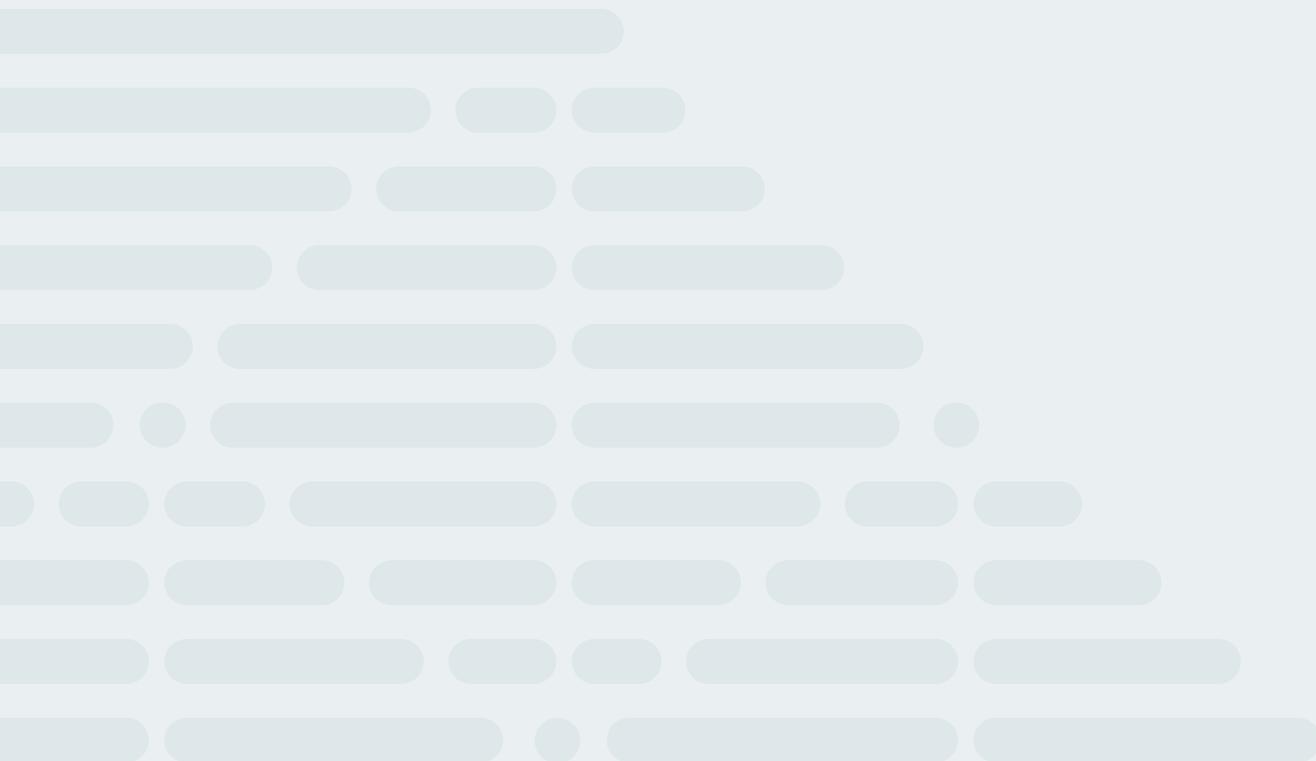


Disputes



Contents

5	Disputes	3
5.1	Background	4
5.2	Guidance	5
5.3	Summary data analysis	20

5 Disputes

Given the long term nature and complexity of PPP projects, it is not uncommon for there to be some form of disagreement or dispute during the contract management period. Disputes have the potential to damage the relationship between the Project Company and the Procuring Authority. In addition, while they are being resolved there is a risk that the service levels will be affected. The most important goal of any party involved in dispute resolution is to make decisions that will ensure the project moves forward in a viable and sustainable manner while maintaining value for money.

The Procuring Authority and the Project Company may have differing opinions on a range of issues where they have conflicting interests. In this chapter reference to a disagreement is to a disagreement which is not the subject of a formal dispute resolution mechanism. Reference to a dispute is reference to a disagreement where formal dispute resolution mechanisms are implemented. Typical dispute resolution mechanisms are detailed in Section 5.1 (Background).

The Procuring Authority should focus on avoiding disagreements turning into disputes where possible. There are, however, a variety of reasons why disputes arise and they will not always be avoidable. When disputes do arise the focus will need to shift to managing the disputes appropriately to reach a conclusion quickly and in a cost-effective manner while also maintaining a strong relationship between the contractual parties.

CHAPTER STRUCTURE

This chapter provides a background to disagreements and disputes in PPP contracts in Section 5.1 (Background) and provides guidance on managing disagreements and disputes. The key elements of successfully managing disagreements and disputes are summarised below and detailed in Section 5.2 (Guidance).

- A. Understand the rights and obligations of the Procuring Authority and use contractual provisions to protect the rights of the Procuring Authority rather than as punitive measures
- B. Monitor the performance of the Project Company to be aware of potential issues and to mitigate the risk of disputes
- C. Be receptive to claims and settle them early, where it is appropriate to do so
- D. Treat disagreements and disputes objectively. Do not allow a poor relationship with the Project Company to affect the approach taken to a dispute and do not let the existence of a dispute affect an otherwise positive relationship
- E. Clarify ambiguous and unclear contract drafting before it leads to a dispute
- F. Ensure settlement agreements are prepared with appropriate legal input to ensure the dispute or disagreement is unambiguously resolved
- G. Consider the full costs of escalating a dispute and the chosen dispute resolution mechanism

Negotiation

- H. Actively seek out negotiated outcomes to disagreements and disputes, as such outcomes have the potential to be significantly more efficient
- I. Appropriately prepare for and assemble adequate resources before entering into negotiation
- J. Consider associated private partners (including the construction contractor) in the resolution of disagreements and disputes related to them

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Mediation

- K. Consider mediation where a more structured approach to negotiation is required
- L. Appoint the right mediator for both parties

Dispute Resolution Boards

- M. Utilise Dispute Resolution Boards where available
- N. Set up the Dispute Resolution Board before a dispute arises, but also consider the changing needs of the Dispute Resolution Board for the project
- O. Appoint the right Dispute Resolution Board for both parties

Expert determination

- P. Where available consider expert determination for disputes that are of a technical nature
- Q. Appoint the right expert for expert determination

Formal court proceedings or arbitration

- R. Consider the full implications of moving a dispute to court or arbitration
- S. Choose the right arbitrator(s)
- T. Prepare to provide detailed evidence when moving a dispute to court or arbitration

Section 5.3 (Summary data analysis) provides a summary of the data analysis with respect to disputes.

5.1 Background

Disputes within a PPP project emerge for many reasons. There are often deeper underlying reasons for why disagreements arise in the first place and why they can escalate into a dispute. Some of these relate to the inherent complexities associated with PPPs:

- PPP contracts are long-term and unexpected circumstances are likely to arise at times
- PPP projects tend to be complex in their scope with multiple stakeholders involved
- Contract documents are complex and subject to interpretation (particularly given multiple interfaces between different parties and potential contradictions between a large number of different but interrelated project documents)

Other underlying reasons for why disagreements arise in PPPs are detailed throughout this chapter. These include a lack of understanding of the PPP contract and/or the performance monitoring requirements of a PPP; poor relationship management; ambiguous contract drafting; and weak underlying project economics.

