

Choosing the Right Path

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Choosing the Right Path

◆ Speakers

- Tina Cicchetti, Fasken Martineau DuMoulin, (Vancouver)
- Patrick Pearsall, Attorney-Adviser, Office of the Legal Adviser, US Department of State, (Washington, DC)
- Lisa Tomas, Arnold & Porter (London)

Arbitration Agreement

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce to occur in Paris by three arbitrators appointed in accordance with the said Rules.”

Where to start?

◆ Who are the parties?

- ◆ Investor/corporate entity
- ◆ State/state owned entity or third party

◆ What is/are the arbitration agreement/applicable treaties?

- ◆ Purchase order
- ◆ Concession Agreement
- ◆ NAVFTA

◆ What are the claims?

Can Mozart Bring an ICC Claim?

- ◆ Consider scope of arbitration agreement
- ◆ Privity of contract
- ◆ Third parties
- ◆ Seat of arbitration

Can Mozart bring an investor state claim?

- ◆ “Investor” (nationality and type of business venture?)
- ◆ “Investment”(commitment of capital and risk?)
- ◆ “In the territory of” (where is the activity at issue?)
- ◆ State attribution (ILC’s Articles on Responsibility of States for Internationally Wrongful Acts)
- ◆ Which rules apply?

When can Mozart bring its Case?

- ◆ Investor state – NAVFTA - Consider cooling off period/Notice of Intent
- ◆ ICC – immediate action is possible - no delay

What remedies is Mozart likely to seek?

- ◆ Damages under the Purchase Order
- ◆ Lost profits under the Concession Agreement
- ◆ Reinstatement of the Concession Agreement

Can Mozart Bring All Claims in a Single Proceeding?

- ◆ Consider presence of umbrella clause?
- ◆ Consider strategic issues – control of resource, document production, length of proceedings
- ◆ Consider power of potential respondents to grant desired relief

Can Mozart Bring Parallel Proceedings?

- ◆ Other arbitral proceedings or court proceedings?
- ◆ Waiver clause?
- ◆ Has the claimant gone down a “fork in the road”?

Risks to Mozart

- ◆ Counterclaims
- ◆ Confidentiality
- ◆ Interim relief
- ◆ Special Considerations

Practical Considerations – who decides?

- ◆ Constitution of the Tribunal

- ◆ Challenges

Practical Considerations – what will this cost?

What is the most cost effective option for the client?

◆ Arbitration Costs

- ICC Costs Calculator - \$534,890 (avg) to \$832,000 (max)
- Or \$232,974 (avg) to \$329,000 (max) for sole arbitrator
- ICSID \$750,000

◆ Legal and Other Costs

- \$4.4 million?

◆ Who pays?

- 56% pay own; 34% get some back; and only 10% get all costs back

Practical Considerations – bet the company

If the client is unsuccessful, are there any grounds of appeal?

Practical Considerations – how long will this take?

How long will the proceedings take?

◆ 18-36 months for ICC

◆ 3-8+ years for investment treaty claim

Practical Considerations - enforcement

If successful, will the client be able to enforce the arbitral award?

- Consider location of assets
- Will the award be made public?
- New York Convention

Can the chances of enforcement be improved?