

CENTER INTERNATIONAL LEGAL STUDIES

SALZBURG ARBITRATION CONFERENCE

(JUNE 10-13, 2004)

SESSION 7 (D) :

DRAFTING HIERARCHICAL DISPUTE RESOLUTION SYSTEMS

INTRODUCTION

Why hierarchical dispute resolution system is becoming so popular ? Because it is efficient and cheap, specially for complex international contracts.

How to engineer and how to prepare the negotiation of an efficient dispute resolution system : 3 prerequisites

- Local due diligence : the applicable laws and their practice
- Analysis of the most likely contentious issues
- Review of the track record and likely behaviour of the other party

I/ THE KEY OBJECTIVES

- To have a guarantee of final decision on the dispute which is quick, fair and easily enforceable.
- To set up a binding hierarchical dispute avoidance and dispute resolution system which guarantee that in most cases the dispute will be resolved by voluntary settlement.

II/ HOW TO REACH THE KEY OBJECTIVES : THE TOP TO BOTTOM APPROACH

1/ The Top Level :

- Secure the most efficient international arbitration system under the particular circumstances (the Atomic Bomb).
- Address the main issues : substantive law, law and principles of procedure, *ad hoc* or institutional arbitrations, quality of arbitrators, forum, timing, language, enforcement.

2/ The Intermediary Level :

- Consider the conditions which will likely “oblige” the parties to settle the dispute before initiating arbitration
- Organize a mandatory and well structured conciliation or mediation system.

Objective :

A mediation proposal the substance of which is as close as possible to the foreseeable final arbitration award.

Conditions :

- Guarantee of choice of a conciliator or of a conciliatory board having a range of skills permitting it to develop a leadership on both parties technically and professionally and having in addition a recognized practice in international arbitration.
- An ADR clause being a clear and efficient guide for the conduct of the mediation or the conciliation and providing for precise timing and obligations for each party with an overall limit on time.
- However, avoid unnecessary complex clauses since flexibility is important in ADR and since the nature of mediation and conciliation is fundamentally different from court proceedings and arbitration (not needed and not advisable to make use of the contradictory principles).

3/ The Bottom Level

Organize a mandatory and well structured negotiation process between the parties when a dispute is arising.

Objective :

Avoid the numerous situations where a dispute crystallizes and develops by lack of understanding, lack of communication and personal issues.

Condition :

- Appropriate definition of what is a dispute
- Mandatory negotiations for a limited time period starting at the lowest possible level and elevated at a higher level up to the top in a sequential order. The top level may include mandate to negotiate given to legal advisers of both parties.

III/ EXAMPLE OF A HIERARCHICAL DISPUTE RESOLUTIONS SYSTEM FOR A TYPICAL COMPLEX INTERNATIONAL MINING AND CONSTRUCTION PROJECT :

- The top level : arbitration clause
- The intermediary level : ADR clause
- The bottom level : negotiation clause

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