

LA/COD/73

QUESTIONNAIRE ON “SETTLEMENT OF INTERNATIONAL DISPUTES TO WHICH INTERNATIONAL ORGANISATIONS ARE PARTIES”

1. What types of disputes/issues (cf. paras. 6 and 7 above) have you encountered?

UNOPS has encountered the following two main types of disputes:

- a. Personnel disputes between UNOPS and individuals (both personnel retained under UN staff contracts and other contract modalities such as Individual Contractor Agreements). Personnel disputes are disputes over administrative decisions made by UNOPS management that impact UNOPS personnel (e.g., regarding non-selection, non-renewal of contract, benefits and entitlements, termination, dismissal and other disciplinary measures, etc).
- b. Commercial disputes between UNOPS and private parties (i.e., companies and non-governmental organisations), governmental entities or other United Nations entities arising out of a commercial transaction. The vast majority of commercial disputes involve private parties contracted by UNOPS to procure goods and/or services, including works, as part of UNOPS projects. In most of these cases, private parties have brought claims against UNOPS, but there are also cases in which UNOPS has a claim against private parties. Commercial disputes with other United Nations entities are very rare in practice and have always been settled amicably.

2. What methods of dispute settlement (cf. para. 9 above) have been resorted to in cases of disputes with other international organizations, states or private parties? Please provide any relevant case law, or a representative sample thereof. If you cannot provide such information for confidentiality reasons, could you provide any such decisions or awards in redacted form, or a generic description/digest of such decisions?

UNOPS is an integral part of the United Nations and therefore enjoys immunity from legal process under Article II, Section 29 of the Convention on the Privileges and Immunities of the United Nations. Therefore, disputes involving UNOPS are not usually resolved through state court proceedings.

Personnel disputes between UNOPS and personnel retained under UN staff contracts are resolved through the UN's internal justice system. This includes formal dispute resolution processes before the UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT) as well as informal dispute resolution processes such as negotiation and mediation through the Office of the UN Ombudsman. Decisions of the UNDT and UNAT are available online at the following links: <https://www.un.org/en/internaljustice/undt/judgments-orders.shtml>; and <https://www.un.org/en/internaljustice/unat/judgments-orders.shtml>.

Personnel disputes between UNOPS and personnel retained under Individual Contractor Agreements are resolved through ad hoc arbitration under the UNCITRAL Arbitration Rules or mediation through the Office of the Ombudsman for United Nations Funds and Programmes, as the UN General Assembly have not provided Individual Contractors with access to the UN's internal justice system. Arbitrations between UNOPS and personnel retained under Individual Contractor Agreements are usually confidential. The main issues in recent arbitrations have included challenges against UNOPS' decision to terminate Individual Contractor Agreements and related claims for damages.

Commercial disputes between UNOPS and private parties or government entities are usually resolved through negotiation or ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules. The vast majority of commercial disputes involve private parties contracted by UNOPS to procure goods and/or services, including works, as part of UNOPS projects. In most of these cases, private parties have brought claims against UNOPS to claim damages arising from alleged breaches of contract. There have also been cases where UNOPS has a claim or counterclaim against private parties.

Commercial disputes between UNOPS and other entities of the United Nations system are usually resolved through consultation between the executive heads of the respective entities, failing which the matter is referred to the Secretary-General of the United Nations for resolution. This provision is usually included in the relevant agreements. As noted above, disputes between UNOPS and other United Nations entities are very rare in practice. They mostly refer to problems related to cooperation in the implementation of a UN project.

3. In your dispute settlement practice, for each of the types of disputes/issues arising, please describe the relative importance of negotiation, conciliation or other informal consensual dispute settlement and/or third-party dispute resolution, such as arbitration or judicial settlement.

Usually, all UNOPS contracts contain a dispute resolution clause which provides that: (1) the contracting parties shall use their best efforts to settle their case amicably through negotiation (in addition to negotiation, some of UNOPS' contracts also provide for conciliation under the UNCITRAL Conciliation Rules); and (2) if the contracting parties are unable to resolve their dispute amicably, they are entitled to initiate ad hoc arbitration under the UNCITRAL Arbitration Rules.

