

International arbitration report

Issue 11 | October 2018

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International arbitration report

Published by Norton Rose Fulbright – Issue 11 – October 2018

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Editorial

Welcome to issue 11 of Norton Rose Fulbright's *International Arbitration Report*.

In this issue we focus on the energy sector. We review global arbitration trends in the energy sector, including both commercial and investor-state disputes. We also take a look at the latest statistics and developments in Energy Charter Treaty disputes. In our Q&A, we speak to the Secretary General of the ECT Secretariat to gain his thoughts on the Energy Charter Treaty.

With liquefied natural gas (LNG) becoming an increasingly important part of the global energy mix, we look at disputes that can arise through the life of a LNG construction project. We also analyze the history of LNG price review arbitrations and ask whether these have run their course.

The transportation of energy supplies around the globe is another key area for energy disputes. Our shipping arbitration specialists consider the principal areas where issues may arise in the transportation of petroleum by sea. We also consider Belt and Road Initiative disputes, analyzing one of the largest infrastructure and investment projects in history.

Disruptive technological innovation continues to be the topic du jour for the energy sector. Our disputes specialists consider how emerging technologies are dramatically changing the sector, and the opportunities as well as the novel risk profile such innovations bring.

Another area of disruption to the sector is climate risk. Climate-related disputes are now a reality for states and industry actors. We look at whether arbitration has a role in resolving such disputes.

In our global round-up, we offer an overview of new arbitral rules and recent arbitral developments across the globe.

In our inaugural op-ed piece, "Arbitrator's Corner", Pierre Bienvenu, global co-head of our international arbitration practice, discusses arbitrators' duties of impartiality and independence, the importance of full disclosure and the need for arbitrators faced with a challenge to show restraint in commenting on the challenge.



Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
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Pierre Bienvenu talks disclosure, challenges and neutrality

About the cover

Our front cover this issue features one of the two winged lion statues at the entrance to the Altare della Patria in Rome. The building was erected in 1911 in honour of Victor Emmanuel II, the first king of Italy after the country's unification. Rome is the host of the IBA Annual Conference 2018.



Discussing the Energy Charter Treaty

Q&A with Dr Urban Rusnák, Secretary-General, Energy Charter Treaty Secretariat

By Cara Dowling

What is the Energy Charter Treaty and why is it important?

The Energy Charter Treaty (ECT) is a multilateral investment treaty that establishes a legal framework for energy trade, transit and investment between member states. It, therefore, provides a multilateral framework for energy cooperation, which makes it a unique international agreement and establishes a legal framework to promote long-term cooperation in the energy field. The ECT embraces the whole course of handling energy: from geological prospecting to final consumption in different sectors of the economy, including the activities linked to the energy industry. Negotiated between July 1991 and December 1994, the ECT is the only multilateral agreement for the protection of investments in the energy field that succeeded and is still in force.

What were the driving economic and political reasons behind the Energy Charter Treaty?

The Energy Charter Process was initially driven by mutually complementing interests of groups of countries. For instance, countries that had capital and highly developed technology, interested in exporting investment, and countries rich in resources, but less developed

and weaker in governance. The ECT provided a legal level playing field and a framework facilitating long-term energy investments for the benefit of investors and host nations. Over the years some countries have changed from recipients of foreign investments to investors abroad, or from energy exporting countries to net importers. Most recently, many less developed countries in Africa and Asia which are trying to attract investors are considering accession to the ECT for very similar reasons as its original Contracting Parties.

Has the Energy Charter Treaty proved successful in achieving those goals?

I believe that unlocking the oil and gas potential of the Caspian region in mid-1990's through foreign direct investment provides one of the best examples that could be directly linked to investment and transit provisions of the ECT.

What are the main misconceptions about the Energy Charter Treaty?

The two main misconceptions about the Energy Charter Treaty are that (1) the ECT is only applicable to a particular geographic area and (2) and that its only function is to provide investment protection. This is simply not the case.

In regard to the first, geographical coverage, it is true that the ECT was originally signed by mostly European and Asian countries, however, from the beginning it was designed as a truly global framework without geographical restraints. That is why the International Energy Charter declaration (the updated 1991 political declaration), which paves the way for future accession, has been expanding to states in South and East Asia, Latin America and Africa.

In regard to the second misconception; the ECT is not merely for investment protection. The ECT, while establishing provisions for investor protection through typical standards, was also designed to promote investments in member states. The ECT is structured on three main pillars: trade, transit and investment, it also contains important provisions on competition, transfer of technology, access to capital, environmental protection, energy efficiency and taxation in the energy field. The ECT is technology-neutral and does not prescribe any particular fuel or technology for its members.

ECT is technology-neutral and does not prescribe any particular fuel or technology for its members

What obligations does the Energy Charter Treaty impose on Contracting States, and how do those interact with state sovereignty?

One of the aims of the ECT is to facilitate transactions and investments in the energy field by reducing political and regulatory risks. The obligations of the Contracting Parties to promote and protect Investments of Investors are found in Part III of the ECT. Under these provisions, Contracting Parties shall commit to fair and equitable treatment including constant protection and security in which a Contracting Party shall not in any way impair by unreasonable measures the management, maintenance, use, enjoyment or disposal of such Investments; and shall accord to Investments and their related activities treatment no less favorable than that of their own Investors or of the Investors of any other Contracting Party or third state, whichever is the most favorable.

While these obligations are not out of the ordinary and can be found in virtually all international investment agreements, they are counterbalanced in the ECT by provisions stressing the concept of sovereignty over natural resources. These provisions contemplate state sovereignty and sovereign rights over energy resources and do not prejudice the rules governing the system of property ownership of energy resources. Each Contracting Party continues to hold the rights to decide the geographical areas

within its area to be made available for exploration and development of its energy resources, the optimization of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its area, and to participate in such exploration and exploitation, inter alia, through direct participation by the government or through state enterprises.

One aspect of the above has been specifically outlined in one recent Energy Charter Conference Decision (CCDEC2017 04), by confirming states' right to regulate to achieve legitimate policy objectives. Indeed, arbitral tribunals constituted under the ECT have confirmed that it is well established that the host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest though subsequent changes should be made fairly, non-retroactively, consistently and predictably, taking into account the circumstances of the investment.

What happens if a Contracting State does not comply with its Energy Charter Treaty obligations?

Multiple tailor-made dispute resolution mechanisms, depending on the type of grievance, are foreseen in the ECT and available as a result of a Contracting State non-compliance with its ECT obligations.

In the event of an alleged breach of the ECT's investment provisions, and if the dispute cannot be settled amicably within a period of three months, Article 26 allows investors to submit the dispute for its resolution to the

courts or administrative tribunals of the Contracting Party to the dispute; in accordance with any applicable, previously agreed dispute settlement procedure; or to international arbitration or conciliation. For disputes between parties to the ECT, Article 27 provides for an arbitration procedure for disputes regarding the interpretation or application thereof (except for competition and environmental issues). For transit disputes, Article 7 provides a specific conciliation mechanism, allowing for a faster and less formal procedure. For trade disputes, Article 29 and Annex D include a mechanism (following the WTO model closely) for settling trade disputes between Energy Charter member countries, provided that at least one of them is not a WTO member. Concerning competition disputes, Article 6 provides for bilateral non-binding consultation mechanism. Finally, regarding environmental disputes, Article 19 provides for disputes to be reviewed by the Energy Charter Conference if no other appropriate international body exists for the consideration of such disputes.

Proper investment conditions could become the determining factor in the development of clean energy sources

Do you see a role for the Energy Charter Treaty or investor-State arbitration in dealing with climate change issues?

Certainly yes! Given the unprecedented amount of investment needed to replace the existing energy industry with new, low carbon sources and to extend energy use in countries where a substantial

amount of the population do not have access to modern forms of energy, the energy transition will have to rely on private (foreign) investment. Proper investment conditions could become the determining factor in the development of clean energy sources. The ECT and its dispute resolution mechanism could also ensure the orderly change and fair compensation, where necessary, of existing investments which would have to be phased out earlier than planned. Forcibly shortening the investment cycle would create instability and cost economies much more in the longer term.

What function does the Energy Charter Treaty Secretariat serve and what does your role as Secretary-General involve?

The Secretariat supports the Energy Charter Conference and its subsidiary bodies in all their functions. It also provides many services for Contracting Parties and Observers such as training programmes, capacity building, governance monitoring, advice, and preparing Observers for accession to the ECT. Upon the demand of the Members of the Conference or investors, we provide mediation and conciliation in case of disputes in investment and transit.

As Secretary-General, on top of my management responsibilities for the Secretariat and its Staff, I can play a specific role in conciliation or early warning mechanism. I report to the Energy Charter Conference.

What have been your greatest challenges and achievements since your appointment in 2012?

Since my appointment, I have been consistently working with delegates in efforts to modernise the Energy Charter Process and to make it attractive for the next generations. In the first phase of modernisation we successfully updated the European Energy Charter of 1991, and today 88 countries and organizations have signed the International Energy Charter declaration of 2015. In the second phase, we revisited all internal procedures, increased transparency, and completed or closed numerous projects we inherited from the past. Today we are facing the biggest challenge to date: to design and implement a process leading to the modernisation of the ECT. I firmly believe in the success and necessity of the modernisation process, and I am convinced we have all the prerequisites to modernise the Treaty in the horizon of two to three years.

I feel strong satisfaction when every new country joins the ECT and deep disappointment, even frustration, when any of our Members withdraw

From a slightly different perspective, I feel strong satisfaction when every new country joins the ECT and deep disappointment, even frustration, when any of our Members withdraw from the Process.

Global overview of dispute trends in the energy sector

By Neil Q Miller

Whilst flying back from the Middle East in the early 90s, with the price of Brent oil floating around US\$20 a barrel, I sat next to an oil broker who argued that, in ten years, a barrel of Brent would be worth over US\$100, and it would not drop below that level. We disagreed, so he handed me his business card and a US\$10 bill on which he wrote the current oil price and told me to send him the bill back when he was proven right. That bill has changed hands between us several times now over the years. Accurately identifying future trends is likely as difficult or futile as predicting the oil price. If history offers us any certainty, it is that there will not be one defining trend for energy arbitration through 2018 and beyond. Instead, we should anticipate that new types of energy arbitration will emerge, whereas others may decline.

Upstream and downstream oil

There is no denying that disputes across the energy sector continue to dominate international arbitration both in number and value, with the highest value arbitral awards in history arising from energy-related arbitration. That seems unchanging.

Upstream, the fall-out from the low oil price over the past few years has resulted in a reduction of exploration and development, with projects put on hold or even terminated. Joint venture agreements are, of course, very prevalent in the energy sector and the economic impact of the low oil price has hit participants to production

sharing agreements and joint operating agreements hard, resulting in defaults or AFE/budget disputes. Those have led to an increasing number of operator/non-operator disputes over licence obligations as well as royalty payment disputes as operators struggle with their cash flows to continue financing and operating. Conversely, a reduction in active projects has resulted in less employer/contractor disputes.

With the oil price now on the rise, although bankruptcy filings stemming from the fall in oil prices are far from complete, the number of new bankruptcies for exploration and production, midstream and oilfield

service companies has been decreasing. Disputes will still shadow the historic insolvencies as, by entering insolvency, these companies are likely to have defaulted on any number of contractual obligations, resulting in counterparty claims. In turn, as more complex, challenging and high cost projects (on-shore or deep water) come back on stream, operational issues and disputes will likely increase.

Whilst tighter margins have caused their fair share of downstream disputes, most of these by their domestic nature tend to end up in litigation in national courts as opposed to domestic or international arbitration.

The gas sector

The gas sector too has been a frequent battleground. Political regime change has resulted in significant cross border gas supply disputes and international arbitrations. In addition, as many LNG contracts were traditionally indexed to oil, there has been a significant number of high value LNG price review arbitrations over many years. Dynamic markets, matched with volatile prices, led to buyers or sellers under long term supply contracts seeking to take advantage of price review provisions to adjust the LNG price depending on changing market conditions. Arbitration is generally the forum for resolving such disputes. As LNG price review disputes arise from a party's attempt to negotiate based on a contractual right and result in an arbitral tribunal enforcing such a right, they are unlike other commercial disputes. For this reason, their prevalence has carved out a whole new brand of energy arbitration. If any sector is in the running for winning the competition for highest-value commercial arbitrations globally, then LNG price review disputes are likely to remain a good bet given the value of these cases can reach the billion dollar mark.

In Europe, with wholesale gas contracts now more frequently linked to Hub indexation and not much left to argue that has not already been argued, that particular roadshow has quietened down but it may re-emerge in Asia-Pacific and other regions where LNG contracts remain indexed to oil.

Investor-state disputes

In recent years, a number of developing states have either threatened, or completed, the termination of their bilateral investment treaties (BITs), and the number of new BITs being entered into is decreasing. This is likely to impact the energy sector,

where foreign investment in emerging markets is critical. Concerns as to the legitimacy of investor-state dispute settlement (ISDS) have also been raised. UNCITRAL's working group on the subject flagged inconsistency, lengthy duration, extensive cost and lack of transparency as just a few of its issues with ISDS. There may be scope for reform in the future. Last year, the UNCITRAL Secretariat produced a note on "Possible Reform of investor-State dispute settlement", and the EU's submission to the working group proposed the establishment of a multilateral investment court as an alternative to investor-state arbitration. The recent judgment by the Court of Justice of the EU (CJEU) in *Slovak Republic v Achmea BV*, has also created much debate among arbitration practitioners, as the CJEU has effectively put an end to investment treaty arbitration based on a BIT between EU Member States (so-called Intra-EU BITs).

Despite this scepticism, there have been record high numbers of investor-state disputes. The currently low price of commodities and investment in cross-border projects makes it unlikely that investor-state arbitration will dry up anytime soon. Even where states have terminated BITs, sunset clauses will mean the continuation of claims for a number of years. Likewise, any reform or replacement of the ISDS system will be a slow burn.

There is also no sign of decline in the number of cases invoking the Energy Charter Treaty

There is also no sign of decline in the number of cases invoking the Energy Charter Treaty (ECT). Although Russia and Italy withdrew from the treaty in 2009 and 2015 respectively, no other states have yet followed suit. Since the first case was registered in 2001, the Energy Charter Secretariat has tracked 114 publicly known investment arbitration cases where the ECT has been invoked. Despite their relative youthfulness in the disputes sector, renewable energy projects have recently contributed to these statistics, in particular with Spain being challenged over tax reforms for solar project investments. The scale, complexity and cost of both solar and offshore wind projects are likely to give rise to investment, regulatory and operational issues and therefore more disputes will follow.