Dispute resolution mechanisms

Many PPP contracts contain pre-agreed dispute resolution mechanisms for the resolution of any disputes that may arise out of the PPP contract. Such mechanisms are aimed at encouraging a less formal resolution of disputes at a relatively early stage before relationships deteriorate and before a significant amount of time and cost is spent in formal court proceedings or arbitration.

Typical dispute resolution mechanisms can include informal meetings of senior executives, mediation, the use of a panel of senior representatives, external dispute resolution boards and finally court proceedings or arbitration. In general terms, parties should seek to address any disputes starting with the least formal mechanism and then stepping up through each level to the final, most formal stage. For example, a disagreement not resolved by a meeting of senior executives, might then proceed to mediation and then finally to court or arbitration.

Typical dispute resolution mechanisms also include time limits. Time limits incentivise the parties to progress disputes and help reduce the risk of wasting time and costs if disputes drag out. For example, a time limit might be a response deadline by which parties are required to respond to a notification of an escalation of dispute. Time

limits also include the time period for which a certain dispute resolution mechanism must run before it can be escalated to the next level. It is important that the Procuring Authority follows these timeframes or agrees specific timeframes with the Project Company in cases where more subjective language such as 'within a reasonable period' is used in the PPP contract.

The parties should agree that they are free to seek urgent (including injunctive) relief through court proceedings or arbitration without having to go through the full dispute resolution mechanism if either party is dissatisfied with the outcome.

The relevant dispute resolution mechanisms available will also depend on what is permitted under the applicable laws. For example, a local law may require that all disputes relating to a PPP contract need to be referred to the local courts and will not permit arbitration.

The majority of projects investigated in the study had defined dispute resolution mechanisms (78 projects out of 115 for which data was available, i.e. 68%). The 2017 version of the World Bank's Guidance on PPP Contractual Provisions¹ provides further helpful commentary and example wording for typical dispute resolution mechanisms.

5.2 Guidance

The following guidance outlines the key issues that should be considered when approaching a dispute in relation to a PPP contract using some select common dispute resolution mechanisms.

A. Understand the rights and obligations of the Procuring Authority and use contractual provisions to protect the rights of the Procuring Authority rather than as punitive measures

Disputes can be created by issues associated with complex contractual terms including the agreed risk allocation between the parties, claims for compensation or additional time, application of payment deductions, Procuring Authority obligations and other procedures and defined time requirements. These issues can be exaggerated where the parties do not have a strong fundamental understanding of PPPs and the specific terms of the relevant PPP contract. Having a strong fundamental understanding of the agreement between the parties is essential.

The Procuring Authority should be aware of the legal frameworks that govern the relationship between it and the Project Company. There may be legal principles in both civil law and common law jurisdictions that are relevant to what is otherwise agreed between the parties in the PPP contract. A specific example of this is the obligations of a regulator acting as a Procuring Authority. This has been a difficult issue in the energy sector where the level of discretion granted to the regulator in the setting of tariffs has caused issues to Project Companies. The Procuring Authority should be aware of all its obligations under the PPP contract and under the applicable laws.

Strict and unfair enforcement of contractual provisions can also lead to disputes. For example, a strict reading of PPP contracts as they relate to claims and payment deductions. A claim can refer to a claim for compensation or additional time. Management of claims is detailed in Section 3.5 (Claims). A Procuring Authority will retain some risk under a PPP contract. The Procuring Authority may create larger issues for a project if it draws out and fails to manage appropriately any claim with respect to those risks.

Payment mechanisms and deductions are typically linked to performance and agreed during the procurement phase. Payment deductions should be applied as was agreed in the PPP contract. Performance monitoring and the application of

¹ Guidance on PPP Contractual Provisions, 2017 Edition. Available at <http://ppp.worldbank.org/public-private-partnership/library/guidance-on-ppp-contractual-provisions-2017-edition>

payment deductions are detailed in Section 3.2 (Performance monitoring).

The Procuring Authority should use payment mechanisms and deductions to incentivise the Project Company to perform in an appropriate manner. An issue can arise if there is an unnecessarily strict enforcement of payment deductions in an inconsistent or unfair manner. For example, the Procuring Authority may be tempted to strictly apply a payment deduction against the Project Company with an unrelated goal in mind, perhaps to create leverage to resolve a wider dispute.

As well as being caused by the action of the Project Company, a project can also be negatively affected by the actions of a Procuring Authority. A Procuring Authority managing its budget deficits may be incentivised to apply payment deductions in a very strict manner. For example, this subject arose in interviews in the UK where local authorities had had their budgets cut and were perceived by the private sector to be under pressure to interpret all obligations and performance standards very strictly.

In some jurisdictions this behaviour may fall foul of general legal obligations to act in good faith. In addition, such behaviour risks damaging the relationship between the parties, and increasing the costs of disputes, which will have a harmful effect on the project in the longer term.

The Procuring Authority may decide that certain procedures are unworkable and that it will formally waive or amend the unworkable contractual requirements and agree to a less formal and more workable process. Waiving rights under a contract should only be undertaken after receiving legal advice, to ensure an appropriate waiver is effected (i.e. that the Procuring Authority is waiving only what it is intending to waive and not waiving any other rights under the PPP contract).

B. Monitor the performance of the Project Company to be aware of potential issues and to mitigate the risk of disputes

Adequate performance monitoring by the Procuring Authority is an essential aspect of managing disputes. Although significant risks and management responsibilities are typically allocated to the Project Company under a PPP contract the Procuring Authority must ensure that adequate systems are in place to track the Project Company's progress and compliance with the PPP contract. Without these systems the Procuring Authority

can encounter difficulties regarding early claims recognition; potential mitigation and management; and reduced visibility on program slippage and service quality, due to asymmetries of information.

As detailed in Section 3.2 (Performance monitoring) it is essential that the Procuring Authority establishes systems that provide adequate warning of any potential issues.

A Procuring Authority that carefully monitors the project, maintains good records of activities and runs an efficient document management system will be well-prepared for disputes as they arise. If the Procuring Authority fails to implement and manage such controls it will struggle to accurately assess the full details of any disputes that arise. This may increase the chances of dispute or add to the time and cost implications of managing any dispute. Information management is detailed in Section 3.4 (Information management).

When the underlying economics of a project are not working well, or the Project Company isn't adequately resourced, there is often an increased risk of dispute. For example, if the Project Company is struggling to make a profit it will be under more pressure to seek compensation from the Procuring Authority. The effect of this may be then that the Project Company is seeking compensation opportunistically in circumstances where it has no legitimate right to claim compensation. This will increase the likelihood of a dispute arising in the hope that an agreement or decision in favour of the Project Company will help it financially. This will also mean that the dispute is less likely to be settled amicably at an early stage.

