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International arbitration report

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The future of oil and gas arbitration: the impact of ESG policies on oil and gas disputes

International arbitration and climate change

Enforcing an arbitral award in an international energy dispute

The role of Building Information Modelling (BIM) in construction arbitration

Public policy conflicts in investor-state energy arbitrations

Energy-related disputes in the Middle East: Is DIAC fit for purpose?

The green energy transition: Clouds on the horizon?

Mexican energy measures impacting foreign investment: an update and potential investor-state dispute remedies

Third-Party funding for energy disputes

Would energy investor-state disputes benefit from a Multilateral Investment Court?

Major infrastructure disputes: Why changes to the English Court's Civil Procedure Rules could make arbitration a better option

A modernization of Italian arbitration law

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Editorial

Welcome to Issue 20 of International Arbitration Report. Energy disputes are undoubtedly on the rise; according to the 2021 ICSID report the international energy industry is the single largest user of international arbitration, with 40 percent of all cases registered with ICSID between 1972 and 2012 involving the energy sector. In this edition of the IAR, we focus on the future of energy, providing insight into the next generation of energy disputes and the role of arbitration in their resolution.

Our team of arbitration lawyers from around the world look at some of the key risks faced by energy projects, from new technology and supply chain issues to regulatory and political instability of host states, and how these can make them particularly vulnerable to disputes. We consider the future of investment arbitration as a dispute resolution mechanism for investor-state energy disputes as a result of developments to the Paris Agreement and the Energy Charter Treaty, and why commercial arbitration remains favoured by parties in the energy industry.

With the main arbitration institutions seeing a steady rise in energy disputes, we look at the advantages offered by third party funding and how this can be particularly beneficial for smaller players in the energy market, and in the face of competition between jurisdictions and institutions to host energy arbitrations, we consider the new offering from the Dubai International Arbitration Centre. Our lawyers also discuss recent trends in the enforcement of energy arbitration awards, particularly in relation to investor state disputes, and provide an update on the ongoing consultations among Mexico, Canada and the USA in light of recent reforms to Mexico's energy policy.

Finally, our lawyers also provide updates on some wider legal and practice developments, including a recent case concerning *functus officio* jurisdiction, how Building Information Modelling can assist parties in complex construction arbitration claims and recent changes to the Italian Code of Civil Procedure that are hoped will make Italy a more arbitration-friendly jurisdiction for parties seeking to resolve their disputes.

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Foreign investment and political risk: Measuring and mitigating exposure at the outset

By Alison G. FitzGerald, Alexa Biscaro and Olivier V. Nguyen

The energy transition and developing renewables industry present a wealth of opportunity for foreign investors but significant risks can arise as a result of the involvement, direct or indirect, with host states. This article canvasses the potential political risks faced by investors choosing to invest in foreign states and identifies mechanisms that can help mitigate those risks.

Identifying and measuring exposure to political risk

A foreign investor's risk mitigation strategy should begin long before breaking ground on a new project. This is particularly important in the energy sector, where significant capital must often be expended upfront, exposing investors to the risk of never being able to generate profit from the project or seeing their ability to do so curtailed by the host state. (For an analysis of risks specifically related to expropriation, see *'Expropriation: a strategic review,' IAR Issue 18, p. 7*)

Investors should consider the following when evaluating political risks in the energy sector: (i) the host state's track record, including hostility toward foreign direct investment (FDI) or foreign investors; and (ii) the host state's political and regulatory stability, both in the short and long term, including its position on the corruption index, electoral history, the strength of its public institutions and its history of changes to environmental and energy-related policies.

First, the host state's historical behaviour toward FDI, foreign investors and the resolution of FDI-related disputes can provide important information. Is the host state a member of key international investment conventions, namely the New York Convention and the Convention of the International Center for the Settlement of Investment Disputes (ICSID)? If so, has the host state expressed unfavourable opinions of either convention or taken unfavourable actions in their regard. Publicly-available arbitration awards and related documents involving the potential host state, including court judgments relating to award enforcement, will also reveal the nature of its disputes with foreign investors and its voluntary compliance with adverse awards. Local counsel in the host state can provide valuable insight into the independence of the host state courts and their approach to matters involving the state. This is important not only at the award enforcement stage, but during the life of the investment, such as if interim relief is needed from local courts pending the constitution of an arbitral tribunal.

Second, a state's history of political (in)stability and/or the state of its public institutions can provide additional relevant information. An ever-changing government, corrupt institutions or an executive body engaging in a tug-of-war with the judiciary can lead to uncertainty and inconsistency. For instance, foreign investors with investments in the Mexican hydrocarbons industry are currently faced with a legislative limbo, as provisions of a controversial 2021 law on hydrocarbons have been suspended by the Mexican courts.

Political and regulatory instability often go hand in hand: foreign investors should expect frequent regulatory changes in a politically unstable host state. However, regulatory instability can occur in any state. As the pandemic has shown, emergency regulations may be enacted as a result of unforeseen circumstances. Such measures may or may not be enacted on a non-discriminatory basis. Many states have seen a rise in populism causing changes at the executive and legislative levels. In some cases, this includes resource nationalism and pressure to protect the local environment and communities. Governments may also be pressured to meet emissions targets set in the Paris Agreement or mitigate the looming possibility of a global recession.

Structuring the investment to mitigate political risks

Foreign investors should carefully structure their investment and any related agreements to maximize protections. Investments can be protected via treaty, investment agreement, and/or project agreement. In each of these cases, foreign investors should ensure they have access to a mechanism for investor-state dispute settlement: dispute resolution, usually international arbitration, in a neutral forum before an independent and impartial panel of

adjudicators (ISDS). Without ISDS, foreign investors may have no effective investment protection in the face of adverse treatment by the host state.

Various forms of investment protection (including bilateral and multilateral treaties) may be available to investors depending on the structure and whereabouts of their investment. Many will provide recourse to ISDS and access to international standards of protection for foreign investors. However, not all treaties are created equal; some treaties have variable standards of protection depending on definitions of key standards of protection and some have bespoke carve-outs, such as in respect of the nature of the investment (e.g. natural resources) or types of government treatment (e.g. taxation). Additionally, recourse to a treaty and its protections may not be available for the duration of an investment, such as where a foreign investor is a national of a state having adopted a policy of withdrawal from investment treaties, ISDS in particular or specific sectoral treaties, such as the Energy Charter Treaty (ECT).

Where treaty protections are less favourable or unavailable, such as due to the foreign investor's home state nationality, investors should consider structuring the investment in such a way as to take the benefit of treaty protections through a third state. This must be done at the outset of an investment and is usually done in tandem with tax planning for the investment. Investment structuring is also prudent to avoid difficulties at the enforcement stage if, as is often the case, ISDS would have been available when the investment was structured. For example, EU national courts have been directed to refuse to enforce any arbitral awards arising from intra-EU disputes under the ETC (Moldova v. Komstroy, Case C 741/19).

Without ISDS, foreign investors may have no effective investment protection.”

The host State may also provide for or require an investment agreement to be entered into between the foreign investor and the host state government. Investment agreements often offer a degree of protection for the foreign investor, including recourse to ISDS, stability clauses, and sovereign immunity waivers. Foreign investors may be limited in what they can negotiate to include in such agreements in the absence of political support. Where available, stability clauses can greatly assist in reducing risks relating to political and regulatory instability for the duration of the investment. They may fix or freeze important applicable legislation or regulations, provide for a right to renegotiate the investment agreement, and/or provide for an economic rebalancing of the investment where the foreign investor must incur costs to comply with any new laws. Sovereign immunity waivers are also critical. Where possible, investors should seek to secure both a jurisdictional and an enforcement waiver. Although jurisdictional waivers are extremely important, they can prove to be futile if the investor has no ability to enforce a successful claim by moving against state assets to recover any damages owed.

Investment structuring is also prudent to avoid difficulties at the enforcement stage.”

Finally, project agreements involving a state entity may also include protections for the foreign investor (although these are often not binding on the host state). Unlike investment agreements, these agreements are less often governed by local laws and may allow for the negotiation of stronger and/or more project-specific protections.

The energy transition will involve political risk for foreign investors.”

Conclusion

The energy transition will involve political risk for foreign investors, including those caused by pressures upon host states. In order to mitigate these risks, foreign investors should carefully evaluate the host state's political and regulatory stability, as well as its history with FDI in general and the energy sector in particular. This will allow investors to consider whether their investment can be structured in a way to avoid or reduce these risks, as well as ensure that any agreements with the host state or related entities include appropriate protections.

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Setting aside an arbitral award under the UNCITRAL Model Law: When is the tribunal *functus officio*?

By Dylan McKimmie and Daniel Allman

In *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2023] WASCA 1, the Court of Appeal in Western Australia upheld a decision to set aside an arbitral award on the basis that the tribunal was *functus officio* with respect to the issues it purported to decide. This decision is a rare example of a court at the seat exercising its set aside power under Article 34(2)(a)(iii) of the UNCITRAL Model Law.

The dispute

In 2011, Chevron Australia Pty Ltd (Chevron) engaged CBI Constructors Pty Ltd and Kentz Pty Ltd (CKJV) to provide construction and related services on the Gorgon offshore oil and gas project, one of the world's largest liquefied natural gas projects. CKJV agreed to provide craft labour and staff labour to carry out work in Western Australia, South Korea, China and Indonesia.

This decision is a rare example of a court at the seat exercising its set aside power under Article 34(2)(a)(iii) of the UNCITRAL Model Law."

A dispute arose over whether CKJV was entitled to be paid for staff labour against contractual rates, or at cost.

The arbitration

CKJV commenced UNCITRAL arbitration proceedings against Chevron seated in Perth, Western Australia. The tribunal granted CKJV's application to bifurcate the arbitration into separate liability and quantum stages ordering a first hearing on 'all issues of liability' followed by a second hearing on 'all matters outstanding… including all quantum quantification issues not dealt with' in the first hearing.

The tribunal delivered its first interim award rejecting CKJV's arguments regarding staff labour. It rejected the argument that the parties had agreed to change CKJV's entitlement from actual costs to contractual rates, and (by majority) that Chevron was estopped from asserting otherwise.

CKJV amended its case to assert that, for staff, it was entitled to payment of specific allowances allegedly provided for in the contract between the parties, rather than actual costs incurred. Chevron objected on the basis that the tribunal was *functus officio* on issues of liability and that CKJV was estopped from re-agitating issues of liability. When the tribunal delivered its second interim award, a majority dismissed Chevron's objections, concluding that CKJV was not foreclosed from running its case on specific allowances. The dissenting arbitrator found that CKJV should not be entitled to re-open a liability issue after such issues had been determined in the first interim award. On the merits of the amended case, the tribunal decided in favour of CKJV.

The tribunal granted CKJV's application to bifurcate the arbitration into separate liability and quantum stages."

Chevron's set-aside application

Chevron applied to the Supreme Court of Western Australia, the court at the seat of the arbitration, to set aside the second interim award under s.34(2)(a)(iii) of the Commercial Arbitration Act 2012 (WA). Section 34(2)(a)(iii), which reflects the equivalent article of the UNCITRAL Model Law, provides that an arbitral award may be set aside if the party making the application furnishes proof that:

> 'the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;…'

Chevron acknowledged that even if a tribunal concludes wrongly that a party is not precluded from advancing claims by reason of cause of action estoppel, issue estoppel or *Anshun* estoppel, that would be an error of law not bearing against the tribunal's jurisdiction. However, notwithstanding this acknowledgement, Chevron submitted that once the tribunal delivered the first interim award it became *functus officio* on all issues of liability and therefore its second interim award went against the 'terms of the submission to arbitration,' or 'beyond the scope of the submission' for the purposes of s 34(2)(a)(iii).

