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Belt and Road Practical Guide

How to resolve disputes on the Belt and Road

2017

Belt and Road Practical Guide

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How to resolve disputes on the Belt and Road

Let's start at the very beginning

Publications are starting to emerge about the Belt and Road ("BAR"). Some focus on applicable laws; others are in country-by-country format providing statistics and other background. At the moment, there seem to be few practical guides. Our series of publications aims to fill that gap. We will tell you about our own experience with our clients working on the BAR. Within each of our booklets, we will offer practical tips regarding the BAR subject in question. Here are our ten recommendations on how best to resolve BAR disputes.

Tip 01

STUDY, AND WHERE NECESSARY, TRY TO NEGOTIATE MODIFICATION OF THE CONTRACT'S DISPUTE RESOLUTION CLAUSE

How many BAR tenderers study and make detailed comments on the draft contract's dispute resolution clause? Not very many. And yet this clause is one of the most important components of the contract, because claims are bound to arise on BAR projects, not least because many of the projects occur in countries with high political, operational, and legal risk. If the parties cannot settle them, they will need to rely upon the dispute resolution clause to resolve their disputes.

All too often, parties automatically draft in "laws of England and Wales", "arbitration in England", "arbitration in Singapore", "Singapore law", as this is what they are used to doing. In BAR projects, it is important to give proper thought as to the logic of whether these are really the most suitable provisions to include.

It is worthwhile for BAR tenderers to pause and consider the dispute resolution clause very carefully, and decide whether they need to go back to the Employer and / or the Lenders to explain why more thought about the dispute resolution clause might be beneficial to all parties concerned. Some Employers/Lenders will say: "no, we are not changing this clause". But others can be persuaded, perhaps as a trade-off for other concessions.

There is no doubt that dispute resolution clauses on BAR projects should utilise arbitration as the principal mode for resolving disputes. International parties prefer arbitration because it is: private and confidential; less formal than court proceedings; and easier to enforce in different jurisdictions. But arbitrate where? And according to the laws of which jurisdiction?

A good dispute resolution clause should contain the following components:

Where is the arbitration to be held?

On a BAR project, it will often be thought that CIETAC arbitration in the People's Republic of China (**PRC**), or arbitration in the BAR host country, will not be sufficiently neutral to be acceptable to at least one party. That is partly why parties often draft in London or Singapore (sometimes Stockholm or Paris). But what about arbitration in Hong Kong? Hong Kong benefits from the "one country, two systems" legal regime, such that it is still a common law jurisdiction, with very efficient, independent common law judges and one of the world's foremost courts of final appeal.

But the BAR host often says "we are worried about Hong Kong, because it is not sufficiently independent of the PRC". That is a serious error by the host. It demonstrates that the host does not actually understand that selecting Hong Kong as the arbitration forum is actually of great benefit to the host BAR participant itself. Why? Because of the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong (the "**Arrangement**")", the special agreement which the Mainland Government has with the Government of Hong Kong.. In accordance with the Arrangement, where a party fails to comply with an arbitral award made in Hong Kong, the other party may apply to the relevant People's Court to enforce the Hong Kong award.

The Supreme People's Court has directed that where any lower court is minded to refuse enforcement of a Hong Kong award under the Arrangement, thelower court must first consult with the Supreme People's Court, and the Supreme People's Court itself will decide whether or not to grant the enforcement. Anecdotally, there have been no reported refusals to grant the enforcement of a Hong Kong award under this Arrangement.

In other words, it is for the host's benefit that Hong Kong should be selected as the forum for arbitration, because of the enhanced enforcement rights that this will give over awards made in London, Singapore, Stockholm or Paris.

For the PRC participant, Hong Kong has obvious attractions, not only as the "brother" of the Mainland, but through its impeccable rule of law, efficiency in processing matters, wide range of arbitration institutions and arbitral rules on offer, plus its cultural proximity.

Governing law

A neutral law can be chosen to govern the substantive disputes, for example, that of Hong Kong, England and Wales or Singapore. There is no difficulty in considering any of these laws while at the same time specifying Hong Kong as the forum. For example, one can have a dispute resolution clause which prescribes Hong Kong arbitration, with the governing law being that of England and Wales.

Selecting an administering arbitration institution and the correct rules

If the parties prescribe Hong Kong arbitration, then there are three institutions which can provide help in Hong Kong. One of them should be named in the clause to administer the arbitration: any of Hong Kong International Arbitration Centre (**HKIAC**), China International Economic and Trade Arbitration Commission (**CIETAC**) Hong Kong Arbitration Centre; or International Chamber of Commerce (**ICC**). Each publishes a number of rules which can be selected. Most importantly, the dispute clause should state which edition of the rules is to be used, for example by providing that the current rules in force at the date of the first issued notice of arbitration are to apply. While it is possible to engage in an ad-hoc arbitration that is not administered by an institute, this is not recommended on potentially large BAR project arbitrations.

Number of arbitrators, language, seat and other matters.

The number of arbitrators is usually one or three. Recently, a BAR client which had not particularly studied the dispute resolution clause had agreed to one arbitrator, but then asked us whether it was possible to change to a panel of three arbitrators, so that it could select its own arbitrator. The only way to achieve that would be by consent of the other party – which was not forthcoming. That is why it is important to consider the clause at the tender stage.

Note that while it is possible for a dispute resolution clause to restrict the nationality of arbitrators, for example by prescribing that no arbitrator shall be of PRC or host country nationality, it is important not to be too proscriptive. For example, in some countries, it is not permissible to state positively: " …and the arbitrator shall be a national of the country of "X".

The language of the arbitration will often be English, Mandarin or Cantonese, and is worth specifying.

The "seat" of the arbitration should also be specified. This is also important, as the laws of the seat will decide how the procedure of the parties' arbitration is to be decided.

Other important factors to consider when drafting the dispute resolution clause are: should there be any compulsory steps before arbitration? For example, that senior directors from each of the parties should first meet for a prescribed period of time to try and amicably settle the dispute. Other clauses require that mediation must take place prior to being allowed to start an arbitration. All of these steps are fine, but they must be very clearly and carefully drafted, otherwise in some jurisdictions they may be held void for uncertainty.

Journeying along the bumpy BAR superhighway

Some BAR countries will prove difficult territory through which to navigate, and will pose serious operational risks. Aside from the usual awareness of risk through prudent contracting and investment structuring, PRC investors and their contracting partners should also be aware of their rights under the web of investment treaties covering the route. This web provides a crucial means of reducing the risks involved in BAR investment. Here, we set out the policy details and investment protections, and detail some of the key considerations for BAR investors.

