

Oil and Gas Arbitration Involving States and State Entities: #YoungITATalks in London

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The first of the Young ITA Talks in London, organized by Young ITA, kicked off on 1 May 2018 at White & Case's London offices. The theme for the evening was 'Oil and Gas Arbitration Involving State and State Entities', and the event featured two panel discussions, with leading practitioners offering their insights on traps and pitfalls of procedure and substantive issues in the area.

The first panel, chaired by Tomas Vail and composed of Margaret Clare Ryan (Shearman & Sterling LLP), Olivia Valner (Freshfields Bruckhaus Deringer) and Scott Vesel (Three Crowns) focused on procedural issues: parallel proceedings, the service of documents on a state and the search for efficiency by bifurcating proceedings.

Ryan opened the session by explaining that parallel proceedings are common phenomena in investment treaty disputes as investment treaties typically allow claims to be brought by foreign investors even if they have no direct loss. The direct loss is usually suffered by a local company, but investment treaties often allow shareholders to bring claims, even where those shareholders have invested through intermediary companies. This can lead to the same issue giving rise to multiple arbitrations, brought by the local company, the holding company and any number of shareholders. Drawing from her experience acting as counsel, Ryan explored how investment treaties and practice can mitigate and minimize the risk that multiple claims will lead to spiraling costs, double (or even multiple) recovery and conflicting decisions. Thankfully it appears tribunals are becoming more alive to these risks and increasingly taking steps to address them, for instance requesting undertakings from the claimants that they are not seeking multiple recovery.

Olivia Valner followed-up by highlighting a procedural pitfall when using court proceedings in support of an arbitration against a state. It is common for the parties in an arbitration to require the support of the courts at some stage during an arbitration, particularly when there is a state or government entity involved, as is often the case in oil and gas disputes. Applications presented to the English Courts are wide ranging, and may be seeking a stay of proceedings, removal of an arbitrator, injunctive relief, to challenge on a point of law, or enforcement of the arbitral award. However valid service on a state can be expensive and time consuming. In the U.K. unless the state has specifically agreed to waive its

service rights, a party must comply with requirements of statute and the Civil Procedure Rules. This includes translating all documents in the state's official language, regardless of the language of the arbitration. Complying with that procedure will often prove tedious, is difficult to comply with at the last minute, and has clear cost implications, all factors to be taken into account when approaching the courts.

Scott Vesel closed the first panel by inviting the audience to re-evaluate conventional approaches to bifurcation and deciding cases in stages. Traditionally arbitration proceedings are split into three phases, dealing with jurisdiction, liability and quantum separately. This is to allow the respondent to "get to no faster", as defeating a claim at any one of these phases should prove fatal to the claimant's case. This has led to issues only being decided separately if they have the potential to resolve the entire arbitration. While the conventional approach has a natural appeal (for example where a tribunal lacks jurisdiction it follows that it should not decide liability and quantum) Vesel argued there could be value in using bifurcation to look at other issues, ones that have the potential to narrow down the issues between the parties at later stages of the arbitration. This would fulfil the objective of getting to an award at a lower cost, rather than simply trying to resolve matters quickly. Absent special circumstances, cost should be the primary consideration. Vesel had brainstormed an approach where issues would be broken down into pure legal issues, mixed law and fact questions, and 'gateway' factual issues (which could be decided to avoid parties having to present submissions at a later stage based on several 'alternative' scenarios). Reframing bifurcation in this way would allow arbitrations to be decided in multiple, shorter, hearings on issues rather than one hearing with lengthy briefs, and should result in lower overall costs.

The second panel, moderated by Margaret Clare Ryan, covered substantive issues: how to hold a state responsible for actions of state entities, gas price arbitrations and the potential for tax measures to breach investment treaty provisions.

Sylvia Tordova began by looking at the legal framework for state attribution, a recurring issue in the oil and gas arbitrations. Arbitral case law provides numerous examples of claimants seeking to hold the host state responsible for the actions of state entities, whether that be the State Committee for oil and gas, the Ministry of Energy or a national oil company with oversight over the national oil transportation network. Tordova explored some of the gateways through which an investor can establish attribution under the International Law Commission's draft Articles on State Responsibility, as well as a selection of specific issues, such as the role of domestic law in establishing attribution and the significance of state attribution in umbrella clause disputes.

Next, Saadia Bhatti discussed gas price arbitrations, which arise out of the performance of long-term agreements for the supply of gas (GSAs). The seller will typically be a state entity and as GSAs tend to have a lengthy term, rather than agreeing a fixed price parties tend to negotiate a price formula, which values the gas by reference to one or more indices (historically this would be based on the indices for the price of oil or oil products). Most GSAs will also contain a price review clause allowing the parties to periodically request a review of the price formula. Due to the sums at stake, where negotiations fail it is not rare to see the dispute be taken to an arbitral tribunal for determination. Bhatti explored some of the key features of gas price arbitrations, highlighting the important

commercial considerations underlying the disputes, the arbitrators' and experts' key roles, recurrent issues in the interpretation of price revisions clauses and the impact of time on a price revision.

Vail closed the evening with a talk on tax disputes in the oil and gas sector. While the sovereign right to tax is in theory unlimited (and tends to be preserved in investment treaties), in practice this right may be limited by contracts and treaties often in the form of a stabilization clause. Different types of stabilization clauses are found in treaty practice, although they all tend to constitute explicit commitments by the host state or state entity to stabilize the tax legal regime for the investor. Other potential limitations of the right to tax can be found under general (customary) international law, as states may not enact tax measures which are either discriminatory or confiscatory towards the investor. Vail looked at the extent to which tax measures could potentially breach investment treaty standards, in particular the protections against expropriation and fair and equitable treatment standard, and in light of the investor's legitimate expectations.

The event was co-sponsored by White & Case and The Center for American and International Law. Further information on Young ITA can be found [here](#).

Young ITA is pleased to launch the annual **Young ITA Writing Competition and Award “New Voices in International Arbitration”**, as a unique opportunity for young professionals to contribute actively to the research of international arbitration. The Competition is open to practitioners and students who are [members of Young ITA](#). The papers must be submitted via email to ita@cailaw.org under subject line “Young ITA Competition” by on or before January 2, 2019. For more information, please visit the webpage of [Young ITA](#) where you can find more [information](#). Alternatively, please feel free to send an email to the Young ITA Thought Leadership Chair, Dr Crina Baltag, at crinabaltag@gmail.com. The Competition is organized with the *support of Wolters Kluwer*.
