Complex Contract Negotiations in the Energy Sector

Energy Charter Workshop

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Dispute Resolution Clause

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Overview

I. Dispute resolution: the options

II. Drafting issues and policy considerations
I. Dispute resolution: the options

- A. Expertise
- B. National courts
- C. Mediation / conciliation
- D. Arbitration
- E. Enforcement issues
I.A Expertise

- Third party who is appointed to make a decision based on its own expertise and investigations.

- Usually the point at issue is open to interpretation or requires expert knowledge.

- Expert decisions are final and binding (provided that is what the parties have agreed);

- BUT are not directly enforceable by the courts. If one party refuses to comply with the determination of the expert, the only avenue available to the party seeking to enforce the determination is to commence proceedings for breach of contract.
I.B National courts

- The applicable law and the court having jurisdiction often do not belong to the same country.
  - A court can apply the law of another country.
  - The rules to determine the applicable law are not the same as the rules to determine jurisdiction.

- Choice of jurisdiction
  - To ensure a fair trial (as much as possible);
  - To avoid being sued before national courts before which a party does not want to go;
  - To direct the law which will be applied;
  - To ensure enforcement against the other side.

- Limits of the choice:
  - Exclusive jurisdiction of some national courts due to the subject matter of the dispute (real estate, patents, etc.) or to protect the interest of a party (consumer, insured, etc.);
  - Parallel jurisdiction of other courts for provisional and conservatory measures.
I.C Mediation / conciliation

Mediation

- The parties select an appropriate third party who may often be an expert rather than a lawyer.
- Mediator may meet privately and hold confidential and separate discussions with the parties.
- Mediator performs a similar role to a conciliator but more interventionist: will usually draw up terms which he considers to be fair having listened to each side’s views.
- Mediator may also point out to the parties what he sees as being a probable outcome should mediation fail and the dispute proceed to litigation or arbitration.
- But the mediator is not empowered to decide any disputes.
- Mediation may be voluntary, by agreement between the parties.
- Some jurisdictions have rules requiring mediation of disputes at some point in the litigation process (may be compulsory).
Conciliation

- Third party is chosen as a “neutral” or conciliator, whose role is to help the parties to reach an amicable agreement.
- May see each party separately, listening to their views.
- Makes sure that each side understands the other’s viewpoint.
- The Chinese word for conciliator is said to be a “go-between” who “wears out 1,000 sandals.”
- Conciliator will “host” and supervise settlement negotiations, but is unlikely to suggest terms of settlement himself.
- Unlikely to be any detailed investigation into the arguments of the parties. Instead they are encouraged and helped to come to their own decisions by the neutral third party.
I.D Arbitration

What is International Arbitration?

- A method of private, binding dispute resolution which may be chosen by parties as an alternative to litigation before national courts.
- Dispute settled by arbitrator(s) to whom the parties agree to refer their claims.
- Based upon agreement of the parties.
- Situated within and supported by national laws and international convention.
I.D Arbitration (cont.)

Steps in an international arbitration

- 1. Constitution of Tribunal
- 2. Written Submissions
- 3. Arbitral Hearing
  - Oral submissions?
  - Witness testimony?
- 4. Arbitral Award
I.D Arbitration (cont.)

- Why choose arbitration? – the real reasons
  - Neutrality of the forum
  - Confidentiality of the process
  - Enforceability of award (international)
  - Finality

- Why choose arbitration? – the “debatable” reasons
  - Cost
  - Speed
  - Less discovery
  - Expertise and commitment of the tribunal
  - Procedural flexibility
I.D Arbitration (cont.)

- Disadvantages
  - Limits on the Tribunal’s powers (Interim Relief) but note recourse to local courts
  - Multiparty arbitration / Joinder
  - Uncertainty
I.E Enforcement issues

- Enforcement of foreign judgments
  - In Europe: Brussels Convention
  - In Asia: reciprocal treaties (few and/or far between)

- Enforcement of arbitral awards
  - New York Convention (1958)
  - ICSID
I.E Enforcement issues (cont.)

New York Convention (1958)

- Large-scale international recognition of arbitral awards because of the New York Convention.
- Well over 100 states party to Convention (all major trading nations).
- Applies when:
  - Award made in one Convention state; and
  - Enforced in another Convention state
  - Note reservations to accession

- Winning party applies to a national court for recognition and permission to enforce the award as if it were a court judgement.
  - Enables sanctions (e.g., seizure of assets and freezing of bank accounts)
- Very limited grounds upon which recognition/enforcement can be refused.
I.E Enforcement issues (cont.)

ICSID

- Advantage: Courts of the country in which an award is presented for enforcement do not have to review the decision in the same way required under the New York Convention.
- ICSID awards are treated like a domestic judgment of the enforcing State.
- Enforcement of an ICSID award cannot be challenged in the courts of the enforcement country, save on grounds of sovereign immunity.
- U.S. courts and the courts of other countries have held that State parties to the ICSID Convention waive entirely any domestic law requirements otherwise applicable to registration and confirmation of arbitral awards.
II. Dispute resolution clause

A. Drafting issues

B. Policy considerations
   i. Rights of States in ISDS
   ii. Transparency
   iii. Appointing authority
II.A Drafting issues

Don’t reinvent the wheel!