The Procuring Authority should ensure that the Project Company is a properly functioning entity at all times, putting pressure on equity investors to allocate more resourcing to the Project Company if required. It may be difficult for the Procuring Authority to actively avoid all of these types of disputes after financial close has been reached and in these circumstances the Procuring Authority should be considering other options such as termination, detailed in Chapter 7 (Default and termination).

C. Be receptive to claims and settle them early where it is appropriate to do so

There can be a misconception, particularly in less developed PPP markets, that a PPP contract involves a 'total transfer of risks' to the Project Company. This can lead to misunderstanding of the contractual claims processes. While the intention

in PPPs is to allocate significant risks to the Project Company, there will always be risks retained by the Procuring Authority, and this will have been the subject of careful negotiation between the parties. This is described in further detail in the Global Infrastructure Hub's PPP Risk Allocation Tool.²

Guidance on managing claims in PPP transactions is detailed in Section 3.5 (Claims). The key point is that claims are likely to be made by the Project Company at some stage during a PPP contract life and that a dispute will be more likely to arise if the Procuring Authority does not have a full understanding of the merits of a claim (for which the Project Company may be entitled to claim for and receive compensation) or the claims processes.

The Procuring Authority needs to also recognise that a claim made by the Project Company often originates with a contractor of the Project Company and the Project Company may be bound to pass the claim on to the Procuring Authority. In such circumstances, it is not necessarily a justification for concern that the Project Company is not acting in a spirit of partnership.

D. Treat disagreements and disputes objectively: Do not allow a poor relationship with the Project Company to affect the approach taken to a dispute and do not let the existence of a dispute affect an otherwise positive relationship

Effective relationship management in a PPP project facilitates the resolution of many disagreements before they escalate into disputes. Triggering the formal dispute resolution mechanism can sometimes be a reflection of broken communication and a damaged relationship between the parties, and even disputes (legitimate or otherwise) have the potential to affect an otherwise positive relationship. PPPs are designed to be collaborative with incentives to encourage the parties to work together on an ongoing basis and find solutions that are mutually beneficial. In one example in the study, the interviewee blamed a dispute entirely on a relationship breakdown. Both parties had a reasonable point for disagreement due to an ambiguity in the contract drafting but the disagreement led to a deterioration in the relationship which made it more difficult to resolve. On a different project, an interviewee described a situation where conversely the relationship between

the parties improved dramatically once they had managed to come to an agreement on a dispute.

One typical mismatch between the public sector and the private sector is that the Project Company is primarily interested in the monetary outcome of a dispute whereas the Procuring Authority will always need to be able to justify any compromise agreed with the Project Company, due to its accountability to the public. It is important for both sides to keep these different viewpoints in mind to help avoid further misunderstandings.

Both parties should maintain a professional relationship and continue with business as usual on any aspects of the partnership which are not affected by the dispute to avoid damaging the relationship and the project as a whole.

EXAMPLE

Focusing on maintaining relationships during disputes

The practice in a toll road PPP in India provides a good example of where there were a number of disputes over issues such as the changes to the scope related to the inclusion of obligations in relation to an existing railway bridge, but the relationship between the Procuring Authority and Project Company remained strong, with the two parties meeting regularly.

Specific approaches to maintaining good relationships include maintaining regular communications between the Procuring Authority and the Project Company aimed at resolving issues as they arise at the day-to-day operational level. Specific bespoke meetings may also need to be set up to manage disputes as they arise. Further examples of relationship management are detailed in Section 3.3 (Stakeholder management).

² Available at <https://ppp-risk.gihub.org/>

EXAMPLE**Frequent meetings to settle disagreements and disputes**

The Port of Miami Tunnel project in the USA illustrates the benefits of having weekly meetings between the contracting parties, to work through potential areas of disagreement. If issues cannot be resolved at the operational level, they should be escalated to the strategic level (involving the relevant representatives from both parties as well as advisors where appropriate).

Another case study in a developed market identified the use of a 'chairmen's' meeting', which included representatives from the Procuring Authority, the Project Company, the construction contractor and the operations contractor during a time of ongoing disputes. These meetings took place for six months on a fortnightly basis and successfully enabled the resolution of many issues.

For more information, see the Port of Miami Tunnel Case Study.

Given the ongoing nature of PPP contracts, it is common for personnel to become overly invested in issues that give rise to disagreements. It may be appropriate to bring in new personnel to settle disputes at a more strategic level. Having well-equipped contract managers is a key step towards avoiding disagreements and disputes. In addition, involving team members with specific skills in relationship building and negotiation can help resolve disagreements that have arisen at an earlier stage. When considering a team structure for contract management it is important for both parties to leave space in their organisational structure to allow issues to be escalated to a fresh pair of eyes. This is supported by the guidance detailed in Chapter 2 (Contract management team set-up and training).

The Procuring Authority contract management team should also consider whether it is advantageous to escalate an issue to senior executive level at an early stage. Senior representatives of the parties may be able to take a more dispassionate approach than operational employees and this may allow the disagreement or dispute to be resolved more quickly than it would be otherwise. It is also important that issues do not become escalated routinely or too

easily, otherwise senior members risk also being entrenched in a particular issue and the mechanism may cease to function, leading to the need for more formal dispute resolution mechanism escalations.

EXAMPLE**Importance of strong relationship skills and independence**

From the point of view of the Project Company in the Central Berkshire Waste project in the UK, a stalemate between the parties was broken by bringing in people who had strong relationship building skills who then focused on improving the relationship with the Procuring Authority. As the staff were new, they had a more independent view as to what had occurred previously and were able to take a more pragmatic approach.

For more information, see the Central Berkshire Waste Case Study.

E. Clarify ambiguous and unclear contract drafting before it leads to a dispute

Contract managers should proactively ensure that any clauses of the PPP contract that are poorly drafted or ambiguous are clarified, preferably before the PPP contract is signed. Though the negotiation stage of a project is not the focus of this reference tool, one approach is for contract managers to work with lawyers, advisors and other personnel involved in the structuring and negotiation of a PPP contract to meet this challenge by clarifying any clauses that are unclear from an operational perspective prior to signing.

In situations where an ambiguity in the PPP contract becomes apparent after the PPP contract has been signed other solutions must be found. Ambiguous drafting can be a source of opportunistic claims by both parties, particularly when the economic conditions of the project change. One approach is for the parties to conduct workshops to help to agree and determine the true intent of clauses where the parties are unclear. If there is a dispute about the intent of clauses after financial close then agreeing at an operational level how the relevant clauses will operate is likely to be more productive prior to a dispute arising. If required the interested parties can also go down a more formal process path of amending the PPP contract, detailed in Chapter 4 (Renegotiation). Any clarifications have the potential to alter the risk allocation and financial position of

both parties and therefore it is worth investing the necessary time and effort in this process, including using external advisors if required.

Ambiguous contract drafting is a common area of dispute and having high quality and clear contract drafting that was well thought out and agreed to before financial close will significantly reduce the chance of disputes, giving the parties less opportunity to disagree on what has been clearly agreed.

F. Ensure settlement agreements are prepared with appropriate legal input to ensure the dispute or disagreement is unambiguously resolved

Settlement agreements are an important part of dispute resolution mechanisms. A settlement agreement is an agreement between the parties agreeing typically to exchange some financial sum for the discontinuance of relevant dispute proceedings.