Of course, one cannot ignore the Trump factor. Right or wrong, the US President's determination to deregulate the US energy industry and achieve energy independence is having far reaching consequences for the global energy sector. Those of protectionism through steel tariffs and of the Iranian sanctions have yet to play out. It is over a year now since the Trump administration decided to withdraw the US from the Paris Agreement (although its withdrawal will not take place until 2020). As the Paris Agreement does not impose binding obligations on its signatories, the US will not face trade sanctions from other contracting states. However, its withdrawal may lead to treaty arbitration claims for failure to meet international policy in relation to climate change. The Trump administration is also showing scepticism towards ISDS. In the course of its NAFTA re-negotiations last year, it posed the possibility of opting out of the NAFTA ISDS provisions. The power that international arbitral tribunals can

wield over the US does not sit well with the Trump administration's consistently nationalistic rhetoric.

Finally, as large numbers of state companies, NOCs or otherwise, spread their wings outside of their home states and look to invest and participate in international markets, the possibilities for a wider range of disputes cannot be ruled out.

Climate change disputes

Energy corporates are facing increased levels of scrutiny of their environmental impact and, consequently, potential disputes in relation to their contribution to climate change. There is a broad range of cases that could be defined as climate change disputes, and these may involve private entities, states or both. Due to the public policy element, most cases in which climate change policy is the sole purpose of the dispute have been brought in the national courts. However, where climate change is but one point of dispute amongst many, arbitration can play a part. As a body of climate change case law continues to grow, so too does the risk posed to corporates active in the energy sector where environmental impact is inevitable. The availability of claimant funding will be a key aspect in this, whether provided by specialist vehicles or now even by crowdfunding. A notable crowdfunded case to watch is that of Peruvian farmer Saul Luciano Lliuya, who is suing an energy company before the German courts for its alleged contribution to climate change which is threatening his Andean home.

Belt and Road Initiative

Another focal point for energy arbitration will be the People's Republic of China's "Belt and Road Initiative". This vast spread of projects focuses on infrastructure, energy and transport across the land-based Silk Road

Economic Belt and the ocean-based Maritime Silk Road, with the aim to connect China with the rest of Eurasia. The initiative encompasses more than 70 countries and has attracted investment of an estimated US\$900 billion in projects planned or already in progress. With developers, contractors and investors involved globally on such an ambitious scale, the scope for commercial disputes is vast. As these projects get underway, predominantly in developing markets, construction disputes will inevitably arise. The International Chamber of Commerce has identified this prospect and, in March 2018, announced that it would be launching a commission purely to address Belt and Road disputes. Similarly, the Hong Kong International Arbitration Centre (HKIAC) has established an advisory committee and website to assist parties to Belt and Road projects and related disputes.

The proliferation of new arbitral seats

Finally, international arbitration itself is slowly changing. International arbitration – arbitral appointments, tribunals, seat and process – can no longer be regarded as a Western game. Arbitration is opening up to new players and participants across Asia, India and Africa. In Africa, for example, international investors have traditionally chosen one of London, Geneva or Paris as their preferred seat for Africa-related disputes. But over the last few years, there has been considerable growth in the number of arbitral centres across the continent and many African governments and national companies are beginning to insist on African seats and Africa-based arbitration centres. This multiplicity of new rules, seats and institutions, as well as the revamping of rules between now competitive institutions to attract arbitral business worldwide, brings with it

uncertainty that did not previously exist within the tighter arbitral fraternity. There will also be an element of a learning curve as these grow and develop. If the quality of process is safeguarded, including a pro-arbitration approach of local courts, then these developments should be welcomed.

Conclusion

As always in the energy sector, an uncertain political landscape combined with cross-border investment in energy projects and fluctuating prices creates the model ecosystem for a whole spectrum of energy disputes to emerge globally, with arbitration remaining a key method of dispute resolution.

That's how I see things, but I could of course be completely wrong.

With special thanks to India Furse, Associate, for her contribution to this article.

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Investment disputes in the energy sector

A bipolar world

By Mark Baker, Cara Dowling and Ben Grant

The energy sector has traditionally been fertile ground for investment disputes. According to statistics collected by the International Centre for Settlement of Investment Disputes (ICSID), of the total cases ever registered under the ICSID Convention, 31 percent are either oil, gas and mining or power and energy related. That remains true to date, with 24 percent of new cases registered in 2017 falling in those sectors.

There is no reason to suggest that trend will change any time soon. The United Nations Conference on Trade and Development (UNCTAD) predicts a 5 percent growth of global foreign direct investment (FDI) flows in 2018. In 2017, there was around US\$150 billion worth of cross-border mergers and acquisitions and FDI greenfield projects in the energy sector alone, comprising a little over 10 percent of the total value that year. Greater volumes of investment will naturally lead to greater volumes of investment disputes.

However, a closer examination reveals a pattern underlying the data, illustrating a regional divergence between “East” and “West” in relation to investor-state dispute settlement (ISDS) generally and in particular in relation to the energy industry. That pattern is supported by other developments in the energy space, and more broadly, which evidence a similar divergence between those regions.

Emerging divergence

There is, of course, no concrete dividing line between “East” and “West” – these are not concepts with fixed definitions or meaning. In economic terms, however, these are helpful geographical markers, which can be used to illustrate global economic trends. As one principal driver of ISDS is the underlying FDI flow, these classifications are also helpful to understand trends emerging in ISDS.

UNCTAD defines East Asia broadly as China, Japan, North and South Korea, and Mongolia, and South-East Asia as a group of states including Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. In this article, these regions are referred to as the “East”. As for the “West”, historically this has been understood as Europe and Northern America.

The EU is taking a critical look at the ISDS system itself, which currently protects foreign investments

Although a similar theme is being seen on both sides of the Atlantic, the 28 Member States of the European Union (EU) provide the most vivid example of the divergence between East and West in attitudes towards ISDS. The EU is taking a critical look at the ISDS system itself, which currently protects foreign investments and affords foreign investors the right to sue host states for certain misconduct. As a result, in the future, ISDS may become less common or it may simply be resolved in a new forum. On the other hand, the East, led of course by China, is growing in size and importance in terms of FDI and that pattern is

beginning to be reflected in the ISDS system, which evidences a growth in claims involving both Eastern investors and respondent states from the region.

Western states have historically been the bastion of ISDS in the energy sector

The West

Western states have historically been the bastion of ISDS in the energy sector. According to UNCTAD statistics, investors from the West have been the most frequent claimants, with North American and European investors taking all top 12 spots on UNCTAD's claimant leader board. Increasingly, however, Western states are also becoming respondents – Spain, Czech Republic, Canada, Poland, Russia and Ukraine all featured in the top 12 spots on UNCTAD's respondent leader board. This trend is reflected in the energy sector. Since 2014, a total of 63 new energy-related investment arbitrations were commenced, of which 78 percent were brought against EU Member States.

Perhaps related to that trend is the shake-up of ISDS recently seen in the EU. There is a growing trend of political resistance to ISDS within the EU – as evidenced by the Wallonian stand-off over the ISDS provisions of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the recent decision of the Court of Justice of the EU (CJEU) in *Slovak Republic v Achmea BV*. In the *Achmea* case, the CJEU held that ISDS provisions in bilateral investment treaties (BITs) as between EU Member States are incompatible with EU law and that these provisions have no legal effect.

The scope of the CJEU's decision is not entirely clear, in particular if and to what extent it affects the Energy Charter Treaty 1994 (ECT). The ECT is a multilateral treaty, to which many EU Member States have signed up and therefore its ISDS provisions apply to disputes as between EU Member States. The EU Commission recently published guidance stating that in its view, the *Achmea* judgment is also relevant for the application of the ECT as between EU Member States, and the ECT “cannot be used as a basis for dispute settlement between EU investors and EU Member States”. This is significant as the ECT accounts for a large proportion of ISDS; of energy-related ISDS since 2014, 76 percent were brought under the ECT, and only 24 percent were brought under BITs.

The EU has also shown hostility towards ISDS provisions in new trade treaties with non-EU states, notoriously stating in the context of negotiations for the Japan-EU Economic Partnership Agreement (JEEPA) that “Investor-to-State Dispute Settlement, is not acceptable. For the EU ISDS is dead.”. The EU wishes to instead implement a new Investment Court System. That system however faces a number of barriers to implementation, including significant scepticism within other Western states. (Read more about the EU's proposed reform of ISDS – *the future or a fiasco?*).

What is clear, however, is that, notwithstanding the West being the primary user and beneficiary of ISDS protections to date, that system is under attack in the West.

The trend of global FDI clearly indicates the importance of Eastern states to global investment flows

The East

The trend of global FDI clearly indicates the importance of Eastern states to global investment flows. In 2016 and 2017, FDI flows to the region remained stable at US\$476 billion, according to UNCTAD. Developing Asia was the biggest recipient of FDI in 2017, with its share of global FDI rising from 25 percent in 2016 to 33 percent in 2017. China, in particular, had a record year for FDI, attracting US\$136 billion of inbound investment.

In contrast, FDI flows to developed economies saw a dramatic fall of nearly one-third. The EU experienced a 42 percent decline in inbound FDI compared to 2016 (though the statistics are somewhat skewed by 2016 having featured an unusually high level of inbound FDI). These numbers illustrate a growing number of investors seeking higher returns in the Asian region, or a “migration” of FDI capital from West to East. Intra-regional investment is also on the rise. The People's Republic of China's Belt and Road Initiative is anticipated to generate a boom in Chinese investment, a significant proportion of which will be in East. The energy sector will attract a significant portion of that capital. World energy demand is projected to grow by 1.3 percent per annum until 2040, with almost all of the growth expected to originate in the Asia Pacific region, and according to the ECT, China is predicted to be the largest growing market for energy for years to come.

As expected, there are signs that investment disputes are following the flow of FDI. Between 1972 and 2015, 539 cases were registered with ICSID and of those only 42 involved a party (either foreign investor or respondent host state) from the South-East Asia Pacific region. However in 2016 and 2017 alone, 14 new cases were filed against respondent states in that region. Given the regional importance of China, it is significant that 2011 saw the first claim lodged against China with ICSID, and since then two more claims have been filed. Notably, in 2017 the first claim by an EU investor was made against China. Equally, there is evidence of growth in the number of claims brought by Eastern investors. To date, there have been only 20 reported claims brought by Eastern investors. However, of that number, 12 were brought since 2012 and seven in the last three years alone. Those statistics are telling.

Politically, there is less evidence of opposition to ISDS as a dispute resolution mechanism in the East. For example, in January 2018, the Trans-Pacific Partnership was agreed between eleven states in the Asia Pacific region (though not yet ratified), and that treaty includes extensive ISDS provisions.

Conclusion

ISDS will remain a critical component of foreign investors' dispute resolution toolkit to protect investments across the globe, particularly in the energy sector. There are, however, signs that a divergence is opening up between the East and the West in attitudes towards ISDS.

There is some evidence suggesting that the energy sector will see an increase of ISDS involving both Eastern investors and states, given the rapid growth of investment in the East. In the West, there is evidence of a desire (most apparent in the EU) to withdraw the ISDS umbrella.

The ramifications of that could be significant for foreign investors from or into the West. ISDS provisions were introduced to fill a need on both sides of the deal – host states wished to increase foreign investment and foreign investors desired enforceable ways to protect their investments. Prior to ISDS, there was often no effective way to deal with state misconduct – foreign investors could resort to local courts or state-state diplomacy (or hostility), and in practice neither proved satisfactory, which drove up the risk and therefore the cost profile of FDI. It will be interesting to see whether this divergence of approach to ISDS between East and West will have a corresponding effect on FDI flows in the future.

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Energy Charter Treaty disputes

Recent statistics and developments

By *Martin Valasek and Kevin O’Gorman*

The Energy Charter Treaty (ECT) resulted from an international effort to facilitate cross-border energy transactions following the end of the Cold War. The ECT – now with over 50 state signatories from Europe, Central Asia and other regions – was signed in 1994 and came into force in 1998. The ECT focuses on the protection and promotion of foreign energy investment, free trade in energy products, freedom of energy transit, and energy efficiency and environmental matters.

ECT v BITs

The ECT, like many bi-lateral investment treaties (BITs), provides protections to certain investments of foreign investors, including

- Fair and equitable treatment.
- Full protection and security.
- Protection against discriminatory measures.
- Protection against unlawful expropriation.
- A right to bring international arbitration claims directly against the host state for the violation of these protections.

Under the ECT, investors may bring claims at the International Centre for Dispute Resolution, under the UNCITRAL Arbitration Rules or at the Stockholm Chamber of Commerce.

The most notable difference between the ECT and BITs is that the ECT is a specialised multilateral treaty

The most notable difference between the ECT and BITs is that the ECT is a specialized multilateral treaty that protects investments associated with economic activity in the energy sector, a concept that has been broadly defined. In contrast, BITs do not generally contain industry or subject matter limitations on what claims are permissible.

Another notable difference with BITs is that the ECT has a regime for provisional application, i.e. pre-ratification. The ECT provides in Article 45(1) that:

“Each signatory agrees to apply this Treaty provisionally pending its entry into force ... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

The ECT’s provisional application regime was among the issues that arose in the Yukos shareholder arbitration, where the tribunal held that the ECT applied on a provisional basis in the Russian Federation. The Yukos award, however, was subsequently set aside by the Hague District Court, which found that the tribunal lacked jurisdiction because the arbitration provision in the ECT was incompatible with Russian law. Russia has since withdrawn from the provisional application of the ECT. Of the three original signatory countries that have not yet ratified the ECT, only Belarus has accepted provisional application; the two other countries – Norway and Australia – filed declarations at the time of signing to the

effect that they were unable to accept provisional application.

Latest statistics

The Energy Charter Secretariat tracks investment arbitration cases where the ECT has been invoked. As arbitrations can be confidential, the Secretariat can only track those cases that are publicly known. Since 2001, when the first investment arbitration case invoking the ECT was registered, there have been 114 publicly known cases.

Forty of these cases – over one-third – have involved Spain; many arising from the country’s recent solar reforms. Awards against Spain have been issued in at least three of these cases. Italy, which faces ten cases, is the next most frequent respondent. Germany is the country whose nationals have most frequently been ECT claimants.

