European Bank
for Reconstruction and Development

EBRD PPP regulatory guidelines collection
Volume II

Chapter 10. Dispute resolution recommendations and related matters

1. General

1.1 The long-term and complex nature of public-private partnership (PPP) arrangements means that PPP agreements (PPPAs) tend to be somewhat incomplete. Where this creates room for differences in interpretation, disputes can arise. PPPs are also large-scale projects that inevitably have some exposure to changing circumstances and the occurrence of unforeseen risks. This, too, can lead to disagreements and disputes. Defining an appropriate dispute resolution process helps ensure that disputes are resolved quickly and efficiently, without interruption of service. Dispute resolution mechanisms can and should be built into PPPAs.

1.2 The legal basis for settling disputes is an important consideration in implementing PPP projects. Private parties feel encouraged to participate in domestic and international PPP projects when they have the confidence that any disputes between or among public partner(s), other strategic government agencies or private partner(s) can be resolved fairly, reliably and efficiently.

1.3 When drafting the dispute resolution process in a PPPA, it is important to check with legal experts to ensure that the provisions are appropriate and enforceable in the relevant Commonwealth of Independent States (CIS) member country. The dispute resolution process in the PPPA may also need to be consistent with the requirements of treaties entered into by the CIS member country – for instance, conventions on the resolution of disputes between investors and states, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965). These requirements should be identified during legal due diligence for the project.

1.4 The legal framework for dispute resolution may be embodied in the CIS member country's legal instruments, rules and procedures. The legal instruments may include the PPP law containing enabling provisions and/or specialised laws. Moreover, international dispute resolution mechanisms should be included and take into account other provisions and recommendations stipulated by international conventions and treaties[1] into which the CIS member country has entered. These must be considered international treaties, such as bilateral investment treaties, and can enable a private partner to bring a claim against a public authority independent of any dispute mechanism stipulated in the PPPA. These treaties often grant substantive rights and protections (for example, the right to fair and equitable treatment), the breach of which can give rise to arbitration before an international tribunal.[2] The PPPA shall unambiguously stipulate dispute resolution procedures and provide detailed regulation of such procedures, as may be required depending on its type. Internal contractual mechanisms (such as expert determination/ mediation/panel arrangements) may need to be regulated in some detail, for example, while external systems that contain their own complete procedures (such as arbitration or court proceedings) would, of course, not be.

1.5 Possible mechanisms for dispute resolution are:

- negotiations / amicable settlement
- mediation and other alternative dispute resolution mechanisms not prohibited by the legislation of the CIS member state
- litigation
- arbitration (including international arbitration).

1.6 PPPAs should provide for the first point of dispute resolution being negotiation between key senior employees of each party. These parties are likely to see the bigger picture of the ongoing relationship, so be ready to come up with solutions. These arrangements are usually only intended to filter the serious disputes from the less serious ones. They are, therefore, not sufficient as standalone arrangements, and other forms of dispute resolution should be followed if they fail. They also depend on each party coming to the table. They have the advantage of providing fast, low-cost, flexible solutions that are within the control of the parties.

[1] Such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965); the CIS Convention on Settling Disputes Related to Commercial Activities (Kiev, 1992); the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 1993); Convention on Protection of Investor's Rights (Moscow, 1997); the Convention on the Resolution of Civil Disputes Arising From the Relation of Economic and Scientific-Technical Cooperation (Moscow, 1972); the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985); and the Rules of Arbitration of the United Nations Economic Commission for Europe (1966).

[2] For example, see Micula v Romania (International Centre for Settlement of Investment Disputes [ICSID] Case No. ARB/05/20), where, independent of the PPPA, a claim was brought against the public authority under the Romania-Sweden bilateral investment treaty (2002) for breach of fair and equitable treatment for repealing a tax incentive scheme that had been in effect under the PPPA. The compensation (later disputed) was €178 million.

1.7 Generally, disputes from domestic and minor PPP projects fall under the jurisdiction of the courts of a judicial system. Major PPP projects with involvement of international and foreign investors are, as a rule of thumb, subject to international arbitration. It is recommended that the legislation of each CIS member country allow parties to set out alternative dispute resolution mechanisms in the PPPA.

1.8 Parties to PPP projects are encouraged to involve an ombudsman to protect the rights of investors and/or entrepreneurs in dispute resolution procedures where they are available under the local PPP system. As part of the resolution of disputes in the field of PPP, the ombudsman can facilitate the pre-trial resolution of conflicts by coordinating the parties during negotiations and facilitating the transfer of the dispute to the mediation procedure (if there is one).

