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Dispute Resolution in International Project Finance Transactions

Christopher Dugué*

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Abstract

This essay discusses how the legal practice in international financial problems has slowly evolved towards a better recognition of international arbitration in the field of project financing. While it is useful to compare the different types of dispute resolution mechanisms that are to be considered by participants for the implementation of their contracts, it is this author's view that international arbitration is the most effective means of resolving international project finance transactions. Indeed, the assessment of the most effective forum cannot dismiss what this author considers as an essential feature of international project financing, i.e., its transactional unity. As a result, international arbitration is the most appropriate mechanism to deal with corollary specificities of international project financing, such as multi-party disputes. The business, and possibly, legal unity of international project finance transactions therefore determines the resolution of the disputes arising with respect to those transactions.

DISPUTE RESOLUTION IN INTERNATIONAL PROJECT FINANCE TRANSACTIONS

*Christophe Dugué**

INTRODUCTION

Most of the legal issues raised in international project financing have been discussed in various studies published on the subject. One angle, however, has been kept in the dark: dispute resolution. The anticipation of disputes and the method of resolving them seem to be perceived by international financiers as a rather automatic and not complex routine consisting of the incorporation of a model dispute resolution clause into the transactions. The reality is quite different. International projects imply many participants. Each participant brings into the project what other participants are lacking: financing ability, political authority, technical know-how, procurement of supplies, human resources, etc. Therefore, setting up a project implies dealing with numerous contracts entered into by various participants from different countries, either bilaterally or multilaterally. Because those contracts are signed in an international context of increased political and credit and exchange-rate risks, the risk of disputes arising between the participants is, in turn, increased. In addition, because of the very intricate nature of project financing, a dispute over one contract may have ramifications for the whole project. For instance, if the project concerns the construction and the management of an infrastructure, a dispute over a loan agreement may negatively impact the project before the infrastructure is completed and may have implications on the implementation of both the construction contract and the management contract. Regrettably, international financiers who negotiate the transactions may overlook the impact of future disputes and focus only on the technical aspects of the deals, at the risk of undermining the effectiveness of the mechanisms they have meticulously set up. The alternative is twofold: either the participants leave it to uncertainty and improvised solutions, which means chaos at the stage of the resolution of the disputes, or they anticipate future disputes and correctly assess

* Partner, Shearman & Sterling, Paris. The author acknowledges the assistance of Yas Banifatemi, Associate, Shearman & Sterling, Paris.

the most effective way of resolving them, which means order as regards the maximized implementation of the relevant agreements. Evidently, project financing participants are concerned with the full effectiveness of their contracts. Therefore, it is expected that, in the alternative between chaos, represented by the lack of dispute resolution mechanisms in those contracts, and order, represented by carefully thought dispute resolution mechanisms, they would select the second option.

When providing for dispute resolution mechanisms, international financiers have a first option between non-binding (mainly, conciliation and mediation) and binding (judicial forums and arbitration[1]) means. Non-binding mechanisms traditionally offer the flexibility that international market participants require while binding mechanisms offer the judicial implementation of the rules set forth in applicable statutory law and in the relevant contracts. Presuming that the parties will choose to resolve their disputes through a binding dispute resolution method,[2] a second option for international financiers is between, on the one hand, the domestic courts of individual states where the parties are located or where the transactions are to be applied and, on the other hand, international fora.

Although international financiers have had a clear preference for domestic courts, practice has slowly evolved towards a better recognition of international arbitration in the field of project financing. While it is useful to compare the different types of dispute resolution mechanisms that are to be considered by participants for the implementation of their contracts,[3] it is this author's view that international arbitration is the most effective means of resolving international project finance transactions. Indeed, the assessment of the most effective forum cannot dismiss what this author considers as an essential feature of international project financing, i.e., its transactional unity. As a result, international arbitration is the most appropriate mechanism to

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1. *See* FOUCHARD GAILLARD GOLDMAN, ON INTERNATIONAL COMMERCIAL ARBITRATION 12 *et seq.* (1999) (regarding arbitrators' judicial role); Philippe Fouchard, *Arbitrage et Modes Alternatifs de Règlement des Litiges du Commerce International*, *in* SOUVERAINETÉ ETATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU 20ÈME SIÈCLE—MÉLANGES EN L'HONNEUR DE PHILIPPE KAHN 95 (2000) (discussing recent developments on the relation between arbitration and alternative dispute resolution).

2. This hypothesis does not include the parties' failure to choose a dispute resolution mechanism. *But see infra* Part II.

3. *See infra* Part II.

deal with corollary specificities of international project financing, such as multi-party disputes. The business and, possibly, legal unity of international project finance transactions therefore determines the resolution of the disputes arising with respect to those transactions.[4]

I. *DISPUTE RESOLUTION IN LIGHT OF THE TRANSACTIONAL UNITY OF INTERNATIONAL PROJECT FINANCING*

International project financing is a method of private financing[5] classically structured in capital-absorbing industries, especially in the fields of energy[6] (e.g., gas, electricity[7]), mining, resort, transportation, or telecommunications.[8] It has been a particularly attractive method of financing industrial projects for developing countries,[9] but is not limited to those countries. Any project with an international side to it—such as the construction of the Eurotunnel in the late eighties[10]—can be suitable for such an arrangement.