Chevron submitted that once the tribunal delivered the first interim award it became *functus officio* on all issues of liability."

The Supreme Court agreed with Chevron. The judgment of Kenneth Martin J, delivered on 28 September 2021, held that a contention of *functus officio* can, as a matter of principle, fit within the criteria for setting aside in s.34(2)(a)(iii), and that a court at the seat determines afresh whether an arbitral tribunal is *functus officio* without deferring to the tribunal's views. Applying that principle, Martin J arrived at the same conclusion as the dissenting arbitrator, namely that CKJV's case on specific allowances did not raise an issue of quantum but instead raised an issue of liability, upon which the tribunal was *functus officio* following its first interim award. Martin J found that although the court has discretion as to whether to set aside under s.34(2), a set aside order in the circumstances of this case should be 'virtually automatic.'

A further practical issue is that in seeking to establish that state property is not sovereign but commercial, there is often information asymmetry between a state and a private entity in favour of the state, which can make discharging the evidentiary burden challenging.

CKJV's appeal

In October 2021, CKJV appealed to the Court of Appeal. CKJV relied on four grounds, of which the first three were related:

1. That *functus officio* is not a self-supporting doctrine that can apply without cause of action estoppel, issue estoppel or *Anshun* estoppel.
2. That to find the tribunal was *functus officio*, the court needed to displace the tribunal's findings that there was no cause of action estoppel, issue estoppel or *Anshun* estoppel, which, even if wrong, were errors of law not bearing against the tribunal's jurisdiction.
3. That, to find the tribunal was *functus officio*, the court needed to displace the tribunal's construction of the phrase 'all issues of liability' in its own procedural orders, or its characterisation of the case on special allowances as not raising an issue of liability, which, even if wrong, were errors of law not bearing against the tribunal's jurisdiction.

The Court of Appeal dismissed these grounds, holding that there was nothing unusual 'in the court intervening where findings have been made purporting to sustain jurisdiction when there is no jurisdiction properly analysed, but not intervening where findings are made within jurisdiction, even if in each case the findings pertain to a question of the finality of an earlier order or award.'

CKJV's fourth ground of appeal was that its case on special allowances did not fall within the expression 'all issues of liability' under the earlier procedural orders. However, the Court of Appeal also dismissed this ground, finding that '[t]here was nothing in the First Interim Award, or in the preceding procedural orders, to indicate that the Tribunal reserved for further consideration any issue as to CKJV's entitlement to, or Chevron's contractual liability for, Staff costs, beyond the specific pleas on which Chevron's counterclaim was advanced and CKJV's alternative plea was predicated.'

Consequences for parties and arbitrators

This case offers a cautionary tale about what happens when an arbitration is split into liability and quantum phases and the importance of the parties and tribunal understanding the significance of this decision (and the words used to define the scope of those phases).

Norton Rose Fulbright acts for Chevron in this matter. In February 2023, CKJV applied for special leave to appeal the Court of Appeal's decision to the High Court of Australia. The High Court's decision on that application is pending.

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The future of oil and gas arbitration: The impact of ESG policies on oil and gas disputes

By Mark Baker and Clinton Slogrove

Environmental, social & governance (ESG) standards have gained increasing attention in recent years as investors, corporations, and policymakers seek to address the urgent challenges of climate change, social inequality and ethical business practices. The energy industry (and in particular oil and gas) has faced considerable scrutiny owing to its impact on the environment and society.

Governments, banks and institutional investors play a crucial role in financing oil and gas projects, including exploration, production and infrastructure development. As ESG concerns have gained prominence, many of these investors have adopted more stringent criteria to take into account ESG factors in their investment decisions.

Growing calls to action to limit financing into the oil and gas sector

As concerns about climate change mount, there has been growing pressure on governments and financial institutions to limit or regulate investment in the oil and gas industry resulting in significant policy shifts and legal disputes.

One notable example concerned Royal Dutch Shell. In May 2019, the Dutch environmental organisation Friends of the Earth Netherlands filed a lawsuit seeking to compel Shell to reduce carbon emissions. This case built on the headway already made in the Netherlands by the *Urgenda* case, in which the Dutch Supreme Court (upholding the previous decisions in *Urgenda*) found that the Dutch government had obligations to urgently and significantly reduce emissions in line with its human rights obligations. The plaintiffs argued that Shell's emissions reduction targets were insufficient to meet the goals of the Paris Agreement and demanded that the company reduce its carbon emissions to meet those targets. Shell was ordered to reduce its emissions by 45 percent (relative to 2019) by 2030. While the ultimate outcome of the case is still to be determined by an ongoing appeal, it exemplifies the ways in which activists may employ legal avenues to hold companies accountable for their impact on the environment and push for more robust ESG policies.

In a similar call to action to address ESG obligations, 2021 saw institutional investors take unprecedented steps in the boardrooms. At ExxonMobil, three sitting board members were voted out and replaced by three fund-elected replacements to act as better proponents for the investor's corporate ESG initiatives. This move made clear the willingness of large institutional investors to cause upsets in the boardrooms to more closely control where their invested funds were utilised, particularly with regards to ESG and climate change action.

> **Governments, banks and institutional investors play a crucial role in financing oil and gas projects, including exploration, production and infrastructure development."**

Most recently on April 24, 2023 the US Supreme Court refused to hear five appeals brought by major oil companies who are defending climate-related claims in litigation in various state courts. This closes the door on further Federal challenges and will see the oil and gas industry facing a variety of climate-related claims under varying, evolving and unpredictable standards across the 50 States.

The implications for the oil and gas industry

In response to increased pressure from investors, banks, governments, and civil society, many countries have implemented

or proposed policies aimed at limiting investment in fossil fuels. Tighter policies have emerged, setting more ambitious targets for reducing greenhouse gas emissions and introducing new regulations to limit oil and gas project financing. This in turn has contributed to decreases in stock price or higher financing costs imposed by the remaining sources of funding in the market. This may soon be reflected in other major jurisdictions.

As companies face increased pressure to comply with stringent ESG standards and policies, disputes are bound to arise over issues such as emissions reductions, environmental impact assessments, social responsibility and corporate governance.”

Even where not mandated by government, investors have implemented their own, voluntary, ESG investment criteria that are often far more restrictive than that adopted in legislation. This is not necessarily driven by anticipated decreased yields in the medium to long term from the oil and gas sector, but rather by perceived obligations to invest away from fossil fuels, which drive investment into greener and more ESG-conscious revenue streams.

This self-propelled movement from investors has a direct impact on the oil and gas industry beyond simply choking investment. As companies face increased pressure to comply with stringent ESG standards and policies, disputes are bound to arise over issues such as emissions reductions, environmental impact assessments, social responsibility and corporate governance. Companies may also face challenges in meeting their existing contractual obligations with partners, customers, and suppliers due to changes in policy and investment limitations.

Recommended adoption of arbitration as the preferred dispute resolution mechanism

The stricter management of investments will have a direct impact on the oil and gas industry and will create new challenges and opportunities for dispute resolution. This is particularly true of arbitration. While not all disputes can be diverted from national courts, where possible, it is highly recommended for the oil and gas industry to do so.

The ICC Arbitration and ADR Commission Report on *Resolving Climate Change Related Disputes through Arbitration and ADR* recommends arbitration as the preferred method of dispute resolution. It does so for a number of key reasons, including the advantage of a neutral forum for the determination of the dispute (which frequently involves sovereign states) and because arbitration benefits from near-worldwide recognition and enforcement of arbitral awards under the New York Convention. In addition, arbitration allows for greater flexibility in regards to the control that parties have over tribunal selection, admissible experts, process and disclosure. Importantly, parties also maintain control over the confidentiality of the dispute.

The IBA Report *Achieving Justice and Human Rights in an Era of Climate Disruption* advocates strongly for ESG disputes, particularly those involving sovereign states as parties, to be resolved by way of arbitration. The IBA report cites the various arbitral institutions and forums available to parties, including the Permanent Court of Arbitration (PCA), the ICC and the LCIA. While most of the leading arbitral institutions are adopting specialised rules and expertise to specifically cater to and accommodate ESG disputes, the PCA has a set of Rules drafted specifically with environmental disputes in mind. The PCA also offers model arbitration clauses for inclusion into agreements.

Conclusion

Arbitration is ideal for resolving disputes relating to ESG issues for the reasons set out above, particularly for investors who are concerned with the increasing impact that political pressure may have on the ability to have disputes resolved fairly and with due process. Loan agreements, joint operating agreements, and PPP ventures with host governments would all benefit from being subjected to arbitration rather than litigated in national courts during a period where political and public opinion considerations would otherwise be highly prejudicial.

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International arbitration and climate change

By Martin J. Valasek and Caroline Bélair

International arbitration will probably be an important dispute-resolution mechanism (DRM) for climate-change disputes, but recent developments under two multilateral instruments point in a different direction for now. Only two countries have recognized arbitration as a DRM under the United Nations Framework Convention on Climate Change (UNFCCC) and an expert panel of the International Council for Commercial Arbitration (ICCA) will be focusing on conciliation rather than arbitration in developing a draft annex. At the same time, some states are concerned that the investment-protection regime of the Energy Charter Treaty (ECT) – notwithstanding recent modernization initiatives – restricts their flexibility to implement measures to address climate change and have announced their withdrawal from the instrument, which will no doubt exclude certain disputes related to climate change from its investment arbitration mechanism.

The UNFCCC and Paris Agreement

The UNFCCC entered into force in March 1994, and today has near-universal membership – 198 states have ratified the treaty. Its ultimate objective is to prevent 'dangerous' human interference with the climate system.

Article 14 of the UNFCCC sets out rules to govern disputes between two or more parties on the interpretation or application of the Convention, including a step-wise dispute resolution framework. More specifically, in the event of a dispute:

- The parties shall first seek a settlement through negotiation or other peaceful means of their choice. (Article 14(1).)
- Parties may opt in and declare that they recognize that a dispute may be submitted either to the International Court of Justice (ICJ) or to arbitration in accordance with the procedures to be adopted by the Conference of the Parties (COP) in an annex on arbitration. (Article 14(2).)
- Parties that have not opted in may, if their dispute is not settled within twelve months through negotiation, submit the dispute to conciliation. In such a case, a conciliation commission is constituted to render a 'recommendatory award' which the parties must consider in good faith. (Articles 14(5) and 14(6).)
- Additional procedures relating to conciliation shall be adopted by the COP as soon as possible in an annex on conciliation. (Article 14(7).)

The Paris Agreement was adopted at the UN Climate Change Conference in December 2015 (COP21) and came into force in November 2016. Its objective is to strengthen the global response to the threat of climate change, including by holding the increase in the global average temperature to below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C. To that end, the Parties to the Paris Agreement have agreed to prepare and publicly share national climate action plans (called nationally determined contributions, or NDCs) and to update them every five years.

