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Procurement-related arbitration

Report by the Secretary-General

Summary

The present report on procurement-related arbitration has been prepared pursuant to the request of the General Assembly in paragraph 2 of its resolution 53/217 of 7 April 1999, and takes into account the recommendations of the Office of Internal Oversight Services (OIOS), as contained in its report (A/53/843), as well as the views expressed by Member States on the subject during deliberations on the report at the fifty-third session of the General Assembly.

The Secretary-General does not dispute the reasons for the arbitration cases as identified by OIOS in its report. The arbitration cases were in large part the consequence of the difficulties that arose with the sudden exponential growth in peacekeeping activities in the late 1980s and early 1990s, and the switch from traditional reliance on Governments of Member States for support services to the use of commercial vendors. Experience has shown that most disputes arose out of operational issues rather than out of questions of contractual interpretation or other strictly legal issues.

Thus far, contractor claims or disputes have been handled in an ad hoc manner. First, the operational unit, such as the peacekeeping mission, which is responsible for contract administration, attempts to resolve the matter with the contractor. The Procurement Division and the Office of Legal Affairs are brought in for contractual or legal issues, respectively. Settlement discussions take place under the authority of the Under-Secretary-General for Management and the Controller. Every effort is made within the various offices of the Secretariat to reach an amicable settlement of claims and disputes, which can and do arise in normal commercial relationships.

The amount of award or settlement as well as the cost of arbitration, including legal fees, are charged to the budget of the peacekeeping mission.

Outside legal counsel is selected through a transparent and competitive process. Contracts are awarded by the Chief, Procurement Division, or the Assistant Secretary-General for Central Support Services, according to standard rules and procedures. Legal litigation services are highly specialized and firms are invited from a roster maintained in the Office of Legal Affairs. Thus far, most arbitrations have taken place in the host city; for practical purposes, legal firms need to have offices in this location in order to properly represent the Organization. The Office of Legal Affairs closely supervises all law firms to ensure that the interests of the Organization are protected, including avoidance of conflict of interest.

Thus far, disciplinary action has been taken against one staff member of the United Nations Development Programme in connection with an arbitration case.

There are currently four pending arbitration cases.

The Secretary-General has taken a number of steps which are consistent with the recommendations in the OIOS report. The keys to avoiding arbitration are a clear and sound contract and timely and effective contract administration that prevents disputes from arising in the first place and provides contractors with confidence that the Organization will be responsive and fair in dealing with disputes that do arise.

Procedures for the preparation of clear and sound contracts have been implemented. Training for field staff in contract administration and claims negotiation is being prepared. A system for contractor evaluation has been introduced. A means for contractors to raise complaints has been included in the Procurement Division Web page. Regular reviews of arbitration cases for lessons learned takes place. Alternate methods of dispute resolution, such as conciliation, are being explored.

I. Introduction

1. The present report is submitted pursuant to paragraph 2 of General Assembly resolution 53/217 of 7 April 1999. In preparing this comprehensive report on the issue of procurement-related arbitration, the Secretary-General has taken into account the recommendations of the Office of Internal Oversight Services (OIOS), as contained in its report (A/53/843), as well as the views expressed by Member States on the subject during deliberations at the fifty-third session of the General Assembly.

2. As requested in resolution 53/217, the Secretary-General sets forth below:

(a) The reasons for arbitration cases;

(b) The roles and mandates of various Secretariat units in arbitration and settlement processes;

(c) The sources of funding for arbitration awards and settlement payments;

(d) The selection of outside legal counsel and provisions to preclude conflict of interest;

(e) Disciplinary action;

(f) Pending arbitration cases;

(g) Measures taken or proposed to prevent or reduce contract disputes which might lead to arbitration in the future.

3. The report covers arbitration cases involving disputes arising from or related to contracts entered into by the United Nations with suppliers of goods and services. It does not address other, non-procurement-related arbitration cases arising from peacekeeping or other contexts in which the United Nations is involved.

II. The reasons for arbitration cases

4. Arbitration is a relatively new phenomenon for the United Nations, having arisen for the most part only since the mid-1990s. Since 1995, there have been a total of 12 arbitration cases, of which 11 relate to peacekeeping activities (the twelfth case relates to construction activities carried out by the United Nations Development Programme (UNDP)). At present, there are only four pending cases,[1] as the other eight have been completed, through arbitral decision or settlement, or withdrawn. It is to be recalled from the OIOS report (A/53/843) that, when compared to the total value of procurement contracts awarded by the Organization, the number and monetary value of arbitration cases has been very small.[2]

5. The Secretary-General considers that these arbitration cases were in large part the consequence of the difficulties that arose with the sudden exponential growth in peacekeeping activities in the late 1980s and early 1990s, and the switch from traditional reliance on Member State Governments for the provision of a wide range of support services to the use of commercial vendors. Many of the contracts at issue were complex and involved high values, requiring specialized skill and experience if they were to be managed properly.

