumstances of a specific transaction.[27] Arbitral proceedings are perceived to be neutral and to give the parties the ability to require arbitrators of third-state nationality, to avoid host state procedures and requirements, and to designate a place of arbitration in order to minimize the prospect of interference through host state judicial proceedings.[28] In many circumstances, it also can be far easier for parties to enforce an arbitral award internationally due to the existence of broadly ratified international treaties, particularly the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention'.[29] The following outline is intended to provide a basic understanding of how a 'typical' arbitration of a cross-border commercial dispute may unfold in the project finance context and to give a sense of the advantages and disadvantages of arbitration.

14.16 Arbitration proceedings commence with the submission of a request document, informing the adversary party of the claim being asserted against it.[30] Such requests vary in length and complexity, but typically describe the nature of the dispute and

those actors to designate someone else to specify, under procedures and on contingencies agreed upon in the contract, certain obligations that will be deemed, in advance, to be part of the contract. . . . With the extraordinary growth of transnational trade and investment, arbitration has become de facto a basic and indispensable strut of the world economy.').

[26] The parties can choose institutional arbitration, *ad hoc*, or un-administered arbitration. *Ad hoc* arbitration generally specifies that the rules promulgated by UNCITRAL shall be applicable. In terms of institutional arbitration, choices abound. Institutional arbitration may be conducted through the following institutions, among many others: American Arbitration Association; the International Center for Dispute Resolution; International Chamber of Commerce; London Court of International Arbitration; Inter-American Commercial Arbitration Commission; Vienna International Arbitral Centre; British Columbia International Commercial Arbitration Centre; Australian Centre for International Commercial Arbitration; German Institution of Arbitration; Japan Commercial Arbitration Association; Singapore International Arbitration Centre; Hong Kong International Arbitration Centre; Chinese International Economic and Trade Association Center; Cairo Regional Centre for International Commercial Arbitration; Kuala Lumpur Regional Centre for Arbitration; Indian Council of Arbitration; Dubai International Arbitration Centre; Abu Dhabi Commercial Conciliation and Arbitration Center; Qatari International Center for Arbitration; Bahrain Center for Dispute Resolution.

[27] How arbitration agreements can be tailored to meet specific project needs is discussed below. See also William W. Park, 'Arbitration of International Contract Disputes' (1983) 39 Bus L 1783; Born (2010) 37–110.

[28] Park, 39 Bus L 1783 (stating, on the basis of a hypothetical: 'Neither the Swedish shipyard nor the Libyan government "chooses" arbitration. Rather, arbitration imposes itself for lack of an acceptable alternative.').

[29] See New York Convention, art. III. The enforcement mechanism is discussed in more detail below.

[30] ICC Arbitration Rules, art. 4(3); LCIA Arbitration Rules, art. 1; UNCITRAL Arbitration Rules art. 3. See generally Julian M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (2003) 514–17.

key evidence supporting the claim.[31] In the request document, the claimant often nominates its chosen arbitrator when the arbitral tribunal will consist of three arbitrators, as is commonly the case for major disputes. One arbitrator will be appointed by each party and the third arbitrator will be chosen by agreement of the two party-appointed arbitrators.[32]

14.17 The parties' ability to choose arbitrators directly, and to have the arbitrators selected by them choose the third arbitrator (often in consultation with the parties), is an important feature of arbitration. It both enables parties to shape the qualifications of the tribunal that will hear their dispute and gives parties a direct responsibility for the arbitral process that may contribute to parties' respect for its outcome.[33] For example, if a technical matter of some kind is at the core of a dispute, parties can appoint arbitrators with the desired technical expertise.

14.18 One significant potential drawback of arbitration follows from the manner of selecting arbitrators. Because parties typically select two arbitrators who then must confer and agree upon a third arbitrator, there is no decision-maker immediately available to issue interim relief, such as orders temporarily restraining transactions or actions that may upset the status quo.[34] This distinction between arbitration and litigation can be significant if time is of the essence, such as when a dispute threatens to grind construction or operation to a halt, or when there is a risk of dissipation of assets. Depending upon the jurisdiction in which the project is located or in which the relevant project participants keep assets, it often is possible to apply to a

[31] See generally David Rivkin, 'Strategic Considerations in Developing an International Arbitration Case' in Doak Bishop and Edward Kehoe (eds), *The Art of Advocacy in International Arbitration* (2nd edn, 2010) 151–72; Julian M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (2003) 505–20.

[32] For example, in one of the largest arbitral institutions, the Court of International Arbitration of the International Chamber of Commerce (ICC), parties have agreed to resolution of disputes by an arbitral tribunal consisting of three arbitrators. See ICC Arbitration Rules, art. 8(4); see also UNCITRAL Arbitration Rules, art. 7. This practice, however, is not universal. Thus, the London Court of International Arbitration (LCIA) uses appointment by the institution if the arbitration agreement is silent regarding the selection of arbitrators. See LCIA Arbitration Rules, art. 7. To the extent that an arbitrator is not appointed within the appropriate timeframe, arbitration rules generally call for appointment of the arbitrator by the arbitral institution in question or by a neutral appointing authority. See ICC Arbitration Rules, art. 9; LCIA Arbitration Rules, art. 5.5; UNCITRAL Arbitration Rules, art. 8-10. For a detailed comparison of different rules practices, see Julian M. Lew, Loukas A. Mistelis, et al., *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 223–53. For a critique of the prevalent appointment method, see Jan Paulsson, *Are Unilateral Appointments Defensible?,* available at <http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible>.

[33] Rivkin, *The Art of Advocacy in International Arbitration* (2nd edn, 2010) 151–72; Lew, *Comparative International Commercial Arbitration* (2003) 505–520; see also Redfern and Hunter, §§ 4.14–4.17; Born at 70–78.

[34] For a discussion of interim measures in international arbitration, see Kaj Hobér, 'Interim Measures by Arbitrators' in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, Montreal 2006 Vol. 13) 721–50 (2007) (summarizing interim measures rules available in ICDR, AAA, ICC, LCIA, CIETAC and SCC arbitrations).

court to act until an arbitration panel can be appointed.[35] This remedy, while effective in many instances, is a realistic option only if the counterparty is subject to the jurisdiction of the court in question. In some instances, resorting to local courts will be less effective if one seeks to restrain the activities of prominent project participants of the host country.

14.19 International arbitration often is described as allowing more disclosure of evidence than European civil law systems, but less than in litigation in the US.[36] Unless otherwise agreed, parties to an arbitration typically will be given access to documents that are relevant or important to the dispute.[37] This generalization, although true, reveals a further key issue for arbitration: the disclosure of evidence is largely dependent upon the arbitrators' perspective of what constitutes 'relevant and material' evidence.[38] Practice in international arbitration varies depending on the background of the arbitrators and lawyers, who usually are influenced by the legal values and principles of their home jurisdictions.[39] Typically a combination of procedures taken from common law and civil law systems is adopted.[40] This amalgam approach can leave users from either legal tradition unsatisfied.

14.20 Arbitration provisions can be drafted to make clear the parties' intention as to the manner and extent of document disclosure and presentation. How extensive is document disclosure to be? Will parties be permitted to request documents prior to the submission of their principal written statements of position? Or will 'fishing expeditions' be prohibited, with each party being limited to document requests

[35] For a discussion on recent developments regarding the availability of courts to issue interim measures in aid of arbitration, see Luis Enrique Graham, 'Interim Measures: Ongoing Regulation and Practices (A View from the UNCITRAL Arbitration Regime)' in Albert Jan van den Berg (ed.), Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, 2009 Dublin Volume 14, 539–69 (2009).

[36] See, for example, Redfern and Hunter at §§ 6.84-6.91.

[37] See, for example, IBA Rules on the Taking of Evidence in International Arbitration, art. 3 (requiring that documents must be described 'sufficient to identify it', 'relevant and material to the outcome of the case', and 'not in the possession, custody or control of the requesting Party'). For a discussion of the IBA Rules, see Hilmar Raeschke-Kessler, 'The Production of Documents in International Arbitration—A Commentary on Article 3 of the New IBA Rules of Evidence' (2002) 18 Arb. Int'l 411.

[38] See IBA Rules on the Taking of Evidence in International Arbitration, art. 3.

[39] Klaus Peter Berger, 'The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction' (2009) 25(2) Arbitration International 216, 228.

[40] Tan Chuan Thye and John Choong, 'Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment?' (2005) 1(1) Asian International Arbitration Journal 51–2. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (the 'IBA Rules'), which set forth detailed procedures for, *inter alia*, the disclosure of documents, can provide a useful starting point or guideline for parties or tribunals. The IBA Rules have 'built-in flexibility', allowing the tribunal to exercise its discretion to suit the circumstances of each case. *Ibid.* at 58. Differences between the disclosure regimes of various countries, such as in the presentation of evidence and the scope of discovery, and the impact of those differences on as-yet unknown disputes, may be difficult to assess at the drafting stage of a dispute resolution clause. Friedland, at 26–35.

only to 'fill gaps' after each side has asserted its claims and defenses in its primary written submission on the basis of the information in its possession before the arbitration began?