> **Absent clear guidelines as to the types of substantive disputes that could be addressed through arbitration, it is unlikely that the COP will move towards adopting an arbitration annex under Article 14."**

The Paris Agreement incorporates, under its Article 24, the dispute settlement provision (Article 14) of the UNFCCC.

Thus far, only two states (the Netherlands and Solomon Islands) have recognized arbitration as a dispute resolution mechanism under Article 14(2) of the UNFCCC, and only one state (the Netherlands) has done so under Article 24 of the Paris Agreement. No annex on arbitration or conciliation has been adopted by the COP under the UNFCCC or the Paris Agreement.

The Paris Agreement incorporates Article 14 of the UNFCCC by reference thereby allowing Parties to opt-in to arbitration as a

dispute resolution mechanism, but it does not expressly set out the types of inter-parte disputes that can be resolved through arbitration. This leads to questions as to what remedies could be obtained through arbitration. For instance, it is unclear whether arbitration be used to enforce another party's obligation to submit an NDC or update it every five years; whether arbitration can be used by one party to claim damages for breach of an obligations under the Paris Agreement. These questions may have to be answered before Parties are willing to opt in to the ICJ or arbitration DRM under Article 14.

On February 10, 2023, ICCA announced the launch of a new project to develop and promote a draft conciliation annex to the UNFCCC and the Paris Agreement. This will address procedural questions as well as the likely characteristics of disputes concerning climate change. The expert panel will present its draft for inclusion on the agenda at COP28 in Dubai later this year.

Absent clear guidelines as to the types of substantive disputes that could be addressed through arbitration, it is unlikely that the COP will move towards adopting an arbitration annex under Article 14. Instead, parties may favour a non-binding DRM like conciliation, in keeping with ICCA's initiative.

Based on these developments, there appears to be a trend by states to divert climate-change related disputes away from arbitration.”

The Energy Charter Treaty

The ECT entered into force in April 1998, and has been signed by more than fifty parties (being states or regional economic integration organisations). The purpose of the ECT is to establish a legal framework to promote long-term cooperation in the energy field, and it includes investment protection of certain energy investments as well as conditions for the expropriation of such investments.

The ECT also contains provisions for the settlement of disputes between investors and contracting parties and disputes between contracting parties through binding international arbitration. According to the International Energy Charter Annual Report for 2022, as of January 10, 2023, the Secretariat of the Treaty was aware of 157 investment arbitration cases commenced under the ECT.

In recent years, contracting parties negotiated amendments to modernize the ECT, reaching a preliminary agreement on June 24, 2022. The modernized ECT would include adopting a novel ‘flexibility mechanism’ allowing contracting parties to exclude investment protection for fossil fuels in their territories, considering their individual energy security and climate goals, and introduce a new stand-alone article on the right to regulate in the interest of legitimate public policy objections, including the protection of the environment. The Energy Charter Conference, composed of signatories to the ECT and observers, expects to meet in April 2023 to discuss the adoption of the amendments to the ECT.

In parallel, and notwithstanding the modernization changes that have been agreed in principle, the European Parliament adopted a resolution in November 2022 calling for the withdrawal of the EU and its member states from the ECT. France, Germany and Poland have already withdrawn effective December 2023. Several other EU states have announced their intention to withdraw, including Spain, the Netherlands, Slovenia and Luxembourg, citing concerns over inconsistencies between the ECT and efforts to combat climate change and implement the Paris Agreement.

Conclusion

Based on these developments, there appears to be a trend by states to divert climate-change related disputes away from arbitration. Whether that is ultimately a good thing for states, investors, and the planet very much depends on one's perspective on the efficacy and wisdom of arbitral panels.

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Enforcing an arbitral award in an international energy dispute

By Sherina Petit and Ewelina Kajkowska

Energy disputes consistently dominate the caseloads of the main arbitration centres. In 2021, 25 percent of the LCIA's cases were energy and resource sector focused. ICSID saw 22 percent of cases in 2022 relating to the Energy Charter Treaty (ECT) and reported that 22 percent of cases registered involved oil, gas and mining, with 20 percent being related to electric power and other sources of energy. The popularity of arbitration in energy-related disputes is heavily influenced by the relative ease of enforcement of a resulting award, as the New York Convention affords a unified and widely recognised framework for enforcement under which only exhaustively listed grounds to resist enforcement are available.

Recent trends in the enforcement of energy arbitration awards

With the rise in prominence of energy-related matters in international arbitrations, various trends have emerged from the spectrum of arguments brought before courts in an attempt to resist the enforcement of awards. This article will focus on three of these trends and examine the extent to which they have been borne out in recent energy-specific examples.

1. Resisting enforcement on jurisdictional grounds

In its landmark decision in *Slovak Republic v Achmea B.V.*, the Court of Justice of the European Union (CJEU) ruled that investor-state arbitration provisions in an intra-EU bilateral investment treaty violated the autonomy of EU law by taking disputes over EU law outside its judicial system. The subsequent decision in *Moldova v Komstroy* ruled that intra-EU disputes under the ECT cannot be pursued in investor-state arbitration. The CJEU decisions continue to have implications before the courts of different states, most notably, in a widely reported series of cases brought by investors against Spain over the reforms of the subsidies system in the renewable energy sector.

One of the most recent iterations of this saga is the US court refusal to enforce an intra-EU ECT award on the ground that no valid agreement to arbitrate existed. In March this year, an enforcement action was brought against Spain in which a US court refused a petition referred by two Dutch entities to enforce a €26.5 million ECT award. The court found that under EU law, Spain lacked the legal capacity to extend an offer to arbitrate an intra-EU investment dispute. It was ruled that under EU law, to which both entities were subject, no valid agreement to arbitrate existed. By contrast, in a decision before the Australian High Court handed down in April this year, Infrastructure Services Luxembourg and Energia Termosolar were successful in enforcing their ECT award against Spain.

Energy disputes consistently dominate the caseloads of the main arbitration centres."

2. Resisting enforcement based on alleged corruption

The New York Convention provides that a court may refuse enforcement of the award where it would be contrary to public policy (Article V(2)(b)). The arguments brought under this ground in energy disputes frequently involve allegations of fraud or corruption. However, despite its common deployment by parties, this ground is rarely made out successfully.

A recent example of parties unsuccessfully raising corruption to resist enforcement is the Swedish Supreme Court decision issued in April 2022. In this case, a subsidiary of General Electric Power (GE) was ordered to pay an ICC award issued in a dispute over a Lithuanian power plant project after Swedish Supreme Court refused to hear its final appeal that the underlying contract was tainted by corruption. The Court found that, although there

was some evidence of bribes being paid, GE had not provided sufficient proof to substantiate all of the corruption allegations it raised relating to the contract. This result was reached despite the relevant entities pleading guilty to UK charges of bribing senior Lithuanian officials through local companies.

Although much less prevalent, parties seeking to resist enforcement argue that alleged corruption taints the arbitration procedure rather than the underlying contract. There is also a high bar for parties to make out such a defence to enforcement. By way of example, the National Iranian Oil Company (NIOC) recently failed to halt the enforcement of a US$2.4bn award in Rotterdam despite its belated call to Dutch prosecutors to investigate the Emirati award creditor for alleged corruption. NIOC pointed to a 2015 Iranian Supreme Court judgment that reinstated criminal verdicts against various individuals who were fined or imprisoned for corruption related to a gas supply deal. the court decided that NIOC should have raised this challenge earlier in the arbitration proceedings as opposed to waiting and submitting such grounds to challenge enforcement.

A successful attempt to resist enforcement on the basis of fraud was, however, made by Kazakhstan before a Dutch court earlier this year. On January 9, 2023, the Amsterdam District Court refused an application to enforce a US$500m ECT award against Kazakhstan after finding that Moldovan claimants, Anatolie and Gabriel Stati, committed procedural fraud in the arbitration. The court ruled that enforcement of the award in favour of the Statis and their companies would contravene domestic public policy on the basis that the applicants made false representations to the tribunal to inflate their damages claim. Notwithstanding the controversy, the award was earlier recognised by courts at the seat of arbitration in Sweden as well as in the US and Italy.

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3. State immunity

Energy disputes frequently involve state entities and assets which may pose difficulties for arbitral enforcement against shielded assets. A recent example of successful reliance on state immunity is the Colombian Supreme Court decision to deny the enforcement of a UNCITRAL award in favour of a group of solar photovoltaic investors against Spain. The decision was made on the basis that Spain had sovereign immunity that prevented it from being summoned before the courts of another country.

Another example where state immunity came into play is the US District Court for the District of Columbia decision where the court refused the enforcement of a US$21m CIETAC award against a Chinese state-owned oil and gas subsidiary of Sinopec International Petroleum Exploration and Production (SIPC). The application for enforcement was brought by Uni-Top who won the claim for lost commission arising from the agency agreement under which it agreed to assist SIPC buy US$4.18bn worth of shares in a Canadian oil and gas company PetroKazakhstan. In enforcement proceedings the court relied on the New York Convention and the US Foreign Sovereign Immunities Act (FSIA), the latter conferring personal jurisdiction in certain actions against foreign states. The court rejected Uni-Top's argument that SIPC could be considered a 'political subdivision' of the Chinese state for the purposes of FSIA. It was also held that Uni-Top had failed to establish that SIPC 'directly' conducted business in the District of Columbia, nor that it had a 'sufficient connection' with other related affiliates conducting business in the district.

In a similar ruling handed down in 2020, a court in Washington DC refused to enforce an ICC award against an Iraqi state-owned oil company.

Energy disputes frequently involve state entities and assets which may pose difficulties for arbitral enforcement against shielded assets.”

Although much less prevalent, parties seeking to resist enforcement argue that alleged corruption taints the arbitration procedure rather than the underlying contract.”

Conclusion

The above cases demonstrate that the enforcement of energy awards may prove to be a complex process, particularly prone to inconsistent or conflicting rulings in the courts of different jurisdictions. Whether it is jurisdiction or public policy considerations, care must be taken to bring the relevant arguments early in the arbitral process to avoid them being considered lost at the enforcement stage. The prevalence of state players in energy disputes poses additional difficulties for enforcement of subsequent awards. Care must be taken at the point of entering into a transaction that the scope of state immunity from both suit and execution is delineated to adequately reflect commercial interests of the parties involved.

The authors would like to thank Charlotte Connell for her assistance in preparation of this article.

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The role of Building Information Modelling (BIM) in construction arbitration

By Mark Berry and Ahmed Bobat

With special thanks to Sarah Sheppard (Trainee Solicitor), and Sarah Keyte (BIM Specialist, HKA).

Construction projects operate within a complex legal and technical landscape. Regardless of whether the project aims to attain new architectural heights, add to a robust portfolio of developments or serve as a first venture into the construction space, managing risk and promoting collaboration is important to succeed. This article provides a brief introduction and description of BIM and then looks at how BIM may be used to help make the resolution of construction related disputes more efficient. Building Information Modelling (BIM) can aid construction claims by providing parties with a time and cost-effective tool that allows for the better management and use of building information and data.

What is BIM?

There is no universally accepted definition of BIM. Here are 3 differing industry definitions:

> BIM is defined in BS EN ISO 19650-1:2018 as the "…use of a shared digital representation of a built asset to facilitate design, construction and operation processes to form a reliable basis for decisions."
>
> The Royal Architectural Institute of Canada (RAIC) defines BIM as "…the process of collaboratively developing and managing an integrated digital model containing a built asset's geometry and lifecycle information."
>
> Leading tech giant Autodesk describe BIM as "…the holistic process of creating and managing information for a built asset. Based on an intelligent model and enabled by a cloud platform, BIM integrates structured, multi-disciplinary data to produce a digital representation of an asset across its lifecycle, from planning and design to construction and operations."

