

Dispute Resolution
**The Financing Institutions'
Point of View**

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**IFI's: EBRD, World Bank Group
Commercial Banks**

- **EBRD** (European Bank for Reconstruction and Development), established in 1991 in London, with a focus on 29 countries from central Europe to central Asia
- Primary focus on **private sector** projects that serve the transition to market economies and pluralistic democratic societies
- Legal transition team and other TC efforts to contribute to the changing laws, courts etc.

Main sectors of EBRD focus

- Financial Intermediaries
 - Credit Lines
 - Bank Equity and Equity Funds
 - Trade Facilitation
 - Leasing and other non-banking FIs
- Power and Energy
- Natural Resources
- Transportation
- Municipal and Environmental Infrastructure
- Agribusiness
- Property and Tourism
- Telecommunications
- General Industry

World Bank Group

- **World Bank** (IBRD and IDA) set up in 1944: traditional focus infrastructure loans to Governments (financial and technical assistance to fight poverty)
- **IFC** set up in 1956 with a private sector focus (basic footprint for EBRD which added further focus on transition and democracy...)
- **MIGA**: Multilateral Investment Guarantee Agency
- **ICSID**: International Centre for Settlement of Investment Disputes (investor-State disputes)

Commercial Banks

- Commercial and investment banks have over time increased their exposures in different parts of the world
- many set up their own project finance departments for advisory and/or lending activities
- EBRD and IFC promote co-financing with commercial banks under same loan documentation

‘Project Finance’ definition

- Project finance is finance for a particular project, such as a mine, toll road, railway, pipeline, power station, ship, hospital or prison, which is repaid from the cash-flow of that project. Project finance is different from traditional forms of finance because the financier principally looks to the assets and revenue of the project in order to secure and service the loan.

Risk allocation in project finance

Successful project financing structuring rests on the project itself. Identifying the project's risks and then analyzing, allocating, and mitigating them are the essentials of project financing. Including adequate physical and price contingencies in the project costs.

This is quite different from a public sector project like e.g. the Gotthard Tunnel.

Example Private Power Station UK



IFI, bank products

- Debt (and sometimes equity) in specific `project finance` cases
- Credit lines, equity in general (going beyond project finance)
- IFIs are by nature in emerging markets with different standards of local courts
- Commercial/investment banks also increasingly involved in emerging markets

Court or a neutral dispute mechanism?

- In each project it is important to evaluate best approach
- Can you use **UK courts**, possible issue no enforcement mechanism where the opponent has main assets (easier within EU, between EU and Russia or Central Asia still difficult)
- **Local courts** may be more partial to local side
- **Arbitration**: world wide treaties with 140 countries signed up. Arbitration awards can be enforced for both debt and equity

EBRD prefers UNCITRAL (London)

- EBRD was set up by treaty similar to the World Bank and is stateless
 - The treaty restricts possibilities to sue EBRD
 - EBRD sees UNCITRAL rules as universal set of rules, not as specific as maybe LCIA (London) or ICC (Paris)
- UNCITRAL arbitration refers to any arbitration which is conducted under the UN Commission on International Trade Law arbitration rules

Commercial and investment banks

- Traditionally went to **court** in Western Europe. Where they could enforce UK court orders, freezing orders etc.
- Since they are doing more business in emerging markets, they have to consider using more **arbitration**
- Preference **LCIA** (London Court of Intl. Arbitration) or **ICC** (International Chamber of Commerce)

Arbitration vs Courts

- Arbitration is confidential, courts are public
- Compared to efficient courts, arbitration can be slower and sometimes costly (in court you do not pay the court judges)
- Compared to less efficient courts arbitration can be quicker
- Arbitration outside the USA is less costly due to less discovery (providing documentation)

Further advantages of arbitration

- **Final, binding decisions**
- International recognition of arbitral awards
- **Neutrality** (it is generally possible to structure a neutral procedure offering no undue advantage to any party)
- **Specialised competence of arbitrators**
(parties can select independent people with specialized competence in the relevant field)

Definition in loan/or investment agreement is crucial

- When you negotiate loan agreement analyze and define best dispute resolution mechanism
- You need to make a choice, leaving options e.g. for the lender to choose court or arbitration could cause problems later. In such a case Russia would not accept to enforce arbitration awards
- Retain specialists early considering countries and potential issues involved in the project

Recent EBRD investment in Czech Republic

The investment agreement (equity) had to be under Czech law. However, Czech courts were not considered acceptable in this case and so EBRD agreed with the parties in the agreement that dispute resolution would be via **Incetral hearing in London**, however, based on Czech law.

IFI corporate recovery teams

- EBRD and others have internal corporate recovery teams which work closely with internal legal departments to define adequate strategies to resolve issues
- Focus: first objective is to turn problem projects around, second objective is to recover assets
- Ultimately IFI wants money back
- Court or Arbitration are used as final measures if client does not wish to pay back
- EBRD has not used Dispute Review Boards

PPP Projects could use DRB

- Whilst IFI is mainly involved in providing finance, it has an interest in efficient dispute resolution between e.g. Government and Contractor and other parties (e.g. Operator)
- DRBF could consider promoting more actively the inclusion of DRB in complex PPP projects
- Selective private sector projects may also benefit (e.g. Industrial project in Albania with Lebanese sponsor and Chinese contractor)

EBRD contacts

- **Banking Teams** work with internal **legal department** and outside law firms to draft loan agreements
- **Procurement**
 - For public sector EBRD requires open tendering and reviews tenders, but the buyer is the government.
 - For private sector, open shopping to meet clients needs.
 - Procurement reviews undertaken each year to monitor compliance. “Red flag” cases submitted to OCCO (Office of Chief Compliance Officer) for further review.
 - Published “black list” of firms EBRD will no longer work with.

OCCO

- Office of Chief Compliance Officer (OCCO) responsible for:
 - Anti-corruption
 - Compliance hotline
 - Project Complaint Mechanism (PCM)
 - Whistleblower Protection
 - Fraud and Corruption

Civil Society

- Bank actively engages with Civil Society through:
 - Public Disclosure and Consultation
 - Engagement at Annual General Meeting
- Project Complaint Mechanism (PCM), previously and Independent Recourse Mechanism (IRM) managed by OCCO.
 - Formalized process for civil society to raise concerns with dispute resolution and problem solving mechanisms.

Opportunities

- Legal Transition Team (OGC)
 - Works with Governments and institutions to improve the legal and regulatory environment.
 - Based on donor funding for technical assistance projects which could include DRB mechanism
- For DRBF Members
 - Register with OGC, OCCO, Procurement, Corporate Recovery.
 - Lobby for DRBs in public sector or PPP projects

DRB as part of the life cycle


