



Arbitration of Energy Disputes: Practitioners' Views from London and Paris

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Hammonds

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Suitability of international arbitration for resolving energy disputes

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General Introduction

Recent Statistics from the ICC and the LCIA

Significant growth of international arbitration, including cases relating to energy disputes

Advantages of institutional arbitration

Major arbitral institutions such as the ICC and the LCIA staffed by experienced arbitration practitioners who are used to handling energy disputes

Institution can quickly rule on a number of issues such as the location of the seat

General Introduction

Ad hoc arbitration - sometimes governed by the UNCITRAL Rules but frequently governed by the law of the seat only, e.g. the English Arbitration Act

BITs - ICSID Arbitration. More than 120 cases pending, many relating to electricity, oil or gas projects

Energy Charter Treaty. Investor may bring an arbitration under the ICSID Rules, UNCITRAL Rules or Stockholm Chamber of Commerce Rules

General Introduction

Paris and London as places of arbitration

France and England are “arbitration friendly” countries

Modern / flexible arbitration laws

English and French Courts supportive of arbitral proceedings – no interference unless absolutely necessary

ICC and LCIA have their headquarters in Paris and London respectively

Suitability of International Arbitration to resolve Energy Disputes

The need for a neutral process

Ease of enforcement of arbitral awards

Confidentiality of arbitration

Speed at which energy disputes can be resolved by arbitration

Cost of arbitration

The Need for a Neutral Process

Energy disputes often involve parties based in different jurisdictions

Fear that domestic Courts are biased towards their own nationals. Parties can refer their dispute to a 'neutral' Court where none of the parties are based, e.g. Switzerland.

However, enforcement can be an issue. No global Treaties / Conventions relating to the recognition and enforcement of Court decisions (Hague Convention on the Choice of Court Agreements not yet in force – although recently signed by the US)

The Need for a Neutral Process

Arbitration is a neutral process

Arbitrators must be independent from the parties involved

Usually sole arbitrator or Chairman cannot be of same nationality as any party

Award can be challenged on the ground of lack of independence and impartiality of the arbitral tribunal

Ease of Enforcement of Arbitral Awards

New York Convention - Ratified by over 140 countries

Countries having ratified the New York Convention will normally recognise and enforce awards rendered in other countries that have adhered to it, subject to limited exceptions

Recognition and enforcement of awards that have been set aside at the seat. French position: *Norsolor / Putrabali* cases

Confidentiality of Arbitration

Parties prefer to resolve their disputes out of the public eye

If parties wish to ensure that the information exchanged during the proceedings remain confidential they should enter confidentiality undertakings

No provision relating to confidentiality in UK Arbitration Act but implied duty of confidentiality

Michael Wilson v Emmott: “the overwhelming majority of arbitrations in England are conducted in private and with complete confidentiality.” (Court of Appeal, 12 March 2008)

Confidentiality of Arbitration

No provision relating to confidentiality in French New Code of Civil Procedure either but implied duty of confidentiality as well

Where a party challenges an award, details of the arbitration may be revealed to the public

Aïta v Ojeh - Party ordered to pay damages to the other for bringing groundless proceedings to challenge an award (Paris Court of Appeal, 18 February 1986)

Speed at which Energy Disputes can be resolved by Arbitration

Court proceedings can last for up to ten years in certain countries such as France (mainly because of the automatic right to appeal)

Generally no or limited right to appeal an award in international arbitration

ICC arbitrations – in theory award needs to be rendered within 6 months of the date of signature of the terms of reference. In practice this deadline is almost always automatically extended

SNF v CCI (Paris Court of Appeal). Claim for damages against the arbitral institution for being allegedly responsible for the excessive duration of the procedure - claim dismissed

Speed at which Energy Disputes can be resolved by Arbitration – How the Appointment of Expert(s) can lengthen the Duration of the Proceedings

Energy disputes often involve complex issues

Parties expect to appoint their “own” expert(s)

Duration of the procedure may increase as a result

IBA Rules on the Taking of Evidence: focus on experts appointed by tribunal

Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration

Experts must remain independent from the parties

Cost of Arbitration

Parties concerned about costs especially in current economic situation

Is arbitration cheaper than Court proceedings?

Depends on duration of the procedure, complexity of the case, who the parties have appointed as arbitrator(s), whether the award has been challenged etc.

Arbitration costs: ICC (based on value of the dispute) v LCIA Rules (based on time spent)

Ad hoc arbitrations

Choice of Forum – Paris or London?

Significance of the choice of the seat

Determines the following:

law that will govern the conduct of the proceedings

likelihood of involvement by national Courts

law applicable and the forum to challenge the award

Not necessarily where hearings will take place

Choice of Forum – Paris or London?

London as a seat: English Courts will support the arbitration proceedings

However, *West Tankers* case – ECJ – English Courts can no longer make anti-suit injunctions directed at proceedings conducted before the Courts of another EU Member State

Fiona Trust case (House of Lords) which confirmed the principle of separability. An arbitration agreement has to be treated as a distinct agreement and can be void only on grounds which relate directly to it

Choice of Forum – Paris or London?