Cases invoking the ECT spiked significantly in 2015, when almost 30 cases were registered

Cases invoking the ECT spiked significantly in 2015, when almost 30 cases were registered (only 12 cases were registered in each of the years before and after).

Of the 114 known cases, 37 have reached final awards, 11 have settled (or been withdrawn or discontinued) and 66 remain pending. The 37 cases that reached an award were decided as follows: 9 failed on jurisdictional grounds; 11 failed based on a finding of no liability; 2 involved a finding of liability but a determination that no damages were incurred; and 15 resulted in a finding of liability and damages.

Seventy-two of the 114 cases used the ICSID Rules, with the rest almost evenly split between UNCITRAL and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) rules.

In recent years, the Secretariat has been promoting the use of “good offices and mediation” for the settlement of investment disputes under the ECT. In 2016, the Energy Charter Conference endorsed a Guide on Investment Mediation, and the Secretariat established a Conflict Resolution Centre. The latter provides assistance and support for the use of good offices and mediation in both investor-state and state-to-state disputes under the ECT.

Recent developments

The most recent development is found in the form of a 2018 decision of the Court of Justice of the EU (CJEU) in *Slovak Republic v Achmea BV*. In that case, the CJEU held that ISDS provisions in BITs as between EU Member States are incompatible with EU law and therefore those provisions have no legal effect. There was some question over the impact of this case on ISDS provisions in multilateral treaties, in particular the ECT, to which EU Member States are parties. Immediately following *Achmea*, states (including, of course, Spain) commenced challenges to ECT arbitrations and awards on that basis. The EU Commission has now sought to clarify the position, publishing guidance which asserts that, in its view, the decision in *Achmea* is also relevant for the application of the ECT as between EU Member States. It has stated that the ECT “cannot be used as a basis for dispute settlement between EU investors and EU Member States”.

This is a highly significant development. Only time will tell whether courts and tribunals will follow this guidance; it may take a further referral to the CJEU to definitively decide the point. Even then we may still see a divergence of approach to the question, particularly where challenges to jurisdiction or awards are brought before tribunals seated in, or before national courts of, states that are not bound to follow EU law.

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Climate-related disputes

Adaptation and innovation

By Mark Baker, Holly Stebbing, Cara Dowling and Emma Nierinck

As scientific consensus over the evidence of climate change and humanity's causal impact continues to mount, the scrutiny of state and corporate action (or inaction) as contributors to climate risk is intensifying. For companies operating in the energy sector, climate change manifests as a complex myriad of legal, financial and reputational risk. The number of climate-related cases commenced to date is well over 1,100, and that number continues to rise. Most cases fall beneath the radar (low key skirmishes over statutory permissions or breaches) but in recent years a number of high stakes claims have been fought very publicly before the highest courts and regularly in the courts of public opinion. Regardless of success, such claims inspire imitative cases all over the globe. Put plainly, climate-related disputes risk is now part of corporate reality.

Whilst most legal challenges to date have been brought before national courts, there is a role for arbitration as a forum for resolution of climate-related disputes. Indeed, arbitration has the potential to become a key mechanism for the enforcement of environmental law and policy.

Climate-related disputes and legal risk

The range of climate-related disputes brought to date is vast – it is a global phenomenon, where legal issues traverse multiple fields of law and various causes of action, and involve a wide range of claimants and defendants from multiple sectors. Climate-related disputes risk is not just an energy sector issue, though

for obvious reasons that sector has become a primary target.

The risk profile is not only complex but in a state of flux. This is partly due to innovative claims being brought by claimants as they seek to get around the legal hurdles frequently faced by such claims (standing, justiciability, causation, to name a few). It is also due to the ongoing evolution of climate related regulation, on the national and international stage, as states grapple with how to address climate change and who should shoulder the fiscal burden.

Climate-related disputes can be roughly divided into two categories: (1) cases brought to either mandate or change

climate related policy or conduct; and (2) cases brought to seek financial redress for damages associated with climate change.

Legal action as an instrument to drive change

The first category includes cases pursued by NGOs, pressure groups (often crowd-funded) and even governmental authorities against governments to enforce existing climate policies or accelerate policy change. The *Urgenda* case is a notable example. The *Urgenda* Foundation successfully sued the Netherlands and obtained a court order compelling the government to implement more stringent climate change policies (the case is under

appeal). *Urgenda* spawned numerous copycat proceedings across the globe, with mixed rates of success. In addition, there have been regulatory investigations of corporates over disclosures of material climate-related risk, and significant levels of investor activism, including investor claims. These also fall within this category as the intention is still to drive policy change, albeit corporate change or behavior. Unsurprisingly, we are also seeing claims (largely by industry actors) aimed at driving policy change in the other direction.

For this type of dispute (at least for the time being), national courts will continue to be the fora of choice, and arbitration will play a more limited role.

A big part of the attractiveness of litigation is the public nature of proceedings – public relations and reputational pressure is brought to bear on defendants, and claimants also seek to raise the profile of and galvanise public support for what is often a political or public interest cause. Pressure groups readily admit that publicity is often a significant win, even if the case is lost on legal merits. In contrast, arbitration has an inherently private nature. Of course, not all arbitrations are confidential (though many are), but almost all arbitrations are *private* – in that only parties can participate in proceedings, access pleadings and evidence, attend hearings, and see the final awards. To the extent that awards or arbitration-related judgments are published, these are often anonymized.

A big part of the attractiveness of litigation is the public nature of proceedings

More fundamentally, as arbitration is a contractual process, public interest groups often will not have legal standing to pursue arbitration. Likewise, there can be problems with arbitrability.

Legal action as a means of seeking financial redress

In the second category are claims against corporates where the main purpose is to seek damages for direct or indirect effects of climate change on the claimant's property or investments (often in conjunction with other relief). A number of such claims have been brought by individuals and pressure groups (again often crowd funded). One example is *Lliuya v RWE AG*. In that case, Germany's largest electricity producer, RWE, is being sued by Saúl Luciano Lliuya, a Peruvian farmer, for a financial contribution towards costs of putting in place flood protections in his village in Peru. This claim is notable for its fact profile – Lliuya is suing RWE before the German courts for emissions released in Germany which Lliuya alleges contributed to climate change and ultimately the melting of a Peruvian glacial lake above his village thereby necessitating the flood defences. It shows the truly global nature of climate change disputes risk. The case survived an initial challenge, with the court of appeal finding that a polluter can be liable for impacts of climate change in principle. The case is ongoing.

Such claims are not limited to individuals or pressure groups but are also being brought by sub-national governmental authorities. For example, the various high profile lawsuits commenced by US cities and communities against carbon majors, before both federal and state US courts.

Arguably also within this category are claims by foreign investors against states, which seek to apportion liability for the impact of climate-related state conduct (e.g. change in policy or law) on their investments.

In at least the short term, arbitration will have a greater role in this category than in the first.

An enhanced role for arbitration?

There is scope for arbitration to play a more prominent role in resolving climate-related disputes. In broad terms there are three key areas where this may prove likely:

Commercial arbitration

Climate change will affect the energy sector in multiple ways – manifesting as physical risk, transitional risk and/or legal or regulatory risk. As such, there are multiple ways that climate-related issues might result in commercial disputes. An obvious example is force majeure claims. Where new risks manifest, parties invariably seek to mitigate and allocate such risks as between them contractually. Unsurprisingly, many contracts now include obligations to comply with and/or warrant compliance with environmental, human rights or sustainability obligations, and commitments to put in place back-to-back arrangements with counterparties further down the line. Disputes over those provisions will eventually arise.

International arbitration is frequently the dispute resolution mechanism of choice for cross-border transactions, particularly where a party is a state or state-owned entity or an emerging market is involved, as is often the case in the energy sector. The confidential nature of commercial arbitration means that it is difficult to track the extent to which climate-related issues are already

being raised. But given the scope of climate risk, it is clear that more disputes with climate-related elements will be decided by commercial arbitration.

Investor-state arbitration

Significant investment will be needed to fund global climate goals. In 2017, the OECD estimated that \$6.3 trillion of investment is needed annually until 2030, of which only a small proportion will be met by states. The gap will be filled by private investment, including foreign direct investment (FDI). Reports are already showing a significant rise in FDI in low carbon initiatives and climate financing. With any increase in new FDI, there will be an increase in disputes between investors and host states.

Disputes will also likely arise in the context of pre-existing investments. Over the last ten years, legal, regulatory and other changes in response to environmental issues have been implemented at an unprecedented rate, at both international and national levels. These will increase as states introduce measures to meet the Paris Agreement commitments and seek to allocate the financial costs of dealing with climate change. Changes to the investment environment often also leads to disputes between investors and host states. Bilateral or multilateral treaties (BITs or MLTs) offer foreign investors a further layer of protection against host state conduct. In particular, they generally afford investors the direct right to bring proceedings against host states, usually in investor-state arbitration (ISDS). A prime example is the significant number of claims (40 at last count) brought against Spain under the Energy Charter Treaty (ECT) following reforms to Spain's renewable energy policies. Climate-related claims in investor-state arbitration are likely to increase.

Anti-ISDS proponents warn of the “chilling effect” of ISDS on public interest regulatory action. That chilling effect is often wrongly blamed on ISDS as a system, and is often misstated or overstated. Any chilling effect would not be the result of arbitration as a process, rather the result of the substantive terms agreed in the BITs. Generally BITs preserve states' rights to pursue legitimate policy objectives, such as the protection of public order, security, morality and health, and taxation, amongst others. Newer BITs, such as the Netherlands' draft model BIT, expressly reference states' rights to regulate to deal with environmental and human rights issues. Moreover, there is little evidence to support the claim that companies are abusing ISDS – of the 767 known ISDS arbitrations, only 32 awards dealt with state measures to protect the environment and public health (statistics reported in Annette Magnusson, “New Arbitration Frontiers: Climate Change” in *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series no. 20, Kluwer forthcoming). If older treaties do not provide such exceptions or the terms are unsatisfactory and in fact being abused, then there is a case for renegotiation of those terms. Likewise, concerns over transparency of public interest ISDS can be dealt with by states signing up to initiatives such as the Mauritius Convention on Transparency in Treaty-Based Investor-State Arbitration. These criticisms are not, however, valid reasons for discarding the ISDS system.

A criticism perhaps worth closer consideration is whether, as a matter of policy, individual arbitrators appointed on an ad hoc basis have sufficient legitimacy to decide the validity of state conduct where it touches on areas of public interest. But this criticism ignores the need that ISDS addresses as well as

the fact that there is currently no viable alternative. ISDS came into existence because host states wished to encourage FDI, and foreign investors needed certainty as to how their investments would be treated and some effective avenue for recourse in the face of host state misconduct. National courts or state-state diplomacy (or hostility) had proved largely ineffective or unsatisfactory in resolving disputes. Tearing down the ISDS system (without any effective replacement) will only lead to greater risk for investors, greater nationalism, and “tit for tat” state-state measures.

Also often overlooked is the potential for BITs and ISDS to facilitate and enforce sustainable development and “climate-positive” policies. BITs can, for example, impose obligations on states to promote sustainable development, climate-positive trade or sharing of environmental technologies. The Netherlands' draft model BIT is again a good example – states must ensure “high levels of environment and labor protection” and “reaffirm their commitment” to international human rights and environmental treaties, including the Paris Agreement. It also allows tribunals to take into account investors' conduct where they have not complied with the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises. ISDS tribunals have already shown a willingness to engage on such issues. In *Urbaser SA & Ors v Argentina*, in the context of investor claims under the Spain-Argentina BIT, Argentina counterclaimed that the investors had breached international human rights obligations (the right to water). The tribunal held that it had jurisdiction over the counterclaim and that consideration of international human rights obligations was within its competence. Ultimately Argentina failed

to establish any breach of obligations owed by the claimants, but the tribunal's willingness to accept jurisdiction was itself a significant development.

There is little doubt that arbitration has a role to play in resolving climate-related investor-state disputes. The scope and breadth of that role is still to be seen and will no doubt fluctuate over time along with political, economic and public perception changes.

State-state arbitration

Arbitration already plays a role in resolving state-to-state disputes, under both BITs and MLTs. One well-touted example in the environmental context is the Indus Waters Kishenganga arbitration (*Pakistan v India*, PCA 2011-01) commenced under the Indus Waters Treaty. There is obvious scope for arbitration to play a similar role in respect of climate-related state-state disputes.

There are two key climate treaties – the Paris Agreement, aimed at enabling states to combat climate change and adapt to its effects, and its parent framework, the UN Framework Convention on Climate Change (UNFCCC). These mark a significant leap forward in global climate change policy. Currently, however, there is a lacuna in respect of enforcement. The Paris Agreement contains optional provisions for state-state arbitration, to be conducted in accordance with yet-to-be agreed arbitral procedure. It also incorporates the dispute settlement provisions of the UNFCCC (with minor necessary alterations). But to date the majority of state parties (with the exception of the Netherlands, Tuvalu and the Solomon Islands) have chosen not to opt-in to these procedures. The difficulty is that there is little impetus (but significant disincentive) for states to

open themselves up to claims from other states, particularly given the potentially catastrophic impact of climate change which some states already claim threatens their very existence.

It will likely take substantial public and political pressure, at international and national levels, before the majority of states agree some form of dispute resolution provisions for climate-related disputes. In parts of the globe, the trend towards nationalism and hostility towards international treaties (and international arbitration as a process) may make this difficult to achieve any time soon.

However, if and when such consensus is reached, arbitration is well-placed to fill the breach, not least because it is a neutral, impartial forum.

Conclusion

Climate change is leading to new economic realities and new legal frameworks to which all state and corporate entities must adapt. Climate-related litigation and legal risk is the new corporate reality. To date, many test cases are unsuccessful but activists across the globe are finding innovative ways to bring legal challenges. Frequently, the battleground is the court of public opinion, and damage is done regardless of whether the claim is successful. Regulation is increasing in this area, as states grapple with how to resolve these issues and, importantly, who should pay – this too brings legal risk and ultimately disputes. As a neutral forum, arbitration is arguably well placed to play a leading role as an arena for resolving many of these climate change disputes. Furthermore, it has the potential to fill an existing lacuna and become a key mechanism for the enforcement of international environmental policy.

With special thanks to Christopher Aird, trainee, for his contribution to this article.

A version of this article will also be published in [Global Arbitration Review](#).