14.21 A hallmark of litigation is that published precedent and/or consistent education and training of lawyers and judges tends to result in similar cases being decided in a similar way. In contrast, commercial disputes in arbitration tend to be resolved not by comparison to past cases (the resolution of which are not routinely reported), but rather on the strength of their individual facts.[41] One benefit of this approach is that arbitrators with particular expertise relevant to the project or the dispute may be in a better position than a judge to assess the facts at hand. One risk (and common fear) is that arbitrators will 'split the baby'—that is, the two party-appointed arbitrators will favour the parties that appointed them, and the third 'neutral' arbitrator will attempt to find a compromise between the two.[42]

14.22 Arbitral decisions usually cannot be appealed. Although post-award challenges are becoming more frequent, many courts will not review the substance or merits of an arbitrator's decision. This lack of a substantive review of arbitral awards is based on several international conventions that have greatly increased the ability of parties to enforce final arbitral awards. The New York Convention, discussed in more detail below, has been ratified by 144 countries and requires domestic courts to recognize and enforce international arbitration agreements and awards.[43] Some parties may view the absence of appeal as an advantage of arbitration, while others may

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[41] Stanimir Alexandrov, Panel Discussion, in Ian Laird and Todd Weiler (eds), *Investment Treaty Arbitration and International Law* (2009) vol. 2, 205 ('the outcome of the case is determined by the facts. And I have said that at other forums, and I want to say it here again. Many of those who comment on awards focus on the legal conclusions of the tribunal and completely ignore the facts of the case.').

[42] Commentators point out, however, a lack of empirical support for the view that arbitrators ignore or misapply the law in favour of finding compromise, and in fact, judges and juries also might render 'compromise verdicts'. See Friedland, *Arbitration Clauses for International Contracts* 18. At least one study suggests that many arbitral awards are substantially in favour of one party. *Ibid.*; see also Stephanie E. Keer and Richard W. Naimark, *Arbitrators Do Not 'Split the Baby': Empirical Evidence from International Business Arbitrations* (2001), reprinted in Christopher R. Drahozal and Richard W. Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (2005) 311, 316 ('there seems to be little factual support for the idea that arbitrators thoughtlessly split award amounts. It also suggests that there is work to be done on the decision-making process utilized by arbitrators . . . Nevertheless, the results from this study show emphatically that arbitrators did not engage in the practice of "splitting the baby."').

[43] See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. Other conventions, such as the Inter-American Convention on International Commercial Arbitration, which has been ratified by 19 countries including the US, Mexico, the Dominican Republic, and several Latin American and South American countries, and the European Convention on International Commercial Arbitration, which has more than 30 signatories, are similar to the New York Convention in their treatment of international arbitration agreements and awards.

conclude for the same reason that international arbitration is 'essentially free of the rule of law'.[44]

14.23 A principal concern arising out of the lack of an appeals process is decisional error incapable of correction. Error can have significant costs for the project: namely that the contractual allocation of risks agreed upon at the outset of the project has been changed. If this happens, a party may become shouldered with expenses and risks that it did not originally agree to incur and consequently will be under-compensated by the agreement in dispute. Outside of the agreement in dispute, depending upon the risk that now has been reallocated, other project agreements interlocking with the contract in dispute may now be founded on an incorrect premise. Because there may be a web of contracts, rather than just one contract, affected by an arbitral decision, misallocation of risk in the project context may have an unanticipated ripple effect. This ripple effect may lead to additional disputes regarding the performance of various agreements. The main safeguard against error in arbitration is the expertise of the arbitrators chosen by the parties.

14.24 Project companies, contractors, and operators often favour arbitration, with its perceived efficient and timely procedures and privacy. The interrelated, ongoing nature of relationships between the project parties may be better preserved by an arbitral decision-making process. Similarly, off-taker purchasers, and particularly governmental off-taker purchasers, frequently are asked to enter into arbitration clauses to avoid having to litigate disputes in their home courts. Some governmental agencies will resist such a request because they may not be free to agree to certain dispute settlement methods, such as arbitration.[45] This can be a highly important matter if the prospect of 'home cooking' causes a sponsor to fear that host state courts may rewrite off-take agreements, leaving the sponsors with no meaningful commercial or legal recourse to address a denial of justice.

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[44] See Friedland at 16–17. It is of course possible for parties to an arbitration agreement to specify appellate review as part of their arbitration clauses. See Born at 101–102 ('such provisions raise significant enforceability issues, on the ground that they purportedly interfere with statutory regimes specifying the permissible grounds for judicial review of arbitral awards'). An example clause provides:

> The arbitrators' award shall be final and binding, but any party hereto shall have the right to seek judicial review of such award in the courts of the place where the award is made in accordance with the standards of appellate review applicable to decisions of courts of first instance in that place.

There is currently an ongoing initiative for arbitration rules for appeals at the AAA.

[45] *Ibid*. See also United Nations Commission on International Trade Law, *Privately financed infrastructure projects: draft chapters of a legislative guide on privately financed infrastructure projects*, A/CN.9/471/Add.7 (8 February 2000) at 4 (hereinafter, 'UNCITRAL Legislative Guide'). For example, the Law of Arbitration of Saudi Arabia states that '[g]overnment bodies may not resort to arbitration for the settlement of their disputes with third parties except after approval of the President of the Council of Ministers.' Under some civil law systems, project agreements are regarded as administrative contracts, thereby requiring that disputes arising under such agreements be settled through the judiciary or administrative courts of the host country.

Disputes Involving Political Risk

Contractual, regulatory, and tax risks

14.25 So far, this Chapter has discussed dispute resolution options for commercial differences between the various participants in a project. But these are not the only disputes that may arise in a project: project participants often find themselves in disputes with host-state governments regarding contract performance, legal requirements, regulation, taxes, and foreign exchange. Disputes relating to such matters may arise in connection with the issuance, renewal, and revocation of permits and licenses;[46] changes in the regulatory and tax environments in which a project must operate;[47] politically driven reopening of price adjustment formulae;[48] the repatriation of profits, and, in extreme cases, expropriations.[49] Although disputes over matters such as these may be brought within the ambit of contractual arbitration, if there is an agreement to which the relevant government agency or instrumentality is a party, these disputes also may fall within the ambit of investor-protection regimes existing separately from the project documents themselves.

Investment agreements

14.26 A very basic tool to protect projects against political risks is the conclusion of an investment agreement, including concession agreements (as discussed in greater detail in Chapter 5) with the host country, or with an agency of the host country responsible for the project. The host state in such agreements frequently agrees to 'stabilize' the regulatory and fiscal regime for the project.[50] Traditionally, this has meant a freeze of the regulatory and fiscal environment as it existed at the conclusion of the investment agreement.[51] Contemporary agreements frequently do not freeze the regulatory and fiscal environment, but instead set parameters within

[46] See, for example, *Lauder v Czech Republic,* Final Award, dated 3 September 2001, Ad hoc—UNCITRAL Arbitration Rules; IIC 205 (2001) (discussing changes in licensing requirements in the broadcasting industry).

[47] See, for example, *Duke Energy International Peru Investments No 1, Ltd v Peru*, Award and Partial Dissenting Opinions; ICSID Case No ARB/03/28; IIC 334 (2008).

[48] See, for example, *Azurix Corp v Argentina*, Award, dated 23 June 2006, ICSID Case No ARB/01/12; IIC 24 (2006).

[49] See, for example, *Compañía del Desarrollo de Santa Elena SA v Costa Rica,* Final Award, dated 17 February 2000, ICSID Case No ARB/96/1, IIC 73 (2000).

[50] On the other hand, such agreements frequently also impose 'performance requirements' on the project participants such as a minimum capital investment, minimum project production, or minimal employment of host state nationals, to name a few.

[51] For example, Peru enters into legal stability agreements at the level of the investor and at the enterprise level. These agreements give contractual assurances for ten years (or, in the case of concessions, the entire period of the concession) of protection from any change in certain key policies. See United Nations Conference on Trade and Development, Investment Policy Review, Peru, UNCTAD/ITE/IIP/Misc.19 (2000).

which both may change in case of larger market shifts. To the extent that the government is a customer of the project or regulates prices for the project, investment agreements also may contain formulae for the determination of prices for the life of the project.

14.27 Frequently, investment agreements with the host state or with an agency of the host state contain arbitration clauses.[52] The inclusion of arbitration clauses historically was to avoid resolving disputes with the host state in the state's own courts. Even with arbitration clauses in place, however, host states frequently refused to enforce adverse arbitral awards by reference to public policy grounds or by reference to the alleged incapacity of state parties to enter into such agreements in the first place.[53] Partly in order to address these concerns, the World Bank in the 1960s took on the task to create, by way of the so-called Washington Convention, an international arbitration institution for the resolution of investment disputes between host states and nationals of third party states, creating the International Centre for the Settlement of Investment Disputes, or ICSID.[54]

14.28 ICSID provides a forum for dispute settlement, setting forth detailed rules of procedure and institutional support for investor-state disputes.[55] The ICSID process is 'entirely self-contained and hence delocalized'.[56] It provides a strong enforcement mechanism expressly adopted to avoid the prior enforcement problems in arbitrations to which a state was a (losing) party.[57] Further, pursuant to Article 25 of the Washington Convention, which defines the scope of ICSID jurisdiction, in order

[52] See, for example, Bishop, *Foreign Investment Disputes: Cases, Materials and Commentary* 225–313.

[53] See, for example, Sébastien Manciaux, *Investissement étrangers et Arbitrage entre états Ressortissants D'Autres états* (2004) 122; A. Broches, 'Note transmitted to the Executive Directors, Settlement of Disputes between Governments and Private Parties' dated 28 August 1961, in *History of the ICSID Convention II-1 2* (1970).