In simple terms, BIM is a process, or a way of working, which involves multiple stakeholders collaborating whilst using intelligent 3D models.

BIM and Design

Using BIM during the design or construction phase typically involves multiple designers (e.g. architects and structural engineers) using software to create, modify and analyse models of the project being constructed.

After designers and project stakeholders have created digital representations of built assets they can share and combine the models. Users are able to view and interact with the design information. Building information models act as digital rehearsals of construction, which helps manage project risk. If designs are coordinated, it reduces the risk of delay.

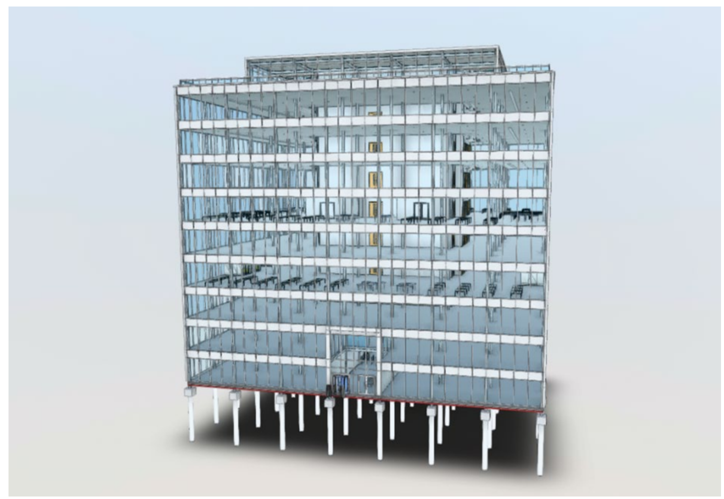

Figure 1 External view of building information model (created by HKA)

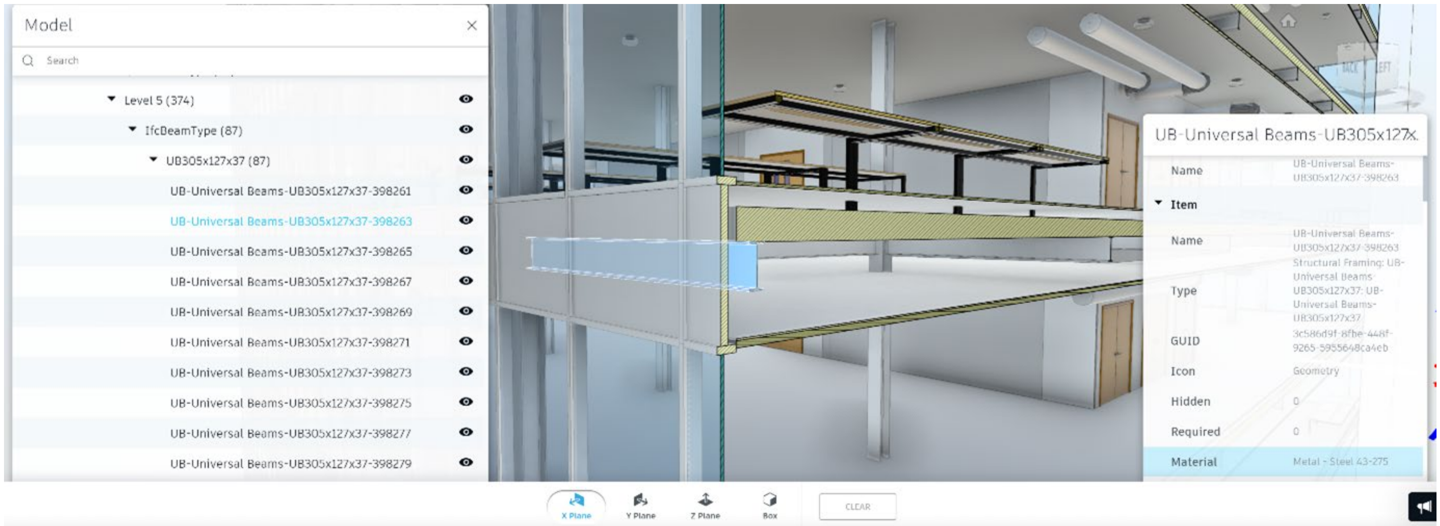

Figure 2 Internal view of model showing beam selected; the model shows the material (steel), location (level 5), and size of the beam. Models can give insights into design. A section has been added to the view to show inside the structure).

BIM and information management

Models help manage information. By way of illustration, if a project design is amended to increase the number of doors, that amendment can be carried through the model with the door schedule automatically updated to reflect the change. Using models to generate quantities (e.g. the amount of concrete, windows, doors etc) helps estimate time and cost, which in turn assists schedulers and surveyors to accurately price works.

Drawings can also be cut from the model. When design changes are made to the model, drawings may be set up automatically to reflect the changes. This in turn improves efficiency and information management.

“Building information models contain useful contemporaneous data which can be helpful in disputes.”

Illustrating the fact that models can be rehearsals for the construction project, models may also be used to identify clashes and resolve them ahead of the physical construction commencing and any clash being discovered later.

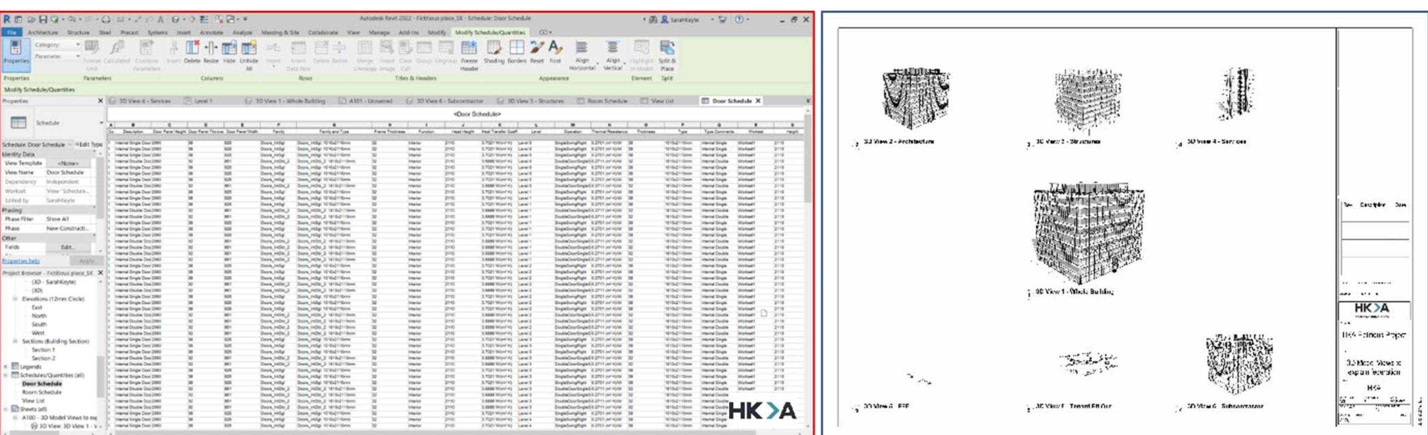

Figure 3 Door Schedule created in the model (left highlighted in red). An example of a 2D drawing cut from the model (right highlighted in blue). Both files are derived from the same Revit 3D Model file (created by HKA).

What about using it in disputes?

In construction disputes, it can often be arduous to piece together not only the sequence of events, but also the impact (both direct and consequential) of changes in design, timing, resourcing, sequencing of works and costing. What tends to result is a laborious, costly and time-consuming task for employers, contractors, counsel and arbitrators alike.

Building information models contain useful contemporaneous data which can be helpful in disputes. HKA BIM Expert Sarah Keyte notes "there are significant advantages to utilising building information models when we [expert witnesses] receive models in evidence. Models can be used to generate clear visual aids. This can help tribunals understand complex technical claims".

A sample of potential types of construction claims in which BIM may be of assistance are as follows:

- Design coordination claims – Using project models and analysis software, models may demonstrate design coordination flaws (which may have caused delay). The use of a model may allow tribunal members to understand visually the design issues and assist with allocating liability and damages.
- Design change claims – Models can be used to identify design changes. A comparison of models at key design milestones can identify the extent of design development. This analysis can be used to supplement instructions and variations, and provide visual contextualisation for a tribunal.
- Extension of time and associated cost claims –Expert witnesses may use 4D BIM (which combines 3D models with time and schedule-related information such as programmes and logistic models to create a virtual construction sequence) to demonstrate visually the interaction of different activities, especially those on the critical path. 4D evidence can provide significant assistance to arbitrators.

Model analysis has the capability visually to demonstrate that which can otherwise occupy many pages of a written submission (and the written submission may yet still remain unclear). Technical issues may be complex, and this issue is perhaps further exacerbated when the languages between parties, lawyers, experts and tribunals differ. Language barriers and translation issues can potentially be mitigated through the use of a models and visual evidence.

What are the key barriers to using Building Information Models in arbitrations?

Ideally, BIM will have been used by the parties at the outset and contain contemporaneous building information models. Models can be created specifically for claims after they have crystalized, and BIM expert Sarah Keyte is regularly tasked with doing so. However, models created after the event are not the same as contemporaneous building information models. These are typically used to explain complex technical issues (e.g. visualise leaks, fire spread, or structural collapses), and are reliant on the accuracy and completeness of project documents for their own accuracy.

Models need to be relevant to the issues in dispute (e.g. they are unlikely to be useful in a dispute regarding delays or disputes about interest rates or bonds).

Model analysis has the capability visually to demonstrate that which can otherwise occupy many pages of a written submission ."

Implementing and adopting BIM (whether at the start of a construction project or in preparation for arbitration) requires upfront investment in terms of time and money. The cost of producing a BIM model for the purposes of arbitration is dependent on various factors, but it is often a justifiable and worthy expense in the event there is a significant claim. Where BIM modelling has not been used during the concurrency of a project, a cost-benefit analysis should be undertaken at the start of dispute proceedings to assess the value of producing a BIM model based on the availability of project documents.

Concluding remarks

Building information modelling can help manage risk in the design, construction and operation of built assets. It may also help supplement and contextualise evidence in construction disputes.

The use of BIM in construction arbitration is an example of a new approach to an old problem (namely, the gathering, assimilation and use of construction data). Models can improve how cases are presented at arbitration in a manner which is engaging and has the potential to save both time and cost for all parties involved.

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Public policy conflicts in investor-state energy arbitrations

By Katie Chung, Edward Low and Violet Huang

Changing energy policy and a growing demand for environmental protection present public policy conflicts for states. There is a fundamental tension between the host state's right to regulate and an investor's expectation of a stable regulatory environment. New domestic laws for environmental protection may conflict with treaty obligations to protect pre-existing investments of foreign investors. A host state's obligation to protect investments through existing international treaties may conflict with international obligations under new multilateral agreements. This article will discuss the resulting constraints on the state's ability to manoeuvre in the realm of energy policy in light of states' international and domestic obligations.