The common denominator between all international projects, in spite of their inevitable individuality, is that the participants negotiate multiple and separate contracts that will form a global structure with links, both from a business and a legal

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4. *See infra* Part I.

5. *See generally* PETER NEVITT & FRANK FABOZZI, PROJECT FINANCING (6th ed. 2000); Nagla Nassar, *Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective*, 23 FORDHAM INT'L L.J. 60 (2000); Don Wallace, Jr., *UNCITRAL Consolidated Legislative Recommendations for the Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects: UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects*, 8 TUL. J. INT'L & COMP. L. 283 (2000); Scott L. Hoffman, *A Practical Guide to Transactional Project Finance: Basic Concepts, Risk Identification, and Contractual Considerations*, 45 BUS. LAW. 181 (1989).

6. *See, e.g.*, William M. Stelwagon, *Financing Private Energy Projects in the Third World*, 37 CATH. L. 45 (1996).

7. *See, e.g.*, Didier Lamethe, *Le Financement de Projets et Leur Organisation Industrielle—L'exemple de la Construction et de l'exploitation de Centrales Electriques*, *in* SOUVERAINETÉ ETATIQUE ET MARCHÉS INTERNATIONAUX À LA FIN DU 20ÈME SIÈCLE—MÉLANGES EN L'HONNEUR DE PHILIPPE KAHN 453 (2000).

8. *See, e.g.*, Christopher J. Sozzi, *Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries*, 12 COMPUTER & HIGH TECH. L.J. 435 (1996).

9. *See* Rahail Ali, *Banking on Islamic Finance for Projects*, 195 PROJECT FIN. INT'L 52 (2000) (providing interesting perspective regarding the use of specific Islamic banking techniques in project financing).

10. *See* NEVITT & FABOZZI, *supra* note 5, at 7-8 (providing Eurotunnel case study).

perspective. This transactional unity is an essential factor in understanding the specificity of dispute resolution mechanisms in international project financing.

A. *The Practical View: Negotiating Multiple and Separate Contracts*

The basic structure of project financing consists of the establishment of a project company by a group of "sponsors," who are the shareholders of that company and who therefore participate in equity. In addition to equity, the project's funds originate from the loans contracted by the project company, often in the form of syndicated loans. The project company's debt is said to be non-recourse—i.e., its repayment depends on the cash flow sourcing from the revenue-producing contracts of the project—and the assets of the project company are used as collateral for the debt. In other words, project financing is an alternative arrangement between debt and equity. Therein lies its main advantage: the project company's investors isolate that company from its external environment by transferring economic and political risks to other entities[11] so that all monetary flows generated through the future operation of the company, after the operating expenses have been paid, are first devoted to the repayment of the loans.

Therefore, a multitude of other mechanisms have to be set up to ensure the viability of the project company and its capacity to repay the project debt. Because project finance participants use a contractual framework to achieve such goals, including the transfer of unavoidable risks to third parties and the undertaking of guarantees, the negotiation of an international project finance structure leads to the setting up of an aggregate of multiple, sometimes intertwining, contracts and documents. Those contracts and documents may be divided into two main categories: the underlying documents regarding the project itself and the financing and security documents regarding the strictly financial aspects of the project financing structure. The different types of documentation have been the subject of previous studies[12] and the framework of this Essay hardly allows for a technical

11. *See* Christophe Dugué, *Risk Control and International Finance Arbitration*, *in* ICC BULLETIN, SPECIAL SUPPLEMENT, ARBITRATION, FINANCE AND INSURANCE 15 (2000). *See generally* Dana H. Freyer, *Practical Considerations in Drafting Dispute Resolution Provisions in International Commercial Contracts—A U.S. Perspective*, 15 J. INT'L ARB. 7 (1998).

12. *See* NEVITT & FABOZZI, *supra* note 5.

and exhaustive description. We will simply enumerate a number of relevant agreements in order to point out to one of the main characteristics of project financing relevant to dispute resolution, i.e., its global nature both as an industrial and business project and as a contractual structure.

1. The Underlying Documents

The corporate structure of the project company, which will be the borrower in the international loan agreements, may be determined by a preliminary series of agreements between the sponsors, instituting either a single corporate subsidiary of the shareholders or a joint venture in the form of a partnership between multiple sponsors.

Depending on the type of project, the participants then negotiate a series of contracts in relation to the construction and the operation of the project company, such as site lease, sales contracts, supply contracts, construction contracts and sub-contracts, technology or license agreements, and administrative agreements and documents (environmental consents, concession agreements, or documents regarding title to land, etc.). There are yet other agreements to be concluded regarding the management of the project.