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LNG construction arbitration

From the beginning to the end

By Dylan McKimmie and Andrew Battisson

LNG comprises approximately 9.8 percent of the world's energy supply.¹ It is an important and growing part of the global energy mix: in 2017 the global LNG trade set a record of 293.1 million tonnes (MT), an increase of 35.2 MT (or 12 percent) from 2016, which itself was a record year. 2018 is expected to see a further record. The expansion of LNG has led to an increase in LNG related production and delivery projects including: (i) liquefaction projects (onshore and floating); (ii) LNG carriers; and (iii) LNG receiving projects (i.e. storage and regasification projects both onshore and floating).

This expansion is expected to continue. There is 92 MT per annum (MTPA) of liquefaction capacity actively under construction in 2018 which is a significant increase to the existing nominal liquefaction global capacity of 369.4 MTPA. 24 new LNG carriers entered the global fleet in 2017 bringing the total fleet to 478 plus a further 106 on order, which amount to an increase of 18 during the course of 2017. Further to this, 87.7 MTPA of LNG receiving capacity is actively under construction in 2018, again a significant increase to the existing global receiving capacity of 851 MTPA.

LNG project costs are increasing

The scale and costs of LNG projects are substantial and growing. For example, the International Gas Union's (IGU) 2018 World Gas LNG Report records that the global average liquefaction unit costs for

greenfield projects between 2009 to 2017 increased by approximately 250 percent (to US\$1,005/tonne) compared to the period between 2000 to 2008. The global average masks significant regional variations, with the costs for Pacific Basin projects increasing by nearly 400 percent in the same time frame (to US\$1,458/tonne). As a rough guide, liquefaction costs comprise approximately 75 percent of the overall capital expenditure on an LNG supply chain, with shipping costs and receiving regasification costs comprising approximately 15 percent and 10 percent respectively.

LNG project characteristics and risks

LNG projects possess characteristics and risks that tend to amplify the potential for high value disputes. Such projects are highly technically challenging (including Floating LNG technology) and require a myriad of sub-contractors, often based across multiple jurisdictions. They are environmentally sensitive and subject to stringent regulatory requirements. LNG projects are often politically sensitive and subject to significant public scrutiny. LNG projects involve very significant upfront capital expenditure, with essentially no income generation prior to project commissioning. Moreover, the overall viability of an LNG project, which may have an expected lifetime exceeding 30 years, will often depend upon the long term stability and predictability of regulatory, political and economic environments.

LNG projects possess characteristics and risks that tend to amplify the potential for high value disputes

¹ Unless otherwise noted, all figures in this article are taken from IGU 2018 World LNG Report.

For liquefaction and regasification projects in particular, the risks associated with them include: project economics, environmental approvals and regulation, political risks, joint venture risks, technical engineering, procurement and construction challenges, feedstock challenges and end product marketing and contracting.

All of the above risks can impact heavily upon an LNG project and lead to disputes. Successfully addressing disputes efficiently can be critical to prospects of a given project.

Project life-cycle risks and challenges

There are a number of stages to an LNG project, which commonly include the following: (i) planning and regulatory approvals; (ii) front end engineering and design (FEED); (iii) EPC construction; (iv) commissioning and handover; and (v) post commissioning operations and price reopeners. Each of these stages presents potential contentious risks and challenges for the parties involved. For example: During the planning and approvals stage, extensive engagement will be required with the relevant legislative and regulatory regimes and the governmental decision making process may be lengthy, complex and lack transparency. In certain circumstances domestic administrative review procedures or investor protections under bilateral or multilateral investment treaties may become at issue.

- During the FEED stage, the precise parameters and scope of the design work being undertaken, together with the accuracy and quality of the design output will be important to: (i) determine the overall project scope and potential disputes that may arise during the construction stage; and (ii) reduce disputes between the FEED

contractor and the EPC contractor that risk delaying the project and/or may in effect, re-allocate performance risk.

- The EPC construction stage is subject to numerous technical and execution risks that may result in significant additional costs and/or delays. The management of change order requests, claim notification and time bar provisions, the imposition of liquidated damages, statutory adjudication regimes and waterfall dispute resolution processes, all require careful attention.
- The commissioning and handover stage raises risks in terms of technical complexities, as well as contractual risks derived from delays in commissioning and from potential “take or pay” obligations incurred in relation to commissioning cargoes.

Finally, the operations phase may be subject to price reopener provisions (such as a gas price review provision) which can significantly change the economic value of LNG supply agreements as between the buyer and seller.

Frequently, the forum of choice for resolving many of such disputes will be international arbitration.

Project life-cycle contentious risk management

With the increase in number and value of LNG construction projects, no doubt the number of LNG construction related arbitrations is set to rise. Disputes can however be ameliorated with appropriate contentious risk management during the project life-cycle.

In terms of contentious risk management, especially during the construction phase, parties should keep a number of issues in mind including the following

- Ensuring strong integration between in-house counsel team/external counsel team and the project team so that contentious issues are actively managed from a commercial and legal perspective, both of which are both necessary in long term projects. This includes ensuring contractual change order/variation processes are properly followed and rights reserved where appropriate.
- Ensuring project team members are aware of how rights can be inadvertently waived or lost through correspondence (e.g. the risks of informal email or other communications).
- Ensuring the contractual effect of claim notice provisions and time bar clauses are not inadvertently waived or otherwise rendered potentially ineffective due to conduct giving rise to an estoppel.
- Ensuring privileged communications are properly conserved and privilege is not inadvertently lost. Particular care is needed where communications are shared with shareholders in the project, including when escalating disputes are reported to management or shareholders.
- Ensuring that dispute resolution escalation provisions are followed within the agreed time limits or rights are reserved where commercially it would be appropriate to adjust the process.
- Ensuring the documentary record in relation to contentious issues is kept up to date and preserved. If a formal, electronic contract communication system is required, it is important that parties use it and abide by its protocols.

- Ensuring/preserving continued access to key project team members and their records who may become important witnesses in the event of a dispute.
- Considering whether the use of a dispute advisory board may assist in the timely identification and resolution of contentious issues. Similarly, considering whether a mediation process, neutral evaluation process or other alternative dispute resolution process may assist in the early resolution of disputes and the preservation of commercial relationships.
- Considering whether the early retention of an external expert may assist in narrowing or resolving contentious issues at a preliminary stage.

While prevention is better than cure, careful and proactive management of the circumstances giving rise to ... disputes is a critical element in any LNG project

Conclusion

LNG projects across the LNG cycle are of growing importance to the world's energy supply. They are costly, long term projects that come with substantial technical, economic and political risks all of which heighten the risk of disputes throughout the project life cycle. While prevention is better than cure, careful and proactive management of the circumstances giving rise to contentious issues and disputes is a critical element in any LNG project.

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The transformation of the global gas industry

Is this the end for price review arbitrations?

By Holly Stebbing and Matthew Plaistowe

A series of major geopolitical events coupled with significant advances in technology have led to dramatic changes to the global gas industry over the past 20 years. These changes have spawned their own particular class of legal dispute amongst buyers and sellers of natural gas – the price review arbitration. However, with liquid hubs for natural gas now well-established in the US and Europe, at least, some commentators have argued that the end of the price review arbitration is nigh. In this article, we look at the history of price review arbitrations, and consider the outlook for the future.

Gas pricing

Historically, buyers and sellers of pipeline gas and liquefied natural gas (LNG) would enter into long term take or pay contracts. There were incentives for both parties to use this model. Sellers needed buyers who were willing to commit to purchase fixed quantities of gas over the life of a project in order to secure cash flow and support the economics of the capital intensive projects needed to bring gas on-stream. In turn, buyers needed security of supply in order to meet customer demand in their home market.

When it came to contract price, for the buyer, the price it paid to the seller needed to reflect the price it would receive from customers or ‘end users’ in its home market, where gas would be competing with other fuels such as coal and oil. For the seller, there needed to

be sufficient margin between its costs of production and the downstream price for it to make a profit. Base prices were therefore typically set by reference to the end user price, plus the costs of distribution, together with an indexation element to allow the price to adjust over the life of the contract. As there was no “market price” for natural gas at that time, parties had to consider other metrics for indexation.

The answer was to use a competing fuel, such as oil or coal for which there were established and stable markets, as a proxy for the value of the natural gas in the indexation element of the pricing formulae. Even with indexation, however, the parties recognized that there may be changes to the gas market that would not be reflected in the competitor fuel index but which could affect the bottom line for either the buyer or seller. A further

solution was therefore required and this came in the form of a price review clause, which permitted changes to the contract price in specified circumstances.

Price review clauses

Whilst there is no standard form price review clause, clauses will typically include a number of key characteristics

- A trigger which determines when the parties can request a revision.
- Details of the process to be followed by the parties in starting and carrying out the price revision.
- Revision factors detailing how the price should be revised.
- Dispute resolution provisions in case agreement cannot be reached by the parties on the price revision.

- A provision determining from what date the revised price should apply.

Price review arbitrations

Price reviews exercises are particularly prone to dispute for a number of reasons.

When drafting a price review clause there is a mutual interest in using general wording. The parties do not know who will want to trigger a review and the clause needs to be broad enough to respond to events which, at the point of drafting, are often outside of the parties' knowledge. With this generality, however, inevitably disputes arise as to the scope and application of the clause when a party seeks a review.

As these disputes tend then to be referred to private arbitration, there is a paucity of precedent on interpretation of price review clauses. This makes it difficult for parties to predict how a tribunal might construe the wording and therefore for disputes to be settled, rather than progressed to arbitration.

There is also a lot of money at stake. Being the losing party in a price review can be very costly – just a small adjustment to the price can run into the hundreds of millions, if not billions, of dollars over the term of a contract undermining the project economics altogether. With stakes this high it can be worth pursuing arbitration, even where prospects of success are uncertain.

Price review arbitrations are also a unique class of dispute. The tribunal is being asked to determine a quite different question to a standard claim

Price review arbitrations are also a unique class of disputes. The tribunal is being asked to determine a quite different question to a standard claim. Neither party is in breach of contract or committed a wrong; they simply cannot agree on how a provision of the contract should operate and are effectively asking the tribunal to 'rewrite' the deal on price to reflect the changed circumstances. The quirks of price review therefore, call for specialist counsel and arbitrators who can handle technical economic, quantum and accounting matters, together with the legal issues, and who are willing to step into the realm of commercial contract negotiation.

Price reviews round 1

The first round of price review arbitrations followed the liberalization of the European gas market in the late 1990s. Whilst liberalization proceeded in a piecemeal fashion, the shift away from single, monopolistic buyers of gas (who were often state owned utilities), to markets where multiple buyers were competing for downstream customers (i.e. gas on gas competition) disrupted the market, with the downstream price being dictated by the new market dynamics at play in the end-user state. Although this was good news for customers who saw their gas bills come down, buyers who were tied into long-term sale and purchase agreements linked to oil prices, which they had entered into when they had a monopoly in their home market, were now being undercut by new entrants to the gas market jostling to secure customers, and seeing their revenues tumble.

This disconnect between the upstream and downstream gas price spawned the first phase of price review arbitrations as buyers sought downward revisions to their pricing to reflect the emergence of competition in the market.

Price reviews round 2

A decade later, following a sustained period of booming commodities prices, the global economic crisis hit. This led to a dramatic decline in demand for gas just at a time when new supplies, including huge volumes of unexpected US shale gas, were being brought online. This led to a supply glut and the diversion of LNG away from the US (historically a net importer) into Europe. With Europe being treated effectively as a dumping ground, the then nascent European hubs were suddenly flooded with large volumes of gas.

The upside of this was a boom in trading which allowed European gas hubs to start maturing but it also triggered a spate of buyer initiated price review arbitrations with buyers seeking downward revisions to their long term oil linked deals.

Price reviews round 3

The most recent round of price reviews has been prompted by the desire of European buyers to move away from oil indexation to pricing based on European gas hub prices. The volumes being traded on these platforms and the stability of pricing is now such that buyers consider them to be a more reliable price indicator than competitor fuel indices, such as oil and coal.

Buyers therefore commenced price reviews to seek revision to the pricing formulae to replace oil indexation with gas hub indexation. Whilst this is a fundamental change to the commercial deal originally struck in these long terms contracts, it is a move which has largely been accepted by the major gas suppliers into Europe who recognise the structural changes in this market.

Even where there is hub pricing, there is still the risk that the hub price and the price in the end users' specific market may diverge

The future of price reviews

In Europe, at least, some now argue that where the pricing formulae is linked to a European gas hub, price review clauses are unnecessary as the contract price should always track the market and there is no risk of divergence as there was for oil-linked contracts. If that proves to be correct, price review arbitrations in Europe may die out. However, even where there is hub pricing, there is still the risk that the hub price and the price in the end users' specific market may diverge (particularly given the destination flexibility offered by LNG where the hub reference could be geographically distant from the buyer's market) and this may trigger price review disputes.

Looking further afield, the European story has not been mirrored in the Asian gas market, which is a huge importer of natural gas and particularly LNG, which will increase as China ceases to use coal for power generation. There pricing largely remains linked to oil indexation, markets are monopolistic and prices reflect supply costs. This region could be the next hotbed for price reviews as Asian buyers look to the lower prices in Europe, and contemplate what they can do to improve the terms of their deals.

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Belt and Road Initiative disputes

Bumps in the road?

By James Rogers, Alfred Wu and Anita Fong

The Belt and Road Initiative (BRI) or the Silk Road Economic Belt and the 21st century Maritime Silk Road is a development strategy proposed by the People’s Republic of China (PRC) government which focuses on connectivity and cooperation spanning across countries in the Asia Pacific area and Central and Eastern Europe.



A map indicating the coverage of the BRI, also known as the One Belt and One Road Initiative.

The BRI is one of the largest infrastructure and investment projects in history, covering more than 68 countries, including 65 percent of the world's population and 40 percent of the global GDP as of 2017. It is an ambitious framework envisaging co-operation between countries on areas such as infrastructure investment, education, construction materials, railway and highway, automobile, real estate, power grid, and iron and steel.

Since its announcement by President Xi of the PRC in late 2013, over 600 contracts have been signed by Chinese enterprises for projects in countries along the BRI routes. It has been projected that Asia alone needs about US\$8 trillion worth of basic infrastructure projects for the ten-year period from 2010 to 2020.

The BRI brings new investment opportunities but also unchartered risks requiring careful management

The BRI brings new investment opportunities but also unchartered risks requiring careful management. The involvement of countries with different stages of development and widely varying legal, political and economic systems means that risks must be properly managed with the choice of effective dispute resolution mechanisms at the heart of that risk management process.