[54] John T. Schmidt provides a list of cases in which states have effectively reneged on their arbitration consent in an investment dispute with an international investor between 1930 and 1963. He list the following cases: *Anglo-Iranian Oil Co. Case*, I.C.J. Pleadings 11, 40, 258, 267–68 (1952); *British Petroleum Exploration Co. (Libya), Ltd. v. Government of the Libyan Arab Republic*, Unpublished Private Arbitral Award (1973); *Sapphire International Petroleums Ltd. v. National Iranian Oil Co., Private Arbitral Award* (1963); *Société Européene d'Etudes et d'Entreprise v. People's Federal Republic of Yugoslavia*, Private Arbitral Award (1956); *Lena Goldfields, Ltd. v. Government of the Soviet Union*, Private Arbitral Award (1930). See John T. Schmidt, 'Arbitration under the Auspices of the International Centre for the Settlement of Investment Disputes (ICSID): Implications of the Decision on Jurisdiction in Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica' (1976) 17 Harv Int'l L J 90, n. 1. See also A. Broches, 'Note transmitted to the Executive Directors, Settlement of Disputes between Governments and Private Parties' dated 28 August 1961, in *History of the ICSID Convention II-1* (1970) 3. In national court proceedings, similar principles have become known as the 'act of state doctrine.' See Andreas Lowenfeld, *International Economic Law* (2002) 439–54.

[55] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 223.

[56] Lucy Reed, Jan Paulsson, and Nigel Blackaby, *Guide to ICSID Arbitration* 8 (Kluwer Law International, 2004).

[57] Guide to ICSID Arbitration at 96.

to be eligible for ICSID arbitration, a dispute must (1) arise out of an investment; (2) involve a country that is a signatory to the Washington Convention and a national of another country that is a signatory to the Washington Convention; and (3) all parties to the dispute must consent to ICSID arbitration.[58] Other than that, the ICSID arbitral process is similar to the contractual arbitration process discussed above.

14.29 Many investment agreements contain arbitration clauses consenting to ICSID arbitration. Such consents have generally survived challenges by host states once an investor needed to commence an arbitration proceeding.[59] ICSID arbitration clauses therefore have become a safer option for investment agreements. Alternatively, ICC arbitration has been a typical choice in investment agreements, especially where the host country of the project is not a party to the Washington Convention.[60]

Treaty-based political risk protections

14.30 Another means of political risk protection exists in the form of international treaties. Although the scope and content of bilateral investment treaties (BITs) and multilateral investment treaties (MITs) varies considerably, most contain similar substantive protections.

Political risks covered by investment treaties and statutes

Expropriation

14.31 BITs and MITs oblige a host government to compensate foreign investors in the event of an expropriation, regardless of whether the expropriation resulted from a direct act of taking, such as nationalization, or an indirect taking that substantially deprived the investor of the use or enjoyment of its investment.[61] An expropriation

[58] Guide to the ICSID Convention at 14; Dolzer and Schreuer at 223. Article 25 of The Washington Convention provides in relevant part: '(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.'

[59] See *Société Ouest Africaine des Bétons Industriels v Senegal*, ICSID Case No. ARB/82/1 (1991) ICSID Review—Foreign Investment Law Journal 125, award (25 February 1988).

[60] Although approximately 144 countries are parties to the Washington Convention, countries that are not parties to the Washington Convention include Russia, Brazil, and India, as well as Canada and Mexico. The list of contracting states is available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>. China is a party, but issued a reservation that indicates that China will consider submitting to the jurisdiction of ICSID with respect to disputes arising in limited circumstances. China issued a Notification on 7 January 1993 stating that: '[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization.'

[61] Guide to ICSID Arbitration at 52.

can be 'creeping' when the host government takes a foreign investment in stages or through a series of acts collectively tantamount to expropriation.[62] Clauses in a BIT typically address 'only the conditions and consequences of an expropriation, leaving the right to expropriate as such unaffected'.[63] Most treaties provide that a legal expropriatory measure must: (1) serve a public purpose; (2) not be arbitrary and discriminatory; (3) follow the principles of due process; and (4) be accompanied by prompt, adequate, and effective compensation.[64]

Regulatory risk (fair and equitable treatment)

14.32 Most investment treaties also provide for fair and equitable treatment of foreign investments.[65] Fair and equitable treatment has diverse manifestations, depending in part upon the wording of the specific clause in a treaty. Much debate has focused on whether the fair and equitable treatment standard to which BITs and MITs refer reflects a minimum standard of treatment, as required by customary international law, or whether it is an independent treaty standard that exists in addition to customary international law.[66] For example, Article 1105(1) of the North American Free Trade Agreement (NAFTA) requires that: 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'[67] The NAFTA Free Trade Commission and subsequent NAFTA tribunals have accepted the interpretation that Article 1105(1) reflects customary international law and does not require additional treatment.[68] In contrast, arbitral tribunals interpreting other treaties have attempted to provide more specific definitions for fair and equitable treatment, based on the specific wording of the treaty.[69]

[62] Dolzer and Schreuer at 114-15. For example, in *Siemens v Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, Argentina had taken a series of adverse measures, including postponements and suspensions of the investor's profitable activities, renegotiations, and cancellation of the project, which the tribunal found amounted to a creeping expropriation.

[63] Dolzer and Schreuer at 89.

[64] Dolzer and Schreuer at 91. Historically this formulation was contested, but it currently has achieved significant global acceptance. On the historical origins of expropriation, see Andreas Lowenfeld, *International Economic Law* (2002) 392–414.

[65] Dolzer and Schreuer at 119, 149. For a detailed discussion of fair and equitable treatment, see Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (2008).

[66] Dolzer and Schreuer at 124.

[67] (1993) 32 ILM 639.

[68] Dolzer and Schreuer at 125. The scope of international custom similarly has led to some debate. A narrower view is currently supported by the recent award in *Glamis Gold Ltd v United States*, Award, dated 14 May 2009, Ad hoc—UNCITRAL Arbitration Rules; IIC 380 (2009); a broader conception has been adopted by *Merrill & Ring Forestry LP v Canada*, Award, dated 31 March 2010, Ad hoc—UNCITRAL Arbitration Rules; IIC 427 (2010).

[69] See, for example, *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, dated 25 May 2004, ICSID Case No ARB/01/7; IIC 174 (2004); Dolzer and Schreuer at 126.

14.33 In general, countries are required to maintain stable and predictable investment environments consistent with the reasonable investment-backed expectations of foreign investors.[70] For example, the tribunal in *Saluka v Czech Republic* described the requirements of fair and equitable treatment as follows:

> A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).[71]

14.34 A protection conceptually linked to fair and equitable treatment is 'full protection and security'. This standard has been applied primarily in situations of physical protection of real and tangible property, but it has been extended to apply to other circumstances, such as the withdrawal of a vital governmental authorization.[72]

Non-discrimination

14.35 The host country usually is under a legal obligation not to impair the management or operation of an investment by 'arbitrary or discriminatory measures'.[73] Arbitrariness has been viewed as a 'wilful disregard of due process of law'.[74] There is a partial overlap between the arbitrary and non-discriminatory standard and the fair and equitable treatment standard, as an arbitrary action arguably is not fair or equitable treatment. Although some tribunals have found that the standards are merged, other tribunals have evaluated the two standards separately.[75] A discriminatory measure treats an investor differently than other similarly situated investors.[76] Under a 'national treatment' standard, a host country must treat foreign investors 'no less favourably' than national investors.[77] Under the 'most favoured nation'

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[70] *Técnicas Medioambientales Tecmed S.A. v Mexico*, ARB(AF)/00/2, IIC 247 (2003), 10 *ICSID Report* 130, at 154, award (29 May 2003); *EDF (Services) Limited v Romania*, award, at 216; *Waguih Elie George Siag and Clorinda Vecchi v Egypt,* award, op. cit. at 450.

[71] *Saluka v Czech Republic*, Partial Award, 17 March 2006.

[72] See, for example, *Waguih Elie George Siag and Clorinda Vecchi v Egypt,* award, at 447; see also Guide to ICSID Arbitration at 50.

[73] See, for example, Agreement Between the Government of the Kingdom of Sweden and the Government of the Republic of Estonia on the Promotion and Reciprocal Protection of Investments, 2 May 1992, art. 2(2); see also Guide to ICSID Arbitration at 50.

[74] *Case Concerning Elettronica Sicula SpA (ELSI) (United States v Italy)*, Judgment (20 July 1989) (1989) ICJ Reports 15 at 76.

[75] Compare *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para. 460 with *Siemens v Argentina*, Award, 6 February 2007, at paras 310–21.

[76] Guide to ICSID Arbitration at 50.

[77] For example, art. 2(1) of the Treaty Between the Government of the United States and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment (the 'US-Bahrain BIT') provides: 'With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies (hereinafter "national treatment") or to investments in its territory of nationals or companies of a third country (hereinafter "most favoured nation treatment"), whichever is most favourable (hereinafter "national and most favoured nation treatment").

standard, a host country may not treat one foreign investor less favourably than another foreign investor from a different country.[78] The inclusion of a 'most favoured nation' clause in a BIT may have broad implications. Some tribunals have ruled on the basis of a 'most favoured nation' clause that a foreign investor may rely on broader treaty protections available to investors, from different states, under different BITs.[79]

Contract risk (umbrella clauses)

14.36 Umbrella clauses are blanket provisions in a BIT that require the host government to observe, or guarantee the observance of, specific promises and obligations towards investors, such as investor-state contracts or national investment laws.[80] It has been argued that umbrella clauses import arbitration into a contract that does not include an arbitration clause. The effect of umbrella clauses is to 'blur the distinction between investment arbitration and commercial arbitration'.[81] One of the most contentious issues with regard to umbrella clauses is 'whether, and under what circumstances, they place investment agreements, that is, contracts between the host state and the investor, under the treaty's protection'.[82] Tribunal decisions have been divided on the interpretation of the purpose, meaning and scope of umbrella

Each Party shall ensure that its state enterprises, in the provision of their goods or services, accord national and most favoured nation treatment to covered investments.'