2. The Financing and Supporting Documents

The heart of international project financing is the loan structure. The negotiation of loan agreements needs to take into consideration many important issues, in particular the limitations on recourse to the sponsors, the future application of cash flows, protective clauses (market disruption, political risks, expropriation guarantees, and stabilization clauses), events of default, or assignment and transfer provisions.

The main financing agreements may be completed by security and support documents, such as intercreditor agreements, completion guarantee and other guarantees and comfort letters, insurance coverage, or security documents. They also may be completed by financial instruments, such as swaps or credit derivatives, aimed at controlling external economic risks beyond the control of the participants that are allocated to third par-

ties.[13]

The structure of project financing also allows, depending on the project, for other types of agreements regarding the intervention of export credit agencies or a funding by international financial institutions, such as the International Finance Corporation ("IFC"), an affiliate of the World Bank, which participates in the financing of projects in developing countries that would otherwise not be financed.[14]

B. *The Legal View: The Unity of Transactional Documents*

It is international financiers' common knowledge that setting up a project financing structure involves negotiating the above-mentioned contracts and documents. It also is common knowledge that there are two levels to each type of project financing contract or document: a loan agreement and a sales agreement or a construction sub-contract. Each agreement is concluded between different parties and has a different purpose. Therefore, they each have a separate economic and legal philosophy. At a more global level, that of the project financing structure as a whole, however, each transaction contributes to the general purpose of the project: the economic viability of the project company and its capacity to make profits and to repay its loans.

The global nature of international project financing is essential in understanding the originality of the mechanism. There are no general negotiations to enter into a single contract, but a series of contracts, which, once entered into, will define the global structure of the project. Therefore, it appears imperative to this author that the participants recognize the concept of unity with respect to the resolution of their disputes and reflect this unity in their future transactions. Any failure to do so would dissolve the transactional unity of the structure and jeopardize the project's viability.

In practice, international project finance participants need to thoroughly examine the connections and interactions be-

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13. *See generally* CREDIT DERIVATIVES: LAW, REGULATION AND ACCOUNTING ISSUES (Alastair Hudson ed., 1999); Christophe Dugué, *Arbitration of Disputes arising from Derivative Financial Instruments and Transactions*, 10 RIVISTA DELL'ARB. 1 (2000); Dugué, *supra* note 11 (using a purely risk perspective).

14. *See, e.g.*, Mark Augenblick & Delissa A. Ridgway, *Dispute Resolution in World Financial Institutions*, 10 J. INT'L ARB. 73 (1993).

tween the agreements involved in the global structure. For instance, they should assess the implications, in terms of implementation and dispute resolution, of the difference between, on the one hand, a set of disparate contracts and, on the other hand, a hierarchical contractual structure between a framework or master agreement and subsidiary agreements.

In addition, international project finance participants need to assess, among all types of risks, the legal risk associated with an erroneous determination of the competent court that will resolve future disputes. Given the transactional unity of project financing, the non-application or the defective application of a given contract may have an economic, as well as a legal, impact on other contracts or mechanisms and, eventually, on the project as a whole.[15] For example, in a project regarding the construction, maintenance, and operation of a petroleum facilities in country A, the scheduling clauses in the construction contract are fundamental to the implementation of a petroleum sales agreement entered into between the project company (in country A) and the purchasing corporation (in country B). Obviously, project financing allows for contractual mechanisms aimed at ensuring the timely completion of the construction phase, such as completion guarantee provisions or documents, liquidated damages provisions in the construction contract, or a fixed-price turnkey contract. The mere existence of these mechanisms, however, does not preclude the occurrence of disputes regarding their enforcement. A dispute regarding the failure to comply with the completion date on the part of the construction contractor may have a consequence on the implementation of the sales agreement and the applicability of the dispute resolution clause in that agreement. In this example, the effective resolution of the overall dispute depends on two elements to be considered by the parties: (1) choosing the appropriate court to resolve the dispute between the project company and the construction contractor and (2) anticipating the likely connections and the possible differences in approach by the competent

15. Lamethe arrived at similar conclusions. *See* Lamethe, *supra* note 7, at 456 ("Le concept de 'pur' signifie aussi bien l'absence de recours aménagés que la renonciation des banques à recours contre les investisseurs."). "Cela suppose de la part du consortium bancaire une analyse approfondie de la *structuration contractuelle au sens large: organisation des liens contractuels, contenu de chaque lien contractuel par rapport aux autres,* équilibre entre les principaux risques." *Id.* (emphasis added).

courts regarding the dispute between the construction agreement (the competent courts being, for instance, the courts of Country A where the project company has its seat) and the dispute regarding the sales agreement (the competent courts being, for instance, the courts of Country B, where the purchasing corporation has its seat).

This simple example shows that dispute resolution in international project financing requires that the participants have an accurate understanding of the project as a whole in order to draft an appropriate dispute resolution clause in their contracts. Such an approach is consistent with the philosophy of project financing and constitutes an effective guarantee against the uncertainty of the outcome.