Legitimate expectations and the right to regulate

The conflict between a state's flexibility in respect of energy policy and legitimate expectations of the investors is illustrated by the line of cases concerning Spain's reform of its renewable energy incentives.

Changing energy policy and a growing demand for environmental protection present public policy conflicts.''

In 2007, the Spanish government offered a subsidised feed-in tariff (FIT) to stimulate solar PV investments. When Spain then faced a budget deficit, it reduced the subsidies. Aggrieved investors commenced over 50 arbitrations against Spain, basing their claim on the Fair and Equitable Treatment (FET) obligation contained in the Energy Charter Treaty (ECT).

Under Article 10(1) of the ECT, states are to refrain from taking 'arbitrary or discriminatory measures' or from 'frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment.' Investors argued that they relied on representations by Spain when investing in renewable energy and legislative change deprived them of the benefits they expected to receive.

Tribunals consider the reasonableness of the investors' expectations based on the circumstances of each case, such as whether specific commitments were made and whether there was due diligence by the investors to ascertain the regulatory conditions surrounding the investment. Where there are no 'specific commitments' by the state, tribunals are less likely to find legislative change breaches the ECT.

In *Novenergia v Spain*, the Tribunal agreed that the subsidies offered by Spain were 'bait' which led the investor to believe that there would be no radical change in the regulatory regime. Various remuneration models in the subsidies (specifically Renewable Energy Plan 2005-2010 and RD 61/2007) had stated how returns of seven percent after taxes would be calculated. These remuneration models strengthened investor expectations of a stable subsidy scheme. Despite Spain's arguments that some changes were foreseeable, the tribunal found that Spain had violated the investors' legitimate expectations and violated its obligations under the ECT.

In contrast, in *Eurus Energy Holdings Corporation v. Kingdom of Spain*, the tribunal noted that Spain had not made any specific commitments 'as to the immutability of the FIT regime.' and confirmed that oral statements on 'promotional occasions' were insufficient to constitute a 'specific commitment.'

The majority of the Tribunal also found that legitimate expectations related to 'circumstances in existence at the time the investment [was] made.' As most of Eurus' investments predated the FIT, Eurus's claim failed.

In Novenergia v Spain, the Tribunal agreed that the subsidies offered by Spain were 'bait' which led the investor to believe that there would be no radical change in the regulatory regime."

However, arbitrator Oscar Garibaldi disagreed, preferring a holistic view of the changing circumstances and the investor's conduct in response. If the investor had demonstrated acquiescence in the new regime even after his investment, it could create legitimate expectations. The dissent demonstrates that, even if the representations were made after the investment was made, the doctrine of legitimate expectations may nonetheless apply as the investor may rely on the new regime in keeping its business operations. This view would constitute another fetter on the states' ability to change course on energy policy.

Environmental regulations may clash with investors' rights

Environmental regulations adopted by states can be in conflict with investors' right to property or to a minimum standard of treatment. For instance, the United States has revoked permits in respect of a controversial pipeline project by a Canadian corporation due to its environmental impact. The investor has brought a legacy claim under Chapter 11 of the NAFTA, as the investor was aggrieved by the 'regulatory rollercoaster' regarding its cross-border permit.

States taking regulatory actions to comply with international obligations may therefore still find themselves in breach of other treaty obligations if the measure in question discriminates against foreign investors."

Conflicts between differing treaty obligations

States may have introduced new regulations to comply with other treaty obligations. In February 2021, the German energy group RWE brought a claim against the Netherland under the ECT, alleging that the state's plan to phase out coal production by 2030 would render its investment in the coal industry worthless without adequate compensation. The plan to phase out coal production was part of the Netherlands' effort to comply with commitments under the Paris Agreement.

Environmental regulations adopted by states can be in conflict with investors' right to property or to a minimum standard of treatment."

The fact that the state has exercised regulatory powers for a public purpose may not constitute a defense to a treaty breach. In *Westwater Resources v. Turkey*, the state revoked the investor's uranium mining license and the investor brought a claim against Turkey for unlawful expropriation in breach of the Turkey-USA BIT. The Tribunal accepted the valid public purpose in the revocation of permits, which was either to regularize permits in accordance with the law (per the respondent) or to assert government control over uranium supply (per the claimant). However, this did not exonerate the Turkish government from liability for unlawful indirect expropriation under the BIT.

In *SD Myers v Canada*, the Canadian government introduced an export ban on the transportation of plastic waste in light of its Basel Convention obligations. The US investor whose company handled such waste by exporting them to the US for processing succeeded in its claim against Canada under the NAFTA. The Tribunal found evidence that Canada's policy was influenced by the desire to protect and promote the market share of enterprises carrying out the waste processing in Canada which were owned by Canadian nationals. The Tribunal therefore found that Canada had breached the national treatment obligation and the obligation of minimum standard of treatment.

States taking regulatory actions to comply with international obligations may therefore still find themselves in breach of other treaty obligations if the measure in question discriminates against foreign investors.

As states struggle to match their energy policies to the pace of climate change and technological development, conflicting international obligation may see an increase in energy-related investor-state arbitrations in the near future.”

Conclusion

Arbitrations are likely to remain as the preferred forum for foreign investors to resolve their disputes with states, as stated in the report on the future of international energy arbitration by Queen Mary University of London (January 2023). As states struggle to match their energy policies to the pace of climate change and technological development, conflicting international obligation may see an increase in energy-related investor-state arbitrations in the near future.

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Energy-related disputes in the Middle East: Is DIAC fit for purpose?

By Dylan McKimmie, Paul Stothard, Daniel Allman, Alan de Rochefort-Reynolds and Ashleigh Giles

With disputes expected to arise due to the energy transition, price volatility, the increase in construction of energy infrastructure, regulatory changes and sanctions, the competition is on for jurisdictions and arbitral institutions to serve the energy sector. Against that backdrop, Dubai has shuttered the DIFC-LCIA Arbitration Centre and placed the revamped Dubai International Arbitration Centre (DIAC) as its flagship arbitral institution. This article evaluates the strengths of both Dubai and the DIAC as an international arbitration hub for energy and resources disputes.

Energy and resources disputes in the Middle East

The Middle East is the world's largest oil producing region with approximately half of the world's oil and a third of the world's gas reserves. Disputes are inevitable in the energy industry because of the frequent use of joint venture structures, the reliance on contractors and the myriad of engineering and geologic complexities. At the same time, extractive energy projects seek to exploit resources owned by host states, which makes company-state relations another potential source of dispute.

When energy-related disputes arise, parties often favour international arbitration as the means to resolve their differences. Arbitration allows for party control over the arbitral procedure and parties' role in selecting arbitrators enhances perceptions of neutral decisions. The near global adherence to the New York Convention also makes awards readily enforceable around the world.

Traditionally, the preferred arbitral institutions in the sector have been the ICC International Court of Arbitration (ICC) or the London Court of International Arbitration (LCIA). In 2020, almost 18 percent (167 of 946) of arbitrations registered with the ICC were energy-related disputes. In the same year, almost 17 percent of the LCIA's total cases involved parties from the Middle East and North Africa, with energy and resources disputes accounting for 26 percent of the institution's total caseload.

Arbitration in Dubai

Dubai has two parallel legal systems. There is an 'onshore' jurisdiction made up of the federal laws of the United Arab Emirates and the local laws of the Emirate of Dubai. This is a civil law system and proceedings are conducted in Arabic. In practice, DIAC arbitrations traditionally were seated in onshore Dubai with proceedings and awards subject to the supervision of the onshore courts.

When energy-related disputes arise, parties often favour international arbitration as the means to resolve their differences."

The 'offshore' jurisdiction relates to the Dubai International Financial Centre (DIFC). The DIFC is a self-contained jurisdiction modelled on the English common law, which is overseen by its own common law courts and where proceedings are conducted in English. By virtue of DIFC Law No. 1 of 2008 (DIFC Arbitration Law), the DIFC is a standalone seat with curial supervision by the DIFC Courts. Between 2008 and September 2021, the DIFC-LCIA Arbitration Centre (a joint venture between the DIFC and the LCIA) was the primary arbitral institution in DIFC.

In September 2021, the Emirate of Dubai abolished the DIFC-LCIA Arbitration Centre by *Decree No 34 of 2021* (2021 Decree). The decree stipulated that:

- all existing DIFC-LCIA Arbitration Centre cases (registered on or before March 20, 2022) were to be administered by the LCIA (article 4);
- all proceedings after that time that referred to the rules of the DIFC-LCIA would be registered by DIAC, unless the parties agreed otherwise (article 6); and
- DIAC was entrusted with administering arbitrations in Dubai and the DIFC pursuant to *the Statute of the Dubai International Arbitration Centre*.

DIAC revamped

DIAC was established in 2004 as an 'onshore' arbitration centre. In addition to transferring DIFC-LCIA Arbitration Centre cases to DIAC, the 2021 Decree remoulds DIAC as the only arbitral institution in Dubai and gives it operations in both onshore Dubai and the DIFC (articles 2, 5).

The Emirate has taken additional steps aimed to position DIAC as a leading arbitral institution including internationalising DIAC's administration to include a mix of foreign and Emirati practitioners. There are also plans to establish a list of registered arbitrators. In February 2023, Australian arbitrator and former chairman of the Singapore International Arbitration Centre, Dr Michael Pryles AO PBM, was named President of the DIAC Arbitration Court. Alongside this, in an attempt to cement DIAC's position as a 'pre-eminent arbitral institution for disputes in the Middle East,' new arbitration rules were issued by DIAC in 2022 (2022 DIAC Rules).

Application of the DIAC Rules to energy disputes

With the new rules and administrative infrastructure of DIAC largely untested, it remains to be seen whether DIAC will garner favour with parties in energy disputes. The 2022 DIAC Rules appear fit for purpose in energy disputes. First, parties in DIAC arbitrations have the option of either an onshore Dubai or DIFC seat. If the parties do not designate a seat, then the default seat will be the DIFC (article 20.1). This is a welcome improvement for domestic and international arbitration, not least because:

- the DIFC has a well-developed, UNCITRAL-based procedural law;
- proceedings are supervised by the DIFC court which has strong powers to grant interim and injunctive relief and takes a pro-arbitration approach; and
- DIFC is pro-recognition and enforcement of arbitral awards.

The 2022 DIAC Rules provide for third-party funding of the arbitration (article 22), which has been available for litigation in the DIFC courts since 2017. This gives both claimants and respondents greater flexibility in choosing how to fund their cases and manage cash flow. The UAE's Federal Arbitration Law is silent on third-party funding.

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In terms of procedure, the 2022 DIAC Rules expressly allow for hearings to be conducted virtually (article 20.2). Virtual hearings can reduce costs to parties and allow greater flexibility for hearing dates. This enhances the efficiency of arbitration, particularly where the parties and witnesses are located on different continents and time zones.

Given the complex nature of energy transactions, it is notable too that, unlike under the 2007 DIAC Rules, the 2022 edition empowers a tribunal to hear disputes under multiple contracts (article 8) and enable parties to be joined to an arbitration (article 9). Likewise, the ability of a tribunal to order consolidation of proceedings is critical (article 8). In operation, the consolidation and joinder provisions are similar to other leading arbitral rules.