See also Model UK Bilateral Investment Treaty, art. 3. In some European BITs, the national treatment clauses state that the foreign investor and his investments are 'accorded treatment no less favourable than that which the host state accords its own investors.' See R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995) 63–5; see also Dolzer and Schreuer at 178; Guide to ICSID Arbitration at 50.

[78] See Model UK Bilateral Investment Treaty, art. 3:

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

See also US-Bahrain BIT, art. 2(1); see generally Guide to ICSID Arbitration at 50.

[79] See, for example, *AAPL v Sri Lanka* ICSID/ARB/87/3; *Maffezini v Spain* ICSID/ARB/97/7; *Suez & Interaguas v Argentina* ICSID/ARB/03/17; and *CMS Gas Transmission Company v Argentina* ICSID/ARB/01/8.

[80] See Model UK Bilateral Investment Treaty, art. 2(2): 'Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.'; see also Switzerland-Pakistan BIT, art. 11: 'Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.'; see generally Guide to ICSID Arbitration at 55.

[81] Dolzer and Schreuer at 155.

[82] See, for example, Michael D. Nolan and Edward G. Baldwin, *The Treatment of Contract-Related Claims in Treaty-Based Arbitration*, Mealey's International Arbitration Report (June 2006); see generally Dolzer and Schreuer at 153.

clauses. In *SGS v Philippines*, for example, the tribunal adhered to the conventional view of umbrella clauses when it ruled that in the presence of an umbrella clause, a violation of an investment agreement leads to a violation of an investment treaty.[83] In *SGS v Pakistan*, on the other hand, the tribunal interpreted the investment treaty narrowly and concluded that the conventional understanding of umbrella clauses would have a 'far-reaching impact' on the sovereignty of the host country.[84] Subsequent tribunals have attempted to distinguish between 'sovereign' and 'commercial' acts when interpreting the scope and impact of umbrella clauses.[85]

Potentially eligible project participants with treaty protections

14.37 To have access to various protections under national legislation and treaties, an 'investment' (as defined in the relevant investment treaties or statutes) must have been made. Some tribunals have held projects or transactions to qualify as investments when the project or transaction:

> (a) had a significant duration; (b) provided a measurable return to the investor; (c) involved an element of risk on both sides; (d) involved a substantial commitment on the part of the investor; and (e) was significant to the [host country's] development.[86]

As a general matter, tribunals 'have not entertained doubts' that construction and infrastructure projects are investments.[87]

Sponsors

14.38 BITs typically include shares of stock in a company or the commitment of capital in the definition of investment. For example, the BIT between Argentina and the US defines 'investment' to include 'a company or shares of stock or other interests in a company or interests in the assets thereof'.[88] The BIT between the US and Chile defines 'investment' broadly:

> Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.[89]

Thus a sponsor, who directly or indirectly owns or controls the project, typically has committed capital, expects a profit and has assumed risk.

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[83] *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports (2005) 518.
[84] *SGS v Pakistan*, Decision on Jurisdiction, 6 August 2003, 42 ILM (2003) 1290.
[85] Dolzer and Schreuer at 158–60.
[86] Guide to ICSID Arbitration at 15.
[87] Christoph Schreuer, et al., *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009) 127 (citing arbitral decisions).
[88] Dolzer and Schreuer at 63.
[89] Article 10.27 of the Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, 6 June 2003.

Lenders

14.39 Financial instruments such as loans and other credit facilities have been repeatedly recognized by arbitral tribunals as investments.[90] Therefore, lenders who extend loans and credit facilities in order to finance projects generally are 'investors' entitled to certain treaty protections.

Contractors

14.40 Most treaties and national legislation include rights under contract as an 'investment'.[91] For example, the US Model BIT of 2004 provides that an investment may take the form of 'turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts'.[92] Thus, a contractor on a project typically also is an 'investor' entitled to certain treaty protections.

Operators

14.41 Contribution to a host country's development has been identified as a feature of an investment.[93] To the extent an operator of a project contributes to a country's GDP or to the 'development of human potential, political and social development and the protection of the local and the global environment',[94] the operator may well be an 'investor' entitled to certain treaty protections.

Consent to arbitration in investment treaties

14.42 One of the main benefits of BITs and MITs is that private investors frequently can initiate arbitration even in the absence of a contractual arbitration agreement. Investors can seek relief when host state consent for such proceedings is given by means of multi-lateral investment protection treaties, such as NAFTA,[95] the Energy

[90] ICSID Commentary at 126; see *Fedax v Venezuela*, Decision on Jurisdiction, 11 July 1997, paras 18–43 (concluding that loans and other credit facilities were within the jurisdiction of the Centre); *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, paras 76–91 (holding that the broad meaning of investment included a loan, especially if the loan contributed substantially to the host country's economic development); *Sempra v Argentina*, Award, 28 September 2007, paras 214–16 (accepting loans as an investment and noting that the loans were part of the overall investment's continuing financing arrangement).

[91] ICSID Commentary at 126 ('It is also well established that rights arising from contracts may amount to investments.').

[92] The full text of the 2004 US Model BIT is available at <http://www.state.gov/documents/organization/117601.pdf>.

[93] ICSID Commentary at 128–34.

[94] *Ibid*. at 134.

[95] NAFTA, art. 1116. For a recent discussion of the jurisdictional scope of NAFTA, see *Theodorus de Boer,* et al. *(Canadian Cattlemen for Fair Trade) v United States,* Ad hoc UNCITRAL Arbitration Rules, IIC 316 (2008), award on jurisdiction (28 January 2008).

Charter Treaty,[96] or the ASEAN Treaty,[97] or by means of bilateral investment treaties, which by some estimates had increased from 385 in 1989 to approximately 2,300 in 2003.[98] These consents frequently are to arbitration pursuant to ICSID or, alternatively, *ad hoc* arbitration or national court litigation.

14.43 In such non-contractual arbitration, consent generally is expressed in two steps.[99] First, the host country expresses its consent by including in a treaty its standing, unilateral offer to submit to arbitration.[100] Secondly, the investor subsequently matches that free-standing consent either in writing to the host government at the time of the investment, or by filing a request to arbitrate with the designated tribunal.[101] It is advisable to consult a specialist to determine whether consent was actually given. A mere reference to arbitration as a dispute resolution mechanism may not actually be consent. Once the consent of the host state has been engaged, the arbitration proceeding follows rules that are relatively similar to the arbitral process discussed above.

Political risk insurance

14.44 As further described in paragraph 4.60, another means to protect against political risk is the purchase of political risk insurance. Political risk insurance is likely to be available from public sources from the home states of project participants. Commercial political risk insurers also offer political risk coverage to investors in emerging market projects.[102] In addition, the World Bank makes available political risk guarantees through the Multilateral Investment Guarantee Agency (MIGA).

14.45 A related coverage offered by the Overseas Private Investment Corporation (OPIC) is coverage for failure to pay an arbitral award or, alternatively, to perform an arbitration agreement.[103] In the first case, an arbitral award must actually have been obtained. In the second case, it is necessary to show only that the respondent

[96] Energy Charter Treaty, art. 26. For a recent discussion of jurisdiction pursuant to the ECT, see, for example, *AMTO LLC v Ukraine*, Final Award, dated 26 March 2008, SCC Case No 080/2005; IIC 346 (2008); *Hulley Enterprises Ltd v Russian Federation*, Interim Award on Jurisdiction and Admissibility, dated 30 November 2009, PCA Case No AA 226; IIC 415 (2009).

[97] For a discussion of the ASEAN framework, see *Yaung Chi Oo Trading Pte Ltd v Myanmar*, Award, dated 31 March 2003, ASEAN Case No ARB/01/1; IIC 278 (2003); (2003) 42 ILM 540.

[98] UNCTAD, Quantitative data on bilateral investment treaties and double taxation treaties, available at <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1>.

[99] For a full discussion of the operation of consent instruments in investor-state arbitration, see Michael D. Nolan and Frédéric G. Sourgens, *The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuelan Case Study, Transnational Dispute Management* (2007); Michael D. Nolan and Frédéric G. Sourgens, *Limits Of Consent—Arbitration Without Privity And Beyond, in Liber Amicorum Bernardo Cremades* (2010) [843].

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

[103] See *MidAmerican Energy Holdings Company* (Indonesia: 1999), (partly relying on failure to arbitrate coverage for its claim).

government should have gone to arbitration but frustrated its own arbitral undertaking. In that case, it is necessary to show only the plausibility of success on the merits.[104]

14.46 Political risk insurance historically was one of the main tools to protect against political risk. With the increased use of other protections such as treaty arbitration, it is no longer as prominent a tool. Yet, political risk insurance remains an important component in political risk structuring, even where investors also have structured their investments to benefit from international treaty protections.[105] Political risk insurance can in many instances be a faster and more reliable means to obtain redress with regard to clear-cut political risks—as evidenced in the context of the Enron decision. Yet the correct mix of investment treaty and insurance protection remains for each project participant to consider on a project-by-project basis. In addition, political risk insurance determinations provide important insight into the scope of proper government conduct and how investors can protect themselves against political risk. These mechanisms continue to have significant importance.