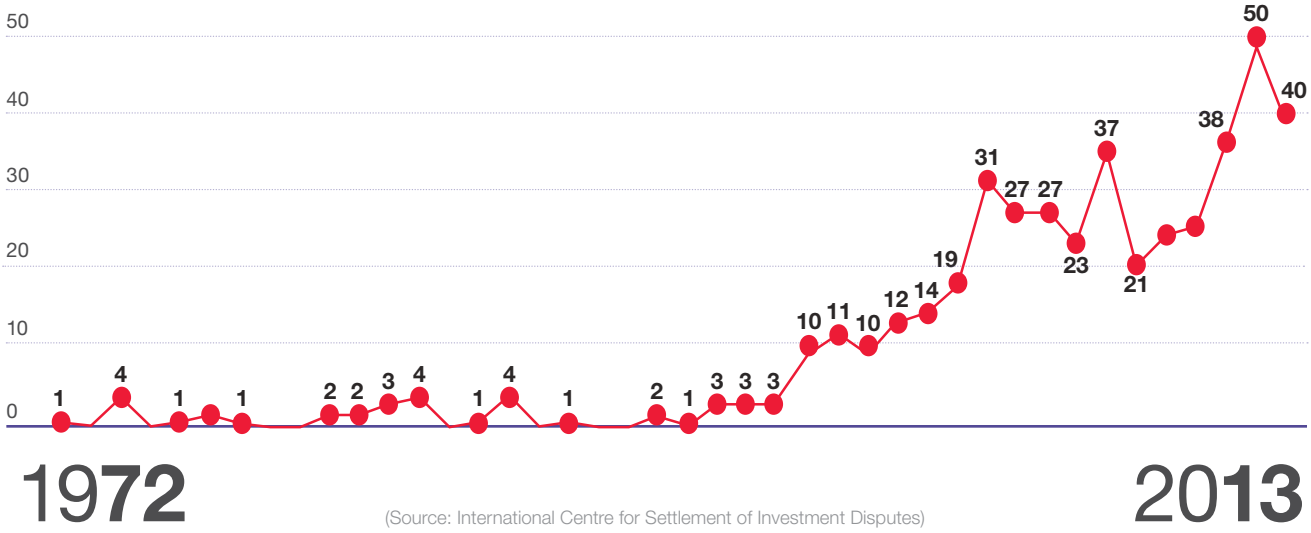
Investigating investor protections covering the BAR route

As at July 2017, 55 Bilateral Investment Treaties (**BITs**) exist between PRC and BAR nations as well as several Multilateral Investment Treaties (**MITs**). While these treaties provide a robust source of potential investor protections, they must be understood and carefully planned for by BAR investors.

BITs are international law instruments – treaties - agreed between two states. MITs are treaties agreed between more than two states. The purpose of BITs and MITs is to create a stable legal environment that fosters direct foreign investment. This is achieved by the "host state" (i.e. the state in which the investment is made) agreeing to provide certain guarantees and standards of protection to the investments of private foreign investors of the "home state" (i.e. those with the nationality of, or incorporation in, the "home state"). With the inclusion of Investor State Dispute Settlement (**ISDS**) mechanisms in these investment treaties, corporate and individual investors may be able to bring claims against BAR governments for breaches of the substantive investor rights set out in those treaties. Importantly, investor rights and remedies through ISDS are often in excess of those that a BAR investor will enjoy under their BAR contract. The independence of this process from domestic legal systems means that BIT and MIT protections are a crucial bulwark against the political and legal risks that BAR investors are likely to face.

Arbitration mechanisms, whether under contract or treaty, are powerful rights for BAR investors because they permit investors to enforce their rights without reliance on local procedures or diplomatic means. Notably, the usual dispute resolution method under PRC investment treaties, ICSID arbitration, allows investors to rely on simplified enforcement mechanisms under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**Washington Convention**").

Settlement of investment disputes



(Source: International Centre for Settlement of Investment Disputes)

Host states that are party to the Washington Convention are required to enforce arbitral awards made under that Convention, making enforcement of awards an international law obligation. Fifty-five countries along the BAR route are party to the Washington Convention and voluntary compliance is the norm, although not always the rule. Nevertheless, concerns surrounding reputation and creditworthiness are likely to continue to encourage BAR governments' compliance with enforcement.

As can be seen in the below Table, the number of ICSID cases has dramatically increased over the past three decades, as more investors become aware of its wide-ranging protections.

What kind of investment protections are offered under investment treaties?

Typically, the protections offered in BITs are similar to the protections offered in MITs, but the scope of guaranteed protection offered by each treaty will be set by its wording. Common forms of guaranteed protection include:

- Compensation for expropriation or nationalization of investor's assets by a state. Typically, this guarantee covers both direct and indirect expropriation, and additionally prohibits expropriation unless it is for a public purpose;
- Fair and equitable treatment, which creates an obligation to provide a stable and predictable investment environment, to act transparently, and to act consistently. Clauses setting out these protections are designed to create a standard of treatment independent of that afforded to domestic investments, which can vary dramatically from state to state;
    - This protection extends to how investors are treated in the host state's legal system. In White Industries Australia Limited v Republic of India, for example, our international arbitration team successfully advised *White Industries against the Republic of India under the Australia-India* BIT, as a result of the failure of India's courts promptly to enforce White Industries' ICC Award. At arbitration, the tribunal ruled that India had violated the Most Favoured Nation ("**MFN**") provision of the Australia-India BIT, because the Indian courts had been unable to resolve White Industries' jurisdictional claim in over nine years. MFN clauses allow investments covered by a particular treaty to be afforded the same treatment that the host state would give to any other third state's investments. This allows a BAR investor to rely on guaranteed protections set out not only in treaties to which PRC and the BAR countries are parties, but potentially also any other, better substantive protections that any third party country enjoys under its treaty with the BAR investment host state in which the investor is investing.
- Full protection and security, which provides a positive obligation to protect investment by the exercise of reasonable care;
- Non-discrimination. Protection against discriminatory measures e.g. taxes, fines, penalties, licences, permits, visa restrictions; and
- "Umbrella clauses". These clauses incorporate into the BIT, by reference, obligations entered into between a host state and investors in other contracts. An example of an umbrella clause can be found in Article 10 of the China-Iran BIT: *"Either Contracting Party shall guarantee the observance of the commitments it has entered into with respect to investments of investors of the other Contracting Party."* For PRC investors on the BAR, such provisions provide additional protection and assurance, in that host states undertake to honour investment contracts as their international obligations.

How to make use of investment treaties?

Falling under the scope of "Investment": in order to fall within the scope of a particular treaty, the investment needs to fall within the definition of 'investment' under that treaty. Typically, the definition of 'investment' under treaties is broad and non-exhaustive, in the hope of capturing evolving types of investments. The broad definition is often followed by a list of non-exhaustive examples such as tangible and intangible property, capital investments in local ventures (regardless of form through which they are invested), financing obligations, infrastructure contracts. Often, the definition of 'investment' encapsulates not only the primary investment, but also its collateral elements such as loans - which may themselves be considered distinct investments. While treaty definitions of investment are often broad, each treaty may also set out requirements that an investment must comply with in order to be afforded protection under the treaty, for example: compliance with national law.

The definition of investment has been subject to significant arbitral scrutiny. In *Salini v Morocco (ICSID Case No Arb/00/04 (Decision on Jurisdiction, 23 July 2001)*, the tribunal identified five criteria indicative of the existence of an investment under the Washington Convention, namely:

- A substantial commitment or contribution to the state;
- Duration (i.e. a certain degree of longevity);
- Assumption of risk;
- Contribution to economic development; and
- Regularity of profit and return.