II. *THE DIFFERENT TYPES OF DISPUTE RESOLUTION MECHANISMS IN INTERNATIONAL PROJECT FINANCING TRANSACTIONS*

There are mainly two types of forums open to the parties to an international contract: domestic courts and international arbitral tribunals. In this regard, international project finance transactions are no exception to the rule.

When negotiating their contracts, the first danger that international financiers should avoid is the failure to draft a dispute resolution clause and, therefore, the failure to select a forum. In such a case, once the dispute has arisen, it can be resolved through a binding method, either by the application of conflict rules of private international law referring the dispute to the competent domestic court or by the signature of an arbitration agreement. The parties could, however, find their dispute brought in an undesirable forum and be confronted with an uncertain outcome. In reality, international project financing participants and their counsels are sophisticated enough to understand the necessity of drafting the most favorable dispute resolution clause. The practical difficulty to which they are confronted relates, rather, to the choice between domestic courts and international arbitration.[16]

16. *See, e.g.*, Norbert Horn, *The Development of Arbitration in International Financial Transactions*, 16 ARB. INT'L 279 (2000); NATHALIE COIPEL-CORDONNIER, LES CONVENTIONS D'ARBITRAGE ET D'ÉLECTION DE FOR EN DROIT INTERNATIONAL PRIVÉ (1999) (providing theoretical private international law perspective).

A. *Recourse to Domestic Courts*

The parties to the different agreements in international project financing can be located in different countries. The jurisdictional corollary is that the parties tend to choose domestic courts for the resolution of their future disputes, in particular the courts of their seat or place of business, perceived as the most favorable forum. Therefore, considering the complex general structure of intertwining agreements, the forum selection clause in individual contracts could refer to the courts of the seat of any of the contracting parties: the courts of the seat of the bank or the leading bank in a syndicated loan, the courts of the seat of the sponsor or the sponsors, the courts of the seat of the project company, etc. The parties may also select the courts of another party because of the legal advantages attached to the possibility of obtaining discovery or to the future enforcement of a judgment in that country. The jurisdiction of domestic courts is reinforced in project financing by the fact that some of the underlying agreements are governed by local laws. As a result, the jurisdictional risk in the implementation of project finance transactions is twofold: the selection of an unfavorable forum and the fragmentation of the resolution of multi-party disputes into as many fora as the number of agreements involved, along with parallel proceedings.

As far as the risk of selecting an unfavorable forum is concerned, the parties to project finance transactions are often sophisticated and know the risk of having their future disputes resolved by a local court, the court of the seat of the project company for instance, which may not be familiar with the complex issues involved in the transactions. Such risk is enhanced by possible difficulties regarding the enforcement of the judgment eventually rendered in a different country. Practice, however, has developed the trend towards the selection of U.S. or English courts (in particular the courts of New York), mainly because of the parties' relation with financial centers in New York or London and the applicability of New York or English law to the agreement under consideration (especially to loan agreements, where there is a stronger protection of the rights of the creditors).[17] An exception to the removal by the parties of their con-

17. *See* Marcus C. Boeglin, *The Use of Arbitration Clauses in the Field of Banking and*

tractual relationship from the reach of the local courts is the applicability of exclusive jurisdictional rules,[18] in particular as regards disputes related to stock exchange laws, bankruptcy laws, revenue-related taxation issues, labor issues, real estate issues, or license agreements.[19]

As far as the risk of the fragmentation of the dispute resolution process is concerned, project financing participants may have a lesser degree of awareness regarding the possible relations between disputes arising in different agreements and submitted to different domestic courts. It is thus essential for international financiers at the drafting stage to have a good understanding of the general structure of the project and to be attentive to the dispute resolution clauses of the most important transactions—those that have an impact on the implementation of the agreement under consideration. They could combine either compatible forum selection clauses or forum selection clauses with international arbitration clauses. They could also

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Finance: Current Status and Preliminary Conclusion, 15 J. INT'L ARB. 19 (1998) (relying on the nature of underlying financial or bank-related business).

18. *See* EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968 (Full Faith & Credit Convention), Sept. 27, 1968, art. 16, at http://www.jus.uio.no/lm/ec.jurisdiction.enforcement.judgements.civil.commercial.matters.convention.brussels.1968/toc.html (regarding enforcement in European Communities States). The matters concerned with exclusive jurisdiction are those that concern immovable property; the validity of the constitution; the nullity or the dissolution of companies; the validity of entries in pubic registers; and the registration or validity of patents, trade marks, and designs. *Id.*