14.47 Although coverage may differ, political risk insurance is available for currency inconvertibility, expropriation, and political violence.[106] Other specialized coverage is available for certain kinds of breaches of contract or breaches of an arbitration agreement or failure to enforce arbitration awards.[107] The coverage generally does not cover the entire loss, but only a fraction of the loss, with the project participant effectively paying a deductible.

14.48 OPIC and MIGA also make available insurance for the breach of certain types of investment agreements. For example, MIGA may require a determination that the contract has in fact been breached in order to pay a claim through an arbitral proceeding or a local court judgment.[108] In those instances, investment insurance coverage in the project context is available only to the extent that the dispute resolution provisions discussed above have already resulted in a favourable result for the insured investor.

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[104] See *Construction Aggregates Corporation* (Dominica: 1977) (arbitration proceedings were commenced but not pursued when the government failed to participate in the arbitration proceedings).

[105] See *Enron Corporation and Ponderosa Assets, LP v Argentina*, Award, ICSID Case No. ARB/01/3; IIC 292 (2007), at 235.

[106] See, for example, OPIC Handbook 16 (2010 version).

[107] See, for example, <http://www.opic.gov>.

[108] See, for example, MIGA, *Types of Coverage*, available at <http://www.miga.org/guarantees/index_sv.cfm?stid=1547> (stating with regard to breach of contract coverage that: '[i]n the event of an alleged breach or repudiation, the investor should invoke a dispute resolution mechanism set out in the underlying contract and obtain a final arbitral award or judicial decision for damages.').

Structuring investments to optimize political risk protections

14.49 Not all investment structures make available the same political risk protections. Some may make available different insurance protection options; others may make available treaty protections. For projects in which political risk is a major concern, political risk structuring may be a worthwhile and long-term cost-saving exercise. In many instances, this structuring could be done in tandem with international tax structure concerns in order to optimize both the political risk protection and fiscal profile of a project.[109]

14.50 The key in structuring for political risk is to understand the scope of treaty protections available for the host country through different structures. Online databases such as <http://www.investmentclaims.com> and UNCTAD's treaty website[110] currently make available many international investment-protection treaties. The substantive protections and arbitration consents of each can be mapped out relatively easily. With these differences in protection in hand, it should be possible to compare the relative tax advantages and disadvantages of the different jurisdictions through which an investment could be structured. It thus is possible to understand fully the indirect costs of each investment structure and proceed accordingly.

14.51 'Nationality planning', 'forum shopping', or 'treaty shopping' is typically accomplished through the establishment of a company in a country that has favourable treaty relations with the host country.[111] 'That company will then be used as a conduit for the investment.'[112] Such structuring at the beginning of a project generally has been recognized as acceptable thus far.[113] Once a dispute is brewing, restructuring an investment in order to benefit from such treaty protections is another matter: depending upon the specific facts, such restructurings may or may not survive scrutiny.[114]

Enforcement of Judgments and Awards

14.52 Dispute resolution mechanisms often are only as good as the reliability of the enforcement of their final results. In the project context, project participants will

[109] Dolzer and Schreuer at 54.

[110] <http://www.unctadxi.org/templates/DocSearch_779.aspx>.

[111] Dolzer and Schreuer at 54.

[112] Ibid. For example, the tribunal in *Aguas del Tunari v Bolivia* stated: 'It is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction . . .' *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, 21 October 2005.

[113] See Alison Ross, 'Brigitte in Brazil', Global Arbitration Review, 22 June 2010, available at <http://www.globalarbitrationreview.com/journal/article/28562/brigitte-brazil>.

[114] Ibid; see also *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5 (15 April 2009).

come from many different countries and generally will not have a reliable large asset base in the same place. This means that the result of the dispute resolution mechanism—awards and judgments—will have to travel. As mentioned above and discussed below, arbitral awards in general travel far more easily than court judgments do. Repeat users of international arbitration value this benefit of international arbitration perhaps the most.

Enforcement of judgments

14.53 Court judgments frequently face cross-border enforcement issues. Many jurisdictions treat foreign money judgments as presumptively enforceable. But judgments generally will be reviewed in detail by the enforcing courts, frequently leading to an effective re-litigation of a dispute at the enforcement stage.

14.54 For example, in the US most states have adopted the Uniform Foreign Money Judgments Recognition Act (UFMJRA), under which foreign monetary judgments are presumptively enforceable under the principle of comity.[115] The UFMJRA allows significant procedural review of the underlying judgment.[116]

14.55 The ease with which a foreign judgment can be enforced in England and Wales is largely dependent upon where the judgment originated. If it originated from a jurisdiction which has entered into reciprocal enforcement arrangements with the UK, enforcement is typically by way of a registration process.[117] If, however, the judgment originates from a jurisdiction which has no such reciprocal arrangement, then it will ordinarily be necessary for the party seeking to enforce the judgment to bring fresh proceedings before the English courts, seeking to recover the foreign judgment as a debt. The claimant would normally seek summary judgment at an early stage. There are a number of potential defences open to a party wishing to challenge such proceedings. These defences include, amongst others, lack of jurisdiction on the part of the foreign court, the judgment not being final and conclusive on the issue, the judgment being obtained by fraud, and the judgment conflicting with a prior judgment of the English court.

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[115] UFMJRA, 13 ULA Supp 89 (West Supp 2000).

[116] The UFMJRA provides a list of mandatory and discretionary grounds for non-enforcement of a judgment. The mandatory grounds for non-enforcement are limited to (1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with due process, or (2) the foreign court did not have personal or subject matter jurisdiction over the defendant or the subject matter. UFMJRA, § 4(a). In several situations, however, US courts have the option to decide not to recognize the foreign judgment even where these mandatory grounds were not present, including situations in which US courts deemed that the foreign court was a seriously inconvenient forum. UFMJRA, § 4(b).

[117] See Part 74 of the Civil Procedure Rules 1998; Council Regulation 44/2001/EC; the Administration of Justice Act 1920; and the Foreign Judgments (Reciprocal Enforcement) Act 1933, in particular.

14.56 The German civil procedure code (ZPO) on its face grants courts a measure of discretion in enforcing foreign judgments. It states that foreign judgments shall not be enforced if, as a matter of German law, the foreign court lacked jurisdiction over the dispute, there has been a failure of service, there is a conflict between the judgment and a German proceeding, the foreign judgment violates German public policy, or if there has been a failure of due process.[118] One potential issue that is frequently overlooked is service: some countries may take particularly strong opposition to service by mail even where the jurisdiction in which a judgment is rendered allows for it.[119] Depending on how the forum selection clause is drafted, such service issues can make a judgment effectively unenforceable.

14.57 There are international attempts to regulate cross-border enforcement of international judgments. One such international regime that has greatly facilitated cross-border enforcement is the Brussels Regulation applicable in the EU (the 'EU').[120] It mandates cross-border enforcement, subject only to limited challenges by a party opposing enforcement.[121] To the extent that a European judgment is sought to be enforced in another EU state, this regime will greatly facilitate the portability of judgments. That said, in the project context, it is likely that project participants will hail from both inside and outside the EU, meaning that the Brussels Regulation will have limited relevance as a practical matter.

14.58 A new development that may support greater enforceability of judicial decisions is the Hague Convention on Choice of Court Agreements (the 'Choice of Court Convention'). The Choice of Court Convention generally applies to forum selection (jurisdiction) clauses. It has been described as making litigation a 'more viable alternative to arbitration', because the Choice of Court Convention 'ensures the enforcement of forum selection clauses just like the New York Convention guarantees the enforcement of arbitration clauses'.[122] So far, the signatories to the Choice of Court Convention are the US and the EU, and Mexico

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[118] ZPO, § 328.

[119] See Philipp A. Buhler, 'Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview' (2002) 27 Tul Mar LJ 1; Charles B. Campbell, 'No Sirve: The Invalidity of Service of Process Abroad by Mail or Private Process Server on Parties in Mexico Under the Hague Service Convention' (2010) 19 Minn J Int'l L 107; Kenneth B. Reisenfeld, 'Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure' (1990) 24 Int'l L 55.

[120] See Council Regulation 44/2001/EC.

[121] *Ibid.*

[122] Louise Ellen Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 Am J Comp L 543 at 557. Article 6, Choice of Courts Convention, provides:

> A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless
>
> (a) the agreement is null and void under the law of the State of the chosen court;
>
> (b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

is the only country that has acceded to the Choice of Court Convention.[123] The application of the Choice of Court Convention in practice has not yet been tested.

Enforcement of arbitral awards

14.59 Arbitration, on the other hand, is a tested international dispute resolution mechanism with a long history of relatively consistent international enforcement. There are two important international conventions governing enforcement of arbitral awards: the New York Convention and the Washington Convention.

New York Convention

14.60 The New York Convention is the main mechanism for enforcement of commercial awards. To date, it has 144 state parties.[124] It requires that 'each Contracting State shall recognize arbitral awards as binding and enforce them'.[125] Awards may be refused enforcement only in certain limited circumstances regarding the procedural propriety of awards—that is, was the question at issue in an award properly submitted to a neutral arbitral tribunal and did the parties have a fair and equal opportunity to present their case?[126] To the extent that these questions are answered

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(c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the state of the court seised;
(d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
(e) the chosen court has decided not to hear the case.

Similarly, if either party to an agreement containing a forum selection clause attempts to file a lawsuit in a court that was *not* designated as a chosen forum, that court must, under nearly all circumstances, suspend or dismiss proceedings.

[123] See Status Table, Convention of 30 June 2005 on Choice of Court Agreements, available at <http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=98>.