6. Arbitration, being a form of adversarial dispute resolution, is the mechanism of last resort for the United Nations and a contractor once they have exhausted all means for an amicable settlement of claims. Of course, disputes and claims can, and often do, arise in any commercial situation, and whether or not they can be resolved amicably depends not only on the Organization, but also on the actions taken by vendors. It must also be acknowledged that, in some cases, it might not be in the interests of the Organization to pursue a negotiated settlement, e.g. where the claims asserted are unreasonable, or where the Organization has a strong legal case.

7. The Secretary-General does not dispute the conclusion in the OIOS report (ibid., para. 62) that a major factor leading to the arbitration cases was inadequate contract administration. In addition, there was a lack of experience on the part of programme managers and operational units responsible for handling major contracts, both before and after they reached the level of a dispute. Coupled with delays inherent in the headquarters/field relationship, the situation led to contractor dissatisfaction and, ultimately, a climate that did not favour amicable settlement of claims. It is also recognized, as reported by OIOS, that unclear contractual terms and non-compliance with rules and procedures by mission staff also contributed to the difficulties that gave rise to arbitrations.

8. The Secretary-General believes that the keys to reducing the number of cases that are referred to arbitration are a clear and sound contract and timely and effective contract administration that prevents disputes from arising in the first place and provides contractors with confidence that the Organization will be responsive and fair in dealing with disputes that do arise. As will be elaborated more fully in section VIII, below, the Secretariat is putting in place procedures, policies and resources to respond to these needs.

III. Roles and mandates within the Secretariat for negotiating settlements and handling arbitration

9. The primary responsibility for contract administration lies with the programme managers or operational units within the Secretariat for whom the goods or services have been procured. For peacekeeping activities, contract administration is handled by the programme managers at the field mission. When a claim or dispute arises under a contract, it must first be addressed at that level. Experience has shown that most disputes involve operational issues (for example, whether or not the goods or services were delivered or whether they meet the quality requirements in the contract), rather than questions of contractual interpretation or other strictly legal issues. But discerning the difference between operational and legal matters is key and, as was pointed out in the OIOS report, timely communication among the relevant offices is critical to avoidance of an escalating situation where a small operational matter becomes a serious contractual dispute resulting in arbitration.

10. Thus far, while each claim or dispute has been handled in an ad hoc manner, the general approach has been as follows:

(a) The operational unit attempts to resolve the matter with the contractor;

(b) Where necessary, the Procurement Division is consulted and that office may enter into discussions with the contractor, if the claim or dispute requires changes to or interpretation of the contract;

(c) The Office of Legal Affairs is consulted on legal issues, including questions of contractual interpretation and assessment of potential liability, as appropriate.

11. Except where the United Nations has its own claims against the contractor, if it is determined that an amount claimed by the contractor is owed by the Organization under the contract, that amount is generally paid to the contractor. Where the obligation of the Organization is not clear or the amount may not be established, because, for example, of uncertainties with respect to issues of fact, any of the key offices may propose that the Organization seek a settlement. In such situations Office of Legal Affairs would be consulted and, if appropriate, would recommend a settlement range based on an assessment as to the degree to which the Organization is exposed to liability in the case and the costs in terms of money, time and effort to arbitrate the matter. Authority from the Under-Secretary-General for Management/Controller to settle for that amount is generally sought before negotiations are undertaken with the contractor. The negotiation team will usually include representatives from the operational unit (e.g., in the case of claims arising out of the peacekeeping activities, the Field Administration and Logistics Division, and, perhaps, the mission, the Procurement Division and, where appropriate, the Office of Legal Affairs. Determination of the lead office for the negotiation has been made on an ad hoc basis, although the Office of Legal Affairs has usually led negotiations where the dispute has been turned over by the contractor to its lawyers for resolution. In any event, if agreement in principle can be reached between the United Nations and the contractor, the formal documentation settling the claim is prepared by the Office of Legal Affairs and submitted to the Under-Secretary-General for Management/Controller and to the contractor for signature.