To avoid the costs and other challenges associated with arbitration, UNOPS places a high priority on resolving disputes with third parties through settlement negotiations whenever possible. This is especially the case for disputes involving government entities, due to UNOPS' status as a United Nations entity. Although UNOPS has faced a relatively high number of arbitration cases in the context of commercial disputes in recent years, the majority of UNOPS disputes are resolved through negotiation.

4. Which methods of dispute settlement do you consider to be most useful? Please indicate the preferred methods of dispute settlement (cf. para. 9 above) for different types of disputes/issues (cf. paras. 6 and 7 above).

As noted above, to avoid the costs and other challenges associated with arbitration, UNOPS places a high priority on resolving disputes with third parties through settlement negotiations whenever possible. This applies to both personnel and commercial disputes.

UNOPS has used mediation particularly in the context of personnel disputes, and has seen great added value from it. Even though UNOPS has not resorted to mediation or conciliation in practice in recent years with regard to commercial disputes, UNOPS sees great added value in these types of consensual dispute resolution procedures.

5. From a historical perspective, have there been any changes or trends in the types of disputes arising, the numbers of such disputes and the modes of settlement used?

Recently, the number of commercial disputes involving private parties (in particular, in the area of infrastructure) has increased, in part due to the organisation's increased engagement with the private sector.

6. Do you have suggestions for improving the methods of dispute settlement (that you have used in practice)?

UNOPS has identified room for improvement in the resolution of personnel disputes between UNOPS and personnel that are not UN staff (in particular personnel retained under Individual Contractor Agreements) who do not have access to the UN's internal legal justice system. For a long time, the only available formal dispute resolution process has been *ad hoc* arbitration under the UNCITRAL Arbitration Rules which usually entails a very lengthy process associated with significant costs.

To tackle some of these challenges, UNOPS has recently started to introduce changes to the dispute settlement process involving Individual Contractors, among other things, including the following: (1) Individual Contractors are now entitled to request a management evaluation in case of non-disciplinary decision before initiating arbitration to challenge an administrative decision; (2) more emphasis is placed on pursuing informal dispute resolution such as mediation as a prerequisite for initiating arbitration proceedings; and (3) UNOPS is in the process of introducing a revised arbitration clause in its Individual Contractor Agreements that provide for a faster and more cost-effective process under the UNCITRAL Expedited Arbitration Rules. UNOPS started implementing these changes for this advanced dispute resolution process for Individual Contractors in September 2022.

In addition, UNOPS sees advantages in giving more attention to resolving commercial disputes through consensual dispute resolution processes such as mediation and conciliation. In practice, commercial disputes within the UN system seem to be resolved only through negotiations (without the involvement of a neutral third party such as a mediator or a conciliator) and arbitration. However, in certain cases there may be an advantage to resorting to mediation and conciliation.

7. Are there types of disputes that remain outside the scope of available dispute settlement methods?

UNOPS is not aware of disputes that do not fall within the scope of available dispute settlement methods.

8. Does your organisation have a duty to make provision for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character under the 1946 Convention on the Privileges and Immunities of the United Nations, the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, or an equivalent treaty? How in practice has your organisation interpreted and applied the relevant provisions?

Yes. UNOPS has an obligation under Article II, Section 29 of the Convention on the Privileges and Immunities of the United Nations to make provisions for appropriate modes of settlement of disputes arising out of contracts of private law character to which the United Nations is a party. This obligation derives from the fact that UNOPS enjoys immunity from legal process and cannot be sued before state courts.

To comply with its obligation under Article II, Section 29 of the Convention on the Privileges and Immunities of the United Nations, UNOPS usually includes an arbitration clause in all its commercial contracts with external parties, as well as in its Individual Contractor Agreements. Therefore, UNOPS' counterparties are usually able to file their claims against UNOPS before an arbitral tribunal.