Subsequent tribunals have applied these criteria flexibly, giving rise to an ongoing debate as to their status. Nevertheless, it is safer for BAR investors to structure their deals with these criteria in mind so that, if a dispute does arise, they will have a better chance of falling under the scope of "investment". This will allow them to take advantage of the protections afforded by the investment treaty. If investors take these precautions, they have a good chance of success with the ICSID. Statistics show that 72% of those arbitrations which were heard were decided in favour of investors.

Depending on the scope of application of the treaty, it is possible that guaranteed protections in treaties which did not exist at the time of investment may nonetheless apply to those investments. Typically, guaranteed protections survive for a certain period of time after termination of a treaty.

Being a qualified "investor": it is also necessary that investors are viewed as such for the purposes of the treaty. Typically, natural and legal persons must be nationals of a contracting state in order to rely on benefits set out in a treaty, but such persons cannot be nationals of the host state. Often, the question of nationality of the investor is difficult to answer when complex holding structures are used to invest. Under some treaties, place of incorporation is relevant whereas under other treaties, the place from which substantial control of the investments is directed determines who the investor is, and accordingly what is the investor's nationality.

As of 2015, 32% of all ICSID arbitrations failed at the jurisdiction stage, as claimants did not qualify as an "investor" for the purposes of the treaty in question. Given that most PRC investment treaties choose ICSID arbitration, BAR investors need to be aware not only of the existence of BIT/MIT rights but the definitions included under the ICSID convention.

For instance, under Article 25(2) of the ICSID convention, a "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

BIT/MIT planning on the BAR

Know your treaty rights: forewarned is forearmed, and BAR investors should carefully check the BITs and MITs between PRC and the BAR country where an investment is being made and their specific provisions. BAR investors should also check that any treaties are still in force and verify the BAR country's history in dealing with ISDS claims.

For example, although a PRC company seeking to benefit from BAR investment might consider taking advantage of the China-Jordan BIT, which incorporates fair and equitable treatment and no expropriation without due compensation clauses, as of the date of writing that treaty is not in force. BAR investors from Special Administrative Regions, Hong Kong and Macau, should take care to ensure that their residency in a SAR qualifies them as a "national" of the PRC for the purposes of any treaty. Although a Hong Kong investor has already successfully brought a case before ICSID as a PRC "national" on the basis of the China-Peru BIT, some treaties expressly exclude the SAR territories from treaty definitions.

PRC investors need to be aware that they should choose the optimum investment structure at the beginning and engage us at an early stage. It is important to note that an investor may not be able to apply to certain dispute tribunals if the investor tries to structure an investment after a dispute to take advantage of "Treaty Shopping".

Contracting for treaty rights: to the extent possible, drafting of contracts governing the investment should: (i) set out the parties' intention that BAR investors and their investment vehicles are understood to be "nationals" for the purpose of the relevant treaties which apply; (ii) make it clear that the investment itself is agreed to be an "investment" for the purposes of the contract. Similarly, where contracting or dealing directly with BAR governments, ISDS clauses of relevant BITs and MITs should additionally be incorporated into contracts to ensure that the host state is contractually obliged to comply with any specific treaty obligations.

Consider structuring an investment to take advantage of BAR ISDS: BAR investors should consider structuring or restructuring their investments to ensure that they qualify for ISDS protections. When structuring investments, parties ought to give similar weight to considerations regarding ISDS and falling within the scope of investment treaty protections, as they do the usual tax, funding and corporate governance considerations.

Case Study

The Ramifications of failing to structure your investment: The Phillip Morris Case Study

In 2015, Phillip Morris lost a one billion dollar challenge to Australia's plain packaging tobacco legislation, with an international investment treaty arbitration Tribunal dismissing the claim. Phillip Morris' complaint was against Australian laws which banned the sale of branded tobacco products. These laws had the effect of requiring all vendors of tobacco in Australia, including Philip Morris, to sell their products, such as cigarettes, without any of their trademarks. Instead, all tobacco products were required to be sold in plain packages, marked with confronting health warnings. Philip Morris' case was that these laws extinguished its intellectual property rights, and therefore impaired the value of its investment in Australia.

The Tribunal dismissed the claims on the basis that it had no jurisdiction to consider the case. Philip Morris' claim was made pursuant to the BIT between Hong Kong and Australia, which gives Hong Kong incorporated investors, such as Philip Morris, the right to initiate claims directly against the Australian government for breaches of the investment protections in the treaty. The ground upon which the claim was dismissed was a procedural matter, that Philip Morris had no standing to bring its claims under the Hong Kong Australia BIT, as it had only transferred its assets into a Hong Kong incorporated company for the purpose of bringing the claim.

This case is an example of a Tribunal ensuring that only genuine investors, who meet the requirements of the relevant treaty at the time of making their investment, will be afforded the protections of BITs. It should therefore serve as a cautionary tale to BAR investors to consider structuring their project in accordance with BIT/MIT rights from day one.

BAR China BIT Table

BIT Contracting Party	Substantive Protections					Procedural Rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and Security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Albania (1 September 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Armenia (18 March 1995)	Yes*	Yes	Yes	Yes	No	No	No	Expropriation only
Azerbaijan (1 April 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Bahrain (27 April 2000)	Yes*	Yes	Yes	Yes	No	5 months	Yes	Expropriation only
Bangladesh (25 March 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Belarus (14 January 1995)	No	Yes	No	Yes	No	No	No	Expropriation only
Bosnia and Herzegovina (1 January 2005)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Brunei Darussalam (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	No	Yes
Bulgaria (21 August 1994, with additional protocol 10 November 2007)	Yes	Yes	Yes	Yes	No	No	No	Expropriation only
Cambodia (1 February 2000)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Croatia (1 July 1994)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Czech Republic (1 September 2006)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Egypt (1 April 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Expropriation only
Estonia (1 June 1994)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Georgia (1 March 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Hungary (1 April 1993)	Yes	Yes	Yes	Yes	No	No	No	Expropriation only
India (1 August 2007)	Yes	Yes	No	Yes	No	6 months	Yes	Yes
Indonesia (1 April 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Iran (1 July 2005)	Yes	Yes	Yes	No	Yes	6 months	Yes	Yes
Israel (13 January 2009)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
Jordan (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Kazakhstan (13 August 1994)	Yes	Yes	No	Yes	No	No	No	Expropriation only
Kuwait (24 December 1986)	Yes	Yes	No	Yes	Yes	6 months	Yes	Yes
Kyrgyzstan (8 September 1995)	Yes	Yes	Yes	Yes	No	No	No	Expropriation only
Laos (1 June 1993)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Latvia (not in force)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Lebanon (10 July 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Expropriation only
Lithuania (1 June 1994)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes

BIT Contracting Party	Substantive Protections					Procedural Rights		
	Fair and Equitable Treatment (FET)	Expropriation	Protection and Security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
Macedonia (1 November 1997)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Expropriation only
Malaysia (31 March 1990)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Moldova (1 March 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Mongolia (1 November 1993)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Myanmar (21 May 2002)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Yes
Oman (1 August 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Pakistan (30 September 1990)	Yes	Yes	Yes	Yes	No	No	Expropriation only	Expropriation only
Philippines (8 September 1995)	Yes	Yes	Yes	Yes	No	6 months	No	Expropriation only
Poland (8 January 1989)	Yes	Yes	Yes	Yes	No	No	Expropriation only	Expropriation only
Romania (1 September 1995, with additional protocol 1 September 2008)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Russia (1 May 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Saudi Arabia (1 May 1997)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Serbia (13 September 1996)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Expropriation only
Singapore (7 February 1986)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Slovakia (1 December 1992, with additional protocol 25 May 2007)	No	Yes	No	Yes	No	6 months	Yes	Yes
Slovenia (1 January 1995)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Sri Lanka (25 March 1987)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Syrian Arab Republic (1 November 2001)	Yes	Yes	Yes	Yes	No	1 year	Yes	Expropriation only
Tajikistan (20 January 1994)	Yes	Yes	Yes	Yes	No	No	No	Expropriation only
Thailand 13 December 1985)	Yes	Yes	Yes	Yes	Yes	No	Legality of expropriation only	No
Turkey (19 August 1994)	No	Yes	Yes	Yes	Yes	1 year	No	Yes
Turkmenistan (4 June 1994)	Yes	Yes	Yes	Yes	No	No	No	No
Ukraine (29 May 1993)	Yes	Yes	Yes	Yes	No	No	No	Expropriation only
United Arab Emirates (28 September 1994)	Yes	Yes	Yes	Yes	Yes	6 months	Yes	Expropriation only
Uzbekistan (12 April 1994, renewed 1 September 2011)	Yes	Yes	Yes	Yes	No	No	No	Yes
Vietnam (1 September 1993)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only
Yemen (10 April 2002)	Yes	Yes	Yes	Yes	No	6 months	Yes	Expropriation only

Tip 03

CAREFULLY SELECT THE ARBITRATORS

Most BAR dispute resolution clauses will specify the appointment of three arbitrators (though note our cautionary advice earlier). In that case, usually: the claimant will appoint its arbitrator; the respondent will appoint its own (and if it refuses, the administering institution will intervene to appoint); the two arbitrators will then appoint the Chairperson or President.

Working out whom to appoint as your arbitrator is an important strategic consideration. One key to success in arbitration is the composition of the arbitral tribunal. Should lawyers or specialists in the industry be appointed? Should a combination of each be chosen? Is the legal team familiar with the future arbitrators? These are all important issues that need to be considered.

We have found that these considerations will be driven by the strengths and weaknesses of our BAR clients' case or defence. Where a BAR client was seeking to advance a claim which was based on a technical, extra-contractual issue, we suggested that a subject-matter expert, rather than a lawyer, would be advisable in their arbitration.

In another high value BAR arbitration, we managed to secure the appointment of international arbitrators (non-locals) as all three members of the arbitration tribunal, which helped our client to achieve a favourable outcome. Had the local party been minded to appoint local nationals as the arbitrators, we might have had a less favourable arbitral award.

Certain protocols allow lawyers to interview prospective arbitrators before they are appointed, and at a second stage before they select a Chairman. One should bear in mind that those protocols have to be very strictly agreed with the other side and the potential arbitrator. We used that protocol very successfully on another BAR project, where we knew that the local participant would appoint a London QC as their arbitrator, and so we wanted to explore our options with a local engineer.

Tip 04

RECORDS, RECORDS, RECORDS

It is always surprising to us that so many of our clients do not keep daily records of everything that happens on the BAR project. Those records will be needed later, should a dispute stage arise, where the parties disagree as to what happened or did not happen, what was said, what was delivered, what was paid. Some arbitrations have been won or lost on simple aspects, such as one party keeping a detailed daily site diary, and the other not; or on photographs with date stamps, and sometimes videos.

The most helpful records break down into two categories: (1) joint or public documentation; (2) internal documentation.

1. Joint or Public Documentation

BAR participants should devise a number of public or joint documents to record progress and problems on the project. These can include:

A. Regular meetings of all project participants (e.g. weekly meetings), to be minuted in the agreed contract language by the contractor, then agreed (or disagreed upon with typed comments) by all parties, and then signed;

B. Records of deliveries, payments, daily site activities again to be signed off by all parties, or with disagreements to be marked on them by any project participant;

C. Date-stamped photographs, which might be attached to weekly site reports, again ideally to be signed off by all parties, with any disagreements added via typed comments by any party.

D. Correspondence. Sometimes, BAR parties are shy to write letters of complaint or records to the employer. This is a mistake. There are polite ways of recording matters without using harmful words such as "breach" or "damages". However, letters do have to be sent on a daily basis recording problems and making claims. Otherwise, contractors may not be able to prove their case, or worse may lose their right to advance their claims.

Tip 05

FOLLOW VERY CAREFULLY THE CONTRACT REQUIREMENTS FOR NOTICES

2. Internal Documentation

We have already mentioned keeping a very detailed diary, which can be done in handwriting separately by different project participants, for example the project director, project manager, site manager, or particular site agents for particular parts of the site. These can be kept in the language used personally by the diary writer (e.g. Chinese). These diaries are personal: they are often not shown to the other side until the dispute emerges.

Emails are also a very useful source, both publicly and internally. However, it is important to realise that any emails generated during a project will usually be disclosable to the other party and the arbitrators if the dispute formalises. As such, it is important for parties to control what they say in emails, and think very carefully about the content of their emails.