Great care must be exercised when drafting and entering into a settlement agreement since the purpose is to adequately agree and capture in writing a variety of different matters that both parties may have previously contested. Comprehensive and well thought out drafting is required to avoid a dispute on the matters where agreement was thought to be reached.

A common area for confusion in settlement agreements are schedules outlining non-legal technical matters. Particular care is required in the preparation of such schedules as in relation to the main body of the document. Often lawyers are reluctant to take responsibility for the schedules, which are developed by technical and commercial team members. Good communication between lawyers and commercial/technical members of the team is essential to ensure the main body and schedules of the agreement are aligned.

A settlement agreement will be applicable in the case of a negotiated solution between the parties, including mediation; and not typically in the case where a court, arbitrator, expert or DRB has made a determination or final decision. A settlement agreement may still be agreed prior to a final decision or in the final stage before a final decision is delivered, but the important distinction is that a settlement agreement is an agreed resolution between the parties, as distinct from a determination by a third party.

Significant settlement agreements should be subject to strict oversight from a governance perspective.

G. Consider the full costs of escalating a dispute and the chosen dispute resolution mechanism

The guidance set out above in this chapter details how the likelihood of disputes can be proactively mitigated. However, given the complexities and long-term nature of PPPs, disputes are not uncommon and the remaining guidance in the chapter provides detail on managing disputes for a select number of specific dispute resolution mechanisms.

The first step to be taken is to assess what the objectives of the Procuring Authority are and how to reach those objectives. Considerations include the following:

- Which dispute resolution mechanism offers the greatest value for money, including considering which avoids interruption to the services?
- What are the full costs implications for the potential dispute resolution mechanisms?
- How can a win-win solution be reached amicably?
- How does the dispute resolution mechanism best preserve the terms of the PPP contract so that the project can continue as agreed at financial close?
- What are the time and cost implications and the impacts on the long-term operational and maintenance obligations?
- Will the decisions made through the selected dispute resolution mechanism be binding and enforceable?
- Does the dispute have an impact on the government's contingent liabilities?

In the interests of maintaining good relations it is important for both parties to have sufficient internal governance in place to control the triggering of a dispute resolution mechanism. The exact procedure for carrying out dispute resolution may depend on the mechanism defined in the contract or the underlying legal framework. And the relevant workflow, personnel and strategy will depend on which dispute resolution approach is adopted. Some of the processes set out below are lengthy and expensive, particularly when using legal practitioners. The best approach will depend on the specific circumstance and, before selecting such an approach, careful consideration should be given to the key advantages and disadvantages of each approach.

There is additional potential area for disagreement on the precise path chosen for dispute resolution. As the selected process will have an effect on the outcome both parties are likely to approach the decision strategically. If the PPP contract is not clear as to what dispute resolution option is to be used in a given situation there is a risk of delay caused by arguments regarding the mechanism to be used.

The following table and the guidance that follows provide a snapshot of the potential time and cost implications of different dispute resolution mechanisms.

Dispute resolution mechanism	Legal costs	Potential legal cost recovery	Potential management time impact
Negotiation	1 to 1.5X	No	1
Mediation	2 to 2.5X	No	2
Expert Determination (technical issue)	2.5 to 3.5X	No	3
Fast Track DRP (multiple issues)	8 to 10X	No	5
Arbitration/ Litigation	25 to 40X	60%-70%	10

Note: The above table multipliers are based on estimates from a disputes practitioner in Europe and are provided as an indicative comparison only between the different options. Ultimately, each dispute is different and market pricing will vary and so actual numbers may vary widely.

NEGOTIATION

Key advantages

- Can avoid time and cost implications of dispute resolution mechanism escalations
- Can resolve disputes faster, leading to a smaller impact on the relationship between the parties
- The parties themselves have the discretion to agree on the appropriate resolution

Key disadvantages

- If a Procuring Authority is not adequately prepared, negotiation can result in an outcome that reduces value for money
- Can waste time when the parties are unlikely to agree to a mutually acceptable outcome because their views are too far apart
- Has the potential to detriment an otherwise positive relationship where there is no progress being made

H. Actively seek out negotiated outcomes to disagreements and disputes, as such outcomes have the potential to be significantly more efficient

Negotiation should be the first step taken as soon as it becomes clear that a disagreement will not be resolved without active intervention by the parties. There may be a structured process set out in the PPP contract designed to make negotiation more effective; however, a structured process is not necessary. Negotiation merely involves the parties communicating with the objective of settling a given disagreement or dispute. Negotiation should be entered into with a clear objective of understanding the issue and attempting to resolve the disagreement.

Negotiation has the potential to be far less costly than escalating the disagreement to the next level of the dispute resolution process, although it still has the potential to be costly and take time. Circumstances will arise where there is the potential for significant time to be wasted discussing an issue on which the parties are too far apart. For such issues, it may be more efficient for the parties to seek an informed third-party decision that is binding on the parties (through court, arbitration or some other dispute resolution mechanism). The other

approaches are typically more expensive and likely to take more time to resolve and all appropriate efforts should be made to resolve the dispute at an earlier stage.

Use of protected (often referred to as 'without prejudice') meetings should be considered in addition to open meetings to allow further space for parties to move away from entrenched positions based on their sense of contractual entitlement without risk of compromising their position should formal proceedings result. Without prejudice privilege is not recognised in all jurisdictions. Even where such approaches are not recognised it may be possible to agree contractually that the contents of certain meetings and written exchanges will not be referred to by either party should formal proceedings result. Without prejudice privilege can be easily invoked but is often misunderstood so it is sensible to seek legal advice before attempting to implement this idea. It is important to understand the status at the start of the meeting, if not earlier, to avoid the risk of inadvertent compromise and also to avoid parties approaching the meeting at cross purposes.

When settling a dispute through negotiation, the impact on other (similar) projects needs to be taken into account as parties on other projects might look to such resolutions and have the effect of setting a precedent.

I. Appropriately prepare for and assemble adequate resources before entering into negotiation

Prior to entering into negotiation, the participants must be clear on the strengths, weaknesses and objectives of the negotiation, including full visibility on the effect any decision may have on all interested parties and any associated third parties. Negotiators on all sides of the dispute need to be appropriately empowered to resolve the disputed matter. If a negotiator on any side of the dispute is not sufficiently empowered, an agreement on a settlement may not be possible, or such agreement may not take proper effect due to a lack of the requisite authorisation. The ultimate decision in terms of overall commercial settlement will typically rest with the most senior member of the Procuring Authority's contract management team. However, in some instances, approval may also be required from the relevant line ministry and/or finance ministry.

The Procuring Authority needs to ensure that appropriate skills are available and it may need to engage the use of external legal, financial, technical, insurance, tax and/or other advisors. One objective will be to reach consensus on the underlying cause

of the problem, including any associated technical issues. The commercial aspects can only be fully evaluated once the technical issues have been clarified and the underlying cause of the disputes has been identified and agreed upon. However, there will be circumstances where there is simply not enough information available or the cost implication of fully understanding the underlying issue is so great that the most cost-effective option is for the parties to make commercial decisions and reach a settlement based on the information available. Though it is preferable to make a fully informed commercial decision, the more cost-effective approach may be to make a decision based on the information available to avoid wasting time and to maintain a good relationship between the parties.