By their very nature, BRI projects are complex, high-value, high-public interest, long-term, capital intensive, multi-party, multi-contract and cross-border

Arbitration for BRI projects

By their very nature, BRI projects are complex, high-value, high-public interest, long-term, capital intensive, multi-party, multi-contract and cross-border. One of the key benefits of the arbitration process is its neutrality – it is separate from and largely independent of the local court system of the investee countries. Risks and concerns of litigating in foreign courts include the applicable law, the impartiality of the local judges, and the international recognition and enforceability of local court judgments.

The portability of arbitral awards is another major benefit. There are over 70 countries within the BRI, with only 5 countries being non-signatories to the New York Convention. Those countries are: Iraq, Maldives, Timo-Leste, Turkmenistan and Yemen. For signatory countries (which constitute the vast majority), enforcement of international arbitration awards should be relatively straightforward.

Mediation as an alternative dispute resolution mechanism that is much more widely embraced in civil law jurisdictions than common law jurisdictions, and likely favoured by Chinese parties, should not be overlooked. This is particularly the case with mediation being combined with arbitration in Med-Arb, Arb-Med-Arb, etc. processes which can result in an award that benefits from the New York Convention enforcement regime.

Arbitral institutions' response to BRI

The last several years have seen an exponential proliferation of institutional arbitration in the international arbitration scene. This appears to be a result of both the recognition of certain civil law jurisdictions of only institutional and not ad hoc arbitration, and intense competition among arbitral institutions to provide better service and to improve the range of tools available to modernise the arbitral process to close the gap between dispute resolution by arbitration and by court litigation. There is no reason to believe that similarly keen competition among arbitral institutions will not arise to seek out opportunities in the BRI dispute resolution arena.

The above is abundantly clear in recent amendments of the rules by various arbitral institutions, some of which are of a more general in nature while others are BRI focused. To maintain competitiveness, most of the major institutional rules have similar features. However, significant differences remain, such as

Confidentiality

The institutions' approach to confidentiality illustrates the differences which arise. For example, the ICC Rules do not contain any express confidentiality provisions. By contrast, the AAA/ICDR Rules expressly prevent the disclosure of confidential information during the proceedings and there is an obligation of confidentiality in relation to the award (except that the AAA/ICDR may publish redacted extracts). Similarly, the LCIA Rules provide that the arbitral proceedings, material created for the purpose of those proceedings and the award are all to be kept confidential.

- **Scrutiny**

The extent to which awards are scrutinised also varies significantly. Awards made by ICC arbitrators are scrutinised and approved by the ICC court to maintain consistency and a high standard of award-writing. Certain other institutions e.g. CIETAC also scrutinise awards. By contrast, the HKIAC and the SIAC do not scrutinise awards.

- **Fees**

Fee structures can also differ, with some institutions charging on the basis of the amount in dispute and others charging on a flat hourly rate basis. As much as possible, advisers need to be informed about these differences so that the end-user can choose the institution that is most suitable for their dispute.

The HKIAC is currently undertaking a consultation with a view to a fairly significant revision of its 2013 administered arbitration rules. The consultation has included proposed revisions in the following areas

- Online Document Repository.
- Alternative Means of Dispute Settlement (e.g. "Arb-Med-Arb").
- Multilingual Procedures, i.e. to allow arbitral proceedings to be conducted in two or more languages.
- New Grounds for Joinder, i.e. joinder of a non-party to the arbitration agreement giving rise to the arbitration in question, and joinder of a party under a separate arbitration agreement under the same rules.
- Expanded provisions for single arbitration under multiple contracts.
- Concurrent Proceedings.
- Third Party Funding.

Each of the above could have significant implications in terms of bringing the HKIAC Rules up to date and improving the efficiency and effectiveness of the arbitral process for BRI disputes.

In March 2018, the ICC International Court of Arbitration announced the establishment of a commission to address dispute resolution potentials in relation to the BRI. According to a spokesperson of the commission, there is a concerted effort to encourage mediation clauses in BRI agreements, with provision for arbitration if mediation fails.

Late 2017 saw CIETAC announcing the adoption of a set of special international investment arbitration rules aimed at promoting the effective and expeditious resolution of BRI related investor claims. The CIETAC Rules are innovative in the sense that cases will be heard by the newly established Investment Disputes Resolution Center in Beijing, and can also be referred to and administered by CIETAC's Hong Kong Arbitration Center if the parties so wish. The rules further permit the use of third party funding which must be disclosed upfront to the counter-party, arbitrators and CIETAC.

The latest set of SIAC Rules, introduced in August 2016, already included multiple contract arbitrations, joinder of additional parties and early dismissal of claims and defences (the last of which is the subject of the HKIAC's current consultation). As to the combination of mediation and arbitration, Singapore had had an Arb-Med-Arb protocol in place since 2014. BRI projects will present a unique opportunity for parties to take a fresh look at how best to use the protocol to their advantage.

International arbitration
... unquestionably should
be at the top of parties'
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resolution mechanism

Conclusion

It is important for investors to have the right tools to manage any accompanying risks in order to benefit from BRI opportunities. International arbitration, with its many benefits and advantages, unquestionably should be at the top of parties' minds as a preferred choice of dispute resolution mechanism. With the multiplicity of institutions vying for a share of the BRI dispute resolution pie, parties are well advised to study the rules of the different institutions carefully as well as the law of the seats where the institutions commonly operate to fully understand the pros and cons of choosing any particular institution. This is fundamentally important to successful risk management for BRI projects.

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Tanker disputes

Plain sailing?

By John Liberopoulos and Peter Glover

According to the US Energy Information Administration, about 61 percent of the world's petroleum and other liquids production, or about 58.9 million barrels per day, moved on maritime routes in 2015. The transport of crude and petroleum products by sea is, accordingly, both a major driver and a facilitator of international trade, of which some 90 percent is carried by sea.

As with any transport system, the transport of petroleum by sea presents a number of difficulties, both legal and factual. Issues may arise in three principal areas: (i) quantity and quality prior to loading and after discharge, (ii) the chartering arrangements agreed for the carriage of oil by sea and (iii) issues associated with the physical carriage of oil by sea. While it may be convenient to divide and discuss the three as separate and distinct fields, both in practice and as a matter of claim and dispute management, such division is rarely achievable.

In addition, factors such as the high value of petroleum products, the timelines for investigating loss and/or damage and the cost of delay while doing so add to the pressures associated with tanker disputes. The consequence of the foregoing dictate that the threshold for disputes is frequently low, even if only for issue protection purposes.

In the overwhelming majority of cases, the parties' dispute resolution mechanism of choice is arbitration. Typically, the contract will provide that disputes are to be resolved under English law by arbitration seated in London and conducted under the London Maritime Arbitration Association (LMAA) Terms.

Tanker disputes

From the three areas in which issues may arise, it is possible to distill the types of potential disputes into two main categories: shortage and contamination disputes. This is not to ignore the significance of other disputes that may and do arise as a result of shipping tanker operations, including collisions, groundings, equipment failure, off-hire, demurrage or constructive and total losses. Rather, the frequency and likelihood of these two categories determine their practical significance in the day to day management of trade and dispute management.

In common with shortage and contamination disputes, the overwhelming majority of tanker disputes will be resolved through charterparty and/or bill of lading dispute resolution clauses which provide for arbitration under LMAA Terms. The exception to this is collision cases, where it is more common for the parties to found jurisdiction by way of in rem arrest proceedings or through agreement to a collision jurisdiction agreement, which typically provides for the parties' claims to be determined exclusively by the English courts under English law.

In the event that a tanker casualty requires salvage assistance, the majority of salvage services are provided on the Lloyd's Open Form (LOF), which provides for incorporation of the Lloyd's Standard Salvage and Arbitration Clauses, which in turn provide for the seat of arbitration to be London (unless otherwise agreed) and for the arbitration to be conducted in accordance with the

Lloyd's Procedural Rules. In casualty cases, is not uncommon for the costs of shortage and contamination disputes to be caught in the LOF arbitration.

Shortage disputes

It is trite law that the legal burden rests upon the claimant. If the claimant alleges a shortage dispute (and any consequential loss), they must prove that claim. The evidential burden may swing between the parties throughout the duration of a hearing, yet in the context of a claim for short delivery, the owner of the cargo must prove such short delivery if they are to succeed in that claim. Against this, it is up to the ship owner, or the carrier, to prevent them from doing so, or to prove affirmatively that such short delivery occurred in circumstances for which they were not responsible.

It is important to note that the LMAA Terms do not address questions of evidence, so the fall back is the Arbitration Act which gives wide latitude to tribunals in regard to evidence.

In most instances, the contractual responsibility for carriage is governed by the Hague-Visby Rules, Article 1(e) of which provides:

“Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

This is frequently referred to as the tackle to tackle, or manifold to manifold rule.

It is common to find representations in the carriage documents, such as the bill of lading, describing the goods as shipped in good order and condition. Such statements are prima facie evidence in favour of the shipper of the goods, but they can be rebutted (save for a conclusive evidence clause) and

become conclusive when in the hands of a bona fide purchaser for value.

Once the oil has been loaded, there is judicial recognition that the ascertainment of any short delivery after a normal voyage is notoriously difficult. The precise determination of shortages depends on complex calculations comparing the quantity apparently loaded with the quantity apparently discharged, with due allowance for un-dischargeable quantities of sediment, oil remaining in the ship's lines and the potential for apparent losses due to evaporation.

Factors effecting quantification of cargo and/or contributing to cargo gain or loss

There are a number of factors contributing to the quantification of cargo that may generate disputes. These include, inter alia, incorrect ullage reading (tank gauging and/or table reading), incorrect temperature determination, incorrect application of VCF, incorrect density correction, use of un-calibrated or defective equipment, poor gauging procedures and ship construction and the tank arrangement.

One particular feature, both of contractual and of practical consequence, is the effect of evaporative loss of light ends during ocean transit, which can be as much as 0.25 percent of the cargo. In order to assist in avoiding potential disputes on each shipment, in light of the notorious difficulty of determining oil shortage claims, and to aid commercial certainty, the industry has developed in-transit loss clauses, which frequently provide that:

In addition to any other rights which Charterers may have, Owners will be responsible for the full amount of any in-transit

loss if in-transit loss exceeds 0.5 percent and Charterers shall have the right to claim an amount equal to the FOB port of loading value of such lost cargo plus freight and insurance due with respect thereto. In-transit loss is defined as the difference between net vessel volumes after loading at the loading port and before unloading at the discharge port.

It is important ... to note, nevertheless, that in-transit loss clauses only provide protection for losses incurred in normal voyages

It is important to understand the specific language of the clause and to note, nevertheless, that in-transit loss clauses only provide protection for losses incurred in normal voyages. Losses occasioned by, for example, piracy and theft, are not covered.

Ship's tanks or shore tanks?

There are a number of factors that may sway any determinative preference for a ship's tanker or shore tanks in the event of a shortage dispute. The principal reason for preferring ship measurements include the advantage of measuring the quantity of oil at the beginning and end of a voyage in the same tanks, thereby eliminating idiosyncrasies which might exist between different containers, such as shore tanks at the load port and discharge port.

Against this, there are notable reasons for not preferring ship measurements. These include the fact that the ship does not provide a platform for measurement

as stable as shore lines and shore tanks. The ship's measurements require allowance to be made for trim and list of the vessel, and for the remains of oil, water or sediment on board the vessel before loading and after discharge. In addition, due consideration must be given to the challenge involved in calculating the capacity of ship's tanks and of changes in their configuration during the life of the vessel.

Theft

Marine transport is not isolated from the orbit of criminal activity and theft does, from time to time, occur. It is trite law that a bailee does not properly and carefully carry, keep and care for goods if he consumes them (for example, in the ship's boilers) or delivers them to an unauthorized recipient during the voyage. A bailee does not properly nor carefully discharge goods if, whether negligently or intentionally, he fails to discharge them and so converts them to his own use. Similarly, any suggestion of deliberate diversion must be considered with caution, as it would probably involve crime.

Contamination disputes arguably represent the second largest category of tanker disputes

Contamination disputes

Contamination disputes arguably represent the second largest category of tanker disputes. From a contractual position, it is necessary to consider, inter alia, the charterers' orders, previous cargo (tanks, lines, pumps, pump wells, manifold, goosenecks etc.) and what preparation and tank washing schedules are required.

From the carrier's perspective, in the absence of express stipulation, Article III(1) of the Hague-Visby rules states that:

The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

As a matter of law, want of due diligence is negligence.

Failure to properly prepare the ship's tanks for the carriage of oil can, in addition to a contamination claim, have far reaching consequences. In the matter of *Mediterranean Freight Services Ltd v BP Oil International Ltd* [1993] 1 Lloyd's Rep. 257, it was held that the failure to remove condensate residues from the vessel, and in particular the failure to carry out a proper line and duct wash at the load port and before loading commenced, constituted a breach by the owners of their obligations under Article III(1) to make the ship seaworthy. Failure to be seaworthy at the commencement of a voyage can materially affect claims in contribution for salvage and general average.

Conclusion

The transport of crude and petroleum products by sea is a major facet and driver of international trade. Compared to other transport regimes, the transport of petroleum by sea presents both logistical and legal problems, which on occasion materialize as tanker disputes. Notwithstanding the propensity for shortage and contamination claims, sound awareness of the legal regimes

and the factors which give rise to such claims can serve either, in the first instance, as a shield to claims or, in the event of a claim, as a tool to mitigate against liability and direct and consequential losses.

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Energy, technology and arbitration

The latest buzz

By James Rogers, Matthew Buckle and Cara Dowling

Technological innovation continues to disrupt the status quo in established industries, presenting both opportunities and threats to established industry leaders. In this article, we focus on the disputes that might arise from changes in the energy sector, and emerging avenues for avoiding and resolving such disputes.

Reenergizing the energy sector – digitalization, big data, smart contracts and the internet of things

We are in the midst of the “fourth industrial revolution”. As discussed in our guide [Unlocking the blockchain: Digitizing the energy value chain](#), distributed ledger technology (DLT), and the applications enabled by it, has the potential to lead to a fundamental change in how the energy industry shares data and transacts, and may even alter market structures.

Lost in the lingo? Speed read our [Legal technology jargon buster](#)

DLT refers to software applications that deploy a digital database of transactions (i.e. a ledger) which is distributed (i.e. identical copies of the ledger are maintained on multiple computer systems). A common iteration of DLT is “blockchain”. The significance of DLT is that it allows data gathering and

record-keeping on enormous scales and facilitates the efficient sharing of certain data between parties to a transaction. DLT has important B2B applications throughout the energy sector, and is potentially disruptive at every stage of the value chain including in asset management, trading, commodities tracking and certification, transport and logistics and payment mechanisms.