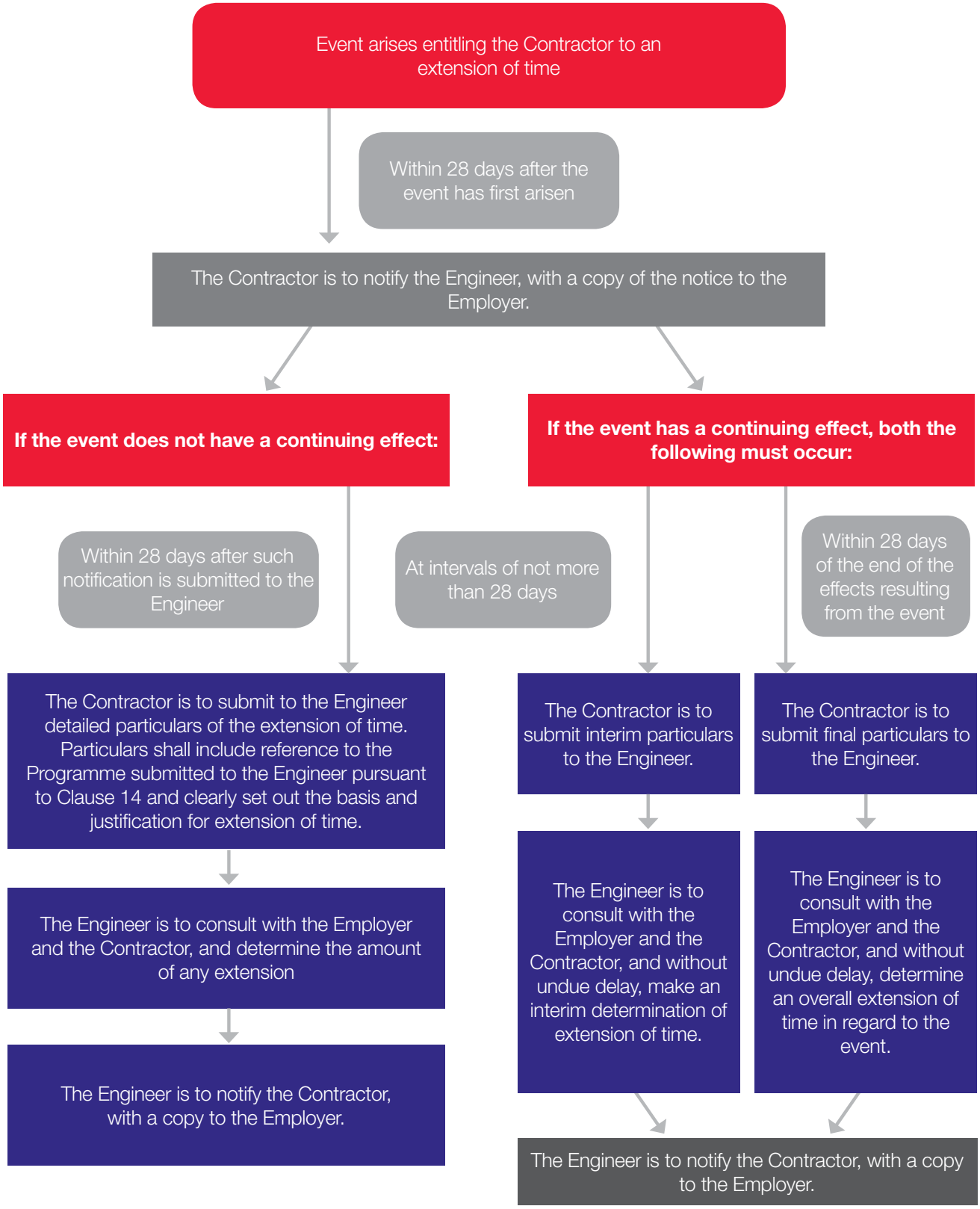
Board minutes at HQ level may be requested and produced in an arbitration, and as such it is important to word board minutes very carefully.

Records with sub-contractors and suppliers are not always public, and will not necessarily be shown to the host participant until the time of the arbitration. This is a difficult set of records to keep, because sometimes the main contractor will, for example, blame the sub-contractor for delays or contract breaches, but in arbitration these complaints can then get shown to the employer. Thus, correspondence and records vis–à–vis the subcontractors have to be worded very carefully.

BAR contracts can be quite complicated with regard to the giving of notices. If contractors miss the giving of notices and do not include within them the detail required by the Contract, they may lose the right to claim. That is why on BAR projects we recommend that we should help you to draw up flowcharts for participants, summarizing what the Contract mandates with regard to the giving of different types of notice. On one of our BAR projects, everyone has our flow charts on their office walls! Here are some examples from previous projects:

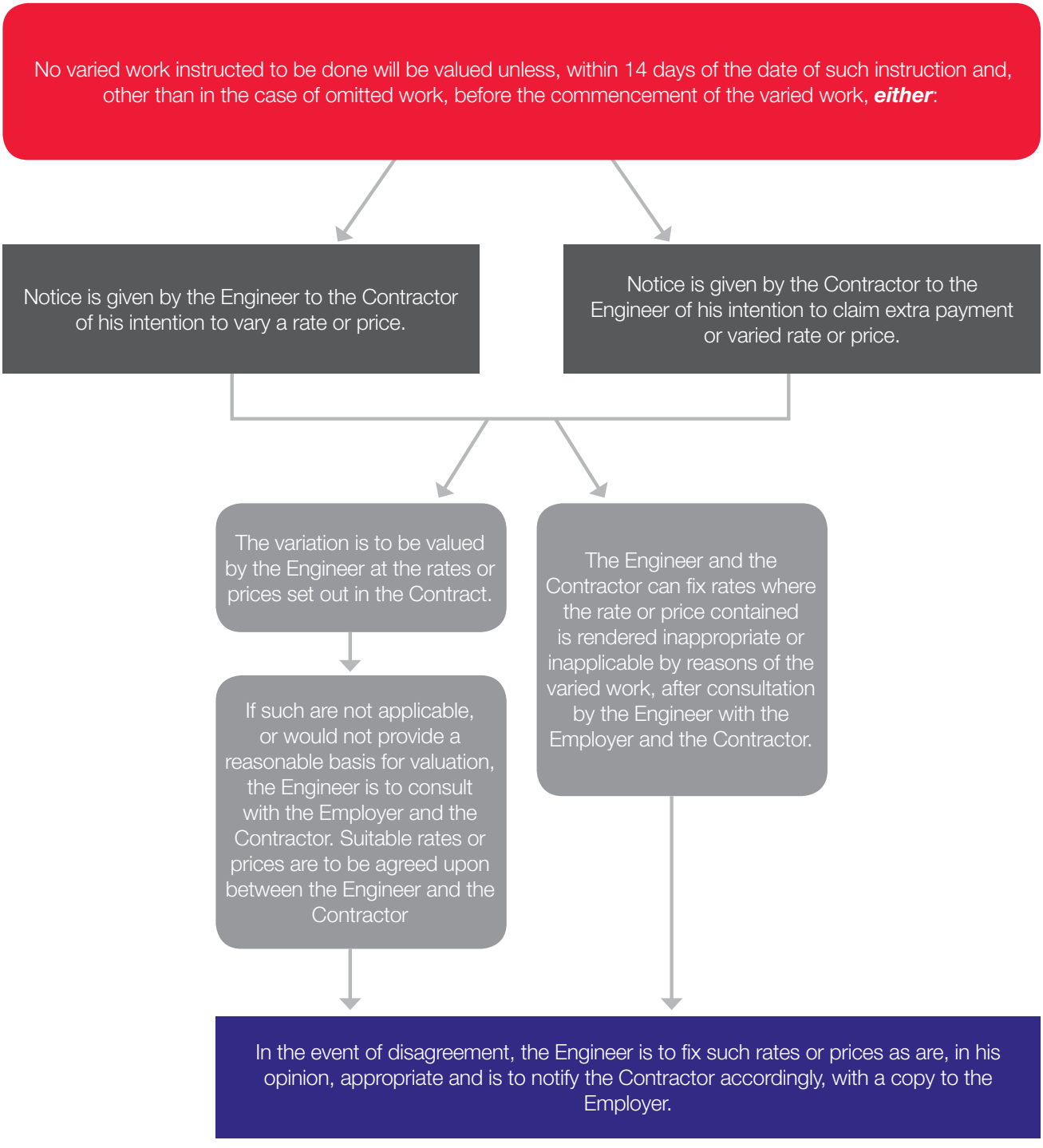
Flow Charts

Extension of Time – Clause 44



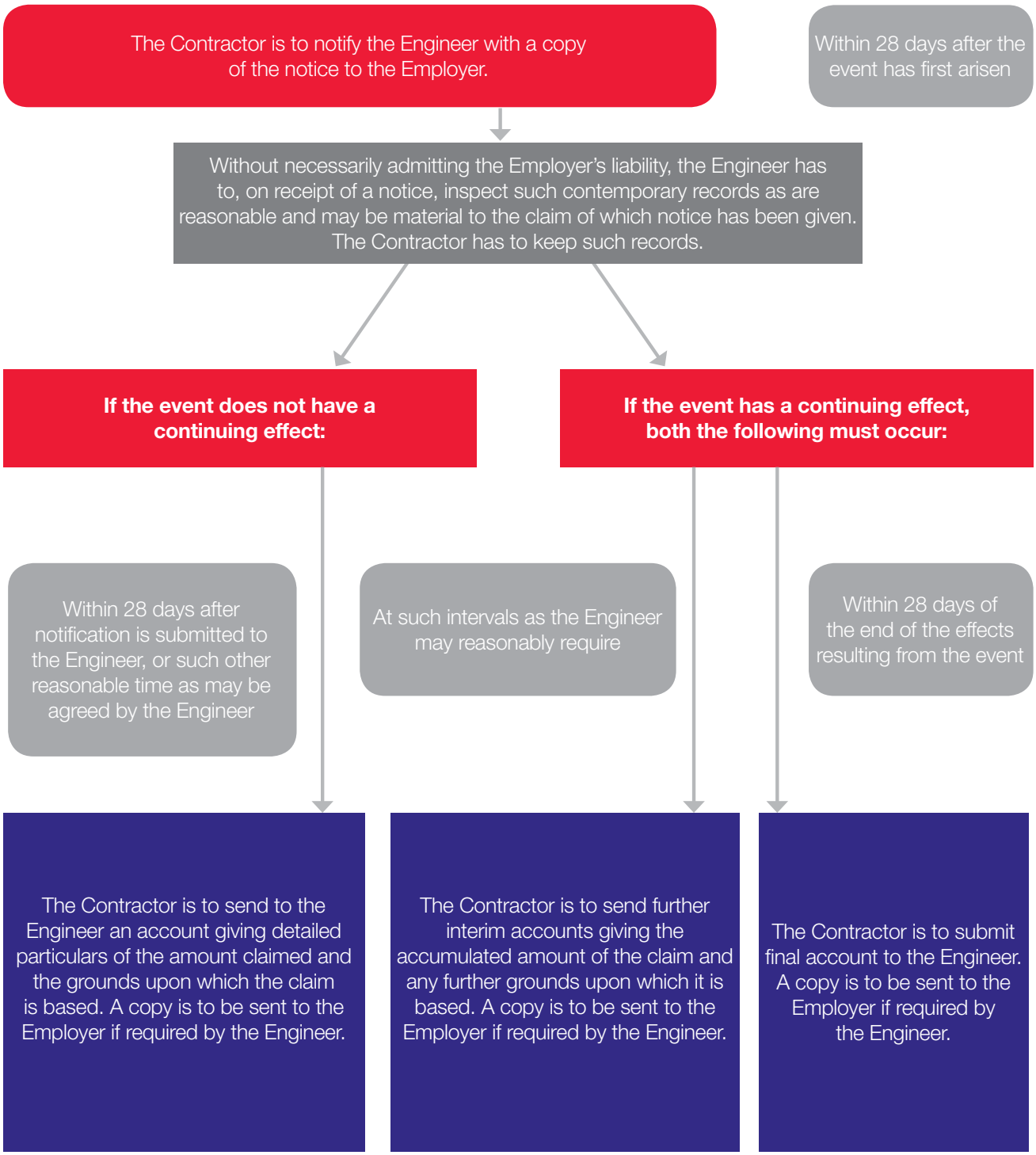
Valuation of Variations

Clause 52



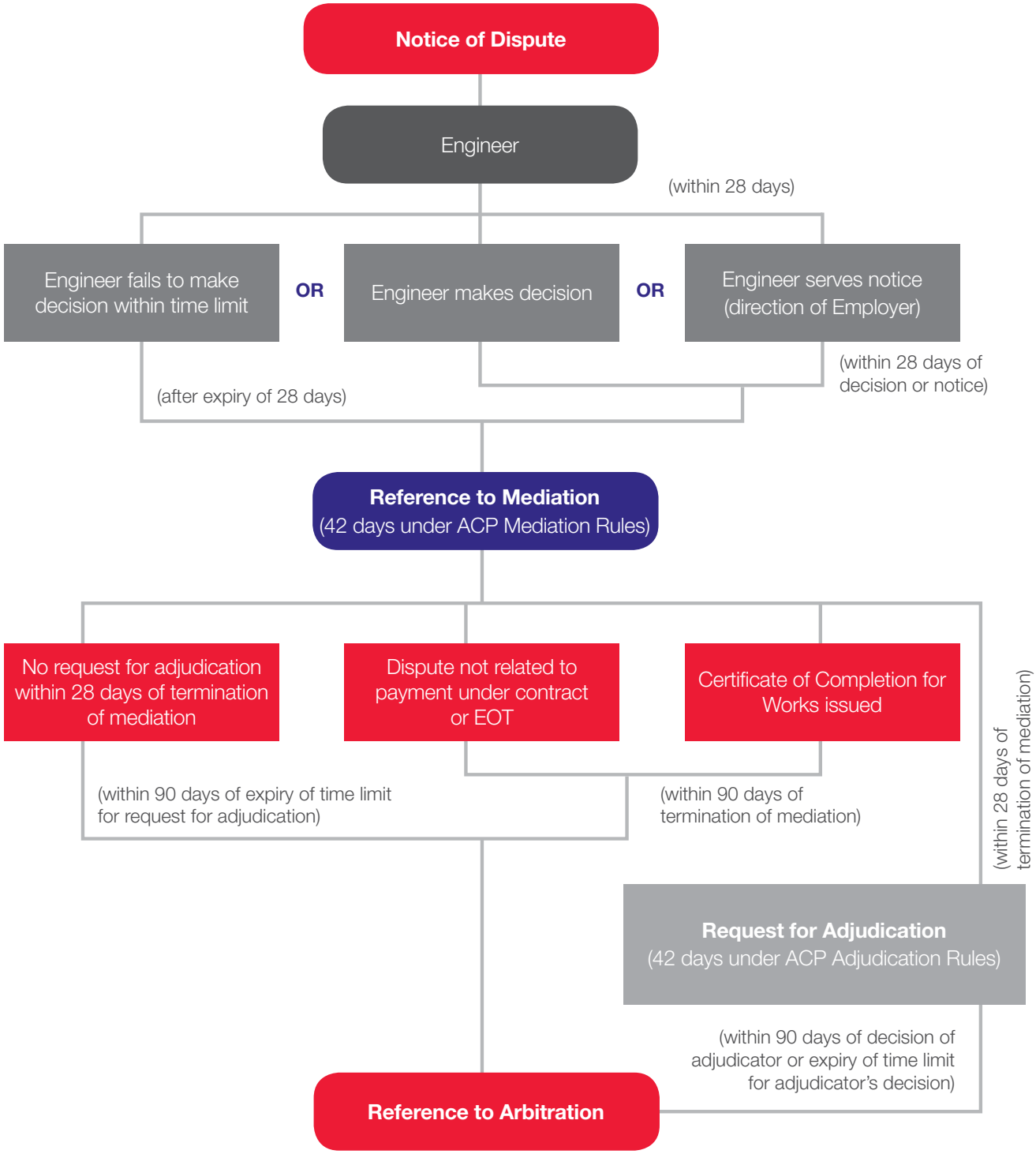
Procedure

Claiming Extra Payment – Clause 53



Flow Chart
Dispute Resolution

Dispute Resolution under Hong Kong Government General Conditions of Contract for ACP (1992 Edition)



