TA Consultants United's Proposal for PRAG to provide for compulsory arbitration of disputes between contractors and experts

About TA Consultants United

TACU was formed in 2011 to protect and promote the interests of independent experts engaged in technical assistance and development cooperation projects.

One area of interest is concerned with dispute-resolution procedures between experts and contractors.

Overview of Dispute Resolution Provision in Technical Assistance Contracts

Experts are engaged under contract to contractors who are in turn under contract to EuropeAid, EU Delegations, or Donor Beneficiaries.

Experts are usually engaged on the standard terms of contract prepared by each individual contractor. There is no widely used common contract in the engagement of experts, therefore contracts vary.

Not all contracts in TACU's experience provide for dispute resolution.

Where the contract does contain a dispute resolution clause, in TACU's experience the contractor's contract just gives the contractor's national court as having exclusive jurisdiction. (On occasion the contractor will nominate his nearest court, which could be in the same city as its office.)

In the rare case that the agreement provides for arbitration then it usually makes provision for the parties agreeing a forum and arbitrator. These agreements then usually provide that, in default of agreement between the parties, the contractor's local/national courts will have exclusive jurisdiction to determine any dispute between the parties. In one case the contractor simply refused to agree to arbitration in order to force the expert into commencing proceedings in the courts.

Generally, in business where there is a dispute over the appointment of an arbitrator, then it is usual for the contract to provide for a third party to nominate an arbitrator.

However, TACU has not seen any arbitration clause providing a mechanism for the appointment of an arbitrator by a third party in the event of a dispute between the parties regarding an appointment. In such circumstances, in default of agreement the arbitration clause lapses and the court jurisdiction clause applies.

Most experts have little or no experience of engaging lawyers, or the laws and legal system of the member states other than their own. This creates hardship when debts are owed by contractors in other member states. For instance, a Swedish expert in dispute with, say, an Italian contractor must engage an Italian lawyer, travel to Italy to meet his/her lawyer, take time to understand the relevant parts of Italian law, pay the costs of translating all relevant documents, travel to Italy and pay travel and related costs for attending the court hearings and to give evidence, etc. The contractor, in contrast, has the advantage of being on its home territory.

Typical disputes

Here is a selection of typical disputes referred to TACU by members:

- South African expert wrongly pressured to comply with original, but unexpired SoEA, when donor re-commenced tender.
- Swedish expert not paid for final invoice because donor wrongly rejected report and contractor refused to pay and refused to challenge rejection by the donor.

- German expert not engaged as expert in tender having signed an SoEA and declined other opportunities.
- Italian expert not paid substantial sum for alleged failure to supply deliverables when fault arose after expert's contract and contractor suffered cost overrun.
- Contractor's tender rejected on basis of wrong evaluation and rejection of expert's CV.
- Refusal of contractor to pay full contract sum to Polish expert on account of defects by contractor unrelated to work of expert, who put in well in excess of what was required. TACU advised complaint to the Commission and Ombudsman. Expert considering same.
- Late payment of fees and expenses by contractor to Dutch expert.
- British expert wrongly found liable for loss suffered by contractor when unable to undertake project although the SoEA did not require exclusivity.
- Spanish expert 'sacked' when attempting to meet the terms of the Project ToR which were being undermined by Team Leader.
- Greek expert threatened with legal action for not honouring the SoEA when term had expired and expert had obtained work elsewhere.
- Non-payment of fees to Belgian expert.

Not all the above could be referred to arbitration. But where there is a pre-existing contract between the expert and the contractor then the dispute arising is suitable for arbitration. Termination of contract and debt collection cases, which are by far the most common, are particularly appropriate for arbitration – wherever the project was carried out.

Proposed Solution

TACU's proposal is to make it compulsory for contractors to provide in their contract with the expert:

for the parties to attempt to resolve disputes by way of negotiation;

for disputes to be resolved by way of arbitration, if negotiation fails;

a mechanism to ensure that, in the event of dispute about the appointment of an arbitrator, a named arbitral institution be deemed to be agreed between the parties to have authority to appoint an arbitrator.