Another development is the new power of the tribunal to make an award on legal costs (article 36.1). The absence of an express power to award costs in the 2007 DIAC Rules led to inconsistent decisions in the onshore courts about whether such a power existed absent the parties' express agreement. Including a power to order legal costs in the 2022 DIAC Rules avoids this controversy and brings DIAC arbitration in line with practice under the roles of other leading institutions.

The 2022 DIAC Rules also do not prohibit a tribunal from awarding pre-award or post-award interest. This is important, particularly for long-term contracts that are common in the energy sector, where interest can form a significant portion of the financial damage incurred by a party.

On the whole, then, the 2022 DIAC Rules modernise DIAC arbitration and bring DIAC in line with other arbitral institutions commonly used by parties in energy disputes.

Conclusion

The 2022 DIAC Rules contain many features that will be attractive to parties in the energy sector, including the facilitation of third-party funding, procedural innovations with respect to virtual hearings, and new rules for consolidation and joinder which bring DIAC in line with international best practice. However, given recent change at the institutional level, it may be some time before trends emerge that will confirm whether the redesign of DIAC will cement Dubai's reputation as a global hub for arbitration.

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The green energy transition: Clouds on the horizon?

By Majdie Hajjar, Amy Armitage and Holly Stebbing

With net zero commitments increasing pressure on the energy industry to move away from fossil fuels, there is a race to the market for renewable energy projects. Whilst renewable energy may be part of the solution for global warming, renewables face their own challenges; to mitigate project risk, bespoke, highly complex contracting structures are used and arbitration is often selected as the dispute resolution mechanism.

Below we explore issues in renewable energy disputes and why international arbitration is the method of dispute resolution often used to resolve them.

Construction disputes

Supply chain disruption

The renewable energy boom has coincided with COVID-19, the war in Ukraine and competition for materials/components driven by technology demand, all combining to create unprecedented pressure on global supply chains. This has highlighted the interconnectivity and fragility of global supply chains, triggering huge disruption to delivery of projects around the globe. Whilst the immediate effects of COVID-19 have now abated, that disruption is expected to continue. For example, finite suppliers and contractors have the capacity to deliver products and services required to scale up renewable projects, causing inflation and further exacerbating price rises of key raw materials. As prices rise, these cause budget overruns and funding pressures, breaches and insolvencies. The inevitable result is disputes.

Project delay

The renewable energy boom has coincided with COVID-19, the war in Ukraine and competition for materials/components driven by technology demand, all combining to create unprecedented pressure on global supply chains."

Delays are a familiar characteristic of complex infrastructure projects and, in the renewable sector, can arise for a number of reasons, such as supply chain disruption and unsuitable weather or ground conditions. As renewable projects can involve development of green belt, they can need detailed environmental impact assessments that can take significant time to evaluate. This can lead to delays in the developmental phase of projects as it is necessary for parties to obtain the requisite permissions, regulatory consents and permits. Delays in securing land and right-of-way rights, as well as financing and engineering and commissioning problems, also have the potential to trigger events of default under the PPA and other project agreements. Another common factor that causes delay to a project is connecting to the electricity grid – a complex process in many jurisdictions.

Delays are a familiar characteristic of complex infrastructure projects."

Technology disputes

Much of the technology, design and engineering adopted for renewable sources of energy, is either: (i) new and unproven; (ii) emerging; or, (iii) is being adapted from a small to a larger, untested scale in a more demanding operating environment. This increases the risk profile of a project, as unforeseen technical issues can arise during the construction phase and performance targets for the operational phase may ultimately prove unsustainable and/or unrealistic. During the construction phase, issues with new technology often arise in the context of design development and intellectual property, while defects emerge in the testing/operational phase as a result of the as-built design not being fit for purpose. These issues can lead to claims of breach of contract, misrepresentation and, in cases which relate to inadequate installation of the technology, negligence.

Investor and state disputes

Due to high upfront costs and the considerable construction and operating risk, critical national energy infrastructure is often backed by private finance, including from foreign investors. International investment agreements, such as bilateral investment treaties, offer foreign investors a framework of protections against state action that could damage the investment. With the drive to net zero, some states offer investors significant financial support in the form of tax breaks and subsidies to invest in renewables projects. However, as renewable energy has taken off, some states have struggled to continue to finance these subsidy regimes. This is evidenced by the wave of claims under investment treaties by investors against states in southern Europe when governments rolled-back or amended climate legislation and policies which supported green energy. These polices were originally introduced to enable renewable energy providers to be cost-competitive against the more traditional energy sources.

International investment agreements, such as bilateral investment treaties, offer foreign investors a framework of protections against state action that could damage the investment.”

Joint venture (JV) disputes

As large scale renewable energy projects involve high upfront cost and significant project risk, it is common to see joint venturing arrangements as a means of sharing that risk. This has always been common in the oil and gas sector and is being brought across into the renewables space as fossil fuel companies diversifying their portfolios look to partner with smaller established renewables providers to benefit from their expertise in the market. In turn, the renewables companies benefit from the investment larger energy companies can offer and the transferable aspects of their long history in the energy sector. Some of these partnerships are inherently unequal and therefore prone to disputes as a result of differing expectations between parties or an unclear allocation of risk in the contract. To mitigate against these issues, parties should allocate risk in the JV agreement by setting out each party's rights and obligations in respect of performance, defects, warranties and termination and include an appropriate dispute resolution mechanism.

Why arbitration?

Many energy-related contracts contain arbitration clauses – this is for a number of reasons.

- It produces awards that are more easily enforceable internationally under the 1958 New York Convention to which more than 160 nations have signed up. No similar enforcement regime exists for court judgments.
- The parties involved in renewable energy projects are often domiciled in different jurisdictions which makes arbitration a neutral and preferable choice over a particular jurisdiction's national court process, which may lack impartiality or expertise.
- Claims involving state parties are common in the energy sector, where there are usually complex licensing and permitting arrangements and significant tax/fiscal considerations. The non-state party will often have misgivings about submitting to the courts of the state party, whereas the state party is often reluctant to submit to the courts of a neutral third state.
- the neutrality offered by international arbitration is essential to investors seeking relief under investment treaties.
- The civil procedure in local courts may be unsuitable for technical disputes. Arbitration allows for the parties to choose an expert tribunal with appropriate technical expertise. This is particularly important in relation to technology and construction disputes involving complex scientific and/or engineering evidence required.
- Arbitration can parties with a confidential forum in which to settle a dispute.
- Arbitration affords parties the flexibility of choice of arbitral institution, enabling parties to find suitable rules for managing their particular type of dispute. In the Queen Mary University Energy Arbitration Survey for 2022, 72 percent of respondents gave arbitration a score of at least 4/5 in terms of suitability, showing that arbitration is seen as the most suitable forum for resolving energy disputes, with London and Singapore the most popular seats of choice.

Conclusion

The necessity of the energy transition will continue to drive investment in renewable energy projects, which we can expect to see proliferate around the globe. These projects face headwinds from the current geo-political challenges and the race for resources - human, material and technological - to support the transition. When coupled with the issues that any major international infrastructure project can face in terms of costs overruns and delays, it is inevitable that renewable energy disputes will arise. International arbitration will often be the selected forum for the resolution of these disputes given its neutrality, enforcement advantages and ability to flex to the particular nature of the dispute.

The authors would like to thank Bea Byrne Hill for her assistance in preparation of this article.

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Mexican energy measures impacting foreign investment: an update and potential investor-state dispute remedies

By Kevin O'Gorman and Erin Formby

In 2013, Mexico pursued reforms that facilitated and encouraged foreign investment in Mexico's energy sector. These foreign investments included the establishment and operation of wind and solar energy farms in Mexico, the implementation of interconnection contracts to bring U.S. electricity to Mexico and the importation of U.S.-origin fuels to Mexico, among others.

Then, in December of 2018, Mexico shifted toward a more insular energy policy as a result of the election of a new president who has publicly urged the Mexican energy regulatory sector to strengthen domestic energy policies to favor the Mexican Federal Energy Commission (CFE), and petroleum company, Petróleos Mexicanos (Pemex). As a result, the United States has estimated that as of June 2022, current Mexican energy policies have negatively impacted over US$30bn of investments from United States investors and investments. This article provides an update on state-to-state consultations between the United States, Canada and Mexico and explores potential remedies for international investors whose investments may be impacted by Mexican energy policy.

State-to-state consultations under the USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020, effectively replacing the North American Free Trade Agreement (NAFTA) and providing a sunset period for certain NAFTA provisions. The United States initiated consultations with Mexico under USMCA on July 20, 2022 to address its key concerns, namely that Mexican energy policy favors the CFE and Pemex and disadvantages foreign investors. The United States asserts that:

1. Mexico's Electric Power Industry Law prioritizes electricity produced by CFE over private competitors in dispatching electricity into Mexico's grid;
2. there have been inactions, delays, denials and revocations of private companies' abilities to operate in Mexico's energy sector; and
3. the following are objectionable:
   a. a regulation issued by Mexico's Energy Regulatory Commission granting only Pemex a five-year extension to comply with maximum sulfur content requirements under the applicable automotive diesel fuel standard; and
   b. a letter sent by Mexico's Secretary of Energy to the heads of Mexico's Energy Regulatory Commission and National Natural Gas Control Center announcing a policy that would incentivize or require users of Mexico's natural gas transportation service to source natural gas from CFE or Pemex, and would impose restrictions on the importation of U.S. natural gas.

Canada has since joined as a party in these consultations.

The USMCA provides that a state party may request the establishment of a tribunal if the states do not resolve the matter under consultation within 75 days after the request for consultations was made. If established, the USMCA provides a tribunal with the power to determine whether measures at issue are inconsistent with the USMCA's obligations, and, if requested by the disputing states, to issue recommendations for the dispute's resolution.

The United States has been able to request the establishment of a tribunal since October 3, 2022. To date, however, it has refrained

from doing so as the parties have continued to engage in discussions. For example, the United States Trade Representative (USTR) has noted that the parties met virtually on November 3, 2022, in person on December 1, 2022, and in San Diego, California on January 25, 2023 to discuss the Mexican energy policies at issue.

While not announced in official channels, it was reported in March 2023, that the United States plans to make a 'final offer' to Mexican negotiators to open Mexican markets or agree to some increased oversight. If a tribunal is ultimately established and goes on to determine that Mexico's measures breach its USMCA obligations, serious economic consequences could follow. For example, if the parties are unable to agree on a resolution to the dispute within 45 days from receipt of a Panel's final report, the USMCA authorizes the United States and Canada to issue sanctions against Mexico in the amount of the impact caused by the nonconforming measures.

Investment remedies for United States investors under USMCA

United States investors in Mexico may be able to pursue claims under the USMCA for investments impacted by the Mexican energy policies. While the deadline to submit a legacy investment claim under NAFTA may have passed, the USMCA provides that an investor may submit a claim to arbitration under two Annexes of the USMCA.

- Annex 14-D allows United States investors to bring claims for national treatment, most-favored-nation treatment, and direct expropriation. However, investors must first exhaust local remedies in Mexico, which would involve filing a complaint with a competent court or administrative tribunal and obtaining a final decision from a court of last resort. Alternatively, an investor must wait for 30 months to elapse, or demonstrate that recourse to domestic remedies is 'obviously futile.'
- Alternatively, Annex 14-E sets out a special regime for resolving disputes for 'covered government contracts' in 'covered sectors.' In this context, a 'covered government contract' means (a) a written agreement between a Mexican national authority; and (b) a covered United States investment or United States investor; where (c) the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself; and (d) where that contract grants rights to the covered investment or investor in a covered sector. 'Covered sectors' include oil and gas, power generation, telecommunications, transportation and infrastructure. Annex 14-E provides a forum for United States investors to resolve the contractual disputes that may arise in the aforementioned industries. Notably, Annex 14-E does not require United States investors to exhaust local remedies in Mexico.