When combined with data analytic software, DLT is also an incredibly powerful B2C tool. It enables much deeper understanding of customer attitudes and behaviors and closer monitoring of market trends, facilitating closer interaction with retail customers.

DLT also has the potential to automate many activities, when used in combination with smart contracts. A smart contract is a “set of promises, specified in digital form, including protocols within which the parties perform on these promises” (Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets*, 1996).

A smart contract is

- Digital – it is in code form.
- Embedded – contractual clauses are embedded (as code) in hardware or software.
- Performance is mediated by technological means – actions are enabled by technology and rules-based operations.
- Irrevocable – performance is automatic and, once initiated, the outcome encoded to be performed typically cannot be stopped (unless the outcome depends on an unmet condition).

As smart contracts are simply automating code other technology could also be used, but smart contracts are typically deployed on DLT.

A key virtue of a smart contract is its “disintermediation”, in that the parties can transact on a peer-to-peer basis, without the need for an intermediary – whether that be a central authority

or third party. The system facilitates correspondence between the parties' respective copies of the ledger, and the smart contract performs automatically, as coded, when pre-agreed events or values are recorded on the ledger.

For an in-depth discussion of smart contracts, read our guide *Smart Contracts: coding the fine print, a legal and regulatory guide*

This has significant implications in the energy sector. In energy trading, for example, cost reductions in deal execution and decreased credit risk may be achieved by enhanced information flow and disintermediation, using smart contracts to automate the execution of trades.

The potential uses are even more exciting when combined with the Internet of Things (IOT). IOT refers to the connectivity between intelligent sensors and devices via a network. Sensors are already used throughout the energy industry, for example, monitoring and maintaining temperatures during oil extraction and in maximizing gas distribution by managing pressures and identifying leakages. Combining this with DLT, smart contracts and IOT could lead to unprecedented automation of operations across the industry. For example, electricity network faults could be identified using smart sensors (rather than visual inspection) and maintenance automatically scheduled by a self-executing smart contract.

There are many other use cases in the energy sector for these emerging technologies – for more information read our guide *Unlocking the blockchain: Digitizing the energy value chain*

Potential disputes

However, any business innovation, whilst creating opportunities, also creates new areas for disputes. Given that much of this technology, and the potential use cases, are rapidly evolving, the exact nature of disputes likely to arise is difficult to predict. To complicate matters, most laws that will apply to such disputes were developed in a world that did not even contemplate such technologies.

One fundamental issue is whether smart contracts in fact have any legally binding contractual effect at all. Under the common law a contract requires: offer and acceptance, consideration, intention to create legal relations and certainty of terms. The coding of a smart contract may lack these essential legal elements. Furthermore, by its very nature a smart contract may not satisfy prescribed formalities for legal validity e.g. a certain form and/or method of execution. There is a clear risk to parties if commercial arrangements lack legally binding effect.

For a more detailed discussion of whether smart contracts are legally binding, read our white paper *Can smart contracts be legally binding contracts?*

Coding errors may also give rise to legal uncertainties, and these matters will be more complicated when things go wrong in situations without any human involvement. In some circumstances, it may be difficult in accordance with established legal thinking to establish liability and/or even identify the defendant against whom to seek redress. For example, if an automatically generated invoice is sent to and automatically paid by a customer but an audit later proves it to have been wrong (based on an inaccurate reading from a defective sensor or due to some small programming error in the algorithm). Another foreseeable example is where a bug or error in a smart contract results in a mistake in what the parties thought they had agreed or some entirely unintended outcome. Most jurisdictions have legal mechanisms to deal with the consequences of or correcting mistakes in contracts, but we are yet to see how the courts will apply such laws to smart contracts.

Also fundamental are questions of jurisdiction and governing law. The energy industry is global, and transactions and supply-chains commonly have cross-border elements. That brings with it questions of which court(s) has jurisdiction to hear disputes and which law(s) should be applied. Pity the court that has to determine governing law and jurisdiction in this hypothetical DLT use case example: disputes arise in respect of a DLT based commodity trading platform created and provided by a Swiss technology company, on which a South African buyer and a US seller transact, with the commodity to be delivered in Italy. It is not that there is necessarily a legal vacuum to decide these issues, and courts are of course accustomed to dealing with difficult jurisdictional and conflict of law issues. But we are yet to see how these issues will be dealt with by the courts in practice.

For a deep dive into legal and regulatory risks, read our guides *Smart Contracts: coding the fine print, a legal and regulatory guide* and *Unlocking the Blockchain – Blockchain disputes: Risks and resolutions*

Legal and regulatory risk in the energy sector is already a complex matrix, complicated by the fact that the sector involves global players but there is no single, universal, legal system. There is a plethora of different and often conflicting systems across the globe, and as disputes arise, multiple courts will grapple with and laws will evolve (or be legislated) to address challenges created by fast emerging new business realities. These few examples are intended only as an introduction to the novel legal risk profile of innovative technologies. The biggest risks are of course likely still unknown.

Majority risk

Parties can take steps to minimise risk. This requires careful analysis of the risk profile of the particular use case in the specific context. Critically, this should be done at the outset. Some issues may be ameliorated, at least to some degree, by incorporating contractual provisions in the smart contract (directly or by reference to terms and conditions). To deal with liability, for example, parties may include provisions to allocate risk or to limit or exclude liability (on a back-to-back basis, as appropriate). Parties may also include provisions to deal with events that amount to force majeure or arise from third-party (mis)conduct. Jurisdictional problems may be assisted by choice of law or jurisdiction clauses.

However, the very nature of emerging technologies means that not all risks can be anticipated. Given the commercial and legal uncertainties, arguably the most important decision will be the choice of governing law and dispute resolution mechanism in the smart contract.

The role of arbitration in smart contract disputes

As discussed in our article *Arbitrating smart contract disputes*, arbitration is uniquely well-suited to deal with disputes relating to innovative technologies arising in the energy sector.

Arbitration often has significant advantages in respect of enforcing the parties' agreement to arbitrate, as well as any arbitral award subsequently rendered. It offers a neutral forum, and allows parties to avoid recourse to courts where, for example, there might be issues with bias, corruption, lack of expertise, or excessive cost or delay. Importantly, parties to arbitration can also choose their arbitrator(s) – a significant benefit where the alternative would be judges or juries with no relevant expertise. As arbitration is a consensual, contractual process, parties also have greater flexibility to tailor the arbitral procedure to their specific needs.

As a process, arbitration is more readily able to adapt to the new status quo brought about by innovation than many national courts, and can offer innovative dispute resolution solutions. Innovators in arbitration are already developing automated dispute resolution processes that operate in the same way that a smart contract does.

For example, parties could agree and code into the smart contract that an arbitrator(s) will be automatically appointed from a pre-agreed list (perhaps chosen at random) and that the

arbitrator's decision is to be fed back into the smart contract giving it immediate effect and circumventing enforcement issues. This idea of "decentralised" arbitration was mooted in 2016 by Vitalik Buterin, the individual behind the blockchain platform Ethereum. This concept could be expanded to add provisions as to how the disputes will be resolved, such as a fast-track process, decided by reference to only certain pre-agreed external data and in accordance with certain laws or rules. For certain types of disputes, a largely automated (and cost effective) arrangement such as this would be welcomed. Other examples of innovative arbitration are set out in the table below.

At the furthest end of the spectrum is so-called "AI Arbitrators". As business activity in the energy sector becomes increasingly automated, and ever greater volumes of data are generated and inter-connected, it is conceivable that arbitration could eventually offer wholly automated dispute resolution solutions by applying analytical tools and artificial intelligence to decide disputes based on data input automatically by the smart contract and which are automatically given effect in the smart contract. In this way technological innovation has great potential to disrupt not only the energy sector, but also dispute resolution itself.

Conclusion

These are exciting times for the energy sector, with emerging technologies offering incredible opportunities. Parties do need to ensure, however, that they also consider the potential new areas of risk, and ensure that they have incorporated appropriate contractual protections and an effective and enforceable mechanism for enforcing the contract and resolving disputes.

With special thanks to Khawaja Akbar, trainee, for his assistance with this article.

Innovations in DLT arbitration

“Multisig” mechanism	Enables parties collectively to nominate an arbitrator, who is empowered to decide disputes and transfer assets or money on the blockchain to give effect to the decision.
Bitrated	An adjudication platform for Bitcoin. Parties nominate, ahead of time, a trust agent to act as an arbiter for their transaction. “Arbiters” build an online profile containing, for example, descriptions of their approach to procedural and substantive rules. They have the power to transfer currency directly to the successful party to the dispute. The platform ranks adjudicators based on “trustworthiness”. Interestingly, those with the highest ratings tend not to refer to national law in their methodology for filling in gaps in contractual arrangements.
Confideal	A platform for transacting via smart contracts on the Ethereum blockchain which contains an integrated arbitration service. Allows parties to select qualified arbitrators, who resolve disputes without having access to the personal data of the parties – all they know is the parties’ cryptocurrency wallet addresses. Arbitrators’ decisions are intended to be legally binding in national courts but arbitrators do not have the power to enforce decisions themselves. Arbitrators create accounts on the platform and enter personal data: languages, location, specialization, working experience, etc. An arbitrator for any particular deal is selected by both sides of the contract during its setup, before signing. Arbitrators are publicly rated and ranked based on objective and subjective criteria. There is also a separate selective measure based on user votes for arbitrators using “likes” and “dislikes”. Arbitrators are paid up to 10% of the smart contract’s sum. There is also a mediation option.
Blockchain Arbitration Rules	Arbitral rules based on UNCITRAL Arbitration Rules. Under the rules, referral to arbitration triggers a function that pauses execution of the smart contract. An appointing authority performs administrative work in connection with the arbitration including nominating the arbitrator. All relevant data is contained on the blockchain, including details of the contract and email communications. Once the arbitrator has the necessary data, including statements of claim and defence, they may call an oral hearing (in person or via video conference). Depending on the arbitrator’s award, the appointing authority either resumes the smart contract, modifies its execution, or ends it permanently. The arbitrator is paid with funds available in the smart contract in dispute.
Datarella	A blockchain solutions provider. In July 2017, Datarella conducted an arbitration using blockchain technology, where the smart contract governing the relationship between the parties contained an arbitration clause referencing to the Blockchain Arbitration Rules.
Kleros Court	A decentralized application built on top of Ethereum, which works as a decentralized third party to arbitrate contractual disputes. It relies on game theory incentives to ensure “jurors” (arbitrators) decide cases correctly. Parties can choose Kleros as their adjudication protocol in the smart contract, and relevant data is securely sent to Kleros. A tribunal is drawn from the crowd, jurors evaluate evidence and “cast their vote”/render an award, which is enforced by the smart contract. Jurors collect fees for deciding disputes in the form of tokens – after the dispute is decided, jurors whose vote is “not coherent with the group” lose tokens, which are transferred instead to “coherent” jurors. The creators postulate that this will incentivise “honest rulings”.
Jincor Arbitrage	Jincor is a smart contract and cryptocurrency platform. Offers an “arbitrage” system. Arbitrators are chosen by mathematical algorithms with regard to “digital reputation, sphere of competence and practical experience in specific jurisdiction and economic sector”. Arbitrators’ fees are defined in advance and paid by the losing party at the end of proceedings. Proceedings are held in “an anonymous digital room”. Arbitrators remain unknown to the disputing parties. The losing party is given “a commitment requirement” and it seems that failure to comply with that (it is not clear from Jincor’s description) will result in “losing reputation and business relations, which are associated with a digital ID of the participant”. All participants of the ecosystem have access to a unified database, which will contain data on all previous arbitration proceedings. This allows parties to assess each other’s reliability before signing a contract.

EOS Core Arbitration Forum (ECAAF)	The dispute resolution mechanism for resolving disputes between parties operating on the EOS blockchain, a “governed” blockchain (i.e. a rules-based environment, pursuant to the EOC Constitution). Arbitration is conducted under ECAAF’s Rules for dispute resolution.
SAMBA (Smart Arbitration and Mediation Blockchain Application)	An application created by a Miami-based start-up which aims to use DLT to offer a private, decentralized application to facilitate cost and time efficient resolution of disputes. Users will be able to input their arbitration clause or agreement into a request form, which will translate the information into code and generate the smart contract. The smart contract will then be sent to the SAMBA account of the designated arbitral institution, which must agree to administer the case, and then to the respondent so the arbitral process can begin. The final award will be stored on the blockchain. All participants (claimant, respondent, arbitrators and institution) have keys to access data at appropriate times in the process, and there is a drop box for electronic discovery. Currently a secure website but intended eventually to be an application that can be used on any device. Also looking at how arbitral institutions need to adapt to the digital era, in particular DLT.
DAMN (Decentralized Arbitration and Mediation Network)	A proposed network which “would be built on top of the New York Convention legal structure”. It would provide users with layers of choices regarding whether a dispute will be resolved by a person, an algorithm, pools of random jurors, through the collaboration of the parties involved or a decentralized autonomous organizations. The creators anticipate “hundreds of dispute resolution systems of different levels of complexity catering to anyone who wants to run them.”
Cryptonomica	An online and offline identity verification service and database of verified identities with keys for signing electronic documents, blockchain transactions etc. Cyptronmica Ltd (formerly known as the International Arbitration and Cryptography Centre Limited (ICACC)) purports to be a permanent international arbitration authority, registered in the UK. Offers an online arbitration procedure under its own arbitration rules.

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Sanctions, arbitration and the energy industry

The heat is on

By Hazel Brasington and Katie McDougall

No industry feels the effects of the seemingly ever-changing regulatory landscape more than the energy sector. Multi-jurisdictional in nature and targeted by sanctions, players in the energy industry can confront the choice of either breaching sanctions, or breaching their contract, following a change in sanctions law. The interplay between sanctions and dispute resolution (usually by international arbitration), has become a difficult but important issue for energy sector businesses to navigate.

The interplay between sanctions and dispute resolution has become a difficult but important issue for energy sector business to navigate

How has this happened?

The sanctions clause was once consigned to the status of boilerplate; rarely reviewed (let alone changed), it was “nice to have”, rather than a deal breaker. Nowadays, debate over single words in these clauses can delay multi-million dollar deals for months, as parties attempt to protect themselves against potentially significant exposure to reputations and balance sheets.