19. The same is true, with some nuances, for international arbitration, but the issue is expressed in terms of the arbitrability of claims under public policy rules. In the particular case of arbitration, it should be noted that the compulsory jurisdiction of domestic courts is to be distinguished from the application, by an arbitral tribunal, of public policy rules, since some public policy issues have been considered as being arbitrable, such as tax issues (through the applicability of stabilization clauses, for instance) or antitrust issues; regarding the acceptance by U.S. courts of the arbitrability of U.S. antitrust issues. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 437 U.S. 614 (1985). *See generally* JEAN-BAPTISTE RACINE, L'ARBITRAGE COMMERCIAL INTERNATIONAL ET L'ORDRE PUBLIC (1999) (providing general study of public policy in arbitration). Therefore, it is admitted that international arbitral tribunals, contrary to domestic courts other than the exclusively competent courts, have the authority to apply the substantive public policy rules of an applicable domestic law. To that extent, international arbitration is a more attractive option for international operators in comparison with domestic courts, all the more that there exists a legal protection for the correct application of domestic public policy rules: at the enforcement stage, the exclusively competent courts can refuse the enforcement of an award contrary to those rules, in accordance with Article V.2.(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 9 U.S.C. 201.

aim to better control the whole dispute resolution mechanism by selecting international arbitration. Contrary to arbitral tribunals whose jurisdiction may be strictly defined by the parties, domestic courts may, once their jurisdiction has been established over the dispute and the parties, rule without particular limitations over all types of issues involved.

B. *Recourse to International Arbitration*

In avoiding the proliferation and dissipation of their potential future disputes, project financing participants have slowly evolved towards international arbitration as a truly neutral alternative to domestic courts. Such an evolution can be explained, as in other fields, by multiple factors relating, in particular, to the extent of the authority conferred to arbitral tribunals or to the enforcement of arbitral awards. The past reluctance of many international operators due to the arbitral tribunals' lack of authority to order provisional measures has been swept away by the adoption by the major arbitration institutions of rules allowing for such measures.[20] Additionally, arbitration clauses are enforced in domestic courts more easily and more successfully than forum selection clauses. First, the application of doctrines such as forum non conveniens in certain countries may be an obstacle to the effective application of a forum selection clause. Second, and most importantly, the adoption of international treaties concerning the enforcement of arbitral awards such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[21] ("1958 New York Convention") or the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[22] ("1968 Brussels Con-

20. *See* International Chamber of Commerce ("ICC"), Rules of Arbitration, art. 23, at http://www.iccwbo.org/court/english/arbitration/rules.asp [hereinafter ICC Rules]; London Court of International Arbitration Rules ("LCIA"), art. 25, at http://www.lcia-arbitration.com/lcia/usergyde/usergyde.htm#21 [hereinafter LCIA Rules]; International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings ("ICSID"), art. 39, at http://www.worldbank.org/icsid/basicdoc/63.htm [hereinafter ICSID Rules]; *see also* United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, art. 39, at http://www.uncitral.org/en-index.htm [hereinafter UNCITRAL Rules] (regarding ad hoc arbitration).

21. *See supra* note 19.

22. *See supra* note 18.

vention"), as well as pro-arbitration legislations,[23] have largely favored the arbitral mechanism.

This general trend towards arbitration has indisputably been reinforced by the fact that even when an arbitral tribunal is set up, domestic courts may remain competent:[24] they may assist the arbitration process, either upstream by compelling a reluctant party to arbitrate or by ordering interim measures, or downstream by enforcing interim measures or a final arbitral award ordered by an arbitral tribunal.[25]

In the context of international project financing, one of the main advantages of international arbitration lies in its flexibility as regards to the resolution of multi-party disputes.[26] It is therefore important for project participants to efficiently draft their arbitration clauses.[27]

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23. In addition to traditional examples of laws favoring arbitration—such as the laws in France (Articles 1442 to 1507 of the French New Code of Civil Procedure), Switzerland (Chapter 12 of the Swiss Private International Law Act), England (1996 Arbitration Act), or the United States (United States Arbitration Act)—many developing countries have also adopted pro-arbitration statutes. *See* GOLDMAN, *supra* note 1, at 87 *et seq.*; TURK. CONST. art. 125 (providing recent example of constitutional amendment reflecting pro-arbitration view). The new Article 125 of the Turkish Constitution states:

> Recourse to judicial review shall be available against all actions and acts of the administration. National or international arbitration may be suggested to settle the disagreements that arise from conditions and contracts under which concessions are granted concerning public services. International arbitration can only be applied in the case of the disagreements which involve foreign components.

Id.; *see also* Gamze Öz & Mehtap Yildirim-Öztürk, *Turkey's Attempt for a Stable Liberalized Energy Market*, 196 PROJECT FIN. INT'L 77 (2000) (analyzing Law No. 4501, which has implemented the Turkish constitutional amendment).

24. *See, e.g.*, WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 105 *et seq.* (1995) (discussing possible combination of litigation and arbitration).

25. *See, e.g.*, Richard H. Kreindler, *Supervision and Support of Arbitration by Courts: A Comparative Approach*, 7 INT'L ARB. REP. 14 (1992). However, some jurisdictions are hostile to arbitration and the courts in those jurisdiction, if called upon to intervene, may obstruct the arbitral process; international financiers should therefore avoid locating the seat of the arbitration in such jurisdictions and turn to other pro-arbitration jurisdictions. *See* Emmanuel Gaillard, *Interference of National Courts in the International Arbitral Process*, N.Y.L.J., Jan. 29, 2001, at 3 (providing recent examples) [hereinafter Emmanuel Gaillard, Interference of National Courts].