1.9 The private party should have the right to file complaints and appeals to the ombudsman, and these must be considered. This is one way to prevent the occurrence of disputes between the parties to PPP projects. Once the complaint has been considered, the ombudsman can send proposals on the adoption, amendment, suspension or cancellation of regulatory legal acts, provide opinions on draft regulatory legal acts (including taking relevant issues to court), and request and receive information.

1.10 If the dispute was considered in the court of the respondent state in accordance with procedure specified in the PPPA, the rule according to which this dispute cannot be re-referred to other arbitration bodies should be taken into account.

2. Arbitration

2.1 The legislation of the CIS member country should provide the possibility of settling disputes under international arbitration systems[3] (in accordance with international treaties of the CIS member country) that are neutral, impartial, professional, competent, independent of any other organisations or public bodies, and consist of highly experienced arbitrators. On the one hand, recourse to international arbitration (where an effective and appropriate domestic arbitration system is unavailable) will allow the parties to PPPAs to benefit from reliable, impartial decisions, relevant professional expertise, speed of process and international conventions on the enforcement of international arbitration awards. On the other hand, the parties should understand that the arbitration process usually takes considerable money and time, so may not be suitable for smaller-scale projects. It also frequently results in a "split-down-the-middle" compromise approach to outcomes (in contrast with courts, which can be much more one-sided and uncompromising when deemed appropriate). To speed up this process, they can envisage simplified procedures of international arbitration, such as an expert determination process or a summary determination.

2.2 The parties should have an option to choose arbitrators, including foreign arbitrators, even where the arbitration is to be domestic. The CIS member country's laws should permit the participation of qualified and international arbitrators.

2.3 Arbitration has certain advantages over judicial systems:

- the parties choose their tribunal
- arbitration can offer greater assurance of a fair and competent decision, involving arbitrators with appropriate expertise
- parties can appoint people with relevant, specific skills – in the field of law and other sectors (financial, economic, technical) in situations where special knowledge is required
- arbitration proceedings can be more flexible and, therefore, more efficient – for example, it is possible to have documents-only arbitration with no oral hearing
- a final decision can often be reached more quickly because the right to appeal an award may be narrower than the right to appeal a judge's decision
- arbitration awards are more easily enforced in other jurisdictions than court rulings as most countries entered into the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

2.4 International commercial arbitration should be allowed in national law – that is, it should permit independent third-party arbitrators to resolve disputes in a neutral location to facilitate foreign investment in a project. In particular, the law should allow a public partner to agree to submit itself to arbitration in a PPPA.

[3] For example, the International Chamber of Commerce, the London Court of International Arbitration, ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce and UNCITRAL.

3. Litigation

3.1 Litigation, in the sense of resolution of a dispute through the courts of a judicial system, has numerous specific features that must be considered while implementing an investor-friendly PPP framework:

• The court system of the CIS member country should be efficient and rapid. The government is advised to take measures to address the potential for delaying the dispute resolution in respect of a PPP project, such as making sure to establish clear and comprehensive PPP contracts that set out the rights and obligations of the parties, as well as the scope and standards of the project. Additionally, as PPPs have high social importance, a qualified judge should always be selected to solve disputes quickly and to a high professional standard.

• The court system should not be expensive. High-quality justice should be available for each PPP project, regardless of its cost. The court should be able to resolve low-cost disputes as well as high-value ones.

• Each bidder in tendering procedures should be vested with suitable remedial rights to challenge failures to act on the part of the public partner or other public authority in accordance with those procedures or its other statutory obligations relating to them (including the relevant administrative procedures).

• The judiciary should be sufficiently independent from the government to make the private partner comfortable that fair and impartial redress will be available.

• If the CIS member country has a separate system of administrative courts for dealing with disputes with government entities, its government is encouraged to ensure that the administrative court is accessible to individual contractors, including those involving foreign investors. The burden of proof for a person bringing the claim should be no higher than a reasonable judicial standard.

• Judgments should be promptly enforceable.

4. Mediation and other alternative dispute resolution mechanisms

4.1 Mediation is a non-binding procedure in which an impartial third party – the conciliator or the mediator – helps the parties to a dispute reach a mutually satisfactory and agreed settlement of the dispute.

4.2 A mediator may help to formulate alternatives and help the parties to clarify how those alternatives fit in with each party's goals and how they might work. A mediator also serves as a conduit for information between the parties, especially where the parties have difficulty communicating directly with one another.

