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DISPUTE RESOLUTION IN INFRASTRUCTURE PROJECTS

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OVERVIEW

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- DISPUTE RESOLUTION MECHANISMS
- ARBITRATION
  - ❖ Arbitration Agreement
  - ❖ Notice of Arbitration
  - ❖ Appointing a Tribunal
  - ❖ Procedural Issues

DISPUTE RESOLUTION MECHANISMS

- Negotiation
- Mediation
- Adjudication /Dispute Adjudication Board (DAB/DRB/DAAB etc)
- Litigation
- Arbitration

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Arbitration Agreement

Arbitration Agreement

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- A clause in a contract or a separate agreement
- Treated as separate from principal contract
- Even if the principal contract falls away, the arbitration agreement may remain valid and binding
- Defines scope and conduct of arbitration

Elements of an Arbitration Agreement

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The arbitration agreement should state:

FIDIC RED BOOK 2017

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Sub-clause 21.6 - Arbitration

"Unless settled amicably, and subject to Sub-Clause 3.7.5 [Dissatisfaction with Engineer's determination], Sub-Clause 21.4.4 [Dissatisfaction with DAAB's decision], Sub-Clause 21.7 [Failure to Comply with DAAB's Decision] and Sub-Clause 21.8 [No DAAB In Place], any Dispute in respect of which the DAAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

(a) the Dispute shall be finally settled under the ***Rules of Arbitration of the International Chamber of Commerce****;*

(b) the Dispute shall be settled by ***one or three arbitrators*** *appointed in accordance with these Rules; and*

(c) the arbitration shall be ***conducted in the ruling language defined in Sub-Clause 1.4*** *[Law and Language]."*

SEAT

- The legal centre of gravity for the arbitration (place of arbitration).
- Determines which state's law governs the arbitration process.
- Award is deemed to be made at the seat (regardless of the physical location of the Tribunal, which can be very important for the purposes of Enforcement).
- Determines which national courts will have a supervisory and supportive jurisdiction over the proceedings, including the power to set aside an award.
- Any challenge to the validity or effect of an award must be addressed to the designated competent court of the seat of the arbitration.
- The 'seat' of an arbitration is distinct from the venue of an arbitration.
- The choice of 'seat' is therefore an important consideration, different from venue of hearings.

Choice of Seat

FIDIC Guidance Notes on Sub-clause 21.6

*"For major projects tendered internationally, **it is desirable that the place of arbitration be situated in a country other than that of the Employer or Contractor**. This country should have a **modern and liberal arbitration law** and **should have ratified a bilateral or multilateral convention** (such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards), or both, that **would facilitate the enforcement of an arbitral award** in the states of the Parties."*

Choice of Seat

FIDIC Guidance Notes on Sub-clause 21.6:

"It is important that the Parties agree on the number of arbitrators and the language of arbitration. In the absence of specific stipulations as to the number of arbitrators and the place of arbitration in the Contract, the International Court of Arbitration of the ICC will decide these matters."

Article 24, LACIAC Rules:

"If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case"

GOVERNING LAW OF ARBITRATION AGREEMENT

Parties should designate the law that will govern their arbitration agreement.

If no such designation has been made and it becomes necessary to determine the law applicable to the agreement to arbitrate, some of the options open to a tribunal or court include:

- The law governing the contract as a whole
- The law of the seat of arbitration.

NUMBER AND SELECTION OF ARBITRATORS

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- **One or three?**
  - Nature of the dispute
  - Quantum of the dispute
  - Cost implications
  - Time considerations

- **What is the selection process?**
  - Each party appoints and arbitrator and the two party-appointed arbitrators appoint a Chair.
  - Parties select from a list of arbitrators compiled by an institution and jointly appoint one person from the list.

CHOICE OF INSTITUTION

Important considerations when choosing institutional rules:

- ☐ Modern rules of arbitration
- ☐ Reasonable charges – ad valorem v time spent?
- ☐ Specialised staff
- ☐ Permanence

LACIAC meets the considerations above.

CHOICE OF LANGUAGE

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1. Promotes Efficiency
2. Promotes certainty
3. Cost effective

ANATOMY OF ARBITRATION PROCEEDINGS

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1. Commencement of proceedings (Notice of Arbitration and Response)
2. Constitution of arbitral tribunal (Challenges)
3. First procedural hearing (procedural order, procedural calendar etc)
4. Exchange of written submissions
5. Production of documents
6. Exchange of witness statements and expert reports
7. Hearing
8. Post-hearing submissions
9. Submissions on costs
10. Award
11. Correction/clarification of award

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Notice of Arbitration

Notice of Arbitration – Essential Elements

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Article 4, LACIAC Rules

The Notice of Arbitration shall include:

- a demand that the dispute be referred to arbitration;
- the names and contact details of the parties (addresses and telephone numbers);
- a reference to the arbitration clause or agreement that is invoked;
- a reference to the contract out of or in relation to which the dispute arises;
- description of the claim, amount involved (with an indication of the facts supporting it);
- Relief or remedy sought;
- Proposal as to the number of arbitrators, language, and seat/place of arbitration, if the parties have not previously agreed this;

Notice of Arbitration

Article 4, LACIAC Rules

- The notice of arbitration may also include:

    a) proposal for the appointment of a sole arbitrator;

    b) Notification of the appointment of an arbitrator referred to in article 12.