Tip 06

DON'T JUST RUSH IMMEDIATELYTO THE LOCAL LAWYERS

One mistake often made on BAR projects is that participants only use local lawyers, with whom they are familiar So, when a dispute arises, they naturally turn to the same local lawyers who have been helping them with tax or employment issues and not disputes. Unfortunately, those local lawyers often do not have the experience to help with an international claim, and, more importantly, with an international commercial or investment treaty arbitration.

Successful resolution of BAR disputes should have as team leader an international law firm, and more importantly an international lawyer familiar with the type of BAR project being undertaken, often an infrastructure project. The team leader should have sufficient experience of international commercial and investment treaty arbitration, sufficient specialist knowledge to handle that arbitration and proper infrastructure experience. The team leader – not the BAR party - should appoint the local law firm. The division of roles should be as follows:

The local law firm will best know how local laws will affect the claims, whether the result will be positive or negative, and the impact of local custom and practice. Furthermore, if it becomes necessary to seek ancillary relief from (or appeal to) the local courts, then that will fall to the local lawyers.

But in primary position, setting all of the strategy and communicating it all to the BAR client, will be the international law firm.

The international lawyer as team leader will settle with BAR participants their dispute resolution strategy and communications, will liaise directly with the local lawyers and the opposition, and will draw up a detailed protocol for the handling of the BAR arbitration. The international law firm will:

- consider carefully the arbitrators' availability (in terms of their ability to devote the time to the pre-hearing stages of the arbitral process, their availability to attend the merits hearing and their capacity to render a timely award) and their expertise for deciding the particular dispute in question;
- recommend a costs protocol be agreed between the parties at the very beginning of the arbitration, with the aim to set out some basic rules relating to costs (such as the costs following the event) so that BAR participants will know where they stand before they embark too far along the process; and
- work with the opponent to appoint a suitable tribunal, usually as we have stated of three arbitrators.

As the arbitration progresses, it will:

- request the arbitrators to convene an early procedural meeting to establish the procedures and timelines of the whole arbitration and in particular, setting the date for the merits hearing (in order to ensure availability of all parties and the tribunal to attend the hearing;
- at the early procedural meeting, address the most appropriate location for the oral hearings in terms of convenience and cost (rather than defaulting to the seat of arbitration);
- explore with the arbitral tribunal and the opponent the possibility of expert teaming, expert conferencing, and adopting the latest version of the IBA Rules on the Taking of Evidence in International Commercial Arbitration;
- request and, if possible, obtain a commitment from the arbitrators at the outset of the proceedings that the award will be issued within a reasonable time after the hearing;
- consider whether it is appropriate for parts of the dispute to be dealt with by a "documents only" process, obviating the expense and delay involved in the conduct of oral hearings;
- encourage consolidation and joinder of parties and disputes where appropriate;
- consider whether a "*fast track*" schedule for the expedited hearing of parts of the dispute is appropriate, where issues in dispute can be dealt with swiftly and/or a prompt resolution of the dispute is of particular importance to the parties; and
- explore the possibility of a determination of preliminary issues that may lead to a quicker resolution of the dispute.

Before the hearing, the international law firm will:

- identify as soon as possible issues in the arbitration that can be taken ahead of the main hearing, the resolution of which would be helpful to settlement and economy;
- try to limit and focus requests for the discovery of documents, and work with the opponent to determine the most effective means of dealing with electronic documents;
- encourage experts to meet in order to identify common views and to pinpoint, with clarity, the points of disagreement; and
- where appropriate, agree to limit the length of written submissions with a view to saving costs.

At the hearing, it will:

- consider dividing time during the oral hearing between the parties on a "chess clock" basis to encourage the parties' counsel to manage time efficiently;
- use video conferencing for non-local witnesses whose testimony is not expected to be lengthy and/or crucial, and considering its use for procedural meetings; and
- avoid the cost and time involved in multiple witnesses testifying about the same facts.

Finally, when should your international lawyer be brought in? Right from the start, long before the dispute happens. All through the project, we can help you write the correct letters, keep the important records and issue the key contract notices that can make or break your claims.

Tip 07

CHOOSING WHEN TO SETTLE YOUR DISPUTES

Some BAR participants worry that proposing a settlement negotiation is a sign of weakness. In fact, taking a hard line in settlement negotiations can undermine any such impression, so attempting settlement should always be considered as one of your options for resolving BAR disputes.

The natural tendency of some clients is to rush in and initiate settlement at the very beginning. In doing so, what they have missed is the importance of settling from a position of strength. We recently handled a huge petrochemical dispute where the client naturally wanted to settle by making the most sweeping concessions very early on in the battle. However, having looked into the merits of the case, we persuaded our own client to hold off and maintain a position of toughness for a period long enough to allow the opponent to see that we were serious in our intentions. So, we started the arbitration. That strategy paid off, in the sense that we settled this huge case early, for an amount above our client's modest expectations and, more importantly, before any hearing had taken place. Timing is therefore everything. Settlement strategy should include:

Proposing formal mediation: an appropriate time should be picked to propose mediation, e.g. at the outset of the case, or after an exchange of submissions has clarified the issues, or after the arbitral tribunal has provided its preliminary views. In choosing a mediator, clients should look for someone with knowledge not only of law but also of the industry and the cultures involved. If you select the right mediator, at the right time, mediation can be useful.

Making settlement offers: where applicable law permits, your international dispute resolution advisers will consider making a "without prejudice save as to costs" settlement offer at an early stage. This will put pressure on the opponent to consider the outcomes of arbitration seriously and protect your legal costs position.

Over the course of the arbitration, you should investigate into your opponents' pressure points, analyse any change in circumstances, and where necessary, make appropriate adjustments to your strategies as the arbitration progresses. It will be useful for the purpose of seeking settlement, to know:

- what the opponent's short and long term business plans are;
- whether there is any restructuring or M&A activities within the opponent's group;
- whether there is a change in management of the opponent; and
- whether the opponents are involved in any further major business disputes or litigation.

Lastly, international lawyers will help you to strategise about the enforcement of international arbitration awards and judgment obtained from foreign litigation.

