NEGOTIATED SETTLEMENT OF PUBLIC INFRASTRUCTURE DISPUTES

Mark Kantor

An issue that I have found often difficult (and which I have discussed recently in my training on oil-gas dispute management in St Andrews) is how to combine the appropriate style of interaction between a private investor at the time a dispute starts to loom (as we have it now in so many oil-gas-mining projects dealing with states directly or with state enterprises). The transaction lawyer (or here the relationship lawyer) will want to avoid anything that antagonises the other party; he/she will want to seek mutually successful renegotiation and maintenance of the relationship. But on the other hand, he/she (or others including outside counsel) will already envisage subsequent litigation (e.g. mostly contract or treaty-based arbitration). If you envisage subsequent litigation, you will want to use the leverage from the prospect of subsequently possible arbitration in the on-going negotiations to re-define the relationship. They take place “under the shadow” of subsequent litigation where both parties should (and often do) calculate the prospects, gains, risks and costs, direct and indirect (e.g. reputational, penalisation for litigation) costs. That is well known and not structurally and essentially different from other dispute-related negotiations “under the shadow” of subsequent litigation possibilities.

But how, so my question, can a corporate lawyer avoid the inevitable antagonisation and greater confrontational mood that comes almost inevitably when you raise your litigation option? On one hand you want the other party to know that you have this double-edged sharp tool. You also want him-her to appreciate better than they probably do with optimistic and group-think internal deliberations the true risks they run—which you are often better positioned to tell them than they are to appreciate themselves. But you also want—while using the negotiating tool of pointing towards the litigation prospects—to keep your options with respect to subsequent litigation options open and not commit yourself too early in any formal ways.

I have here my own solutions (some discussed in my case study on the SwePol mediation done between two state enterprises and under the shadow of three volatile and politicised evolving regulatory regime and with several influential

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1 Mark Kantor is an independent arbitrator and the Editor-in-Chief of Transnational Dispute Management. He teaches both International Business Transaction and International Arbitration as an Adjunct Professor at Georgetown University Law Center. Mr. Kantor is also a Senior Research Fellow at the Vale Columbia Center for Sustainable International Investment. He can be reached by email at mkantor@mark-kantor.com or through the web at www.mark-kantor.com.
add-on players) but I would be interested to know any reactions on this interface between sound and effective “relationship management” lawyering and the imperatives of being later able to build a sound and solid case.

Prof. Thomas Wälde, OGEMID
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Prof. Thomas Wälde was drawn to discuss the problems of public infrastructure in developing countries. So too, he was drawn to discuss the benefits and limits of negotiated settlements for international investments in infrastructure projects. This essay offers some practical thoughts on the circumstances that encourage or discourage negotiated settlements of disputes between developing country authorities and foreign investors with respect to public infrastructure projects.

I. Introduction

Innumerable papers have been written and speeches given about finding a path toward settling infrastructure disputes. Too often, those pronouncements are based on assumptions about the underlying problem, or about the capacity of the disputing parties to settle, that are candidly unrealistic. Some amicable dispute resolution advocates demonstrate a missionary zeal for settlement that fails to come to grips with real barriers to resolution. Similarly, other, more hard-eyed critics overstate the barriers to settlement, preferring to describe one party or another as inevitably intransigent or faced by insurmountable moral hazards. At times, perhaps, one of those two polar views is justified by the particular circumstances. But, too often those observers overstate the opportunities for, or barriers to, settlement.

This essay will review the experience with respect to a large number of independent power projects (IPPs) caught up in the Indonesian political and economic upheavals triggered by the Asian financial crisis. Most importantly, there are times when the gap between the parties is simply too large to bridge by negotiation. There may be no middle ground that will simultaneously preserve the fundamental economic interests of the principal parties to the dispute. That was the case for the Indonesian IPPs and thus the manner in which those problem projects were addressed is useful for understanding the parameters for negotiated resolution of infrastructure disputes.

II. The Indonesian Experience

The circumstances facing 27 Indonesian private power projects in 1997–1998 are illustrative of the issues considered in this Essay. Those projects, and their