26. *See supra* Part I.

27. *See supra* Part II.

1. Transactional Unity of International Project Financing and Multi-party Disputes

Because of the transactional unity of project financing, even the most simple contractual structure includes a network of various interrelated agreements between different parties: a first agreement between the sponsors (in the form of a shareholders' agreement, a joint venture agreement, or a consortium agreement) may be completed by agreements among financiers, agreements among financiers and sponsors, agreements among sponsors and the project company, and insurance agreements and guarantees, not mentioning the various agreements the project company will have to enter into as regards the building and the operation of the project. The global, multi-contractual, multi-party aspect of the transactions may, in cases of difficulty, call for multi-party disputes. Simply put, two different types of multi-party disputes may arise.[28] In a first situation, a dispute may arise between multiple parties to a single multilateral agreement (a consortium agreement for instance) containing a single arbitration clause; in a second situation, a dispute may arise between different parties to multiple bilateral agreements containing different arbitration clauses.

In such cases, there may be a question as to whether arbitration is the most effective dispute resolution mechanism or whether the incorporation of multiple domestic jurisdictional clauses is sufficient or preferable.[29] However, practice shows

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28. *See, e.g.*, Jean-Louis Delvolvé, *Final Report on Multi-Party Arbitrations*, 6 ICC BULLETIN 1, at 26 (discussing multi-party arbitration); Bernard Hanotiau, *Complex—Multicontract-Multiparty—Arbitrations*, 14 ARB. INT'L 369 (1998); *see also* Philippe Leboulanger, *Multi-Contract Arbitration*, 13 J. INT'L ARB. 43 (1996); Fritz Nicklisch, *Infrastructure Projects: Interlinked Contracts and Interlinked Arbitration?*, 27 INT'L. BUS. LAW. 212 (1999); Karl-Heinz Böckstiegel, *Practical Problems in Resolving Disputes in an International Construction and Infrastructure Project*, 27 INT'L BUS. LAW. 196 (1999).

29. *See, e.g.*, Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 69-70 (2000).

> Arbitration agreements in multi-party or multi-contract transactions are seldom straightforward. Drafting an arbitration agreement that binds all relevant parties in a complex (or not-so-complex) transaction can require considerable foresight and drafting skills. In some cases, parties to related transactions will refuse to agree to multi-party arbitration. In other cases, institutional arbitration rules will be ill-suited to a complex dispute. Despite these obstacles, it is generally possible, with a measure of effort, to draft arbitration agreements for even complex multi-party, multi-contract transactions. Nonetheless, it is often easier in such cases to rely on the jurisdictional authority of national courts. In many states, national law readily permits the exercise

that domestic courts may be ill equipped for the resolution of complex international project financing disputes. First, the very existence of multiple contracts possibly drafted in different languages and governed by different laws makes it legally challenging and practically arduous for the same domestic court to be competent over all disputes arising out of those contracts. In practice, different domestic courts, depending on the application of the relevant forum selection clauses, will have jurisdiction over different disputes, which creates the dissipation and the overlapping jurisdiction of multiple domestic courts. In addition, the challenge of obtaining the enforcement of multiple judgments obtained in different jurisdictions makes it even more difficult for the parties to achieve satisfactory results. Secondly, supposing that the same domestic court may consolidate all disputes into a single action, the practical result for the parties may be the proliferation of cross-claims, the introduction of third parties and other procedural challenges, at the risk of a lengthy procedure and a not-so-satisfactory result. In both cases, whether there is a consolidation of disputes before domestic courts or parallel national proceedings, the dispute resolution process is hardly harmonized, neither on a procedural nor on a substantive level.

To the contrary, international arbitration offers a more effective dispute resolution mechanism in case of multi-party disputes. Where, for instance, a contractual structure including a master agreement and subsidiary agreements exists, an arbitral tribunal that has jurisdiction over the master agreement may also have jurisdiction, on the basis of the theory of unified transaction, over the subsidiary agreements,[30] whereas a competent domestic court may not have jurisdiction over those agreements. A procedural difficulty may arise as to the tribunal's jurisdiction over the parties to subsidiary agreements, if they are different

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of jurisdiction over all related parties in a complex transaction. A forum selection clause may possess advantages in these circumstances over an arbitration agreement.

Id.

30. The tests required to establish the legal unity of the transactions may consist in cross-references contained in the agreements or express provisions in the master agreement requiring further partial agreements for the purpose of securing its implementation. *See* Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123 (1980) (providing example of unified transaction in ICSID context).

from the parties to the master agreement. As a general rule, however, since international arbitration is based on the parties' consent, multi-party arbitrations are initiated with the consent of the parties and to the extent allowed for by the arbitration clauses or the arbitration rules of major international arbitration institutions such as the International Chamber of Commerce ("ICC") in Paris. Regarding multi-party disputes, the issue of jurisdiction is thus resolved differently depending on whether an arbitral tribunal or a domestic court has jurisdiction over the master agreement.