4.3 In mediation, a neutral third party shall be appointed to resolve a dispute by helping the parties to settle their disagreements. A mediator typically acts as a facilitator, helping the parties identify the best possible negotiated solution or settlement (the disputing parties will largely develop the solution themselves). A conciliator has a neutral but more active role, also proposing solutions and settlement terms.

4.4 The typical process for mediation might be as follows:

• The party that believes the PPPA has been violated should refer the dispute to the identified mediator in writing, with a copy to the other party. This reference should describe the nature of the dispute, the quantum in dispute (if any) and the relief or remedy deemed suitable.

• The mediator shall use their best efforts to conclude the mediation within a certain number of days.

• If no resolution can be reached through mutual discussion or mediation within the set number of days, the matter should be referred to litigation or arbitration.

5. Use of experts

5.1 Experts are qualified specialists used to help resolve questions or disputes by providing their binding or non-binding (depending on the form of their participation) opinions from specific areas of knowledge.

5.2 Parties to the PPPA may use experts in various ways. While a party is preparing a claim, it may need essential technical or financial expertise that only the engaged counsel can provide. Such experts may advise parties during arbitration procedures and review the opinions of appointed experts or interrogate them during hearings. The parties shall be free to involve experts in this way as professional advisers at any point in relation to any subject they choose.

5.3 Experts can be proposed or selected by the parties and appointed by the arbitrators in arbitration procedures. The role of these experts is to provide the arbitrators with their expert opinion and evidence on questions from their special area of expertise in the form of an expert report and, if required, testimony at hearings. Expert determination can also be used to help make decisions about very specific modifications to the PPP agreement, such as the calculation of an amount or replacement of an index, without the need for arbitration proceedings at all.

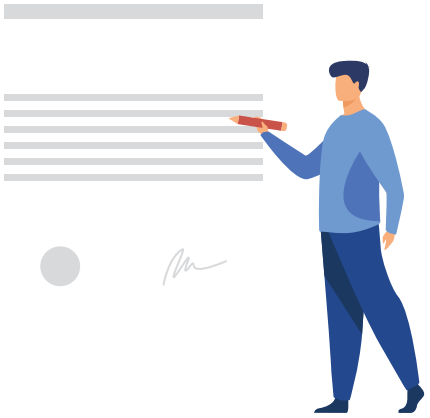
5.4 When the parties cannot agree on a single expert, each can appoint their own expert and the two experts shall work together to issue one jointly developed opinion on questions posed. This approach can be useful when the experts appointed by each party have conflicting responses to the same questions. In any case, arbitration decides the final issue of the appointment of experts. It is recommended that independent experts who can provide an objective and transparent position should be involved.

5.5 Another effective way to overcome parties' conflicts is for the arbitrators themselves to appoint an expert. This can be done in addition to or instead of experts appointed by the parties. In this case, arbitrators will have to deal with possible differences between expert opinions.

5.6 Another option is expert determination, using an impartial expert to make a decision on some aspect(s) of the issue in dispute. This can be a rapid, simple and inexpensive way to settle a technical or non-technical question without or before any arbitration.

5.7 Expert determination may be used if the subject of a dispute is technical rather than legal (for example, closing accounts in an agreement) in CIS countries where expert determination is legally feasible.[4] The parties may include a split clause in the PPPA that refers some types of dispute arising from the agreement to one method of dispute resolution (for example, international dispute resolution for all legal disputes) and another dispute resolution mechanism for another type of dispute (for example, domestic expert determination for technical issues such as the application of accounting rules). In this case, the expert's opinion is usually binding on the parties (though the parties shall decide this for themselves). In the context of PPPs, the appointment of an independent certifier to verify that the project's progress during the construction phase satisfies the agreed objectives, including payment sums and performance standards, is an example of expert determination. The use of expert determination reduces delays arising from disputes.

5.8 Participants in arbitration proceedings (including experts themselves) should aim to develop effective and cooperative approaches when dealing with experts, show flexibility and be open to discussion.



[4] This is not always the case for various reasons, such as political/legal uncertainty. For instance, in 2015, the Ukrainian Supreme Court was involved in a wave of bilateral investment treaty claims by Ukrainian state-owned entities against Russia. See Everest Estate LLC et al. v The Russian Federation, PCA Case No 2015-36; PJSC Ukrnafta v The Russian Federation, PCA Case No 2015-34; Stabil LLC et al. v The Russian Federation, PCA Case No 2015-35; Limited Liability Company Lugzor et al. v The Russian Federation, PCA Case No 2015-29; PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation, PCA Case No 2015-21 and Aeroport Belbek LLC and Mr. Igor Valeriecich Kolomoisky v The Russian Federation, PCA Case No 2015-07.