Similarity to Existing Dispute Resolution procedures.

There is a precedent for providing for arbitration in the context of EU funded projects. A similar approach was taken in General Conditions for contracts funded by the European Development Fund and found in Annex V to Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, the general conditions and the rules governing the conciliation and arbitration procedure for works, supply and service contracts financed under the EDF.

It is submitted though that the ACP-EEC EDF model is not suitable for disputes between experts and contractors on account of the amount of sums in dispute, which will rarely exceed €100,000.

Enforcement of a Dispute Resolution Clause against Contractor

If all experts under contract are to have the benefit of this proposal then it is essential that, when EuropeAid concludes a contract with a contractor, that it obligates the contractor to provide for arbitration in its contract with experts.

The obligation must require that the contractor agree, acknowledge, represent and undertake, for the benefit of third parties (including experts) that any contract shall include, or (in absence of same) shall be deemed to have incorporated into it a model dispute resolution clause.

In this way, if the contractor fails to properly provide for dispute resolution in a written contract, the expert may point to the contractor's agreement, acknowledgement, representation and undertaking in the main contract as evidence of its agreement to enter into arbitration.

Model Clause

The PRAG rules or Main Contract should provide:

“The contractor shall and hereby agrees to include the following clause to be expressly or implied incorporated in any contract entered into with an expert whom it engages under contract to provide technical assistance services in conjunction with deliverables in respect of the project:

'The parties shall attempt to resolve any dispute arising out of or relating to this contract through negotiations between the parties, who have authority to settle the same.

If the matter is not resolved by negotiation within 30 days of receipt of a written 'invitation to negotiate', the dispute may be referred to arbitration by any party. Should the parties be unable to agree, at the time the dispute arises, on an arbitrator or arbitrators, or they are unable to agree on the rules for the arbitration, any party may, upon giving written notice to other parties, request NAMED ARBITRAL INSTITUTION* to nominate an arbitrator in accordance with its rules.'

The Contractor hereby authorises EuropeAid to maintain a list of arbitral authorities, and agrees to submit to the jurisdiction of same in proceedings commenced by an expert.”

*Suggested Arbitral Institution

It is normal to allow parties to agree who will arbitrate, although this does present a difficulty if there is a dispute about appointment. Therefore someone somewhere needs to be given authority by the parties to nominate an arbitrator. Normally this is done by a named institution.

This proposal suggests that the named arbitration institution should be the Belgian Centre for Arbitration and Mediation http://www.cepani.be.

CEPANI, was founded 40 years ago. CEPANI itself does not serve as an arbitrator; it provides a framework in which arbitrations may be held on the basis of pre-determined and published rules by arbitrators that have been accredited following an examination of qualifications and experience.

CEPANI offers the right amount of flexibility, certainty, and confidence for this situation. TACU refers the reader to the website for full details, but it is worth highlighting the main features:

The rules include the possibility for a written procedure that will not require the attendance of parties at a hearing, unless live testimony is required.

Its fees are reasonable.

It has language capacity for French and English which are the main languages used for contracts with experts. (Where other language capacity is needed then this can be agreed between the parties, or it will be possible for CEPANI to nominate an arbitrator that has the necessary language capacity.)

The “seat” of the arbitration can be anywhere. The seat is the place where an award is given. This is important with regard to enforcement of the award. So even though CEPANI is in Belgium, and for example, the arbitrator is based in Denmark, and the parties are based in France and Germany respectively, the seat could be any of these or another place that is agreed. Belgian law is also very flexible as to what particular rules can be agreed.

* TACU does not have any existing affiliation with CEPANI.

Conclusion

TACU commends the inclusion of a mechanism within the PRAG to enable disputes between experts and contractors to be resolved by way of arbitration at the election of either party.