A Changing Landscape for International Energy Arbitration: A Report from the 6th Annual ITA-ICC-IEL Joint Conference

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The 6th Annual Joint Conference on International Energy Arbitration, co-hosted by the Institute for Transnational Arbitration (ITA), the Institute for Energy Law (IEL), and the International Court of Arbitration of the International Chamber of Commerce (ICC), took place on January 24-25, 2019, in Houston, Texas. Under the guidance of conference co-chairs Andrew T. Clarke (ExxonMobil International Ltd., England), Samaa A. Haridi (Hogan Lovells US LLP, New York), and Allan B. Moore (Covington and Burling LLP, Washington), the conference took the challenges to international energy arbitration head on, and examined the forces that shape the practice of energy arbitration today. A diverse group of panelists surveyed a host of topics in the field, including the future of investor-state dispute settlement, climate change disputes, the role of technology in international arbitration, and what trends we can expect in coming years.

Political Risk and Geopolitics: Lessons from Arbitrations against Russia

The conference began with a running start by spotlighting Russia, an important player in the energy-related arbitration space and one with some high-profile cases to its name. Floriane Lavaud (Debevoise & Plimpton, New York) moderated a panel of three practitioners: Laura Hardin (Alvarez & Marsal, Houston), Tomas Vail (White & Case, London), and Thomas Voisin (Quinn Emmanuel Urquhart & Sullivan LLP, Paris). They were asked to share their insights about some recent events related to Russia, including the challenges of investing under Soviet-era BITs, the Yukos award, and the possible effects of the annexation of Crimea on international arbitration.

Although investing in Russia carries its share of risk, it is not hopeless. The panel offered some helpful practice points to help minimize the uncertainty. First, understand the BIT you're dealing with. Tomas Vail discussed a current trend within the Russian judiciary to set aside awards on the basis that the tribunal did not have jurisdiction. This trend is closely tied to the particular wording of many Soviet-era BITs, which limit the jurisdiction of arbitral tribunals to the question of the amount of compensation due for an expropriation, but not whether an expropriation actually occurred. This wrinkle, in his words, shows up over and over again, and he cautioned investors and those representing them to carefully consider the text of these Soviet-era BITs when investing or initiating arbitration against Russia. Second, make sure you have a well-supported quantum calculation. Laura

Hardin focused on the damages award from the Yukos arbitration, and drew attention to the tribunal's calculation of damages. She advised that if a party wants to have an influence on the final number, they are better served by introducing their own number than by staying silent on quantum.

At the end, the panel's discussion turned from the past to the future of arbitration against Russia, with Thomas Voisin presenting his view on the sovereignty issues attendant to the annexation of Crimea. Noting that all 7 tribunals confronting the question have found that Crimea is Russian territory on the basis of effective sovereignty, Thomas suggested that we may see the principle of "effective control and jurisdiction" applied to other arbitrations involving boundary issues. For those with an ear to boundary or territorial disputes, this trend may be one to follow.

Responsibility and Opportunity: Technology Issues in International Arbitration

As technology in the legal space progresses, arbitration institutional rules attempt to keep pace. For practitioners, keeping up with the latest recommended protocols can be a challenge, which is why the conference included a panel on evidentiary issues and technology in international disputes. The panel examined the role of technology through the lens of three distinct roles: an arbitrator, Stephanie Cohen (Independent Arbitrator, New York), an international disputes lawyer, Thomas Stouten (Houthoff, Amsterdam), and an in-house attorney, Elizabeth McKee Devaney (Occidental Petroleum Corp., Houston). Moderator Krystal Pfluger Scott (Jones Walker LLP, Houston) led the panel to evaluate the impact of technology on international energy arbitration and to offer best practices related to its use.

Since we are in an international field, the panelists were quick to point out that the perception and use of technology may differ depending on the background of the attorneys and parties involved. For instance, as Thomas Stouten discussed, in Europe, e-discovery does not exist in the same way as it does in the US, and the parties need to be clear about the format and content of document production as early as the Terms of Reference. Europe has also seen new changes relating to data privacy in the EU's General Data Protection Regulation, and he made clear that although there is ambiguity as to its effect on arbitration at the moment, at a minimum, practitioners should ensure that they have a "legitimate interest" in collecting the relevant private data. Notwithstanding the complications of discovery, Stephanie Cohen reminded counsel that the arbitrators are often concerned with holding to a realistic schedule for document production, and any practitioners seeking evidence above and beyond the norm should be prepared to justify the scope of production to the tribunal. In her view, discovery in international arbitration is a live debate, and the Prague Rules are evidence of the divergent approaches between legal systems. Finally, Elizabeth McKee Devaney offered her input about in-house counsel's expectations for data privacy and security, and how important it is that firm counsel complies with best practices for protection of client data. Although avoiding these pitfalls may impose an extra burden on counsel, technology is ultimately an essential tool for understanding a case and presenting it to a tribunal.