Paris as a seat: French Courts will also support the arbitration proceedings

French Court's review of an award will be minimal

The aim of an action to set aside an award should not be to review its merits (Paris Court of Appeal – 12 March 1985)

Challenge of an award on the ground that it infringes international public policy as interpreted under French law. Court may not review the arbitrators' analysis of the rights of the parties (*SA compagnie commerciale André v SA Tradigrain France*)

Choice of Panel – the Selection of ‘Skilled’ Arbitrators

International energy disputes tend to be complex

Arbitration allows the parties to choose arbitrators with a particular expertise in the subject matter in dispute. Parties may select an arbitrator who is not a lawyer, e.g. an engineer

Arbitrators can be familiar with complex conflicts of laws and comparative law issues

Choice often guided by law applicable to the contract and language of the procedure

Numbers: one or three? The parties should deal with this issue in the arbitration clause if possible

The Parties' Control of the Procedure

Flexibility of the procedure

Availability of interim measures

Taking of evidence

Flexibility of the procedure

General rule is that the parties can agree on the procedure and if they are unable to do so, the arbitrator(s) will decide. Parties may incorporate arbitration rules such as ICC or LCIA Rules

These rules allow the parties to decide on important issues such as the language of the procedure or the location of the hearings

Article 1494 of French New Code of Civil Procedure allows the tribunal a very wide discretion as to procedural issues: *“an arbitration agreement may, directly or by reference to arbitration rules, determine the arbitral procedure or subject to any procedural law”* and *“if the arbitration agreement is silent the arbitrator shall determine the procedure inasmuch as necessary, either directly or by reference to a law or to arbitration rules.”*

Flexibility of the procedure

The UK Arbitration Act allows the tribunal the same flexibility

Section 34 of the UK Arbitration Act provides that “*it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.*”

This includes the location of the hearing(s), the language(s) to be used and whether any form of written statements of claim and defence are to be used

Availability of Interim Measures

Most arbitration rules provide that the arbitral tribunal may order interim measures

Section 38 of the UK Arbitration Act: parties are free to agree on the powers exercisable by the tribunal, including giving directions for the preservation of evidence

English Court can grant interim measures before or after the tribunal has been constituted, whether or not the seat is in England & Wales

Mobil Cerro v Petroleos de Venezuela - \$12 billion worldwide freezing order granted without notice and before the tribunal was constituted. The Court of Appeal set aside the order. Seat was in New York and no assets in the UK. In the absence of fraud and / or substantial assets in UK, English Courts will be very reluctant to grant a worldwide freezing order

Availability of Interim Measures

French Courts may also order interim measures in case of urgency

No specific provisions in French New Code of Civil Procedure, however, it is generally accepted that unless the parties have agreed otherwise, the tribunal may order interim measures

Taking of Evidence

Usually no discovery or disclosure in international arbitration

Section 34 of the UK Arbitration Act - the tribunal decides all procedural and evidential matters, subject to the right of the parties to agree any matter

This includes “*whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage*” and “*whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done.*”

Taking of Evidence

French New Code of Civil Procedure does not contain any provisions relating to the disclosure of documents

In practice, parties produce documents on which they rely

IBA Rules on the Taking of Evidence in International Commercial Arbitration

Compromise between the civil and common law approach. Each party should produce copies of the documents on which it relies and each party may make specific requests for documents

Challenge of Awards in France and England & Wales

If the seat is in England & Wales the English Arbitration Act will apply

Awards may be challenged on the basis of lack of substantive jurisdiction and procedural irregularity

Appeal on a point of law only. Parties may exclude this right. They are deemed to have done so when they incorporate rules such as the LCIA or the ICC Rules

Successful challenges are rare

Enforcement of award stayed pending the final disposal of the application to challenge the award

Challenge of Awards in France and England & Wales

Under French law, no appeal on the merits of an award rendered in an international arbitration

Award may be set aside only if

- it was made in the absence of an arbitration agreement, or on the basis of a void or expired arbitration agreement;

- there was an irregularity in the constitution of the arbitral tribunal or in the appointment of the sole arbitrator;

- the arbitral tribunal or sole arbitrator did not comply with the terms of its reference;

- the principle of due process has not been respected; or
- the arbitral tribunal infringed a rule of international public policy

Successful applications to set aside awards are rare

Enforcement of award stayed pending the final disposal of the application to challenge the award

Conclusion

No worldwide convention on the reciprocal recognition and enforcement of Court decisions

Arbitration particularly suitable for resolving energy disputes but issues with arbitration process such as, general lack of summary judgment procedure or difficulty in consolidating proceedings or joining parties who have not signed up to the arbitration agreement. Group of companies doctrine sometimes allows a way around some of these issues but not recognised in England & Wales (*Peterson Farms* case)

UNCITRAL Arbitration arising from a petroleum project. All members of the arbitral tribunal from a Common law background. Refused to draw one party into the arbitration on the ground that it was not party to the arbitration agreement. A panel from a civil law background might have reached a different conclusion

Arbitration of energy disputes will continue to grow and Paris and London will remain popular seats

QUESTIONS