To assist a Procuring Authority in entering into a negotiation to settle a disagreement or a dispute the Attachment (Dispute negotiation checklist) to this section sets out a checklist that can be used as a guide to prepare for a negotiation.

J. Consider associated private partners (including the construction contractor) in the resolution of disagreements and disputes related to them

Some disagreements and disputes result from actions or inactions and risks transferred to the Project Company's construction or operations contractors or some other third party. This may complicate negotiations. The Procuring Authority should make an assessment of which parties should be involved in the negotiations to settle a dispute as it may be beneficial for the construction or operations contractor to be present as well as the Project Company. This will particularly be the case where there is a corresponding claim made by the relevant contractor or other third party against the Project Company. In such circumstances, what the Project Company is able to agree to may be conditional on agreement by the relevant contractor. Additionally, the Project Company's contractors may have a greater level of expertise and more detailed information available which will assist in crafting a reasonable resolution for all.

The Procuring Authority should, however, be hesitant to open the door to a variety of parties without good reason and without clear agreements over the role each will play in the process. Without this the cost and timescale of the process can quickly escalate. Care should be taken to avoid the risk of the private sector entities 'ganging up' on the Procuring Authority.

EXAMPLE**Senior management meetings to prevent issues escalating into disputes**

On a transport project in a developed market, the Procuring Authority instigated a 'chairmen's Meeting', which included representatives of the project advisory board, the Project Company, and the construction and operations contractors. These meetings proved very useful in solving issues, and also helped to enhance the relationship between the two parties.

MEDIATION**Key advantages**

- Lower cost than court proceedings or arbitration and is less likely to damage relationships
- Confidential
- More structured than bilateral negotiations
- The introduction of a third party can help to bring new ideas to the disagreement as well as objectivity

Key disadvantages

- May not lead to a final decision. If parties are far apart to begin with can be a waste of time
- More expensive and time consuming than negotiation

K. Consider mediation where a more structured approach to negotiation is required

Mediation is similar to negotiation but with the involvement of a mediator, an independent third party tasked to assist parties to resolve the issue. Mediation is an effective dispute resolution mechanism as the mediator is independent and typically very experienced in the resolution of disputes. The mediator acts as a neutral facilitator to help guide the parties to resolve the dispute and can bring reason to the discussions which is more likely to be accepted given their neutrality and independence.

Mediation should be approached in an open and inclusive manner as it is designed to help parties settle their dispute amicably without harming long-term relationships. It is a flexible confidential dispute resolution method which can accommodate any number of parties and issues, allowing parties to control the process and dispose of issues promptly. A further incentive is that whilst mediation is more expensive and time consuming than unassisted negotiation, the resolution of the matter remains in the hands of the project parties. Any dispute resolution process which involves more formal escalation such as formal court proceedings or arbitration risks generating binding decisions which may not suit either party. 32% of the PPP contracts reviewed globally allowed for mediation. This is the second highest mechanism after arbitration.

Prior to entering mediation the participants must be clear on the strengths, weaknesses and objectives of the mediation. The guidance on preparing for negotiation detailed above at guidance 'I. Appropriately prepare for and resource before entering negotiation' is just as relevant to preparing for mediation, as is the Attachment (Dispute negotiation checklist) to this section.

It is important during mediation that the parties present their cases clearly as the mediators are not necessarily technically skilled people. For example, the mediator may come from a legal background and not be a technical or financial expert. It is normal for the parties to brief the mediator thoroughly beforehand by providing position statements and agreed reading lists.

Mediation does not require a final agreement and there are no consequences if the parties are unsuccessful in concluding a settlement. Parties can walk away from mediation at any time since it is a voluntary process. However, to be successful representatives on all sides of the dispute need to be appropriately motivated and empowered to close out the disputed matter.

If the parties can agree to a resolution it is important this resolution is well documented using a settlement agreement. This topic is detailed above at guidance 'F. Ensure settlement agreements are prepared with appropriate legal input to ensure the dispute or disagreement is unambiguously resolved'.

EXAMPLE**Mediators for the Belt and Road Initiative**

The Singapore International Mediation Centre and the Mediation Center of the China Council for the Promotion of International Trade and the China Chamber of International Commerce have agreed to work together to help resolve disputes that may arise in cross-border transactions under China's Belt and Road Initiative. They have agreed to cooperate in the promotion of international commercial mediation, and will serve both Chinese and Singaporean companies.

EXAMPLE**Use of independent certifier as a mediator**

On the Daang Hari-SLEX Link Road project in the Philippines an independent consultant was commissioned by both parties to certify progress of the works. It was noted that this consultant can act as a mediator helping to prevent disputes as it offers an impartial evaluation of any issues, which can then be presented to the parties for agreement.

For more information, see the [Daang Hari-SLEX Link Road Case Study](#).

L. Appoint the right mediator for both parties

The appointment of a good independent mediator is very important. Mediation can require several months of engagement and may require several sittings. The mediator, as well as the correct representatives from the parties, are integral to the process and its potential outcomes. A mediator acts as a neutral third party and their recommendations will only be accepted if they are trusted. The parties must ensure that the mediator is reputable, experienced and, respected by both parties with a verifiable track record.

Consideration should be given to the mediator's background, as the more technical or contractual a dispute is will influence who is best placed to mediate. However, the core skill of a mediator is to bring the parties together. Focusing too heavily on sector or technical specialism can unhelpfully narrow the options available. Where a dispute involves high levels of technical detail an expert can be appointed in addition to a mediator. The expert can provide expert knowledge to assist the mediator.

DISPUTE RESOLUTION BOARDS**Key advantages**

- Versatile. Decisions can be binding or non-binding. Can make recommendations or determinations.
- Can guide the parties from the beginning of a disagreement

Key disadvantage

- Costs are not insignificant and are typically fixed, irrespective of whether a dispute arises during the project term.

M. Utilise Dispute Resolution Boards where available

Dispute Resolution Boards (DRBs), also referred to as Dispute Avoidance Boards or just Dispute Boards, can be effective mechanisms for the avoidance and resolution of disputes. They are designed to be established at the outset of the project and to monitor the project on an ongoing basis, including by meeting regularly to assess the progress of a project.

EXAMPLE**Key role of DRBs**

The interviewees on the Port of Miami Tunnel project in the USA felt that the Dispute Resolution Board was helpful in avoiding the escalation of disputes. It was used for a dispute that occurred over increased tunnelling costs, where the DRB ruled that certain cost increases should be covered by the Procuring Authority. Once this decision was made, the parties were able to negotiate the dollar amount, avoiding court proceedings.

For more information, see the Port of Miami Tunnel Case Study.

Because DRBs are designed to be established at the outset and PPP contracts are long-term in nature, their costs can be high and fixed irrespective of whether a dispute arises.