Investment remedies under other multilateral agreements and bilateral investment treaties (BITs)

Investors may have recourse under other multilateral agreements with investment protections, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Pacific Alliance Additional Protocol and the MERCOSUR-Mexico Complementation Agreement. Notably, Canadian investors may be able to seek protections under the CPTPP.

Mexico is also party to 36 bilateral investment treaties (BITs) including with Argentina, France, Italy, Spain, Switzerland, the United Kingdom and Uruguay. Investors originating from states that have BITs with Mexico should review the availability of investor-state dispute resolution under those treaties.

Final considerations for investors

Investors should continue to monitor developments in the US, Canada and Mexico state-to-state consultations regarding Mexico's 2018 energy-related measures and consider the various dispute resolution options they may have in respect of investments impacted by the these policies. Investment planning for current and future investments that may be affected by Mexican energy policies is key, including careful review of applicable investor-state protections, which depend on nationality of the investor and differ from treaty to treaty.

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Third-Party funding for energy disputes

By Paul Stothard

This article examines how parties to energy disputes manage to fund these expensive and long-running disputes and whether third party funding is suitable to fill an emerging funding gap for small and mid-cap parties to future energy disputes.

The role of arbitration in energy disputes

A theme of this edition of IAR is international arbitration's role as the leading means of resolving international energy disputes. The energy industry spawns large, complex international disputes, often involving state parties, partly as a result of the energy markets' particular sensitivity to political and economic disruption. A leading survey by London's Queen Mary University shows that industry participants expect energy disputes to increase in volume over the next five years as a result of short to medium term market issues such as price volatility of raw materials and energy, inflation in construction costs, procurement and supply chain issues and changes in regulatory frameworks and technology. In the longer term, issues such as the impact of the energy transition and the drive for energy security are also likely to be important. The energy transition is also likely to cause new players to emerge as technology is developed and deployed; will these new players have the resources to pursue disputes in international arbitration?

A leading survey by London's Queen Mary University shows that industry participants expect energy disputes to increase in volume over the next five years."

Arbitration has not emerged as the preferred choice of dispute resolution because it is cheap or swift. On the contrary, international arbitration is often expensive because the parties must incur legal, tribunal and expert costs, and have to bear these costs for a long time as proceedings can take years to be resolved and awards paid out. Arbitration has also largely adopted the common law practice of cost shifting, so that the loser can end up having to meet the reasonable legal and other costs of the victorious party. Arbitration is therefore costly and involves risk. These may be key considerations for parties in terms of whether claims can or should be pursued.

Advantages of third party funding

For these reasons, third-party litigation funders have long identified the energy industry as an attractive target. Funders assess the attractiveness of investing in claims based on a number of factors, including the amount in dispute, prospects of success and possibility of turning awards into cash at the end of the proceedings. The energy industry reliably produces claims that meet all of these criteria.

The central claim in funders' sales pitch to energy industry players is that funders assume the cost risk associated with the proceedings. This means that the risk of material financial liability for legal and other costs, and of the other parties' costs should the claim fail, are removed from the funded party's balance sheet. This may not be a material consideration to states or the traditional energy majors, which have both the resources and expertise necessary to manage their own claims and can absorb costs as they arise. However, this is not the case for small- and mid-cap energy players. These smaller players find third party funders attractive because they are unable to raise capital, or have to conserve cash, precisely because of the same factors (e.g. economic and political volatility) in the industry that cause disputes to arise in the first place. Funders report that they are increasingly developing relationships with such players for all of these reasons.

Third-party litigation funders have long identified the energy industry as an attractive target."

The funders' second claim is that they understand their market and provide a product tailored to suit that market. For example, claimant parties bringing claims under investment treaties for breach of treaty obligations owed to foreign investors face a range of challenges in funding such claims without recourse to specialist funders. In a 2021 study, the British Institute of International and Comparative Law found that the mean costs incurred by investors are US$6.4m (with states incurring US$4.7m) with proceedings taking on average just under five years. Claimants often lack the resources to pursue such claims.

Disadvantages of third party funding

The major downside of litigation funding is that it can be expensive in comparison with other forms of finance (assuming that any is available). A typical funding model for a single case dispute referred to international arbitration will involve the funder funding all of the legal and other costs of the proceedings in return for having recourse to recover all of the money put in, plus a multiple of that amount (e.g. three times) and a proportion of any damages recovered.

Specialist funders, who understand and accept how investment arbitration functions in terms of cost and the time periods involved, have been active in some of the highest profile energy disputes of recent times.”

Funders are more attracted to, and offer more competitive pricing for, a portfolio of claims by which they can spread their risk over multiple different claims. Some funders argue that portfolio financing also unlocks value because the funder may be prepared to finance claims that would otherwise not be pursued by a self-paying client, which might be more disposed to focus financial and management resources on their strongest and most valuable claims only.

The other drawback in third party funding is that the process by which funding is obtained can be long and cumbersome, with the funder conducting extensive due diligence on the dispute in advance. Further, whilst there have been reported instances in which the additional cost associated with funding is recoverable as a cost in the arbitration but this is by no means an established practice.

The fact that a claim is funded can also be a strategic asset in the arbitration.”

Conclusion

Third party funding may be an expensive option but, for certain types of claimants, it can be a good option or even the only feasible option, and it looks likely to play an increasingly prominent role in the energy arbitration landscape.

Further, whilst there have been reported instances in which the additional cost associated with funding is recoverable as a cost in the arbitration but this is by no means an established practice.”

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Would energy investor-state disputes benefit from a Multilateral Investment Court?

By Jo Feldman, Daniel Allman, Alan de Rochefort-Reynolds

The international investor-state dispute settlement (ISDS) system that has blossomed over the last century is now under the microscope. Concerns about the legitimacy, coherence and predictability of tribunal decisions have led to calls for ISDS to be replaced by standing 'investment courts'.

For those involved in cross-border energy-related commerce, this proposal is not merely academic. The European Union (EU), for example, is a vocal proponent of an investment court and is phasing out intra-EU bilateral investment treaties (BIT). At the same time, a growing number of EU states – including Germany, France, Spain and Denmark – have announced their intention to exit the Energy Charter Treaty (ECT), which provides for investment treaty arbitration.

This article discusses the issue arising from the proposal to establish an investment court in the context of cross-border energy disputes and examines whether the leading proposal can address those issues.

Concerns with ISDS

Questions over the adequacy of ISDS are not new. In the early 2000s, a string of awards made against Argentina following the Argentinian debt crisis prompted critiques from scholars and states, primarily in the Global South. More recently, states in the Global North responding to investment treaty claims have increasingly voiced misgivings with the current ISDS system. Since 1999, more than 200 investment treaty claims have been brought against EU member states, with more than 40 of those claims brought against Spain alone in respect investments in renewable energy.

EU courts have expressed reservations about the ISDS system. In Slovak Republic v Achmea BV (Case C-284/16), the Court of Justice of the EU (CJEU) found the ISDS clause in the Netherlands-Slovakia BIT was incompatible with EU law as it impaired the CJEU's exclusive jurisdiction to interpret EU law. Subsequently, in Republic of Moldova v Komstroy LLC (Case C-741/19), the CJEU held that the ECT did not apply to intra-EU disputes. Most recently, in Republic of Poland v PL Holdings Sàrl (Case C-109/20), the CJEU extended the prohibition in Achmea to an ad hoc arbitration agreement between an investor and a state.

Against this backdrop, several bodies have initiated reviews of the ISDS system, including the European Commission and the United Nations Commission on International Trade Law (UNCITRAL). The work of the UNCITRAL Working Group III (Working Group) is particularly enlightening as the Working Group is comprised of all 70 UNCITRAL members and has received submissions from the EU. Three key concerns have emerged:

1. A lack of consistency, coherence, predictability and correctness of arbitral decisions.
2. A lack of impartiality of arbitrators and decision-makers.
3. The costs and duration of ISDS proceedings.

The Working Group is currently considering proposals to address these issues, including whether to replaced ISDS with a standing Multilateral Investment Court (MIC).

The proposed solution: a Multilateral Investment Court

In its proposal, the EU envisions the 'establishment of a standing mechanism for the settlement of international investment disputes' with two tiers of tribunals staffed by full-time, salaried adjudicators.

The first tier of the MIC would comprise a first-instance tribunal to conduct fact-finding and apply relevant law like existing arbitral tribunals. The second tier would be an appellate tribunal, to hear appeals on errors of law or 'egregious' factual errors. Suitably qualified MIC adjudicators would be appointed by state parties and be randomly assigned to cases.

Considering the proposal

An MIC may relieve some concerns with ISDS, in particular ensuring ongoing access to ISDS for cross-border energy disputes. There are a number of practical hurdles to an MIC and much remains to be clarified.

Most importantly, it is unclear whether a MIC judgment would qualify as an arbitral award."

Perhaps the largest of these hurdles is political will. For a truly global MIC to emerge, a critical mass of states would have to commit to move from the current ISDS system to MIC. This would likely require a new international convention that is widely adhered to and the amendment or replacement of hundreds of existing international investment agreements.

The EU considers that an MIC with permanent, full-time adjudicators and an appellate system would enhance the predictability and consistency of decisions in investor-state disputes. The development of 'continuous collegiality' between MIC adjudicators could conceivably create a more reliable, shared approach, but it is unclear whether the decisions of an MIC would have precedential value, which is a key factor in addressing the concern of consistency across awards.

For a truly global MIC to emerge, a critical mass of states would have to commit to move from the current ISDS system to MIC."

The proposed MIC would also require adjudicators to have qualifications 'comparable to adjudicators in other international courts' such as the International Court of Justice. However, the International Centre for the Settlement of Investment Disputes (ICSID), which is one of the fora for the current ISDS system, already requires members of the ICSID Panel of Arbitrators to have a recognised competence in law, particularly international investment law and public international law and 'recognized competence … in commerce.'

A panel of full-time adjudicators who are unable to act as counsel in other matters during the term of their appointment to the MIC would reduce incidences of 'double-hatting.' In addition to reducing the ethical issues that double-hatting can raise, this may enhance user perceptions of adjudicators' impartiality. However, the appointment of adjudicators by states leaves the MIC open to criticism of 'court packing' (i.e., that only adjudicators sympathetic to host states are appointed), and even criticism of politicisation by states, a claim that has on occasion beset the appointment processes for the International Criminal Court, the International Court of Justice and the World Trade Organization.

Most importantly, it is unclear whether a MIC judgment would qualify as an arbitral award for enforcement purposes. A foundational element of arbitration is party autonomy to appoint decision-makers, and the EU's proposal does not appear to contemplate that parties would select their tribunal members. It is not evident that the governing law for the MIC procedure would be domestic law. This raises the question as to whether an MIC decision could be said to be 'made in the territory of a State' for the purposes of the New York Convention (Convention). 'The Convention allows an award creditor to enforce a foreign arbitral award in more than 172 states, whereas the scope for enforcing a foreign court judgment is far more limited, and often depends on the domestic rules at the place of enforcement. The utility of an MIC for states and investors alike would be greatly reduced if MIC decisions do not qualify as arbitral awards for enforcement purposes.