[124] UNCITRAL, New York Convention, status, available at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>. Note that the convention allows states to ratify its terms subject to certain reservations; these are typically referred to as the 'reciprocity reservation' (in essence, that an award will only be enforced if it has been rendered from another Convention state) and the 'commercial reservation' (that the state will enforce only awards relating to commercial matters).

[125] New York Convention, art. III.

[126] New York Convention, art. V: 'I. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the

in the affirmative, it is difficult, barring exceptional circumstances, to challenge and set aside an arbitral award.

14.61 The main risk to enforcement in the context of the New York Convention is an action to set aside the award at the seat of the arbitration. Such challenges can be broader than those listed in the New York Convention itself, depending on the jurisdiction.[127] Jurisdictions differ significantly in terms of whether they will enforce an award which has been set aside, with the US having expressed some concerns with regard to enforcement and France having a strong pro-enforcement point of view where the setting-aside decision itself is dubious.[128]

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submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.'

See also *Admart AG v Stephen & Mary Birch Found., Inc.,* 457 F.3d 302 (3d Cir. 2006) (explaining that 'to carry out the policy favouring enforcement of foreign arbitral awards, courts have strictly applied the Article V defenses and generally view them narrowly').

[127] Compare *Caja Nacional De Ahorro Y Seguros in Liquidation v Deutsche Ruckversicherung AG,* 2007 US Dist LEXIS 56197 (SDNY 1 August 2007) (limiting review in a set aside action to egregious procedural issues) and *Saipem SpA v Bangladesh*, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No. ARB/05/07; IIC 280 (2007) (describing Bangladeshi set aside proceeding on relatively minor procedural grounds).

[128] See, for example, *Judgment of 9 October 1984, Pabalk Ticaret Limited Sirketi v Norsolor SA*, XI YB Comm Arb 484 (French *Cour de cassation civ Le*) (1986) (reversing lower court judgment denying recognition to an arbitral award that had been made, and then annulled, in Austria, the arbitral seat); *Judgment of 29 September 2005*, XXXI YB Comm Arb 629 (Paris *Cour d'appel*) (2006) (recognizing award annulled in arbitral seat); *Judgment of 6 December 1988*, *Société Nationale pour la Recherche, le Transport et la commercialization des Hydrocarbures (Sonatrach) v Ford, Bacon & Davis, Inc.*, XV YB Comm Arb 370 (Brussels *Tribunal de Premiere Instance*) (1990) (recognizing award annulled in Algeria); *Judgment of 20 October 1993, Radenska v Kajo*, XXVla YB Comm Arb 919 (Austrian *Oberster Gerichtshof*) (1999) (reversing lower court decision refusing to recognize an award that was made and then annulled on public policy grounds in Belgrade); *Chromalloy Gas Turbine Corp v Arab Republic of Egypt*, 939 F Supp 907 (DDCs 1996) (recognizing an arbitral award made in Egypt, notwithstanding the fact that an Egyptian court had subsequently annulled the award on the grounds that the arbitrators had misapplied Egyptian law); *Baker Marine Ltd v Chevron Ltd*, 191 F3d 194, 197 n.3 (2d Cir., 1999) (refusing to recognize an arbitral award that had been annulled in Nigeria due to excess of authority and procedural misconduct); *Termorio SA v Electranta SP*, 487 F3d 928 (DC Cir., 2007) (holding that an arbitral award made by a Colombian tribunal could not be enforced in the US, because Colombia's highest administrative court nullified the award on the ground that the arbitration clause violated Colombian law).

Washington Convention

14.62 As noted above, The Washington Convention is applicable to investor-state disputes arbitrated at ICSID. One advantage to ICSID arbitration is the enforcement mechanism available under the Washington Convention. 'One of the greatest strengths' of the Washington Convention is that it is 'even more favourable to recognition and enforcement than the New York Convention', because the Washington Convention 'accepts no grounds whatsoever' for refusal to recognize and enforce ICSID tribunal awards.[129] ICSID awards are considered binding and final. They are not subject to review except under certain limited conditions outlined in the Washington Convention—on restricted grounds before a three-member *ad hoc* committee that may only interpret, revise, or annul the award.[130] Generally, an ICSID award is therefore more readily enforceable than a New York Convention award. An ICSID award avoids local set aside actions, and replaces such actions with specialized review by a panel chosen by the ICSID itself. Despite a current surge in attempts to set aside a number of ICSID awards rendered in the context of the Argentine Peso crisis in the early 2000s, the efficacy of ICSID awards remains significant.

Dispute Resolution 'Toolkit'

14.63 Previous sections discussed key risks and benefits of different dispute resolution mechanisms and investment structures. This section identifies tools which are available to structure around some of the risks discussed above, as well as the costs those structures may entail.[131] These tools generally need to be employed at the drafting stage, rather than after a dispute has already developed.

Dispute resolution clauses, common components

14.64 If the parties to a project finance transaction choose arbitration as the method to resolve disputes, consideration of the various types of disputes that may arise is vital in addressing the political and commercial risks that are inherent in a multi-party, multi-contract transaction. It is important to remember that disputes to which an

[129] Guide to ICSID Arbitration at 96.

[130] Dolzer and Schreuer at 224; Guide to ICSID Arbitration at 96; but see E. Baldwin, M. Kantor, and M. Nolan, 'Limits to Enforcement of ICSID Awards', (2006) 23 J of Int'l Arb 1 (identifying possible ways to avoid ICSID Awards).

[131] For more detailed discussion of the following section, see generally Born; Friedland.

arbitration clause applies frequently arise years after it has been drafted.[132] As one influential treatise explains:

> Most international commercial arbitration takes place pursuant to an arbitration clause in a commercial contract. These clauses are often 'midnight clauses', i.e. the last clauses to be considered in contract negotiations, sometimes late at night or in the early hours of the morning. Insufficient thought is given as to how disputes are to be resolved (possibly because the parties are reluctant to contemplate falling into dispute) and an inappropriate and unwieldy compromise is often adopted. . . . If a dispute arises, and arbitration proceedings begin, these matters must be dealt with before any progress can be made with the real issues.[133]

14.65 Below is a list of the various components of an arbitration clause.

Exclusivity

Unilateral option clauses

14.66 Typically an arbitration clause states that arbitration is the sole method of dispute resolution. Situations may arise, however, in which the parties to a project finance agreement would like the option of choosing either arbitration or litigation, depending on the type of dispute that arises. Currently, courts in the US 'are not aligned on whether "unilateral option clauses" are enforceable in the arbitration context'.[134] Hybrid clauses that allow one or more parties to choose between litigation or arbitration is an attempt to permit parties to select the most appropriate type of dispute resolution *after* a dispute has arisen. Such clauses have become increasingly popular in Asia, the Middle East, and Saudi Arabia. A well-drafted clause that presents just one of the parties with the option to refer a dispute to arbitration, if and when such a dispute arises, will typically be upheld as a matter of English law.[135]

Scope of arbitration

14.67 The range of disputes or claims that will be subject to arbitration is critical. Most arbitration clauses are drafted broadly to encompass 'all disputes, claims, controversies and disagreements' that are 'arising under', 'arising out of', 'in connection with', or 'relating to' the agreement or the 'subject matter of the agreement'.[136] Questions arise as to whether non-contractual claims, such as tort claims, 'arise

[132] Alternatively, parties can enter into a 'submission agreement'—an agreement to arbitrate that is made after a dispute has actually arisen. See Redfern and Hunter at § 1.39.

[133] See Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (2004) 3-302.

[134] Scott L. Hoffman, *The Law and Business of International Project Finance* (3rd edn, Cambridge University Press, 2007) 406.

[135] See *NB Three Shipping Ltd v Harebell Shipping Ltd* [2005] 1 All ER 200 and *Law Debenture Trust Corporation PLC v Elektrim Finance BV and others* [2005] 2 All ER 476.

[136] See generally Born at 39–41; Friedland at 61.

under' an agreement. Courts in the US, for example, look to the terms of the clause to determine whether the parties intended the clause to be broad or narrow.[137] Therefore, the broader phrases of 'relating to' or 'in connection with' may be preferable. The position under English law was clarified and modernized by the House of Lords in the case of *Premium Nafta Products Ltd v Fili Shipping Ltd*. In the words of Lord Hoffmann:

> . . . the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction . . .[138]

Institution selected for arbitration

14.68 Institutional arbitration is conducted pursuant to procedural rules of the selected arbitration institution. Choosing among the established arbitral institutions requires considering the parties' transaction, identities, and respective interests, as well as the likely nature of future disputes.[139] Once an arbitral institution has been selected, it is important to incorporate the institution's rules. Keep in mind that it is usually possible to modify aspects of an institution's arbitration rules (although, if this is done, such modifications should be drafted with great care). Institutional arbitration may be the most useful for project financing because the complexity of transactions as well as multiple parties and interests may need an experienced panel acting under well-developed rules.[140]

14.69 By contrast, *ad hoc* arbitration is conducted without an administering authority and generally without the aid of institutional procedural rules. The United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules were approved by the UN General Assembly, thus making them more acceptable to parties from all regions. Moreover, there is a substantial body of reported interpretations using UNCITRAL Rules. The CPR Institute for Dispute Resolution also has published procedural rules for *ad hoc* international arbitrations. *Ad hoc* arbitration is appropriate when all parties to the transaction are experienced with international

[137] See, for example, *Vetco Sales, Inc. v Vinar*, 98 F. App'x 264, 266-67 (5th Cir., 2004) (finding that 'arising out of' language in arbitration clause indicated that 'the parties intended to limit the applicability of this clause', and holding that claims for breach of a related agreement were outside the scope of the arbitration clause).