The process for resolving disputes using a DRB normally begins with each party producing an appropriately detailed position paper for consideration by the DRB. Thereafter a meeting can be held to give each party an opportunity to present its case for determination by the DRB. Once formal procedures have begun the timeframes will generally be tight, emphasising the importance of ongoing good document control by the Procuring Authority. Information management and document control is detailed in Section 3.4 (Information management). DRBs are not bound by traditional rules of evidence and the members will have broader discretion on how they inform themselves of the subject matter.

DRBs can provide interim solutions to problems and keep the parties working constructively together. Their use should therefore help to avoid problems escalating and the relationship between the Project Company and the Procuring Authority deteriorating. However, any determination will typically be subject to review through court proceedings or arbitration if a party decides to go down that path.

A DRB may have a broader function to help avoid disagreements turning into disputes. This can involve seeking the opinion of the DRB to assist the parties' thinking in agreeing to an appropriate dispute resolution mechanism.

EXAMPLE**Additional benefits of DRBs**

The dispute resolution process for one of the case studies in a developed market included the use of a Dispute Avoidance Board, which can make recommendations to the parties. In one situation it recommended an expert determination process be used, which was then successful in resolving the dispute in question.

DRBs are commonly used in construction contracts between a principal and a contractor. PPP arrangements are more complex because there are more parties involved. For example, a PPP contract is agreed between a Procuring Authority and a Project Company, though construction risks are passed down to a separate construction contractor under a construction contract. This adds complexities to a DRB arrangement. One way of addressing such complexity is to give the construction contractor a 'seat at the table' in addition to a Project Company and/or require the construction contractor to agree upfront to the determinations of a DRB.

DRBs will generally have a dispute resolution function whereby either party can formally refer a dispute to the DRB for a written recommendation or determination. These recommendations or determinations can be binding or non-binding, depending on what the parties agree in the PPP contract. The other option is that the board can fulfil either function (i.e. issuing binding and non-binding decisions) and the parties decide on a case by case basis whether they are seeking a binding or a non-binding decision.

22% of the PPP contracts reviewed globally allowed for DRBs. There were several examples of disputes being resolved using a DRB, including in Germany, the USA, and Australia. Out of the data sample, 9% of disputes were successfully resolved using a DRB.

In some jurisdictions, such as Chile, a standing technical panel is established to hear certain disputes and propose settlement agreements prior to any formal arbitration (though the panel may not necessarily be called a DRB). Other jurisdictions (e.g. Europe) also consider the engagement of a single or a panel of experts on a case by case basis to issue an opinion on a dispute to assist the parties

in coming to an agreement before the dispute moves to arbitration. A technical panel of experts can have similar cost implications to those of a DRB.

N. Set up the Dispute Resolution Board before a dispute arises, but also consider the changing needs of the Dispute Resolution Board for the project

A decision should be made on whether to set up a DRB on a permanent basis. Setting a DRB up on a permanent basis has the advantage of allowing it to maintain familiarity with the project and avoid disagreements on the arrangement of the DRB itself, including the appointment of the board.

This cost implication has led to the practice, in many jurisdictions, of DRBs not being established until after a dispute arises to save on the costs of retaining the board members at financial close. Setting up a DRB on an ad-hoc basis may be considered less costly, as the board is only engaged when a dispute has arisen. Although, in the context of a large PPP, they are only a small percentage of the total project cost. It can also cause several difficulties, as if the parties have to agree jointly to the board members, this process will be less simple once a dispute is already in motion and it will further delay the resolution of the dispute.

It may not be necessary for the DRB to be established for the entire duration of a PPP contract, considering the costs involved in having a DRB for the entire duration. The likelihood of complex disputes decreases after the construction phase has ended and a DRB may be able to function at a reduced capacity during operations. For example, it could meet less frequently, or the board could be reduced in number, perhaps from three members to one member. The members may also need to change based on the different experiences required for the relevant project activities in the operations phase. A DRB can also be appointed, subject to review every three or five years, giving the parties a chance to decide not to re-appoint the DRB if they decide it is no longer required.

O. Appoint the right Dispute Resolution Board for both parties

The composition of a DRB can be outlined in a PPP contract, and will often include three members with a mixture of technical and legal expertise. A common process involves each party appointing one member and the two party-appointed members selecting the final member. Where the Procuring Authority has the right to select a member or

members of the DRB, it needs to consider the experience of its nominee from a technical, legal and contract management perspective. The process for appointing the board should not be rushed. Often the parties are stuck with panel members for an extended duration and often there is no mechanism for replacement of the board.

Board members are typically required to have the technical qualifications or skills necessary to review or determine the technical matters in dispute (e.g. engineering, cost or programming qualifications). The presence of one board member who has legal qualifications is also common. Potential issues with appointees to be considered include lack of experience, lack of independence and lack of availability. Professional advisors may be able to assist to provide recommendations if the parties cannot think of who to appoint.

Further information on how to set up a DRB is available at the Dispute Resolution Board Foundation³ or the International Chamber of Commerce.⁴

EXPERT DETERMINATION

Key advantages

- Can resolve disputes quickly and in a cost-effective manner
- A determination will typically be contractually binding subject to certain exceptions

Key disadvantages

- Only appropriate for certain matters of a technical nature, and not for matters which require the provision of evidence
- Determination will not be as enforceable by a court like a court decision or arbitral award

P. Where available consider expert determination for disputes that are of a technical nature

Expert determination typically refers to a mechanism common to some PPP contracts where disputes that are of a 'technical nature' are referred to an individual or panel of experts with the relevant

³ Available at <http://www.drb.org/>.

⁴ Available at <https://iccwbo.org/dispute-resolution-services/dispute-boards/>.

technical expertise for a determination. A PPP contract may set out the issues of a 'technical nature' that are applicable. These typically include things like scheduling forecasts, specific valuations and accountancy issues.

The expert will consider factual evidence (whether witness or documentary), but expert determination is not a forum for cross-examination of witnesses. In addition, it is common for the parties to submit reports from party-appointed experts to support their own standpoints.

Expert determination is different to the other dispute resolution mechanisms mentioned because of the narrow scope covered. There are advantages to this as the determination is typically binding and relatively quick and cost effective for the specific issues referred. A determination by only one expert on very technical issues is not uncommon. 25% of the PPP contracts reviewed globally allowed for expert determination. There can also be contractual timetable constraints around expert determinations. There often needs to be agreement to a reasonable extension to the contractual timetable for the expert to issue their decision. If a decision is issued out of time there is a risk the determination may be invalidated.

It is rare to find a dispute that is exclusively technical. Money is usually the underlying basis of most disputes and while it may be possible to isolate a technical issue for referral, in practice parties often combine all or the majority of issues. This may mean that elements of the dispute are outside the strict scope of the appointees' expertise. However, resolving the very technical aspects of a dispute can assist the parties to come to a common understanding of the underlying facts of a broader dispute and help to reach a commercial resolution.

The 2017 version of the World Bank's Guidance on PPP Contractual Provisions⁵ provides additional helpful commentary on typical expert determination dispute resolution mechanisms.