The utility of an MIC for states and investors alike would be greatly reduced if MIC decisions do not qualify as arbitral awards ."

Conclusion

If these issues can be resolved, and if the political will exists, an MIC may address concerns about ISDS. In the meantime, the rapidly changing network of investment protection treaties with ISDS provisions, combined with supply chains and investment pathways adapting to the energy transition, make for an increasingly uncertain legal landscape.

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Major infrastructure disputes: why changes to the English Court's Civil Procedure Rules could make arbitration a better option

By Sam Bamford and Simon Ramsden

Recent developments in English procedural law may have an important bearing on whether and where to bring a claim in infrastructure-related disputes. In particular, these developments raise a number of legal and practical considerations that could make arbitration a more attractive forum than the English courts for resolving disputes over large scale, complex infrastructure projects going forwards.

Witness statements

In recent years, stake-holders have expressed concern that witness statements submitted in court proceedings were becoming increasingly argumentative and overly-lawyered. In 2021, the Business and Property Courts of England & Wales introduced new rules in relation to witness statements. These rules, contained in Practice Direction 57AC, make it clear that the scope of witness statements should be narrowed so that they only contain evidence as a matter of fact, of which a witness has personal knowledge, which is relevant to the case and which needs to be proven at trial.

Parties may feel that arbitration is a better option for disputes that are fact-heavy, such as those relating to large scale infrastructure projects."

These new rules do not apply in arbitration seated in England & Wales. Instead the normal practice is that the tribunal will adopt the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the IBA Rules), which provide the parties and the tribunal considerable flexibility to agree or determine how witness statements are to be presented (if indeed they are to be presented at all) and in relation to their content..

As a result of this new regime, parties may feel that arbitration is a better option for disputes that are fact-heavy, such as those relating to large scale infrastructure projects. In large infrastructure disputes, parties often use witness evidence to provide narrative for the detailed and complex factual background relevant to the dispute to assist the tribunal to navigate voluminous documentary evidence. Using witness statements in this way is now much more difficult under the new court rules, placing more pressure on pleadings and skeleton arguments.

Documentary evidence

The process of disclosing documents and adducing evidence at a final hearing can often be overwhelming whether it be in arbitration or court litigation. For disputes in the English courts, this is often exacerbated by the approach to disclosure under English law, which has traditionally required parties to disclose: i) those documents they rely upon; ii) those that are adverse to their case or another party's case; and iii) those that support another party's case. This can lead to parties including a large volume of unnecessary material at trial. In the case of *Energy Works (Hull) Limited v MW High Tech Projects UK Limited* [2022] EWHC 3275 (TCC), which concerned an energy from waste plant in the North East of England, 142,037 pages of disclosed evidence were included in the electronic bundle (said to be equivalent to 474 lever arch files), and the parties provided witness statements from 28 witnesses, running to over 10,000 pages.

Energy Works serves as a good example of why litigation proceedings in the English courts may not always be the most efficient and cost effective option for parties when compared to arbitration. Whilst new rules governing witness statements may limit the volume of witness evidence, this will not address the pressure on hearing bundles driven by broad litigation-style disclosure. Prescriptive requirements for disclosure in litigation proceedings can result in potentially very large numbers of documents being disclosed, increasing the costs of the disclosure phase for both parties and the likelihood of voluminous hearing bundles at the merits stage.

In contrast, disclosure rules commonly selected by parties in arbitration, such as the Chartered Institute of Arbitration rules (CIArb Rules), the IBA Rules, and the Rules on the Efficient Conduct of Proceedings in International Arbitration, all propose more limited levels of disclosure obligations upon parties. Those obligations are generally confined to documents upon which a party relies and documents that are reasonably requested by another party, which, under the IBA Rules for example, are confined to documents that the requesting party can show are both relevant to the case and material to its outcome. The ability to limit disclosure will appeal to parties seeking to control the amount of time and cost spent on resolving large scale disputes concerning infrastructure projects. This may be particularly the case when those dispute relate to parties who are more familiar with civil law concepts of disclosure, where the scope of such disclosure is limited or non-existent.

Presentation of a claim

Separately to the points about evidence, arbitration can also offer parties greater flexibility regarding the way in which their claims are presented when compared to the approach adopted by the English courts. This can be especially advantageous for disputes concerning complex infrastructure projects, where the use of presentations and visual aids may help Tribunals to better understand the subject matter and the issues involved.

The use of tools such as visual and electronic aids, or presentational software, is becoming increasingly common in international arbitration and, according to the 2021 International Arbitration Study by the Queen Mary University of London, only 12 percent of participants 'never' or 'rarely' used some form of hearing room technology (such as multimedia presentations). Similarly, the February 2022 report by the ICC Commission on 'Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings' records that over two thirds of participants had either always, often or sometimes experienced trial graphics or multi-media presentations during an evidentiary hearing. By utilising such technology, parties will be better placed to explain detailed and complex issues or concepts relevant to the dispute. For international disputes, presentations and visual aids may also help to transcend language barriers and enable parties to present their position in a way that can be understood by all.

While parties should keep in mind that presentations and visual aids should only utilise the evidence already filed in the dispute, the flexibility that arbitration offers in using such tools means that parties may be more inclined to choose arbitration for resolving a dispute on an infrastructure project.

The use of tools such as visual and electronic aids, or presentational software, is becoming increasingly common in international arbitration."

Conclusion

National courts choose adopt rules that they consider best suit civil procedure in that jurisdiction, whereas arbitration provides for flexibility. While there may be good reasons for the recent changes in English civil procedure, those changes may not benefit the parties in large-scale infrastructure disputes and this may be another factor to lead such parties to choose arbitration instead.

National courts choose adopt rules that they consider best suit civil procedure in that jurisdiction, whereas arbitration provides for flexibility."

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A modernization of Italian arbitration law

By Cecilia Buresti and Edoardo Mazzoli

In recent years, arbitration has gained prominence in Italy. While particularly popular in international commercial transactions, domestic parties are also increasingly opting for arbitration over the Italian state courts as they consider that – in some specialized matters – arbitration is more effective than litigation. The increased predictability provided by the procedural rules of the main arbitration institutions is additionally playing an important role in the development of the practice. Notwithstanding this, the use of arbitration is still limited compared with court litigation in Italy.

In October last year, the Republic of Italy carried out a reform of several areas of the Code of Civil Procedure (the Code) via Legislative Decree no. 149, Riforma Cartabia (the Reform). Among other changes effected by the Reform is an attempt to modernize arbitration by improving the reliability of arbitral procedure under Italian law. The hope is that this will make arbitration more attractive to both domestic and foreign operators and will improve Italy's reputation as an arbitration-friendly hub.

The changes under the Reform

The main changes effected by the Reform are:

1. long-awaited grant of arbitrators' power to issue interim relief;
2. strengthening of arbitrators' disclosure obligations in an attempt to foster impartiality; and
3. enhancement of the interaction between arbitration and Italian court litigation.

The use of arbitration is still limited compared with court litigation in Italy."

Grant of arbitrators' power to issue interim relief

The new Section 818 of the Code, as amended by the Reform, grants arbitrators the power to order interim relief. This is a welcome change for parties arbitrating in Italy, as prior to this development no section of the Code expressly granted arbitrators this power.

Although the main arbitration institutions in Italy (for example, CAM - Chamber of Arbitration of Milan) used to grant arbitrators the authority to order provisional measures in their rules, absent a provision in the Code, these measures could not be enforced by Italian courts in the event that the other party refused to comply with the arbitrator's interim order.

The Reform is an attempt to modernize arbitration by improving the reliability of arbitral procedure under Italian law."

However, while these reforms go some way to bringing Italy in line with other arbitration-friendly jurisdictions, arbitrators' power in respect to granting interim relief remains subject to some restraints:

i. the parties' express consent is required, and must be either recorded in the arbitration agreement or separate document, prior to the commencement of arbitration;
ii. orders for interim reliefs are appealable in Court of Appeal; and
iii. if the party subject to the arbitrator's order does not comply, the other party has no alternative but to seek enforcement before the court; in fact, under Italian law, arbitrators are not entitled to exercise coercive powers, as these traditionally stay in the exclusive dominion of the courts.

Notwithstanding these restraints, supporters of the Reform predict that Italy is likely to become more "arbitration-friendly" as parties will be able to seek both final and interim relief from the same arbitration tribunal, safe in the knowledge that this can be enforced in the Italian courts.

> **Supporters of the Reform predict that Italy is likely to become more "arbitration-friendly" as parties will be able to seek both final and interim relief from the same arbitration tribunal."**

Strengthening of arbitrators' disclosure obligations in the attempt to foster impartiality

Changes have been introduced in the Reform regarding the appointment of arbitrators. First, a new 'catch-all' provision allowing the parties to challenge an arbitrator's appointment both on the grounds of pre-determined circumstances set by the law – as was previously the case under the Code - but also for 'serious reasons of convenience' has been implemented by the Reform. The scope of this provision has not been tested by the courts yet, however, we expect that it may be construed in accordance with Article 51 of the Code, which uses the same wording in respect of grounds for judges' abstention.

Secondly, at the time of appointment and acceptance, arbitrators must promptly file a statement to disclose all facts potentially relevant to their impartiality or independence. Any omission of a relevant fact in this statement will make the acceptance void, and may result in an arbitrator's removal – a stricter sanction that was not previously imposed under the Code.

Prior to this change, CAM already imposed sanctions on arbitrators for failure to disclose relevant facts pertaining to their impartiality in their regulations. However, these rules were only applicable to proceedings conducted under the institutional rules and not to *ad hoc* arbitrations governed by the Code.

These changes are likely to have both positive and negative effects. On one hand, there are now better safeguards in place in respect of arbitrators' impartiality; on the other hand, the newly adopted 'catch-all' provision may create an increase in the number of illegitimate challenges to arbitrators, potentially slowing the procedural process. The effectiveness of these developments remains to be seen as they are used in practice.

Enhancement of the interaction between arbitration and court litigation

Finally, the Reform has expressly codified the following principles that had previously been established by case-law.

First, service of a request for arbitration will now have the same effect for limitation purposes as the commencement of litigation proceedings. Previously, no section of the Code expressly provided for this.

Second, the Reform enhances the interaction between arbitration and court litigation. Under the new Section 819 *quater* of the Code, as amended by the Reform, the parties may now 'save and transfer' the effects of a claim submitted in court or compelled in arbitration when jurisdiction is denied, meaning they can effectively resume the existing proceedings before the alternative competent authority. In summary, the Reform's goal is to establish a more efficient mechanism for reinstating proceedings in the correct forum, whether they were erroneously initiated before either state courts or arbitral tribunals.

Third, in contexts in which the appointment of arbitrators is delegated to courts, tribunals or other bodies, the Reform mandates that the appointing authorities adhere to transparent, efficient and rotational criteria when appointing arbitrators. This may include the collection and publication of a list of available arbitrators to be potentially selected.

Conclusion

With the advent of the Reform, it is hoped that Italian procedural law will be perceived as more 'arbitration-friendly,' generating increased clarity, predictability and efficiency of the arbitral process and harmonizing the interaction between arbitration and the Italian courts.

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