[138] [2008] 1 Lloyd's Rep 254.

[139] See Born at 57.

[140] See Hoffman at 412; see also Born at 44 (institutional arbitration offers heightened predictability, stability, and international expertise). Refer to footnote 26 above for a non-exclusive list of arbitral institutions.

arbitration and are cooperating. It also may be attractive for disputes for which parties wish to avoid paying fees to an arbitral institution.

Selection of arbitration panel

14.70 The selection of the arbitral tribunal, whose members will serve as the judges in the case, is one of the most important aspects of the arbitral process. The number of arbitrators should be determined in advance and should depend on cost, speed, expertise, consistency, and efficiency. The most common way to select arbitrators is to include an 'appointing authority' (as set out in the institutional arbitration rules) which will select either a sole arbitrator or a presiding arbitrator (if the parties chose three arbitrators as the number to sit on the panel). When three arbitrators are selected, each party usually selects one arbitrator and the third arbitrator is selected by the two party-nominated arbitrators or by the 'appointing authority'.

14.71 The nationality of the arbitrator can be a particularly important factor in choosing, or objecting to, an arbitrator. Different arbitration rules deal with the question of nationality differently.[141] Many commercial arbitration rules do *not* prohibit the appointment by a party of an arbitrator who has the same nationality as the party itself. Many institutional rules require, however, that the presiding arbitrator should not have the same nationality as any of the parties. For example, the 1998 ICC Arbitration Rules provide that 'the sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties'.

14.72 Finally, arbitrators should be 'independent' and 'impartial' of the parties—that is, arbitrators should not have direct financial, business, or professional relationships with any of the parties. Arbitrators may be required to submit statements, which should be updated in the light of any material developments, certifying their independence.

Severability

14.73 Most jurisdictions treat an arbitration clause contained in a larger transactional agreement as a separate contract from the remainder of the transaction. For example, the House of Lords in *Fiona Trust and Holding Corp. v Privalov*[142] (also reported

[141] See, for example, ICSID Arbitration Rules:

> The majority of the arbitrators shall be nationals of States other than the State party to the dispute and of the State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the Tribunal is appointed by agreement of the parties. Where the Tribunal is to consist of three members, a national of either of these States may not be appointed as an arbitrator by a party without the agreement of the other party to the dispute. Where the Tribunal is to consist of five or more members, nationals of either of these States may not be appointed as arbitrators by a party if appointment by the other party of the same number of arbitrators of either of these nationalities would result in a majority of arbitrators of these nationalities.

[142] [2007] UKHL 40.

sub nom. Premium Nafta Products Ltd v Fili Shipping Co. Ltd) confirmed that, as a matter of English law, an agreement to arbitrate is separable from the underlying contract, even in the face of allegations that the entire contract was induced by bribery.[143] Therefore, challenges against the transaction or the contract will not necessarily defeat the arbitration clause.

Language of arbitration

14.74 An easily overlooked, yet significant, matter is the language for the conduct of the arbitration. It is common for the language of the arbitration to be the same language that governs the contract. Some arbitration clauses, however, may require that arbitrators be fluent in a second language or that witnesses be permitted to testify in their native languages. Choosing two or more languages may burden the arbitral proceedings and increase the time and cost for translation and interpreters.[144]

Seat of arbitration

14.75 The law governing the arbitral proceedings—the *lex arbitri*—is normally determined by the seat of the arbitration. It can be a different law altogether from the law that governs the underlying contract. The choice of an appropriate seat can have significant implications for an international arbitration. The seat of arbitration is the place where the formal arbitral award will be made and the jurisdiction whose laws will ordinarily govern the arbitral proceedings and actions to vacate the award. Moreover, the arbitral seat could have a material effect on the selection of the arbitrators, arbitral procedures, and other substantive and procedural issues. The procedural rules of an arbitration will be affected to some extent by the choice of an arbitral institution, as each of the institutions and *ad hoc* arbitrations have formulated different rules.

14.76 It is key to designate the arbitral seat to be a state that is a party to one of the international enforcement conventions (i.e. the New York Convention, the Panama Convention, or the European Convention). Similarly, the arbitral seat should have national arbitration legislation and national courts that are 'hospitable to and supportive of' international arbitration, such as legislation based on the UNCITRAL Model Law on International Commercial Arbitration.[145]

14.77 Unless, as is usually the case, the parties agree on the seat of the arbitration, the rules of the various institutions typically empower the tribunal to make

[143] See Mark S. McNeill and Ben Juratowitch, 'Agora: Thoughts on Fiona Trust—The Doctrine of Separability and Consent to Arbitrate' (2008) 24(3) Arbitration International 475.
[144] See Friedland at 70.
[145] The purpose of the UNCITRAL Model Law is to make international arbitration agreements and awards more 'readily, predictably, and uniformly enforceable'. See Born at 65, 107.

that determination. Various factual and legal factors influence the choice of place of arbitration, such as: (1) the suitability of the law on arbitral procedure of the place of arbitration; (2) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the state where the arbitration takes place and the state or states where the award may have to be enforced (as described above); (3) the convenience of the parties and the arbitrators; (4) the availability and cost of support services; and (5) the location of the subject matter in dispute and the location of evidence.[146]

Scope of disclosure

14.78 International arbitration lacks a fixed legal regime governing discovery; therefore, a party that desires expressly to permit or prohibit certain types of discovery may do so through the arbitration clause. The efficacy and application of discovery provisions may be affected by the national law in the seat of arbitration, the institutional rules, the nationalities and legal backgrounds of the arbitrators, and the availability of remedies or sanctions for non-compliance.[147] As discussed above, broad disclosure of documents is not embraced by some arbitrators.

Privacy and/or confidentiality

14.79 Arbitration proceedings are generally less public than litigation proceedings. Such privacy does not, however, keep the submissions or the proceedings confidential. Confidentiality provisions in, or parallel with, the parties' arbitration agreement can supplement the privacy or confidentiality provided by institutional rules.

Jurisdiction

14.80 Jurisdictional objections can be raised in court proceedings or with the arbitral tribunal. The manner and timing of such challenges will depend on the respective legal system in which the proceedings are taking place, as well as the arbitral clause. For example, in some countries, such as the US, courts have the first turn at deciding jurisdictional issues *unless* a clause in the arbitration agreement gives the arbitral tribunal the power to decide such issues.[148] Other countries, however, may have different default rules with respect to jurisdictional objections.[149]

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[146] UNCITRAL Notes on the Organization of Arbitral Proceedings (1996).

[147] See, for example, Born at 80-81.

[148] See, for example, *China Minmetals Materials Import and Export Co. v Chi Mei Corp.*, 334 F.3d 274 (3d Cir., 2003).

[149] For example, in Germany an arbitral tribunal may rule on its own jurisdiction. See § 1040 (1) Code of Civil Procedure. Objections to the jurisdiction of the arbitral tribunal must be raised within certain time-limits. See § 1040 (2) Code of Civil Procedure. In England and Wales, the tribunal is able to rule on its own jurisdiction, unless the parties have agreed otherwise. Section 30(1) of the Arbitration Act 1996. Further, a challenge to a tribunal's jurisdiction should typically be made to the tribunal itself, rather than the court, unless (1) all parties consent to the court hearing the issue or

Entry of judgment, judgment currency, and manner of payment

14.81 An arbitration clause can limit the remedial powers of the arbitrator by stating a range of monetary awards (a 'high-low' arbitration clause) or by providing that the arbitrators must select a proposal submitted by one of the parties (sometimes called, 'baseball arbitration', especially in the United States). The purpose of such provisions is to provide a financial incentive for compromise and negotiation.[150]

14.82 An 'entry of judgment' clause ensures the enforceability of arbitral awards in the United States. Although other legal systems generally do not require such provisions for enforcement, it may be prudent to consider such a clause when a U.S.-related party or transaction is involved.[151]

Final and binding arbitration

14.83 The clause should state that the arbitration award will be final and binding on all parties.

Payment of costs and legal fees

14.84 Under most institutional arbitration rules, parties pay their own litigation expenses and share payment of the arbitrators' and the institution's fees and costs.[152] This initial payment, however, usually is subsequently reallocated to the unsuccessful party.[153]

Choice of law

14.85 A choice of law clause specifying the substantive law applicable to the underlying contract should be in a separate provision in the contract, not in the dispute resolution clause. A different law, however, may apply to the arbitration agreement, because most legal systems deem the arbitration agreement to be a separable contract.[154] Regardless, the law governing the proceedings will be the law of the seat of arbitration. Parties can include a choice of law provision that designates the law governing future arbitral proceedings.[155] If the parties do not select a governing law,

(2) the permission of the tribunal is first obtained and the court is satisfied that the application was made without delay, will result in a substantial saving in costs, and there is good reason why the court should hear the issue (s 32 of the Arbitration Act 1996). Note that time-limits apply to any challenge to jurisdiction: see, in particular, s 73 of the Arbitration Act 1996.

[150] See Born at 105–6.

[151] *Ibid.* at 86.

[152] See *ibid.* at 82–4. Note also that should one party fail to pay its initial share of the tribunal's or the arbitration centre's costs, the other (innocent) party will likely have to pay the defaulting party's share as well and then seek to recover those costs by way of a costs award from the tribunal.

[153] See *ibid.*

[154] See *ibid.* at 79–80.

[155] See *ibid.*

then the decision is left to the arbitrators, who typically choose the law of the location of the arbitration.