Therefore, to fully benefit from the advantages offered by international arbitration, the project participants may wish to consider incorporating multi-party arbitration into the dispute resolution clause of their contracts. When drafting such clause, the participants could reflect on the three following features. Firstly, the clause should allow for equality among all parties in the appointment of the arbitrators.[31] Secondly, depending on the contractual structure of the project, the dispute resolution clause of an agreement could incorporate the parties' consent to the participation of third parties (i.e., the parties to related contracts) to future arbitration proceedings. Finally, a dispute resolution clause could provide for the consolidation of possible parallel arbitration proceedings. Although multi-party arbitration implies complex proceedings and considering that such complexity is far more significant if dispute settlement is left to disparate domestic courts, the parties' control over the resolution of their disputes is better secured if they are able to anticipate and plan for the joinder of multiple related proceedings. In any case, even if the participants do not wish to be too specific in the drafting of their dispute resolution clauses, choosing the same international arbitral institution, the same selection process for the arbitrators, the same seat of arbitration, the same procedural

31. *See, e.g.*, ICC Rules, *supra* note 20, art. 10 (regarding multi-party arbitrations and multiple parties, rules provide for nomination of arbitrators by multiple claimants jointly or by multiple respondents jointly); *see also* LCIA Rules, *supra* note 20, art. 8. For an analysis of the ICC rules before their amendment in 1998, see the famous *Dutco* decision of the Paris Court of Appeals, May 5, 1989, B.K.M.I. Industrieanlagen GmbH v. Dutco Construction Co. Ltd., 1989 REV. ARB. 723 (for an English translation, see XV Y.B. COM. ARB. 124 (1990)), reversed by the French *Cour de Cassation*, Jan. 7, 1992, B.K.M.I. v. Dutco, 1992 REV. ARB. 470 (for an English translation, see XVIII Y.B. COM. ARB. 140 (1993)); *see also* Eric A. Schwartz, *Multi-Party Arbitration and the ICC—In the Wake of Dutco*, 10 J. INT'L ARB. 5 (1993); GOLDMAN, *supra* note 1, at 468 *et seq.*

rules are further safeguards for a homogeneous and consistent resolution of project financing participants' complex disputes.

In choosing arbitration and, possibly, allowing for multi-party arbitration, the participants may prevent the dissipation of their disputes, the overlapping jurisdiction of various domestic courts, and the consolidation of multiple disputes before an unfavorable court. International arbitration, therefore, allows for a harmonized, consistent, less uncertain, and less expensive outcome in case of multi-party disputes. In addition, the finality of arbitral awards and their better enforcement, as compared to the difficulties encountered in the enforcement of domestic judgments, makes international arbitration a trustworthy alternative to domestic courts.

2. Drafting an Effective Arbitration Clause

The recognition of international arbitration as an effective dispute resolution mechanism in project financing being a reality,[32] the efforts of both project financing participants and their counsels should be focused on drafting the most effective international arbitration clause[33] rather than making international financiers' belief on the usefulness of arbitration a focal point.[34]

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32. *Cf.* UNCITRAL, *Consolidated Legislative Recommendations on Privately Financed Infrastructure Projects*, U.N. Doc. A/CN.9/471/Add.9 (1999). Recommendation 68 concerning the settlement of disputes reads as follows: "The contracting authority should be free to agree to dispute settlement mechanisms regarded by the parties as suited to the needs of the project, including arbitration." *Id.*

33. *See, e.g.*, Emmanuel Gaillard, *The Economic Value of an Arbitration Clause*, N.Y.L.J., Oct. 7, 1999, at 3.

> The most carefully negotiated contractual provisions will, indeed, prove worthless if disputes to which they give rise cannot be brought before a body empowered to resolve such disputes, or if an arbitral award recognizing the rights of the private party is subsequently set aside by the national courts of the other party to the dispute. Thus, the primary question to be asked with regard to an international agreement is not that of the parties' substantive obligations, or that of the law governing such obligations, but that of *who* shall determine the parties' compliance or non-compliance therewith.

Id.

34. *See, e.g.*, Carsten T. Ebenroth & Thomas J. Dillon, Jr., *Arbitration Clauses in International Financial Agreements—Circumventing the Act of State Doctrine*, 10 J. INT'L. ARB. 5, 20 (1993) (stating that "there is general agreement among scholars that arbitration clauses are not suitable for inclusion in international loan agreements"). This view is in contrast to the current general trend in favor of arbitration expressed by both scholars and, growingly, practitioners. *See* Philippe Marini, *Arbitrage, Médiation et Marchés Financiers*, REVUE DE JURISPRUDENCE COMMERCIALE 155 (2000); Marcus C. Boeglin, *The Use of Arbitration Clauses in the Field of Banking and Finance: Current Status and Preliminary Conclu-*

In particular, international financiers should become familiar with pathological clauses,[35] i.e., the most common drafting defects likely to jeopardize the effective operation of an arbitration clause.