9. Are there standard/model clauses concerning dispute settlement in your treaty and/or contractual practice? Please provide representative examples.

UNOPS usually uses the dispute settlement clause in the UN General Conditions of Contract established by the UN Office of Legal Affairs. The current version of this arbitration clause (which is currently being updated) reads as follows:

“AMICABLE SETTLEMENT: The Parties shall use their best efforts to amicably settle any dispute, controversy, or claim arising out of the Contract or the breach, termination, or invalidity thereof. Where the Parties wish to seek such an amicable settlement through conciliation, the

conciliation shall take place in accordance with the Conciliation Rules then obtaining of UNOPS Commission on International Trade Law (“UNCITRAL”), or according to such other procedure as may be agreed between the Parties in writing.

ARBITRATION: Any dispute, controversy, or claim between the Parties arising out of the Contract or the breach, termination, or invalidity thereof, unless settled amicably under Article 17.1, above, within sixty (60) days after receipt by one Party of the other Party’s written request for such amicable settlement, shall be referred by either Party to arbitration in accordance with the UNCITRAL Arbitration Rules then obtaining. The decisions of the arbitral tribunal shall be based on general principles of international commercial law. The arbitral tribunal shall be empowered to order the return or destruction of goods or any property, whether tangible or intangible, or of any confidential information provided under the Contract, order the termination of the Contract, or order that any other protective measures be taken with respect to the goods, services or any other property, whether tangible or intangible, or of any confidential information provided under the Contract, as appropriate, all in accordance with the authority of the arbitral tribunal pursuant to Article 26 (“Interim measures”) and Article 34 (“Form and effect of the award”) of the UNCITRAL Arbitration Rules. The arbitral tribunal shall have no authority to award punitive damages. In addition, unless otherwise expressly provided in the Contract, the arbitral tribunal shall have no authority to award interest in excess of the London Inter-Bank Offered Rate (“LIBOR”) then prevailing, and any such interest shall be simple interest only. The Parties shall be bound by any arbitration award rendered as a result of such arbitration as the final adjudication of any such dispute, controversy, or claim.”

10. Does “other disputes of a private law character” (see 8) above) encompass all disputes other than those arising from contracts? If not, which categories are not included?

UNOPS understands that “other disputes of a private law character” mainly include non-contractual disputes such as tort claims.

11. What has been the practice of your organization in determining this? What methods of settlement have been used for “other disputes of a private law character” and what has been regarded as the applicable law?

UNOPS does not have a standard practice in determining “other disputes of private law character” that do not arise from a contractual dispute. In practice, UNOPS hardly faces non-contractual disputes. However, should such a dispute arise, in order to fulfil UNOPS’ obligation under Article II, Section 29 of the Convention on the Privileges and Immunities of the United Nations to provide appropriate modes of dispute settlement, UNOPS would, when appropriate, agree ex post to resolve the dispute through formal or informal dispute resolution processes such as negotiation or arbitration.

12. Have you developed a practice of agreeing ex post to third-party methods of dispute settlement (arbitration or adjudication) or waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, e.g. because no treaty/contractual dispute settlement has been provided for?

In practice there have barely been any disputes at UNOPS that could not be resolved through a contractual dispute resolution process and required an ex-post agreement to third-party dispute resolution methods. UNOPS is aware of only one case in which it entered an ex-post arbitration agreement with another party to enable it to formally pursue its claims.

UNOPS has not established a practice of waiving immunity in cases where disputes have already arisen and cannot be settled otherwise, as this would be contrary to established UN practice. In view of the privileges and immunities of the UN, the established practice of the UN is not to appear in local courts of Member States. Instead, where it is necessary to take action before local courts, the UN requests the government of the State concerned, through its Ministry for Foreign Affairs, to make representation on behalf of the UN. In addition, UNOPS notes that it does not have the authority to waive its immunity from legal process itself, but must seek the UN Secretary-General’s approval for a waiver through the UN Legal Counsel. Such waiver will only be granted in very special and exceptional circumstances when UNOPS has exhausted all other possible avenues to pursue its claims.