12. Given the risks and costs associated with arbitration, every effort is made, consistent with the interest of the Organization, to reach negotiated settlements of contract claims with contractors. This has proved successful with the overwhelming majority of claims. Pursuant to article VIII, section 29, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly in its resolution 22 A (I) of 13 February 1946, the United Nations is obliged to make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party. Pursuant to that provision, contracts entered into by the United Nations contain a clause providing for disputes arising under the contracts which cannot be settled by negotiation to be submitted to arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[3]

13. Sometimes, however, it has not been possible to reach an amicable settlement with the contractor and the claimant has commenced arbitration proceedings pursuant to the United Nations General Conditions of Contract. Once the arbitration proceedings commence, the Office of Legal Affairs is responsible for defending the interests of the Organization, with support from the operational units and the Procurement Division. Even during the course of the proceedings, the Office of Legal Affairs may negotiate a settlement of the case with the claimant, with the approval of the relevant offices.

IV. Sources of funding for arbitration awards and settlement payments

14. As a matter of budgetary principle and practice, no provision is made in peacekeeping budgets (or the regular budget for that matter) to cover the possible cost of arbitration cases that may occur, since such expenses represent contingent liabilities. At the same time, once it is known that a dispute has arisen and may be proceeding to arbitration, as a matter of financial prudence and where feasible, the validity of available obligated funds in approved peacekeeping mission budgets for non-governmental liabilities is extended and maintained to cover the potential liability. As many of the arbitration cases to date have involved closed or completed peacekeeping missions, payments for legal fees incurred, settlements and arbitral awards have been charged on an ad hoc basis against available residual funds of such missions. In view of the provisions of paragraph 3 of General Assembly resolution 53/217, information on other future payments of this nature will be provided on a consistent basis in future financial performance reports of individual peacekeeping missions, as applicable.

V. Selection of outside legal counsel and provisions to preclude conflict of interest

Selection of outside legal counsel

15. While arbitration is an alternative to litigating in the domestic courts of a Member State and is intended to be considerably less formal and time-consuming, it is still a form of litigation requiring the special training and skills of a litigator. Moreover, arbitration with the United Nations involves unique considerations deriving from the status of the Organization as an international intergovernmental organization and the privileges and immunities accorded the Organization in order to fulfil its special mandates. There is also the added consideration that with one exception all of the procurement-related commercial disputes that have been the subject of arbitration thus far have arisen in the unique circumstances of peacekeeping operations. The private commercial entities involved in those cases were asked to provide goods or services that traditionally had been supplied by government agencies, usually military, in hostile circumstances.

16. Owing to all of these circumstances, the legal services required for representation of the United Nations in these cases are of a highly specialized nature. With a view to obtaining the most effective legal representation at the lowest cost, a transparent competitive process is used for the purpose of selecting counsel to represent the Organization in arbitrations. In an audit observation of 24 October 1997, the Board of Auditors concluded that "the Office of Legal Affairs engages in a competitive process for the purpose of selecting counsel to represent the United Nations in arbitrations in order to obtain the most effective legal representation at the lowest cost." The Office identifies law firms that may be suitable to provide the services needed for a given case; formulates the terms of the solicitation of proposals from law firms to represent the United Nations in that case; and evaluates the qualifications and experience of the teams that the law firms propose for the cases, the manner in which they propose to handle the case and the reasonableness of the financial terms that they offer in regard to such services.

17. The Office of Legal Affairs typically identifies and solicits proposals from a field of three to five law firms that it determines generally have the special expertise and resources needed to represent the United Nations effectively in the case. Such firms are identified on the basis of a database of prospective outside counsel maintained by the Office and other firms that may be identified by the Office in regard to a particular arbitration. In selecting firms from which to request proposals an effort is made to achieve geographic diversity, consistent with the practical constraints of obtaining the most effective legal representation at the lowest price. Notably, resolution of disputes under major contracts has typically involved arbitration in New York. This is because most of the contracts giving rise to such arbitrations have been negotiated and concluded in New York. In addition, the field missions in which the goods or services were supplied usually have been terminated and the documents and other records relating to the contracts and their implementation, as well as many of the personnel concerned, are to be found in New York. Also, legal counsel for the companies involved in the arbitration have usually been located in New York, as have at least one of the three arbitrators appointed in many cases. In such circumstances, it is usually in the interests of the Organization for its counsel to be located in or near New York.

18. In this respect it is also important to note that the preparation of evidentiary submissions in an arbitration case by counsel representing the United Nations typically involves working closely, and in most cases extensively,

with staff members at Headquarters, for example in various offices in the Field Administration and Logistics Division and the Procurement Division, often under difficult time pressures imposed by the arbitral tribunal. Moreover, the Office of Legal Affairs supervises the work of outside counsel and may be extensively involved not only in framing any legal response to demands by the claimants or the arbitral tribunal but also in the development of submissions to the arbitral tribunal, to ensure that the unique character, status and rights of the Organization are properly reflected and protected in the course of the arbitral proceedings.

