

Dispute Resolution Clauses in Impact Benefit Agreements with First Nations

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Agenda

1. Introduction to impact benefit agreements
2. Dispute resolution in IBAs
 - A. Arbitration clauses
 - B. Tiered dispute resolution clauses
 - C. Expert determination clauses
3. Selecting dispute resolution specialists for IBAs

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Impact Benefit Agreements (IBAs)

- Agreements between First Nations and a company regarding a development or project
- First Nations' support project in exchange for corporate benefits
- Benefits vary but may include:
 - Direct financial compensation
 - Profit sharing
 - Employment opportunities
 - Preferential contracting arrangements
 - Education and training programs

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Dispute Resolution in IBAs

- Dispute resolution within IBAs often overlooked
- Carefully drafted dispute resolution mechanisms essential to:
 - Quickly resolve future disputes under the IBA
 - Ensure the long-term viability of the relationship and project
- Common mechanisms include: 1) arbitration clauses; 2) tiered dispute resolution clauses; and 3) expert determination clauses.

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Arbitration Clauses

- A clause that requires the parties to resolve their disputes through an arbitration process
- Advantages:
 - Faster (earlier arbitration date)
 - Cheaper
- Disadvantages:
 - Delays by parties
 - Intervention by the courts
- Cannot oust court jurisdiction for urgent and interim relief

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Arbitration Clause Best Practices

- Arbitration clauses should adopt the following best practices:
 - State the number of arbitrators
 - Adopt the rules of an arbitral institution
 - Clearly exclude any issues or sections of the agreement from arbitration, if required
 - Take into account the applicable arbitration legislation (e.g., the availability of default rules to fill in gaps and the availability of rights of appeal)

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Tiered Dispute Resolution Clauses

- A clause that requires negotiation and mediation before arbitration
- Advantages:
 - Encourages negotiation
 - Increases possibility of internal resolution
- Disadvantages:
 - May cause additional delays
 - May raise challenges to the arbitrator's jurisdiction
 - Premature negotiations may be hampered by inadequate evidentiary record

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Expert Determination Clauses

- A dispute resolution clause to resolve discrete technical, accounting or scientific matters
- Advantages:
 - Efficient
- Disadvantages:
 - Only suitable for discrete issues

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Expert Determination Case Study

- *Haisla Nation v. Bear Creek Contracting Ltd.*
 - JV agreement between a First Nation and resource company
 - Clause for accountants to make a final determination of profit from JV
 - Court rejected clause was arbitration clause, allowing First Nation to continue action for amounts owing
 - Take-away: Expert determination clauses should be:
 - Clearly limited in their scope
 - Expressly excluded from any arbitration provision

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Selecting Specialists

- The choice of arbitrators, mediators and counsel is also important to dispute resolution under IBAs
- The best individuals are:
 - Familiar with the perspective of First Nations and resource companies
 - Dedicated to efficiency, fairness and finality

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Questions

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