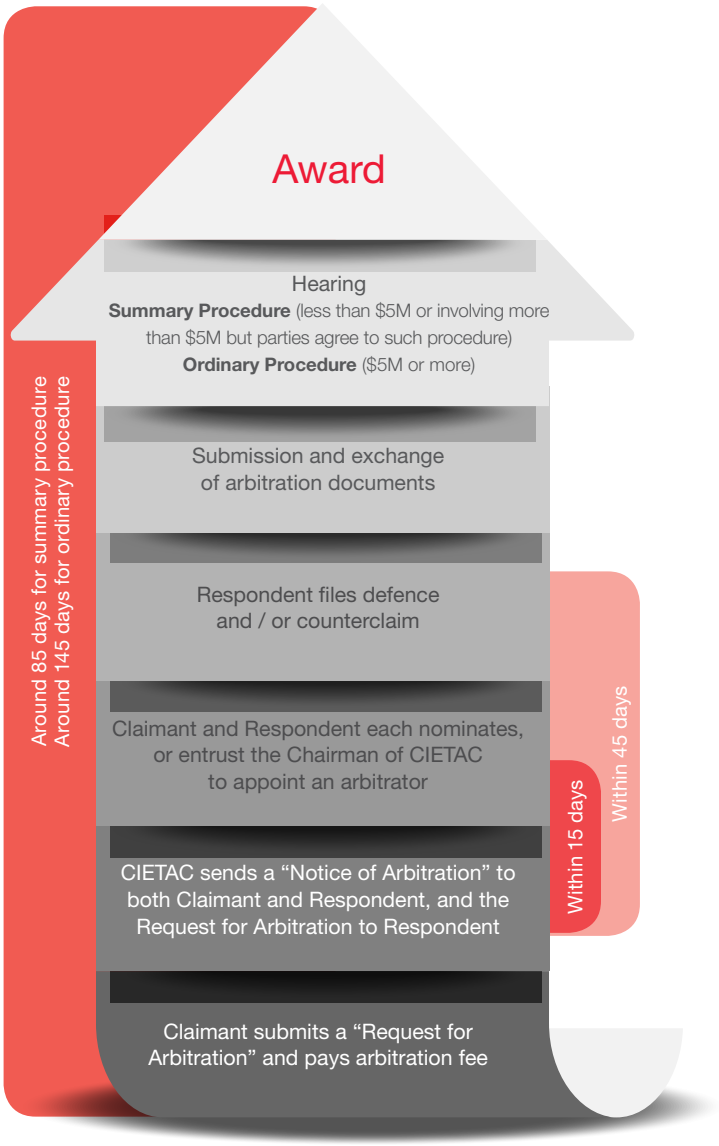
Tip 08

CONSIDER CAREFULLY HOW TO CONDUCT THE ARBITRATION

We have already recommended that an international law firm, specializing in infrastructure, should be the team leader in conducting any BAR arbitration. Conduct of the arbitration will very much depend upon the arbitration rules that have been chosen. For example, the rules of the CIETAC Hong Kong Arbitration Center provide for a quick process:

Other rules have longer procedures that can take between 1 and 2 years.

CIETAC HK



Arbitrations

The handling of these longer arbitrations can be something of a long and winding road.

1. **Arbitration Agreement**
2. **Commencing arbitration**
3. **Emergency Arbitrator**
4. **Appoint arbitral tribunal**
5. **Joineder / Consolidation**
6. **1st hearing for directions**
7. **Pleadings**
8. **2nd hearing for directions**
9. **Discovery**
10. **Lay witness statements**
11. **Expert reports**
12. **Hearing**
13. **Award**
14. **Enforcement**

Each of the following steps should be handled by the international legal adviser as team leader, working in conjunction with the local lawyers.

Tip 09

CONSIDER WHETHER TO TRY MEDIATION

As we have stated, some dispute resolution clauses have a compulsory mediation step before arbitration. But many do not. When a clause is silent about mediation, then it is open for any BAR participant to propose to the other side a mediation at any time. The other side may agree, or it may refuse. The advantage of mediation is that it may help to settle the dispute at a relatively early stage, for relatively low legal costs. The disadvantage is that statistically, parties may end up with a lesser amount by way of mediation settlement than if they had gone to the full arbitration and obtained the arbitrators' award.

Some parties prefer trying mediation, even though they are going to recover less, to preserve business relations, or because they do not want to go through the rigours of a full-scale arbitration.

The question then becomes: if the local BAR participants agree, when should you conduct the mediation? Should it be before the arbitration or during the arbitration? Should the arbitrators (or some of them) become the mediators, or should the mediator be an independent third party, quite separate to the arbitrators and indeed the arbitration? The international legal team leader can advise on all of these aspects. Sometimes it is better to wait until quite some time into the arbitration, to show the complexity and merits of the claims, before proposing mediation. Sometimes it may be expeditious to postpone the arbitration timetable while the mediation goes on, but for other cases it may not, and indeed often the arbitrators are not even informed that a mediation is taking place.

Tip 10

CULTURAL CONSIDERATIONS

In resolving international disputes, it has always been important for clients to understand the cultures of any overseas entities, and the cultural and political context of the chosen seat of arbitration. This is particularly important in BAR disputes, given the divergence of cultural approaches to disputes along the BAR route.

Factors to take into account include:

- the opponent's way of doing business and dealing with disputes;
- the opponent's way of thinking, and the factors affecting their thought;
- the opponent's cultural habit of negotiation; and
- any political or legal risk (such as bureaucratic procedures) that client may encounter locally.

We have a recent example in the Middle East which is particularly relevant to BAR disputes. The PRC client tried to settle a large claim without success. We decided to time some preliminary issues in an arbitration to conclude before Ramadan, the Holy Month (where, similar to Chinese New Year, Arabic entities prefer to conclude settlements). Working with our PRC law firm colleagues, we won five out of six of the preliminary issues. Sure enough, the Dubai entity offered settlement just before Ramadan.

Conclusion

Dispute resolution is a war. It needs careful strategy. The army needs careful composition – international DR advisers with sufficient Chinese culture, language and infrastructure specialism, plus the local lawyers. We hope that our ten tips have provided insight on how issues arising from BAR arbitrations can be dealt with. We hope there will be more PRC-based lawyers rendering high-quality legal services to PRC enterprises expanding their businesses abroad, to provide strong support for the expansion of PRC companies' BAR ventures, and the globalisation of the Chinese economy.

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The Power of Together

About King & Wood Mallesons

When working with clients engaged in Belt and Road projects, we draw on our international strength and resources to offer a truly unique service. Our role is to travel with our clients along the Belt and Road, providing insight and assistance from the very beginning of their project through to the resolution of any unavoidable dispute.

Recognised as one of the world's most innovative law firms, King & Wood Mallesons offers a different perspective to commercial thinking and the client experience. With access to a global platform, a team of over 2000 lawyers in 26 locations around the world, works with clients to help them understand local challenges, navigate through regional complexity, and to find commercial solutions that deliver a competitive advantage for our clients.

As a leading international law firm headquartered in Asia, we help clients to open doors and unlock opportunities as they look to Asian markets to unleash their full potential. Combining an unrivalled depth of expertise and breadth of relationships in our core markets, we are connecting Asia to the world, and the world to Asia.

We take a partnership approach in working with clients, focusing not just on what they want, but how they want it. Always pushing the boundaries of what can be achieved, we are reshaping the legal market and challenging our clients to think differently about what a law firm can be.

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