

USE OF INTERNATIONAL ARBITRATION INCREASING WITH HELP OF THIRD PARTY FUNDING - DECHERT

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Arbitration teams can mitigate risk for clients at 'every stage of an investment' by working closely with project finance lawyers and other experts

The use of international arbitration to resolve commercial disputes is rapidly increasing, while third party funding is making this form of alternative dispute resolution more readily available to a larger number of clients, says Arif Ali, partner and co-chair of the international arbitration practice at Dechert.

International arbitration is increasingly being used to resolve commercial and investment disputes, with caseloads at the major international arbitration institutions increasing by almost 40 per cent in the past five years. Ali believes this is not only due to the expansion of the global economy in the aftermath of the 2008 financial crisis, but also because of the benefits of international arbitration. Ali says these benefits include "treaty-based frameworks for the enforcement of awards", as well as procedural neutrality and flexibility. In addition, he says arbitration also offers "cosmopolitan,

multilingual and culturally sensitive decision-makers". Meanwhile, changes to third-party funding rules are easing financial pressures and making it possible for more claimants to bring cases. "Singapore and Hong Kong, both key arbitration centres, have recently approved the use of third party funding, and the International Centre for Settlement of Investment Disputes (ICSID) is adapting its rules to accommodate it as well," says Ali. He adds: "Access to justice is increasing due to the greater availability of third party funding, although this is raising new ethical and legal issues." While the number of arbitration cases is increasing, the type of claims being brought before tribunals is also changing. "We are seeing more claims in the investor-state area where states are applying legislation and associated regulations retroactively to get around stabilisation clauses and without taking into sufficient consideration their obligations to accord investors fair and equitable treatment," says Ali. "Seldom are we seeing the police or army walk in to a power plant or factory and physically expropriate an investment, although this is still happening," he adds. "Some would say that states have become more sophisticated in how they expropriate, others will say that states are better balancing their duty to regulate in the public interest with their obligations to protect foreign investment."

Companies looking to invest in a foreign jurisdiction should engage counsel with expertise in the host country's regulatory environment as this is key to avoiding problems at a later date. Ali says there are hundreds of arbitration cases in which clients could have avoided disputes if they had sought advice sooner.

Exploiting natural resources

Working closely with project finance lawyers, international arbitration teams can mitigate risk for clients at every stage of an investment, according to Ali. "For corporate clients our advice includes: political risk assessment; structuring investments to benefit from investment treaties; negotiating sound investment agreements including solid arbitration clauses and stabilisation agreements; and managing relationships with government entities and other interested stakeholders," he says. Predictability is still an issue for clients, especially with regard to long-term investments. "Major undertakings involving the exploration and exploitation of natural resources, for example, often require a commitment that is decades in duration," says Ali. "During that time, politics, government, laws and regulations may undergo transformations which adversely affect the investment – as for host governments, a long term foreign investment may generate longer term issues related to the environment or indigenous communities."

Allegations of corruption are another challenge faced by investors, and Ali says that there are instances where states are alleging that the investment was procured through corruption and is therefore not entitled to protection under "investment protection mechanisms". Ali says Dechert recently won a landmark case in which the Government of Croatia alleged that Dechert client MOL Hungarian Oil and Gas Company had bribed Croatia's former Prime Minister in order to acquire controlling rights in Croatia's national energy company. Dechert was able to test the criminal allegations underlying Croatia's commercial claims by convincing the tribunal to incorporate certain principles of criminal law and procedure into the arbitration, with the result that MOL Hungarian Oil and Gas was cleared of all allegations.