The reason for this change is not just the more frequent use of sanctions affecting an expanding number of countries. In our view, two factors are at play. First, the EU and the US (followed by many other countries, including Australia and Canada) have introduced a new variant of sanctions that targets industry sectors in specific ways, which differ from the general embargos against countries or persons that have traditionally been the core of most sanctions regimes. Secondly, the two widest reaching sanctions regimes, being those of the EU and US, have diverged in their application, both in dramatic and in more subtle ways.

Nowhere is this shift more evident or impactful than in relation to the energy industry. The sanction programmes that have arguably had the most effect on global trade in recent years are those with respect to Russia, Iran and Venezuela. Each of these programmes (both from EU and US perspectives) specifically targets the energy sector in those jurisdictions, albeit by different methods.

For example, the sanctions imposed with respect to Russia in 2014, and gradually expanded since that date, target key Russian energy sector companies and individuals, in limited or extensive ways, depending on the subject. Further, they target particular types of energy projects and the provision of goods, technology and equipment for those projects, and certain financing, insurance and services related to the energy sector. With respect to Iran, many of the sanctions reintroduced by the US following its withdrawal from the Iran nuclear deal specifically target Iran’s oil and gas and petrochemical sectors, together with the related finance and transport sectors. The sanctions recently imposed with respect to Venezuela have implications for any entities doing business with the state oil and gas company PDVSA. Highly specific prohibitions affect existing contractual commitments, trading positions, deliveries, pricing, hedging, scheduling, and forecasting, and any change in these prohibitions can have a significant impact for companies operating in this market.

Further, the manner in which the energy sector in various sanctioned jurisdictions is targeted by the EU and US sanctions programmes has diverged, and the difference is becoming more pronounced as various state actors pursue different goals. This is clearly evidenced by the strong divergence between the EU and US with respect to the Iran Nuclear deal, where energy companies face the impossibility of compliance with both EU and US sanctions with respect to Iran, and severely limited contractual options. Perhaps more subtle, but with a wider impact, are the differences of approach to the Russian energy sector taken by the EU and US, which require particularly deft consideration.

What does this mean for the energy sector?

Where there is uncertainty, disputes flourish. Any business operating in a sanctioned jurisdiction, or involving a sanctioned party, or where there are potential sanctions implications for the project or products involved, must apply well drafted and sufficiently sophisticated sanctions clauses in their trade, project and finance documents. “Market” sanctions clause wordings for various energy related contracts have drastically changed over the last four years. Sanctions clauses need greater flexibility to deal with divergent regimes and to adapt to frequently changing circumstances. Bespoke clauses that suited one transaction may be very different to what is acceptable to parties and their financiers in a different transaction.

As arbitration is the preferred dispute resolution mechanism in the international energy market, a robust arbitration clause is also vital in any energy sector related contract. Moreover, given the interplay between disputes and sanction risks, it is now more

important than ever to ensure that contractual protections designed to mitigate exposure or to cause contractual outcomes (such as suspension, renegotiation, termination, waiver or alteration of rights) will all work effectively *together*.

Starting points include assessing potential present or future sanctions nexus and exposure, and recognizing that this may entail a deeper and more wide ranging enquiry into risk appetite than contractual parties may have previously found necessary. Contractual protections will be more successful the better the quality of the preceding analysis of underlying facts and circumstances. The ultimate aim should be so far as possible to ensure that dispute resolution mechanisms will work in tandem with the sanctions clause, regardless of how any sanctions issues actually play out.

By way of example, when new sanctions are introduced, it is very often not at all clear whether continuing to perform a contractual obligation will definitely be in breach of sanctions or not. Commercial positions would frequently cause parties to take opposite views. Depending on how sanctions are dealt with in the contract (if at all), a variety of different contractual consequences could follow, including allegations of failure to perform, attempts to claim or preserve termination rights, invocation of frustration, illegality or force majeure, each of which may engage the arbitration clause. There may be benefit to all parties in contractually preserving alternative pathways to resolving the sanctions issue, such as obtaining an independent legal opinion, applications for informal and anonymous guidance, or formal authorisation/licence, from a regulator. Finally, the parties must consider what happens within the

arbitration process while one or more of these steps are being taken to avoid lengthy and expensive satellite disputes.

In light of the above, a holistic approach to disputes and sanctions risk mitigation is vital

In light of the above, a holistic approach to disputes and sanctions risk mitigation is vital. Energy related trades that involve sanctions affected jurisdictions, parties or trade (or the risk of such), will continue, and will continue lawfully. The right preparation will not only protect energy businesses from investigative and enforcement action, but also help to avoid, minimise or resolve as efficiently as possible, any related disputes.

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A global round-up

Developments in international arbitration rules and laws

By Ramón J. Alvins S., Andrew Battisson, Pierre Bienvenu Ad. E., Christian Dargham, Dylan McKimmie, Matthew H. Kirtland, Yke Lennartz, Pedro Saghy, Sherina Petit, Irina Tymczynszyn, Cara Dowling, Janice Feigher, Jenna Relton, Katie Connelly and Koen van Zwieten.

In recent months we have seen a number of new arbitration related developments across the globe. In this article, we look at a few of the most significant and highlight key points of interest.

English Court confirms decision in *West Tankers* remains good law

The English Commercial Court has held that the Court of Justice of the European Union's (CJEU) decision in *Allianz SpA v West Tankers Inc* (Case C-185/07) (*West Tankers*) remains good law under the Recast Brussels Regulation (*Nori Holding Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm)).

English courts therefore remain prohibited from issuing anti-suit injunctions in respect of court proceedings before EU Member State courts. As such, the court granted an anti-suit injunction to restrain court proceedings commenced in Russia (i.e. outside the EU) in breach of an arbitration clause but refused to issue an anti-suit injunction to restrain similar court proceedings commenced in Cyprus (i.e. inside the EU) on grounds that it was bound by the CJEU's decision. The position post-Brexit was not commented upon by the court, though it is likely that English courts will no longer be constrained this way post-Brexit.

English court rejects challenge of an arbitral award on grounds of serious irregularity

The English court has dismissed a party's application to set aside an award on grounds of serious irregularity pursuant to s68 of the Arbitration Act 1996 because that party had failed to exhaust any available remedies under s57 of the Arbitration Act for clarification/correction of the award before making its application to set aside (*X v Y* [2018] EWHC 741 (Comm)).

In response to the claimant's application to set aside the award, the defendant submitted *inter alia* that s70(2)(b) of the Arbitration Act obliges the claimant to exhaust any available recourse under s57 (correction of award or additional award) before applying to set aside the award, but had not done so. The court agreed, and rejected the claimant's argument that in light of Article 27.1 of the LCIA Rules 1998 (correction of awards and additional awards), s57 of the Arbitration Act did not apply.

The court held that Article 27 of the LCIA Rules does not exclude the arbitral tribunal's powers under s57 of the Act, and therefore the claimant should have sought clarification of the award pursuant to s57, but, having failed to do so, could not now bring an application to set aside.

ICC takes steps to improve diversity

The International Chamber of Commerce (ICC) have achieved a breakthrough in gender diversity with the composition of its supreme governing body now achieving gender parity (88 women and 88 men). Alexis Mourre, President of the ICC called this a "major milestone in the history of international arbitration". Recent gender statistics also revealed growth in the number of women arbitrators appointed in ICC proceedings for the second year running, with women representing 14.8 percent of all arbitrators appointed by ICC Arbitration parties, co-arbitrators or directly by the ICC Court in 2016.

Efforts have also been made in respect of regional diversity within the ICC Court’s Council appointments for the 2018-2021 term, with 176 members being appointed from 104 countries, including previously unrepresented countries such as Kyrgyzstan and Uzbekistan.

Norton Rose Fulbright’s global co-head of international arbitration, Pierre Bienvenu, has been renewed as an alternate member of the ICC Court for a second term.

ICSID publishes draft amended rules

ICSID has published proposals for amending its rules and regulations, which will be the fourth update to the ICSID rules and the most extensive review to date. The overarching goals are to modernize, simplify, and streamline the rules.

France introduces statute to govern sovereign immunity from enforcement

France recently codified the regime governing enforcement procedures against foreign states in a statute known as the “Sapin 2 law” of December 9, 2016. The provisions of the Sapin 2 law were integrated into the French Civil Enforcement Proceedings Code under Articles L-111.1-1, L.111.1-2 and L.111.1-3 relating to sovereign immunity from enforcement.

Detractors of these provisions have referred to them as the *Poutine amendment* as the law was voted in the wake of the multiple enforcement proceedings against Russia following the award in the *Yukos* case.

The Sapin 2 law introduced the obligation for creditors of foreign states to obtain a prior authorisation from a French court before they can

seek enforcement measures against foreign states. The law provides that enforcement measures on assets belonging to a foreign state can only be granted if one of the following conditions is met

- The state expressly gave its consent to such measure.
- The state reserved or allocated the asset to the satisfaction of the request.
- When a judgment or award has been rendered against the state *and* the asset is specifically used or intended to be used by the state otherwise than for purposes of non-commercial public service and there is a link between the asset and the entity against which the proceedings were initiated. The law provides a non-exhaustive list of assets that are deemed specifically used or intended to be used by the state otherwise than for purposes of non-commercial public service. Such assets include the assets of diplomatic missions (including consulates and the state’s delegations with NGOs or international organizations), property of the military or to be used in the performance of military duties, property that is part of the cultural heritage or archives of the state and which is not intended for sale, property that is part of an exhibition of scientific, cultural or historical interest and which is not intended for sale and tax and social receivables of the state.

The Sapin 2 law clarifies that unless the state has given an “express and specific waiver”, no enforcement measures can be granted on assets of foreign states’ diplomatic missions in France (including bank accounts of diplomatic missions).

Previously, the French Supreme Court had wavered on this issue, sometimes requiring an express waiver only and thereafter ruling that an express and specific waiver was required. In two recent decisions rendered in the framework of the *Commisimpex v Republic of the Congo* saga, the French courts rendered decisions aligned with the rules of the Sapin 2 law to claims pertaining to the legality of enforcement measures taken *before* the coming into force of such law. In a judgment of January 10, 2018, the French Supreme Court ruled that enforcement measures on assets of diplomatic missions require an express and specific waiver (as opposed to an express waiver only). On May 5, 2018, in yet another decision relating to enforcement measures taken in the *Commisimpex* case before the coming into force of the Sapin 2 law, the Court of Appeal ruled that this double requirement applies to assets of diplomatic missions only and not to the other assets of the state.

Dutch Supreme Court rules that an arbitral award might be enforceable despite annulment

The Dutch Supreme Court (Hoge Raad der Nederlanden) has ruled that an arbitral award might be recognized and enforced in the Netherlands on the basis of the New York Convention, even if the arbitral award has been annulled by a competent authority pursuant to article V(1).

The relevant arbitral award was rendered by the ICAC (Moscow) in a dispute between Mr Maximov and Novolipetsk Metallurgical Plant (NLMK). Mr Maximov claimed payment of the remaining purchase price for the shares in Maxi Group that he sold to NLMK. The ICAC partly awarded Mr Maximov’s claim in its award dated March 31, 2011 (the Award). The Award was annulled by

the Moscow Arbitrazh Court and the annulment was upheld by Russia's appellate courts.

Despite the annulment, Mr Maximov sought to enforce the Award in the Netherlands. Both the Amsterdam District Court (*rechtbank*) and the Amsterdam Court of Appeal (*gerechtshof*) denied Mr Maximov's request, but both courts also found that annulment of an award would not necessarily mean that it cannot be recognized and enforced in the Netherlands.

The Supreme Court came to the same conclusion. In doing so it first had to decide on the correct interpretation of article V(1) of the New York Convention. The Supreme Court concluded that under article V(1) recognition and enforcement can be allowed even if a ground for refusal exists, because the article only establishes a discretionary power (but not an obligation). The court applied the Vienna Convention on the Law of Treaties and so took into account the wording of article V(1) of the New York Convention (in various languages) and the ultimate goal of the New York Convention as a whole. However, the court noted that even though article V(1) establishes a discretionary power, that power must be applied cautiously. It is for a competent authority of the country in which (or under the law of which) an award was made to rule on the validity of the award, including the right of annulment. If the courts before which parties seek recognition and enforcement fully reviewed annulment decisions, then it would interfere with that principle. Therefore, the discretionary power to allow recognition and enforcement of an award annulled at the seat can only be used in exceptional circumstances.

The Supreme Court gave two examples of such exceptional circumstances: (i) the arbitral award was annulled on grounds that are not listed in article V(1) (a)–(d) of the convention, or on grounds that are not internationally accepted, and (ii) the annulment judgment itself would not be enforceable in the Netherlands because it does not meet the relevant criteria established in Dutch international private law. In this case, the Supreme Court concluded that there were no such exceptional circumstances, which meant that recognition and enforcement of the annulled Award had to be refused. In a more recent case, the Supreme Court confirmed this formulation of the exception.

International Court and Arbitration Centre launches in Astana, Kazakhstan

The International Arbitration Centre (IAC), a part of the Astana International Financial Centre (AIFC), was officially launched on 4 July 2018. Together with the AIFC Court, it provides AIFC members with an alternative mechanism of dispute resolution, using unique procedural rules modelled on English common law procedures and leading international practice. The entire AIFC legal framework is based on the principles, legislation and precedents of the law of England and Wales and the standards of leading global financial centres, and the AIFC Court's bench includes some prominent members of the UK judiciary.

Both the AIFC Court and the IAC are independent legal entities, entirely separate from the courts of the Republic of Kazakhstan. The AIFC Court, with Lord Woolf as its Chief Justice, has exclusive jurisdiction over disputes arising out of the activities and operations of the AIFC and jurisdiction in the case of other disputes in which

all parties agree in writing to give the AIFC Court jurisdiction. The IAC, chaired by well-known international arbitrator, Barbara Dohmann QC, has its own procedural rules, modelled on leading international arbitration practice, and its own panel of world-leading arbitrators and mediators with significant experience in multiple areas of commercial law areas including oil and gas, trade, construction, energy, Islamic finance, banking, and copyright.

The launch of the AIFC Court and the IAC reflects the growing popularity of English law in transactions conducted by businesses that are active in the Republic of Kazakhstan and/or the surrounding Eurasian region, and may prove an attractive dispute resolution procedure given it results in an award which can be expediently enforced in the jurisdiction.