14.86 Parties can explicitly consent to release arbitrators from their obligation to apply substantive law. Such *ex aequo et bono* and *amiable compositeur* arbitrations are based in equity and fairness, similar to a mediation or conciliation, rather than on a substantive application of the law.[156] The concepts were developed with the aim of restoring harmony and achieving a workable legal relationship between the parties.[157]

Reducing disruption—multi-tiered dispute resolution

14.87 Drawn out disputes are inherently disruptive to ongoing projects. Given the collaborative nature of a typical project, it may be preferable to avoid formal confrontation from a business perspective. Further, there are often significant and negative implications associated with the publicity of court cases and arbitrations that can have a further damaging impact on the project.

14.88 Court hearings and the court file, including pleadings and exhibits, are open to the public and press in many countries. Such disclosure could impede negotiations as well as the broader progress on the project due to bad publicity. For some participants in certain projects, 'transparency'—and in particular, the desire to avoid being publicly perceived as being non-transparent—is important. Other parties may desire for the proceeding and the outcome to become public, in order to raise public awareness or to generate binding precedent. By contrast, arbitral proceedings typically are private, a characteristic that appeals to lenders and host governments which may want to avoid publicity of their disputes. Arbitral hearings and parties submissions are almost always private.[158] Arbitrations, however, appear to be moving in the direction of more transparency, not less.

14.89 Although there is an expectation and tradition that arbitration proceedings are confidential in addition to being private,[159] that expectation is not entirely accurate. Arbitration permits, not imposes, confidentiality. Different countries have different legal regimes respecting arbitral confidentiality. For example, Singapore recognizes an implied duty of confidentiality in arbitration proceedings, although

[156] Karl-Heinz Bockstiegel, Stefan Michael Kroll, and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2007) 359.

[157] See *ibid*.

[158] There is a distinction between contractual and treaty-based arbitration. For example, the Central American Free Trade Agreement guarantees the transparency of arbitral proceedings by requiring the respondent to make submissions available to the public and the tribunal to conduct hearings open to the public. (Dominican Republic—Central America—United States Free Trade Agreement, 2004, Article 10.21.)

[159] See, for example, Friedland at 20–1 ('Notwithstanding the usual absence of prohibitions on party disclosure, there is an expectation and tradition of confidentiality in arbitration, which a party violates at its own peril vis-à-vis the arbitrators.').

disclosures can be made in certain circumstances.[160] Under Swedish law, on the other hand, parties in arbitration proceedings are not bound by a duty of confidentiality unless the parties have entered into an express agreement regarding confidentiality.[161] The differences in laws regarding confidentiality illustrate the importance of the seat of arbitration (as discussed above). Confidentiality agreements or provisions still must be expressly negotiated and executed, either at the contracting stage or when a dispute arises and arbitration has commenced.

14.90 A tool that can help avoid drawn-out and costly disputes is the use of different forms of alternative dispute resolution (ADR) prior to engaging in arbitration or litigation. 'Escalation' or multi-tiered dispute resolution clauses are an example. Such clauses require the exhaustion of specified dispute resolution mechanisms prior to the institution of the 'formal' and final form of dispute resolution. The main benefit is the ability to settle a dispute at an early stage. The main drawbacks include the time and resources it takes to complete such preliminary steps of dispute resolution (especially if it seems unlikely in a particular circumstance that success will result) and the strategic withholding of key positions and information that parties may be tempted to engage in order to improve their positions should preliminary efforts and dispute resolution fail. Problems and satellite disputes can occur if the drafting of the multi-tier dispute resolution provisions do not make it entirely clear which steps in the process are optional and which are mandatory. Care should be taken to ensure that, by agreeing to ADR as part of a mandatory escalation procedure, the parties have not prevented themselves from seeking urgent precautionary or protective relief from a court while the ADR process runs its course.

Typical means of ADR

Mediation and conciliation

14.91 Non-binding forms of dispute resolution include mediation and conciliation, in which an independent third party or panel assists the parties in dispute to reach an amicable settlement.[162] The terms 'mediation' and 'conciliation' often are used interchangeably as synonyms, although there are distinctions. A mediator listens to the outline of a dispute, meets with each party separately, and tries to 'persuade the parties to moderate their respective positions'.[163] A conciliator makes proposals for a settlement, and if no settlement is reached during the conciliation proceedings,

[160] Michael Young and Simon Chapman, 'Confidentiality in International Arbitration: Does the Exception Prove the Rule? Where Now for the Implied Duty of Confidentiality Under English Law?' (2009) 27(1) ASA Bulletin 41 (citing *Myanma Yaung Chi Oo Co. v Win Win Nu* [2003] 2 SLR 547).

[161] Young and Chapman, at 43–4 (citing *Bulgarian Foreign Trade Bank Ltd. v A.I. Trade Finance Inc.*, an English translation of which can be found in A.J. van den Berg (ed.), *Yearbook of Commercial Arbitration*, Vol. XXVI (2001) 291–8).

[162] See Redfern and Hunter at 46; see also UNCITRAL Legislative Guide at 6–7.

[163] See *ibid*.

the conciliator may formulate the terms of a possible settlement and submit the terms to the parties for acceptance or rejection.[164]

14.92 Mediation and conciliation procedures typically are confidential, informal, easily pursued, quick, and inexpensive.[165] Both mediation and conciliation end when there is a settlement of the dispute or if the process is unsuccessful in reaching a settlement.[166] Mediation and conciliation may be particularly useful when there are many parties involved and it would be difficult to achieve a settlement by direct negotiations between the parties.[167] As with all dispute resolution methods, conciliation and mediation raise issues that parties should consider. For example, parties may be reluctant to present, at an early stage in a dispute, a well-developed statement of position for fear of providing 'informal discovery' or some type of advantage to the other side. Parties may perceive that agreeing to conciliation or mediation before commencing arbitration or litigation is a wasted expense, particularly if the parties believe that the dispute ultimately will go to arbitration or litigation. But the International Chamber of Commerce has had success with ADR, with many cases leading to a settlement before resorting to arbitration.

14.93 If parties provide for mediation or conciliation in the project agreements, they should consider a number of procedural questions. For example, parties should consider whether a mediator should be permitted to become an arbitrator. This may increase the efficiency of the process, because the individual will already be familiar will all of the issues. But it may undermine the arbitral process and its requirements of impartiality and a fair hearing.[168] The UNCITRAL Conciliation Rules and the ICC ADR Rules are a popular means of pre-arbitration mediation.[169] Further, the parties should ensure, to the extent possible, that material created for the purposes of any mediation or conciliation are protected from subsequent use in any arbitration or litigation. It is important to bear in mind that, in some jurisdictions, such as the United Arab Emirates, the protection which is afforded in other jurisdictions to 'without prejudice' communications is not, *prima facie* respected.

Expert determination

14.94 Disputes arising from a project financing may involve highly technical matters. Disputes also may need to be resolved quickly in order not to disrupt the construction or the operation of the facility.[170] In those circumstances, parties may wish to consider selecting mechanisms that allow for the choice of competent experts to

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[164] *Ibid.* at 46–7.
[165] UNCITRAL Legislative Guide at 4.
[166] *Ibid.* at 6.
[167] *Ibid.* at 7.
[168] Redfern and Hunter at 48.
[169] ICC ADR Rules, available at <http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf>.
[170] See UNCITRAL Legislative Guide at 4.

assist in the settlement of disputes.[171] Expert determination may be useful in international contracts relating to energy, mining, and telecommunication projects.

14.95 An agreement can specify that certain disputes, such as taxation issues, should be presented for expert determination, while other disputes should be resolved by arbitration or some other dispute resolution method. An expert determination clause should include, among other things: (i) the issue to be determined; (ii) the qualifications of the expert; (iii) the methodology for appointing the expert; and (iv) the conditions under which the expert's decision will be final and binding.[172]

Dispute boards

14.96 Another form of dispute resolution is a dispute resolution board, which under some circumstances may offer advantages over both arbitration and litigation, including speed, cost and simplicity.[173] Dispute boards historically have been used almost exclusively in connection with construction contracts, but they have become more widely used over time. The boards typically are established at the beginning of a project and remain in place throughout its duration. The members of these boards or panels—which can be companies or organizations, as well as individuals—are chosen for their expertise in a certain area. For certain disputes, it will be more useful to have decision-makers with technical expertise rather than legal expertise. In other cases, it may be useful for a dispute resolution board to be located on the site of a large-scale construction project in order to immediately address problems as they arise.[174] In some large infrastructure projects, more than one review board may be established—for example, one board may deal exclusively with disputes regarding matters of a technical nature, while another board may deal with disputes of a contractual or financial nature.[175] The ICC has adopted simple and proven rules for different types of boards that can be established for any type of contract.[176]

Management resolution

14.97 Another form of dispute resolution is management resolution, requiring that high-level decision-makers for the disputing parties become involved in the resolution of

[171] *Ibid.* at 4, 8.
[172] See Friedland at 150–1.
[173] See *ibid.* at 143.
[174] See UNCITRAL Legislative Guide, p. 9.
[175] *Ibid.* at 8–9.
[176] A Dispute Review Board issues recommendations with which the parties agree to comply if no party expresses dissatisfaction within a given time period. A Dispute Adjudication Board issues decisions with which the parties must comply immediately. A Combined Dispute Board typically issues recommendations, but it can issue decisions upon a party's request. Even if a contract contains a clause designating a Dispute Resolution Board, arbitration or litigation can be preserved as option that a party may elect if the party is dissatisfied with the decisions or recommendations of the board. See <http://www.iccwbo.org/court/dispute_boards/id4529/index.html>.