19. Under the foregoing circumstances, representation of the United Nations by firms physically located outside the United States will normally be significantly more expensive, because of the additional travel costs involved, and create practical difficulties that undermine the ability of the Office of Legal Affairs and the Organization to work as closely with outside counsel as the matter merits. For these reasons, the Office has made a vigorous effort to solicit foreign firms that have offices in New York or the vicinity. However, the Organization has found that these offices typically have limited staffs and other resources, which normally focus on corporate counselling rather than arbitration or litigation. Representation by such firms thus would normally involve requiring them to incur additional costs either to second staff from their home offices outside the United States to New York or require staff from their home offices to travel frequently to New York to consult with the Office of Legal Affairs and the substantive departments and witnesses of the Organization, review documentation and attend hearings. For that reason, the Organization has had only limited success in engaging foreign firms located in New York. In any event, the Office of Legal Affairs considers in each case whether the interests of the Organization would be best served by seeking arbitration outside of the Headquarters area and has proposed arbitration abroad in a number of instances. These have included sites in Europe and Africa. Of course, the tribunal will usually give deference to the wishes of the parties, where there is agreement. Where the parties disagree, the tribunal will make the decision.

20. The Office of Legal Affairs evaluates the proposals received from law firms and transmits its detailed analysis and recommendation to the Procurement Division for approval by the Chief of the Procurement Division, or through Procurement Division to the Headquarters Committee on Contracts, as applicable. Once approved by the Assistant Secretary-General for Central Support Services, a contract is signed by the Chief of the Procurement Division.

Provisions to preclude conflict of interest

21. It is a generally accepted principle that an attorney is ethically bound to represent only the interests of his or her client. This principle is invariably reflected in the law of each jurisdiction in which attorneys practice and any violation of such professional ethics usually carries with it extremely serious sanctions, which would at a minimum include financial liability.

22. In selecting law firms from which to solicit proposals, one prime criterion used by the United Nations is their reputation for integrity. Moreover, reputable law firms routinely engage in a "conflicts search" when they are asked to represent a new client, to ensure that there would be no conflict of interest. Even so, when the United Nations solicits proposals from law firms, it specifically asks them to disclose any conflict of interest, or appearance thereof, which the firm, or any of its members, might have in representing the United Nations.

23. Stringent ethical and legal rules governing the legal profession in most major legal systems prohibit any collusion by an attorney with opposing parties or their counsel. Courts or professional oversight bodies in these systems are empowered to impose severe sanctions, including disbarment, for violations of these rules. The Office of Legal Affairs is satisfied that the risk of such behaviour by a major reputable law firm selected to represent the Organization is minimal, if not non-existent. In any case, the Office closely supervises all law firms representing the United Nations in order to ensure that the interests of the Organization are protected. Should such conduct be detected, under a provision included in the United Nations contracts with law firms, the Organization would be entitled to terminate its contract with the firm upon seven days' notice.

VI. Disciplinary action

24. Whether misconduct by a staff member is the cause of an arbitration award against the Organization is a determination to be made on a case-by-case basis. The Secretary-General is fully committed to taking disciplinary action where such misconduct is found to have occurred. In the case of one arbitration involving suspected fraud by a contractor and a UNDP staff member, disciplinary action was taken against the staff member.

VII. Pending arbitration cases

25. A table of pending procurement-related arbitration cases is found in the annex to the present report.[4] Of the four cases, three relate to contracts arising out of peacekeeping activities and one relates to architectural and construction supervision activities for UNDP. The four cases are at various stages of the arbitration process. The total claims amount to $14.95 million. However, it may be noted that these amounts are the unilateral and unlitigated assertions by claimants against the United Nations. Moreover, amounts claimed by claimants in litigation typically are highly inflated. Whether the United Nations is liable to the claimants, and if so, the amounts of compensation to which the claimants are entitled, are the ultimate issues to be decided in the arbitration cases. Therefore, these amounts should not necessarily be regarded as indicative of the actual exposure of the United Nations in these cases.

26. It is to be recalled that eight arbitration cases have been concluded, by either arbitration decision or settlement. The claims against the Organization in these eight cases totalled $121.65 million. The total amount the United Nations was obliged to pay under awards or in settlements of these cases was $26.7 million. In the most recently concluded case, which concerned air charter services for peacekeeping activities, the arbitration panel rejected all of the approximately $50 million in claims by the contractor and ruled in favour of the United Nations.

VIII. Measures taken to prevent or reduce contractual disputes that might lead to arbitration

27. The Secretary-General has already taken a number of steps which are consistent with the recommendations contained in paragraph 63 of the OIOS report.