Indian Arbitration and Conciliation Act (Amendment) Bill 2018 to be scrutinised by Parliament

The Arbitration and Conciliation Act (Amendment) Bill 2018 (the Bill) has been cleared by the Union Cabinet, and will be scrutinized by Parliament. The Bill stems from the recommendations of the Report of the High Level Committee to Review the Institutionalisation of Arbitral Mechanism in India, aiming to foster a pro-arbitration environment in India. The key amendments include

- A call for the creation of an independent Arbitration Council of India (ACI) to grade or accredit arbitral institutions and appoint arbitrators.
- The introduction of default confidentiality provisions into arbitration proceedings in India.

- The provision of immunity to arbitrators for actions or omissions made in good faith during arbitral proceedings.
- A provision to the effect that the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment) will only operate if the arbitration was commenced after October 23, 2015, whether in the context of the arbitration or in the context of any litigation related to the arbitration. However, this is inconsistent with the recent judgment in *BCCI v Kochi Cricket Pvt Ltd*. The Indian Supreme Court held that the Amendment also applies court proceedings commenced after October 23, 2015, even if they concern arbitral proceedings commenced prior to the Amendment taking effect. The resolution of this inconsistency remains to be seen.

The New Delhi International Arbitration Centre Bill 2018 was put before the lower house of India's bicameral parliament by the central government in January 2018. This proposed to *inter alia* establish the New Delhi International Arbitration Centre to encourage foreign investors to resolve their disputes in India.

Australian Supreme Court grants freezing injunction to protect enforceability of a future award

The Supreme Court of Western Australia has confirmed the availability of freezing injunctions to prevent the dissipation of assets outside of the jurisdiction, in order to protect the enforceability of a future arbitral award, even in circumstances where the arbitration had not been commenced (*Trans Global Projects Pty Ltd (In liq) v Duro Felguera Australia Pty Ltd* [2018] WASC 136). The court held that it had the power to make such an order pursuant both to

its inherent jurisdiction and by virtue of Article 17J of the UNCITRAL Model Law which has the force of law in Australia pursuant to s16 of the International Arbitration Act.

The court approached the analysis in three parts: (i) whether the plaintiff had shown a good arguable case on accrued or prospective causes of action; (ii) whether, on the evidence before the court, there was a danger that a prospective arbitral award and any judgment in respect of it will be unsatisfied because assets are removed from Australia, or disposed of, or dealt with, or diminished in value; and (iii) whether in all the circumstances this was a case in which it was in the interests of justice to grant a freezing order. The court answered the first two questions in the affirmative, and as such found the third question was also satisfied.

In addressing the plaintiff's delay in commencing arbitration (which had been threatened in mid-2015, amounting to a delay of three years), the court noted that circumstances had changed in the intervening period including that the respondent's financial position had deteriorated and that the plaintiff (through its liquidators) had recently entered into a third party funding agreement to pursue the arbitration. The presence of third party funding was thus an important factor. While not setting a specific timeline, the court ordered that the arbitration be commenced "expeditiously".

This is a welcome decision furthering the arbitration friendly reputation of the Australian courts, and demonstrates an increasing desire to protect the integrity of the arbitral process not just at merits stage but also through to enforcement, a matter of significant interest to parties.

Second Canadian province modernizes its arbitration law

On May 17, 2018, British Columbia became the second Canadian province to modernize its international arbitration law, under the impetus of the Uniform Law Conference of Canada (ULCC). British Columbia has amended its International Commercial Arbitration Act, RSBC 1996, to adopt the 2006 amendments to the UNCITRAL Model Law. This follows Ontario updating its international commercial arbitration regime in March 2017, as reported previously in [issue 9](#) of the *International Arbitration Report*.

Conflicting US court guidance on New York Convention grounds for resisting enforcement

Under the US Federal Arbitration Act (FAA), notice of a motion to vacate, modify or correct an arbitral award must be served within three months of the award's issuance. Courts have applied this deadline to motions to vacate international arbitral awards issued in US-seated proceedings. There is substantial overlap between the grounds for vacatur set forth in the FAA and the defences to recognition and enforcement in the New York Convention. However, the FAA also permits the filing of a petition to confirm a New York Convention award within three years after the award is issued. This raises an important timing question: if the losing party in a US-seated international arbitration does not serve a motion to vacate within three months of an award's issuance does that party forfeit its similar New York Convention grounds to revisit enforcement and recognition of that award?

The courts have answered this question both ways. Certain recent cases – applying a rule that originated for domestic awards – have held that a party

resisting confirmation of an award will forfeit its New York Convention defences by not serving a motion to vacate within the three-month period prescribed by the FAA. However, other cases have held that the three-year period for the filing of the petition to confirm also applies to a motion to vacate filed in opposition to that petition.

Until this issue is conclusively resolved, parties should be acutely aware of this risk of potentially forfeiting New York Convention defences to enforcement and recognition of a US-seated international arbitral award if a motion to vacate is not served within time.

California loosens restrictions on counsel in international arbitrations

California has signed into law a new bill allowing foreign lawyers (i.e. not licensed in the US) and out-of-state lawyers (i.e. licensed in a US jurisdiction other than California) to represent parties in international arbitrations seated in California, subject to certain conditions. Senate Bill (SB) 766, Representation by Foreign and Out-of-State Attorneys will take effect on January 1, 2019. For more information about this development, please read our article *California loosens restrictions on counsel in international arbitrations* as published by International Law Office (ILO).

Argentina approves draft law on International Commercial Arbitration

On July 4, 2018, the Argentine Chambers of Deputies approved its new International Arbitration Act which incorporates the Model Law of the United Nations Commission for International Trade Law (UNCITRAL) with only minor changes. It was published on July 26, 2018 in the official gazette.

Ecuador enters into 16 Bilateral Investment Treaties

In 2017, Ecuador announced 16 Bilateral Investment Treaties (BITs). On March 8, 2018, Ecuador's foreign minister, María Fernanda Espinosa, presented a new model BIT which will form the basis for future negotiations. Although the draft is currently confidential, apparently with regards to dispute resolution it imposes a duty for investors to exhaust local remedies before initiating an arbitral proceeding in a Latin American country in accordance with the Ecuadorian Constitution.

Mexico signs the ICSID Convention

On July 27, 2018, Mexico ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), becoming the 162nd signatory to that convention and the 154th to have also ratified it. On signing, Mexico stated: "The signing of this instrument will strengthen the position of Mexico as a safe, reliable and attractive country for investments, which protects and promotes foreign investment."

Uruguay approves draft law on International Commercial Arbitration

In May 2018, the Chamber of Senators of the Uruguayan Congress approved the draft Law on International Commercial Arbitration, based on the Model Law of the United Nations Commission for International Trade Law (UNCITRAL). In July 2018, the draft was approved by the Chamber of Deputies of Congress. Prior to this approval, Uruguay had no international arbitration law.

Venezuela faces enforcement proceedings across the globe

After a long period accumulating arbitral proceedings against Venezuela and Venezuelan State companies, various arbitral tribunals have started to hand down awards. This coincided with a decline in oil prices, and as a result, a decline in Venezuela's capacity to pay the awards rendered against it. As a consequence, in 2018 some creditors have initiated enforcement proceedings in different jurisdictions, particularly in the United States where Venezuela seems to be more vulnerable. This seems to suggest a new chapter in international arbitration proceedings where until now the awards were voluntarily respected and enforced.

With thanks to Khawaja Akbar (trainee) and Eddie Skolnick (summer associate) for their contributions to this article.

Arbitrator's Corner

Pierre Bienvenu talks disclosure, challenges and neutrality

By Pierre Bienvenu, Ad. E.

In the Arbitrator's Corner, practitioners of our firm who serve as arbitrators are invited to contribute articles commenting on questions of interest to our readership from the perspective of the arbitral tribunal. In this inaugural column, Pierre Bienvenu, global co-head of our international arbitration practice, discusses the arbitrator's duty to disclose facts and circumstances relevant to the parties' assessment of his or her independence and impartiality, as well as the importance for the arbitrator who faces a challenge to display restraint in commenting on any challenge.

The duty of independence

The independence and impartiality of arbitrators are crucial to the legitimacy of international arbitration. This article offers examples of arbitrators failing to comply with their disclosure obligations or, when challenged, commenting inappropriately on the merits of the challenge or the bona fides of the challenging party.

Scope of disclosure

Every arbitrator must be and remain impartial and independent of the parties. As parties have a strong interest in being informed of facts and circumstances that may be relevant to assessing the independence and impartiality of the arbitral tribunal, prospective arbitrators are required to disclose any facts or circumstances that may, in the eyes of the parties, call into question their independence or give rise to doubts as to their impartiality.

Arbitrators are under a duty to make reasonable inquiries to identify such facts and circumstances, and their disclosure obligation remains in force for the entire duration of the proceedings.

Arbitration rules adopt a subjective standard for this obligation by requiring the disclosure of facts or circumstances that may call into question the arbitrator's independence *in the eyes of the parties*. However, the standard applicable to decide on an arbitrator's independence and impartiality is objective and focuses on whether "a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision". The arbitrator's

failure to disclose facts or circumstances based on the subjective standard may still be relevant to assessing his or her independence and impartiality in the event of a challenge. As the ICC *Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration* explains, "[a]lthough failure to disclose is not in itself a ground for disqualification, it will however be considered by the [ICC] Court in assessing whether an objection to confirmation or a challenge is well founded".

National case law and challenge decisions by arbitral institutions offer too many examples of arbitrators, often unintentionally, failing to abide by these standards, thereby imposing significant costs on the parties and undermining public confidence in arbitration. A recent example is the case of *Saad Buzwair Automotive Co v Audi Volkswagen Middle*

East FZE LLC, in which the Paris Court of Appeal annulled an arbitral award on the ground that one of the arbitrators had failed to disclose that his law firm had carried out work for an affiliate of one of the parties during the pendency of the case, thereby raising a reasonable doubt as to his independence and impartiality (C.A. Paris, Pôle 1, Chambre 1, 27 March 2018, No. 16/09386). The case is currently pending before the French Supreme Court. Should the award's annulment be confirmed, the parties will be left facing the prospect of having to start the proceedings afresh.

Arbitrators must therefore take a liberal approach to disclosure and pay heed to the guideline that any doubt as to whether certain facts or circumstances should be disclosed must be resolved in favor of disclosure.

Scope of participation in challenge proceedings

The requirements of independence and impartiality have implications for the arbitrator in the event he or she is challenged. Arbitration rules typically afford challenged arbitrators the opportunity to comment on a challenge but they are silent as to the scope of participation permitted.

It is appropriate in the context of a challenge for the arbitrator to ensure that all relevant facts are placed before the arbitral institution or court called upon to determine the challenge. However, when commenting on a challenge, the arbitrator should exercise caution before deciding whether to respond to criticisms directed at the arbitrator's conduct advanced by the challenging party, or to argue the merits of the challenge (otherwise than by simply declining to resign). The challenged arbitrator must be careful not to descend into the fray, and resist any temptation to attack the party raising the

challenge lest that provides the decision maker with independent grounds to uphold the challenge.

A striking example of a course to avoid is given in the disqualification decision of the Chairman of the ICSID Administrative Council in *Burlington Resources inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5). The Chairman held in that case that the primary substantive grounds for the challenge had not been raised in a timely manner, and he dismissed the proposal to disqualify the arbitrator to the extent it relied on these grounds. Nonetheless, the Chairman disqualified the arbitrator based on his response to the challenge. The Chairman noted that arbitrators may legitimately "ask questions and satisfy themselves of the legal merits of the arguments put forward by the parties", as well as "address the circumstances related to the proposal for disqualification". However, the arbitrator in that case had made "allegations about the ethics of counsel" for the party bringing the challenge, which in the opinion of the Chairman "did not serve any purpose in addressing [the challenge]" and evidenced an apparent lack of impartiality that justified upholding the challenge.

Similarly, a Division of the LCIA Court concluded in a 2001 case that while the substantive grounds for the challenge did not give rise to justifiable doubts as to the arbitrator's impartiality or independence, the challenge ought to be upheld considering "the self-evident tension and ill-feeling" resulting from the challenge (LCIA Reference No. 1303, November 22, 2001). In that case, the challenged arbitrator had described the challenging party's submissions as "fictitious, false and malevolent". More recently, in *Cofely v Bingham and Knowles* [2016] EWHC 240 (Comm),

the English Commercial Court upheld an application to remove an arbitrator based in part on the arbitrator's response to a party's enquiries regarding potential conflicts of interests. The Court held that the enquiries were reasonable, courteous and appropriate, and that the arbitrator had descended into the arena by responding aggressively, adopting attack as the best form of defence.

Concluding thoughts

The lesson from these decisions is that a challenged arbitrator should cooperate with the decision maker by providing observations as to the factual bases for the challenge. However, the challenged arbitrator should be prudent in addressing the merits of the challenge. In no circumstances should the challenged arbitrator appear to descend into the fray or display animosity toward the challenging party.

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Caracas
Ramón Alvins

Europe

Amsterdam
Yke Lennartz

London
Patrick Bourke
Marie Kelly
Sherina Petit
James Rogers
Irina Tymczyszyn

Paris
Christian Dargham

Moscow
Yaroslav Klimov

Middle East

UAE
Paul Stothard
Deirdre Walker

Africa

South Africa
Andrew Robinson

Asia

China/Hong Kong
Alfred Wu

Singapore
KC Lye

Australia

Brisbane
Ernie van Buuren

Perth
Dylan McKimmie

Sydney
Andrew Battison

Norton Rose Fulbright

International arbitration

At Norton Rose Fulbright, we combine decades of international arbitration experience with a commercial approach to offer our clients the very best chance of determining their disputes promptly, efficiently and cost-effectively. Our international arbitration group operates as a global team, regardless of the geographic location of the individual.

We deliver experience across all aspects of international arbitration, from commercial arbitrations to investment treaty arbitrations; skilled advocates experienced in arguing cases before arbitral tribunals, who will oversee the dispute from start to final award; and a commercial approach from a dedicated team experienced in mediation and negotiation and skilled in promoting appropriate settlement opportunities.

Dispute resolution

We have one of the largest dispute resolution and litigation practices in the world, with experience of managing multi-jurisdictional disputes across all industry sectors. We advise many of the world's largest companies and financial institutions on complex, high-value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice which focuses on our clients' strategic and commercial objectives.

Our global practice covers alternative dispute resolution, international arbitration, class actions, fraud and asset recovery, insolvency, litigation, public international law, regulatory investigations, risk management and white collar crime.