The negotiation and drafting of an arbitration clause should take into consideration many features including, classically, the seat of arbitration, the modalities of the nomination of the arbitrators, and the choice between ad hoc or institutional arbitration. Firstly, in project financing as in any other field, it is essential for the parties to choose a seat where both national legislation and judicial tradition favor arbitration. Secondly, international financiers should take the opportunity offered by international arbitration to select specialized arbitrators, especially with regard to the technicality and complexity of project financing. Finally, it is important that the parties to project financing transactions are aware of the experience of arbitral institutions, such as the ICC, the London Court of International Arbitration ("LCIA"), or the International Centre for the Settlement of Investment Disputes in Washington, D.C. ("ICSID"), and draft their arbitration clauses accordingly.

As far as the enforcement of the award is concerned, it is important for international financiers to predict the country where they will seek the enforcement of a future award. If the parties would rather select an ad hoc arbitral tribunal or a global institution, such as the ICC—especially if they anticipate inserting an ICC arbitration clauses in various agreements to ensure some consistency in the resolution of future disputes—they should be aware of the applicability of the New York Convention and make sure that the State where they would like the award to be enforced is a party to the New York Convention[36] or to any

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sion, 15 J. INT'L ARB. 19 (1998); William W. Park, *When the Borrower and the Bank Are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323 (1991); Piero Bernardini, *The Use of Arbitration in Banking and Financial Transactions*, INTERNATIONAL BAR ASSOCIATION, 12th colloquium (1995).

35. *See* Emmanuel Gaillard, Interference of National Courts *supra* note 25; GOLDMAN, *supra* note 1, at 262 *et seq.* (providing examples of pathological clauses).

36. *See* New York Convention art. 3 (stating that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles"). In addition, the parties should pay attention as to whether the State where enforcement will be sought has made a reciprocity reservation according to which enforcement will be recognized to awards issued only in other contracting States.

other bilateral or multilateral enforcement treaty. But if the agreements that will be submitted to arbitration relate to an investment, international financiers may be interested in ICSID.[37] In addition to the significant substantive protection offered by the Washington Convention[38] and its application by ICSID arbitral tribunals, the enforcement of ICSID awards is not dependent on the applicability of any other convention than the Washington Convention itself.[39] The ICSID alternative will be all the more attractive in project financing in developing countries if the host state has signed and ratified a bilateral investment treaty with the investors' state. Such bilateral investment treaties will often offer additional protection to the investors and provide for the protection of their investments under international law.[40]

In addition, one specific issue should be taken into consideration with respect to project financing. One of the parties to the transactions may be a state, in which case incorporating an arbitration clause in the relevant transaction is a neutrality safeguard for project finance participants. However, inserting such a clause may depend on local law technicalities, as shown by the Eurodisney example where the French State being a party to a contract that was governed by French law entered into in the context of the construction of the leisure park outside Paris, the incorporation of an arbitration clause into that contract was refused by the *Conseil d'Etat* (the highest French administrative court and the advisory body to the French Government) until such time when a special statute was adopted to allow such an incorporation.[41]

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37. *See* Georges R. Delaume, *How to Draft an ICSID Arbitration Clause*, 7 ICSID REV.—FOREIGN INV. L.J. 168 (1992) (discussing drafting of ICSID clauses).

38. Convention On the Settlement of Investment Disputes Between States and Nationals of Other States, signed in Washington, D.C., Mar. 18, 1965.

39. *See id.* art. 54(1) ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State.").

40. *See* Richard H. Kreindler & Timothy J. Kautz, *Issues in Drafting and Performance of Arbitration Agreements In The Context Of Bilateral Investment Treaties And Energy Projects: The Example Of Turkey*, 12 INT'L ARB. REP. 25 (1997); *id.* at 28 *et seq.* (discussing personal standing, and possibility for project company to assign its claims to other juridical persons, including lenders, under a bilateral investment treaty between Turkey and United States).

41. *See* Law No. 86-972 of August 19, 1986, J.O., August 22, 1986, 10190 (according to which "the State, local authorities and public establishments are entitled, in contracts which they conclude with foreign companies for the purpose of carrying out transac-

CONCLUSION

Because dispute resolution clauses are fundamental to the effective implementation of international project finance transactions, they should be one of international financiers' first concerns when they enter into negotiations. Drafting a dispute resolution clause, whether referring the parties to domestic courts or to international arbitration, requires that project participants possess comprehensive knowledge of the project, an accurate anticipation of the risks incurred—including the judicial risk—and a thorough understanding of dispute resolution mechanisms. Given the complexity and the uniquely global nature of international project financing, international arbitration clearly appears as the most fitting avenue for project participants. Because it allows for flexibility in the dispute resolution process and for effectiveness in the enforcement of the outcome, international arbitration optimizes, both legally and economically, the implementation of project finance transactions and the protection of the parties' rights.

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tions in the national interest, to enter into arbitration agreements with a view to resolving, definitively if appropriate, disputes connected with the application and the interpretation of such contracts").