Q. Appoint the right expert for expert determination

As with other forms of third party recommendations (such as mediation), the choice of expert is vital. The expert must be appropriately experienced and trusted by the parties, otherwise there is a chance their decisions will not be followed. For example, the party that is unhappy with the determination

may not comply with the determination until the determination has been confirmed by a court proceeding or arbitration.

The Procuring Authority needs to keep in mind that PPP contracts are complex and typically quite bespoke. If the experts come with a pre-determined approach (e.g. an approach similar to that which would be used for a determination in relation to a traditional construction contract) they might have a tendency to apply such concepts also to a PPP contract, which will not end with a positive or correct outcome.

COURT PROCEEDINGS

Key advantage

- Provides a final determination

Key disadvantages

- Is an adversarial process and may lead to a deterioration in relationships
- Typically the most expensive and time consuming of all dispute resolution mechanisms

ARBITRATION

Key advantages

- Provides a final determination
- Customisable to parties' preferences
- Can be more efficient in terms of time and costs than court proceedings

Key disadvantages

- Is an adversarial process and may lead to a deterioration in relationships
- Can be perceived by members of the public to lack transparency (if conducted in private and the results are confidential)

R. Consider the full implications of moving a dispute to court or arbitration

Moving a dispute to court or arbitration is an adversarial process and should be considered as a last resort. As such processes are adversarial they are potentially damaging to the reputation of the parties. An advantage is that the processes will deliver a binding decision delivered by a third party and so may prove to be more efficient where the

⁵ Available at <http://ppp.worldbank.org/public-private-partnership/library/guidance-on-ppp-contractual-provisions-2017-edition>

parties are unlikely to otherwise agree to a mutually acceptable resolution. The outcome of such proceedings is binding and can typically be enforced through the courts, subject to rights to appeal the decision (which will depend on the forum and the jurisdiction).

Arbitration can be agreed in the PPP contract as an alternative process to court proceedings although the parties may still have access to the court systems for specific issues (such as issues requiring immediate court intervention). The parties may not always be able to agree to arbitration as an alternative to local court proceedings in a particular jurisdiction. Additionally, individual jurisdiction's applicable laws may not allow for disputes to be decided in a forum other than a local court.

Arbitration is often preferred by private partners because it is perceived as being more neutral than the use of local courts particularly in relation to contracts with government entities. It may also be a non-negotiable requirement for lenders as lenders will be less willing to accept the risks associated with local courts.

Arbitration is more customisable than court proceedings, which can have the effect of making it faster and cheaper. For example, arbitration may allow for the streamlining of document disclosure processes, as compared to more stringent court requirements. There is ongoing debate that typical arbitration procedures have, in fact, become more time consuming.

Some disadvantages of arbitration over court processes are that the parties have to pay the costs. Arbitration can also be less flexible than court proceedings for multi-party disputes. Disputes in PPPs are often multi-party disputes as significant risk is passed through the Project Company to its contractors.

Arbitration is also different to court proceedings in that it is conducted in private and often confidential. This will typically benefit the Project Company, whereas it may be a positive or a negative attribute for the Procuring Authority. On the positive side the Procuring Authority may see the benefit of keeping any spurious disagreement around the project out of the public sphere and the media. However, there can be negative implications for the Procuring Authority if the public perceives the confidential nature of arbitration as a hindrance to government transparency. In several jurisdictions court proceedings are preferred due to their higher level of transparency.

The data shows that 39% of disputes were settled in court as opposed to 22% through arbitration. It should be noted, however, that this is based on a relatively small sample size. Only 42 projects were found to have data on court proceedings and as arbitration is conducted in private and is often confidential the results may be skewed, indicating a higher incidence of settlement through court proceedings. Within PPP contracts arbitration was a common and widely used dispute resolution mechanism. Arbitration provisions were in 56% of the PPP contracts reviewed globally, with 54% of the PPP contracts adopting domestic arbitration and 17% adopting international arbitration.

S. Choose the right arbitrator(s)

The selection of the arbitrator must be carefully carried out. PPPs are unique contracts and most arbitrators will not have had direct experience with PPP projects. It is also important to find an arbitrator who does not have a potential conflict of interest, especially if the jurisdiction is relatively small or the market is developing. There are different forums available for arbitration with international arbitration available as well as the domestic equivalents. A full discussion of the differences is beyond the scope of this reference tool.

Both parties need to be happy with the appointment of the relevant arbitrators such that the decision is seen as legitimate by all parties to avoid further issues.

EXAMPLE

Difficulties with arbitrators

The Project Company on a cross-border rail project in a developed market did not favour the arbitration clauses in the PPP contract, which allowed each party to choose an arbitrator to sit on the panel. There were two Procuring Authorities and each had the right to appoint a representative to the arbitration panel. Thus the Procuring Authorities had two representatives compared to only one for the Project Company, creating an impression the process was not fair to the Project Company. A lack of trust in the mechanisms used to resolve disputes can damage the relationship between parties, as well as potentially prolong the dispute or lead to further disputes.

T. Prepare to provide detailed evidence when moving a dispute to court or arbitration

The provision of evidence is a key process used by court proceedings and arbitration in reaching decisions. The Procuring Authority needs to be aware of the rules of evidence that it will be required to comply with, such as providing access to witnesses. In addition, preparing for arbitration takes time as detailed evidence needs to be submitted by each party to support their arguments. Such preparation will require careful interpretation of the PPP contract, accurate records, a robust review of the Procuring Authority's liabilities and risks, and an objective assessment of the cost and time implications of the underlying cause of the dispute. This emphasises the importance of ongoing good document control by the Procuring Authority. Information management and document control is detailed in Section 3.4 (Information management).

The concept of legal privilege should also be considered. The concept can be used in many jurisdictions to protect certain documents from disclosure. However, specific conditions must be met to obtain this protection. It is important for Procuring Authorities to establish, with the benefit of legal advice, procedures to enable the use of such protections.

ATTACHMENT: Dispute negotiation checklist

- What are the Procuring Authority's objectives for the negotiation?
- Be clear about what your understanding of the underlying cause of the disagreement or dispute is.
- Consider the Project Company's understanding of the underlying disagreement or dispute.
- What are the strengths and weaknesses of the different sides of the disagreement or dispute?
- A key objective for the Procuring Authority should be to reach a common understanding on the underlying cause of the problem leading to the disagreement or dispute, including any associated legal and technical issues.
- What are the skills needed to assess the underlying cause and carry out the negotiation (legal, financial, technical, insurance, tax, other)?
- The Procuring Authority may need to appoint external advisors.
- Consider the effect any decision may have on all interested parties.
- Assess who should be involved in the negotiation. It may be beneficial for the construction or operations contractor to be present.
- Depending on the significance of the dispute and settlement options, the Procuring Authority may need to seek approval from another relevant government department.
- Are negotiators on all sides sufficiently empowered to resolve the matter?
- What are the strengths and weaknesses of the participants in the negotiation?
- Once technical and legal aspects have been clarified, the commercial aspects can be properly evaluated. Commercial aspects should be considered on both short-term and long-term basis.
- Evaluate the Procuring Authority's 'worst case scenario' option, preferred option and compromise option.
- Where limited information is available (or the cost implications of fully understanding the underlying issue are great) the parties should attempt to reach a settlement based on the information available.