- Should be in writing
- Define the scope of the dispute to be arbitrated
- Include the recommended elements
- Model clauses (ECT, UNCITRAL, ICC…) advisable
- For complex transactions, important to consult legal counsel for advice on specific provisions
II.A Drafting issues (cont.)

- Other issues
  - Pre-arbitration negotiation ("cooling off")
  - Qualification of arbitrators (experts)
  - Discovery and document production
  - Pre-agreed time periods ("fast-track")
  - Forbidding / Allowing punitive damages
  - Fee Shifting / Payment of costs
  - Multi-party arbitration
  - Consolidation of disputes under different agreements
II.B.i Policy considerations - rights of States in ISDS

i. Rights of States in investor-State dispute settlement

- Criticism:
  - ISDS as a pro-investor system of corporate rights
  - Interpretation of treaties favouring investors
  - Mechanism to oppose government policies
  - Regulatory chill
  - Position of developing States
II.B.i Policy considerations - rights of States in ISDS (cont.)

- ISDS was created by sovereign States (not by international corporations) to encourage foreign direct investments.

- Majority of ISDS cases were decided in favour of the States
  - UNCTAD statistics on ISDS outcomes (end of 2014)
    - 37% cases decided in favour of the State
    - 25% cases decided in favour of the investor
    - 28% cases settled
    - 8% of cases discontinued for other reasons
  - ICSID Caseload Statistics (Issue 2015-2)
    - 46% awards upholding claims by investors in part or in full
    - 36% awards dismissing all claims
    - 18% awards dismissing jurisdiction
II.B.i Policy considerations - rights of States in ISDS (cont.)

- Investment claims brought by States against foreign investors:
  - Gabon v. Société Serete S.A. (ICSID Case No. ARB/76/1)
  - Tanzania Electric Supply Co. Ltd v. Independent Power Tanzania Ltd (ICSID Case No. ARB/98/8)
  - Government of the (Indonesian) Province of East Kalimantan v. PT Kaltim Prima Coal (ICSID Case No. ARB/07/3)
II.B.i Policy considerations - rights of States in ISDS (cont.)

- Counterclaims by States in ECT jurisprudence:
  - *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2
  - *Europe Cement Investment & Trade S.A v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2
II.B.i Policy considerations - rights of States in ISDS (cont.)

- Reasons why claims by States against foreign investors do not occur more frequently:
  - Substantive
    - Investment treaties grant investors rights, but rarely impose obligations that States could enforce;
    - Most States have other, more attractive enforcement options (regulatory powers, judicial system).
  - Procedural
    - Many treaties offer the possibility of initiating investor-State arbitration only to investors;
    - Investor consent is more difficult to establish.
II.B.i Policy considerations - rights of States in ISDS (cont.)

- Possible solutions:

  - Substantive
    - Investment treaties to impose obligations on investors that States could enforce (e.g. symmetrically drafted umbrella clause).

  - Procedural
    - Investment treaties drafted or amended to give States the right to initiate investor-State arbitration;
    - Investor consent given preferably at the time of the making of the investment
      - Investment agreement (Article 43(1) of ECT Model HGAs);
      - Investment laws (e.g. by the simple fact of making an investment).
II.B.ii Policy considerations - transparency

ii. Transparency in ISDS

- Criticism:
  - Investment tribunals deciding matters of public importance behind closed doors;

- Traditionally - No general duty of confidentiality in investment arbitration (subject to express stipulations of confidentiality in some arbitral institutional rules);

- BUT a general presumption of respecting the confidentiality and privacy;

- Move towards greater transparency - “a marked tendency towards transparency in investment arbitration” (Biwater Gauff v. Tanzania)
II.B.ii Policy considerations – transparency (cont.)

- UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (11 July 2013, entered into effect 1 April 2014)
  - Increased transparency in investor-State proceedings under UNCITRAL Arbitration Rules;
  - Free public release of all key documents; open hearings; participation of non-disputing third parties in certain circumstances;
  - Automatic application to UNCITRAL arbitrations filed under investment treaties concluded after 1 April 2014 (or prior to that date if parties so agree).
II.B.ii Policy considerations – transparency (cont.)

  
  - Provides mechanism for agreement to the application of the Transparency Rules;
  - Once in force, the Convention will constitute consent by its contracting parties for the Transparency Rules to be applied to proceedings (UNCITRAL or other) brought under pre-April 2014 investment treaties to which they are a party.
II.B.iii Policy considerations – appointing authority

iii. Appointing Authority

- Article 26(4) ECT affords investors a wide choice of submitting the dispute to ICSID, ICSID Additional Facility, *ad hoc* under UNCITRAL Rules; or SCC.
- Investor’s choice of arbitral institution and rules has an impact on the procedure for appointment of arbitrators in the ensuing arbitration.
- Article 43(2) of Model HGAs currently refers the parties to Secretary-General of the PCA for any outstanding arbitrator appointments.
- Is there a better way?
  - ECT Secretary-General as an appointing authority?
  - ICSID appointments made by the president of the World Bank (no requirements as to background in law);
  - Difference between appointing authority and actually acting as an arbitrator.