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Appointing a Tribunal

Article 10, LACIAC Rules

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1. *If the parties have not previously agreed on the number of arbitrators, and if **within 30 days after the receipt by the respondent of the notice of arbitration** the parties have not agreed that shall be only one arbitrator, **three arbitrators shall be appointed**.*

2. *Notwithstanding paragraph 1**, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit** provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 12, **the LACIAC Court may, at the request of a party, appoint a sole arbitrator** pursuant to the procedure provided under article 11, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.*

Selection

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- **Selection criteria**
  - reputation as arbitrator
  - professional experience
  - technical knowledge
  - nationality
  - previous decisions in similar arbitrations

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Procedural Issues

First Procedural Hearing

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- At the initiative of the parties or by direction of the tribunal

- Beneficial if the first meeting takes place early in the proceedings, soon after appointment of the tribunal

Purpose of hearing:

- Resolve points of principle: how is the arbitration going to be conducted?
- Deal with any interim applications

Draft and circulate a proposed procedural order in advance of the hearin

First Procedural Hearing

Establish framework and timings (fairness v equality)

- Documentary/oral hearing
- Bifurcation into liability and quantum stages?
-
- Preliminary issues?
- Is fact witness evidence necessary?
- Is expert evidence necessary?
- Will translations be needed?
- Memorials v Pleadings/Statements of Case
- Timing of document production
- Dates and length of final hearing
- Closing submissions – at the hearing, post-hearing briefs, or a combination?

First Procedural Hearing

- Documentary/oral hearing
- Memorial vs pleadings
- Bifurcation
- Early applications
- Document production (Redfern schedule?)

Procedural Order No. 1

Record:

- procedural steps to date including constitution of the tribunal
- jurisdictional objection, if any
- seat, language, governing law and any other procedural matters agreed by the parties
- application of the IBA Rules of Evidence or any other rules of evidence agreed by the parties
- details of any constitutional rules the parties have agreed to
- details of parties and their legal representatives
- contact details for the tribunal
- logistical details for service of documents
- details as to format of submissions

Memorial vs Pleading

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- A memorial is a detailed presentation of the facts and all the evidence (documents, witness statements, experts reports) that support a party's claims and defences in arbitration. The information is submitted concurrently at an early stage of the arbitration process.

- The memorial is an 'all cards on the table' process of arbitration which shows the entirety of a parties' case from the outset.

- The difference between memorials and pleadings is the timing of the witness statements and expert reports.

- For memorials, parties serve witness statements and/or expert reports alongside the pleadings and supporting evidence.

- The pleadings process, on the other hand, consists of exchanges on facts, then submission of the witness statements and expert reports and then finally submissions on the law.

Overview of Arbitration Procedure: Memorial vs Pleading/Statement of Case

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Statement of Case Approach

1. Notice of Arbitration
2. Response to Notice of Arbitration
3. Constitution of arbitral tribunal
4. Statement of Claim
5. Statement of Defence
6. Reply
7. Document Request and Production
8. Factual Witness Statement
9. Factual Witness Statement in Reply
10. Expert Report
11. Preparation of legal submissions
12. Final Hearing and Award

Overview of Arbitration Procedure: Memorial vs Pleading/Statement of Case

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Memorial Approach

1. Notice of Arbitration

2. Response to Notice of Arbitration
3. Constitution of arbitral tribunal

4. Claimant's First Memorial (Written Submissions, Witness Statements, Expert Reports, Case Authorities and any documents relied on)

5. Respondent's First Memorial (Written Submissions, Witness Statements, Expert Reports, Case Authorities and any documents relied on)

6. Claimant's Second Memorial (Reply Submissions, Reply Witness Statements, Reply Expert Reports, Case Authorities and any documents relied on)

7. Respondent's Second Memorial (Reply Submissions, Reply Witness Statements, Reply Expert Reports, Case Authorities and any documents relied on)

8. Prehearing submissions

9. Final Hearing and Award

Memorial Approach

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Advantages

- ✓ The arbitration tribunal gets a complete overview of the legal and factual matters from the very start of the arbitration and therefore are better suited to grasp the issues in dispute and manage the parties accordingly.

- ✓ Reduced likelihood of the arbitration from dragging from one procedural hearing to the next without any tangible progress being made.

- ✓ The production of the evidence at the earliest stages of the arbitration may have the effect of narrowing factual issues or ruling out some points entirely as issues of non-dispute.

- ✓ Often in cases referred to arbitration, one party has a significantly stronger position on the law, which means that under the pleadings process this will only come to light at the very end of the submissions while the memorial style ensures that this is revealed earlier on in the process, to the benefit of the arbitrators and the parties.

- ✓ It not only streamlines the factual issues surrounding the dispute but may also increase the likelihood of resolving the dispute. Memorials have the effect of encouraging parties to face up to the case from an early stage and reminds the parties that extra expense will have to be expended in the early stages of the arbitration. These legal and commercial influences may encourage the parties to engage in realistic early evaluation of the dispute and potentially earlier settlement

Memorial Approach

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Disadvantages

- ✓ Advocates for the pleadings process argue that memorials serve as inefficient basis on which evidence is led, as it may later turn out to be points of no dispute.
- ✓ They also argue that value points to a party's case may only arise in rebuttal, therefore requiring two rounds of witness statements or expert reports.
- ✓ The upfront costs of preparing experts/witnesses as there may be with pleadings.

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THANK YOU