5.3 Summary data analysis

This section provides a summary of the data analysis related to disputes. The full data analysis is available in Appendix A (Data Analysis).

Contractual disputes are common in PPPs during both the construction and operational phases. The research found that a formal notice of dispute was issued by one of the contracting parties on 42 projects out of 165 PPPs studied (for which dispute data was available) which is a prevalence of 25%. There was a prevalence of 17% for dispute events occurring in the first four years after financial close. There was an approximately even split between disputes during the construction and operational phases. Construction phase disputes occurred 3.2 years after financial close on average. Operation phase disputed occurred 4.3 years after financial close. The average length of the construction phase for the projects was 3.9 years indicating that the disputes in the operations phase were occurring near the start of that phase.

The prevalence of disputes during the operations phase would have potentially been higher than during construction had the study timeframe been longer and had it included projects which had completed their full contract term. The study

was limited to projects that reached financial close between 2005 and 2015 (inclusive). There was only one project which had completed full operations during this period. Given the timeframe, the earliest projects in the study (i.e., those that reached financial close in 2005) have reached a maximum of 13 years after financial close.

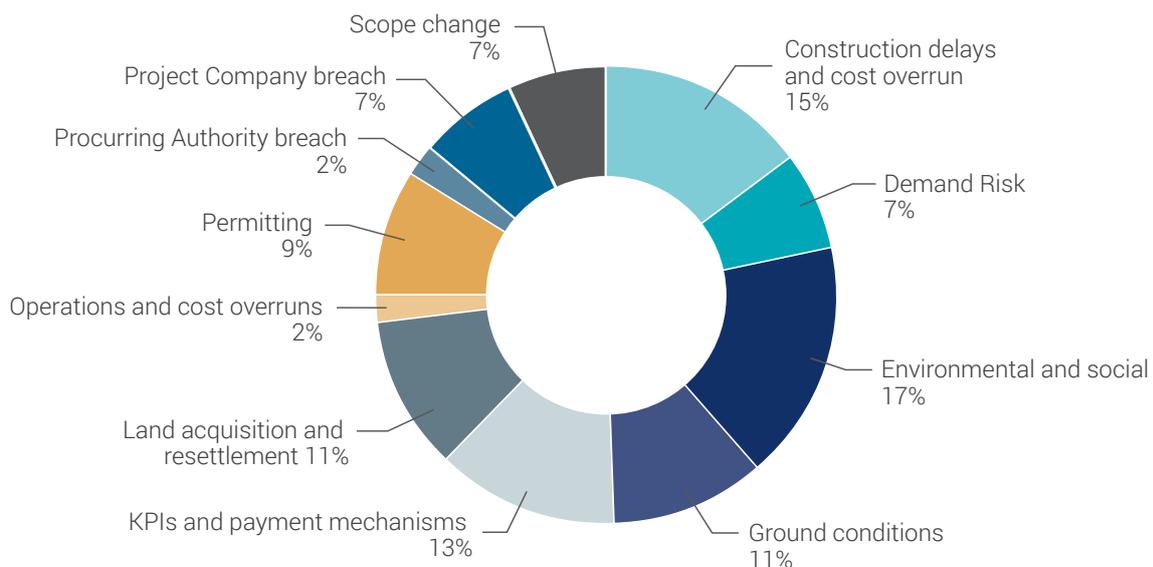
The highest prevalence of disputes was in the transport sector, with 27 instances out of 77 projects for which data was available (35%). The energy sector came in at 16%, with 11 instances out of 68 projects for which data was available. There were four disputes found in the water and waste sectors. These numbers are too small to draw any firm conclusions on the prevalence of disputes in these sectors.

The research also indicates that asset condition upon handback is often an under-appreciated risk and there could be several handback-related disputes in the future for the projects studied.

Dispute subject matters

There was a large variation in the subject matter of disputes in the sample. The research indicates that disputes often occur due to ambiguous contract drafting, misunderstandings of the intent of risks transferred and the further risks associated with the differing interpretation of bespoke and/or complex terms.

Figure 1: Cause of disputes, based on 30 projects that have dispute causes available



The most common reason for the Project Company to issue a dispute notice was an increase in costs for which the Project Company was seeking compensation. Some common examples from the study were increased costs due to: unexpected ground conditions; unanticipated maintenance costs for existing infrastructure; a change in scope; and revenue forecasts. These disagreements were based around how to calculate the compensation to the Project Company or the Project Company arguing that the actions of the Procuring Authority led to reduced demand.

The most common reason for the Procuring Authority to issue a dispute notice was the ongoing failure of the Project Company to meet operational requirements. Some common examples from the study came about as a result of poor road quality or a failure to meet Key Performance Indicators.

The other category of disputes which appeared were those caused by actions of a third party. This includes decisions by an environmental regulator or ongoing protests by local populations. These are worthwhile noting as a reminder that external events have the potential to cause problems if handled poorly, either before contract signature or during project delivery.

Overall, disputes caused by issues related to permitting, environmental and social impacts or land acquisition and resettlement amount to 43% of all disputes identified on the 165 projects for which data was available. If disputes due to ground conditions and various other construction delays and associated cost overruns (for which full detail on granularity of causes was not available) are added to this category then the overall prevalence of disputes due to site conditions, permits and or approvals, social issues and land acquisition amounts to 57%.

Dispute resolution mechanisms

The majority of projects investigated in the study have defined dispute resolution mechanisms (78 projects out of 115 for which data was available, i.e., 68%). The prevalence of each type of mechanism is shown in Table 1 below.

Table 1: Prevalence of dispute resolution mechanisms explicitly defined in PPP contracts, based on 115 projects

Mechanism	Examples found*	Percentage*
Escalation to senior management	31	27%
Expert determination	29	25%
Dispute Resolution Board	25	22%
Mediation	37	32%
Domestic arbitration	62	54%
International arbitration	19	17%

*As there may be more than one mechanism used per PPP contract the total examples/percentage is greater than the number of projects with data available

Many projects were able to solve their issues using the earlier escalation mechanisms stipulated in the PPP contract. An example of this is illustrated in the Central Berkshire Waste Case Study. Multiple projects which were investigated as part of the data collection process, however, had no dispute resolution mechanisms detailed in the PPP contract (as common in some civil law jurisdictions) and consequently disputes were escalated to the relevant court.

A preferred method for project parties is to pursue settlements through facilitated discussion and mediation. This is done to avoid progressing detailed claims on a winner takes all basis, such as through court proceedings or arbitration. A private, collaborative approach enables parties to reach amicable settlement where both parties compromise and thereby also avoid expensive and potentially acrimonious formal dispute resolution mechanisms which may damage the parties' working relationship. This process may also allow discussion and exploration of the different methods of financial compensation and funding available

through the various payment models in place. The data showed only 9% of disputes are settled by mediation. However, this is likely skewed since mediation proceedings are typically confidential and so data is less accessible.

Although many disputes in PPP transactions are resolved before they reach court or arbitration, the data indicates that as high as 65% of disputes are still settled through court proceedings or arbitration. This data may also be skewed as there is typically more data available on higher profile arbitration and court proceedings.