28. Measures have been taken to ensure that contracts are clearly written and sound. The Office of Legal Affairs is now routinely consulted on sensitive or complex contractual matters, in particular, for non-standard contractual provisions. Guidance on such consultations is contained in the Procurement Manual.

29. Based upon the review of cases thus far and lessons learned, the Secretary-General recognizes the importance in having qualified staff who are experienced in the administration of contracts. As this level of skill and experience needs to be applied at all levels of the contract management process, the Secretariat is examining the decision-making process at mission and at headquarters levels in order to identify a more proactive, preventive and streamlined approach for the handling of commercial contract issues, both before and after they reach the level of a dispute. The aim of this exercise is to prevent disputes from arising in the first place and to provide clarity within the Secretariat, which would permit more efficient and effective handling of contract disputes, as well as providing a level of confidence to contractors that the United Nations is serious about handling their concerns in a prompt, consistent and fair manner. It is believed that such an operational environment would favour dispute settlement rather than litigation.

30. The Secretary-General also supports the introduction of training in contract management and, in particular, the handling of contractual relations and claims. In this connection, a training course in contract administration is being organized by the Procurement Division, in consultation with the Field Administration and Logistics Division, for delivery to mission and headquarters staff. Such training will also reinforce elements of contract handling, including: procedures for processing contract deviations, withholding payments, recovering losses by third parties and handling contractor negotiations. It will also emphasize the need to maintain confidentiality of key information, such as budgetary provisions for contracts.

31. A system for contractor evaluation has been introduced.

32. The Secretariat reviews arbitration cases to learn from the past. In 1997, the Office of Legal Affairs conducted a retreat on arbitration with offices in the United Nations and some of the funds and programmes. It expects to repeat the exercise periodically. The Office also provides analyses of arbitral judgements that seek to identify lessons learned from the experiences in each case. Such reviews aim to improve procurement processes, contract management as well as claims and dispute settlement and the process of arbitration.

33. In addition, the Procurement Division Web page now includes information for contractors to direct complaints to senior management. Contractors will therefore know exactly how to proceed with claims or other complaints, expediting their resolution. This will be supplemented with administrative instructions, in the form of a revision to the Procurement Manual, on internal roles and responsibilities for responding to contractor claims.

34. The United Nations General Conditions of Contract include provisions for amicable settlement of disputes through the UNCITRAL conciliation procedures. While conciliation is less formal and costly than arbitration, its objective is to identify a solution that is possibly acceptable to both parties, often involving a compromise where both parties would forego pressing for complete vindication of their positions. For these reasons, and because conciliation, whatever its savings in money and time, is not binding, it has been invoked only rarely. The Secretariat is giving consideration to whether it is in the interests of the Organization to have greater recourse to conciliation.

35. It goes without saying, however, that the Secretary-General is committed to ensuring that the interests of the Organization are protected. By promoting greater efforts at amicable resolution, the Secretary-General does not want to leave the impression that the Organization will not take whatever steps are necessary to ensure that it gets what it contracts for, even through arbitration, where it believes such action is justified.

Notes

[1] In October 1998, the United Nations issued a notice of arbitration against a shipping company for breach of contract. However, the Organization has been attempting to settle the claim and no arbitral proceedings have taken place in the case.

[2] While the total value of United Nations procurement since 1991 has been over $3 billion, the total value of procurement-related claims brought to arbitration during that period has been less than $140 million.

[3] United Nations publication, Sales No. E.93.V.6.

[4] Information on previous cases was provided to the Fifth Committee and the Advisory Committee on Administrative and Budgetary Questions on several occasions, including during deliberations on the OIOS report during the fifty-third session of the General Assembly.

Annex

Pending procurement-related arbitration cases in which the United Nations is involved

Claimant(s)	*Nature of claim*	*Total claim (Millions of United States dollars)*[a]	*Status*
M&M Maritime Co.	Claim arising from lease of containers by UNTAES	.25	Proceedings began December 1997. Principal claims settled July 1998. A remaining claim of approximately $150,000 is being arbitrated. Proceedings ongoing.
H.C.B. Hols International and Croatia Bank Partners, Inc.	Claims arising from contract to run PX at UNPROFOR	1.8	Claimant sought to institute proceedings January 1998. United Nations challenges right of claimant to bring this arbitration.
Candy Logistics, Ltd.	Claims arising from freight forwarding services for UNOSOM	11.2	Proceedings began June 1997. Pending.
Peter Kamya	Claim against UNDP arising out of contract for provision of architectural and construction supervision services for UNDP premises.	1.7	Proceedings began May 1997. Pending.

[a] Figures are rounded.