Understanding our Past to Save our Future: The Debate about ISDS

With so many attacks on ISDS in the last few years, it is hard not to ask questions about where international arbitration is heading, and the conference did just that in a Friday-morning panel moderated by Andrew T. Clarke (ExxonMobil International Ltd., England). The panel included a highly experienced group of speakers in the arbitration field: Professor Peter Cameron (University of Dundee, Scotland), Tim Foden (Lalive, London), Alexis Mourre (ICC International Court of Arbitration,

Paris), Professor Marike Paulsson (Albright Stonebridge Group, Washington), and Baiju S. Vasani (Jones Day, London).

A central theme of this panel was looking to the past to understand and respond to criticisms of the ISDS system as it exists now. Professor Marike Paulsson gave the audience a short history lesson to make her point that a multinational investment court has always been an "impossible dream," and renewed interest in it is misplaced. Tim Foden also invoked history to show that we are living in a second era of resource nationalism, and should be prepared to defend the energy sector against new nationalization efforts.

Alexis Mourre went so far as to say that the past may contain the answer for the future, and as ISDS shrinks, we are likely to see more investment arbitration under contract instead of BITs. Finally, Baiju Vasani used history to show that this is not the first assault on ISDS, and he has little concern for its future. He pointed to the fact that when Latin American countries left the ICSID Convention, many commentators were concerned about the end of ISDS writ large, but as we know, that was not the case. Although states may have their complaints with the system in its current form, as Professor Peter Cameron discussed, the panelists could all agree that some type of ISDS will persist in the future, and we need only look to the past to see the truth of this.

The Changing Landscape of International Energy Arbitration

Change is never far away from international energy arbitration, with global events constantly shaping and evolving the practice as we know it. In the final panel, moderator Samaa Haridi (Hogan Lovells US LLP, New York) asked Niuscha Bassiri (Hanotiau & van den Berg, Brussels), Julie Bédard (Skadden Arps, New York), Jung Lee (Encana Corp., Calgary), and Constantine Partasides QC (Three Crowns, London) "what's next?".

Their answers drew from both the past and future, as has been the theme throughout much of this conference. Echoing an earlier statement by Alexis Mourre, Constantine Partasides QC discussed the new-old form of investment arbitration under contract as opposed to BIT, while Julie Bédard and Jung Lee offered their perspective as corporate counsel and discussed some pressures on companies to change the terms of their contracts to allocate risk and termination rights in more complex ways. Niuscha Bassiri picked up on a topic that was the subject of an earlier discussion—the impact of climate change on international arbitration. She anticipates that an increase in renewable energy, and a corresponding reorientation away from traditional fossil fuels, will impact international energy arbitration by implicating different types of contracts and national regulations.

The earlier panel emphatically agreed. Moderated by Allan B. Moore (Covington & Burling, Washington), the panel was comprised of Wendy Miles QC (Debevoise & Plimpton, London), Tim L. Moorhead (BP American Inc., Houston), and Carol M. Wood (King & Spalding, Houston). All panelists emphasized that the paradigm of climate disputes is changing, and international arbitration will be forced to be a part of it. Tim Moorhead and Carol Wood discussed their experiences in dealing with climate change attribution law suits in the US, with an eye towards the fact that similar disputes could arise in arbitration. Fortunately, Wendy Miles reminded us that the beauty of international arbitration is its flexibility, and the field will shift to accommodate new types of lawsuits and become part of the solution for addressing climate change.

Conclusion

As we head into 2019, energy arbitration faces daunting but conquerable challenges. The first of these is the general backlash against ISDS, which may not be unique to energy arbitration, but will undoubtedly continue to have a strong impact, as 41% of ICSID cases pertain to the energy sector. This was a topic of great concern among the panelists, and 2018 developments including the ECJ's *Achmea* decision, new treaties with limited ISDS provisions, and strengthened calls for a multinational investment court will pose a risk to the ISDS status quo in 2019.

Second, depending on the nature of their practice, energy arbitration practitioners might look at the rise of renewable energy and the corresponding displacement of traditional fossil fuels as either a challenge or an opportunity (or possibly both). As the panelists discussed, renewable energy contracts can differ in some ways from the oil and gas contracts counsel and arbitrators are used to interpreting, and the national regulations at issue are certainly distinct. Related climate change concerns may also give rise to new types of disputes or emerge in relation to national public policy.

Third, and finally, practitioners should continue to keep abreast of new developments in technology in 2019, as cybersecurity will continue to be a responsibility and a challenge for energy arbitration. Recent regulations designed to protect parties' information only work when practitioners understand and adhere to them. It can be a struggle to keep up with the current best practices, but doing so is in the best interest of all stakeholders.

Although it may seem that international energy arbitration is in a period of flux, this conference offered an assuring hand and a reminder that we may be more prepared than we think. When faced with the prospect of a new technology, a different type of dispute, or the possible collapse of ISDS as we know it, there is no better way to understand our future than to reexamine and learn from our past. International energy arbitration may face new challenges in 2019, but we can face them with a bit more confidence as a result of the timely insights of those speaking at the 6th ITA-ICC-IEL joint conference.

Since its reorganization in June 2017, Young ITA has become an active and engaged global community, with members now in 70 countries. Applications are now open for the following Young ITA leadership positions for 2019-2021: ***Communications Chair; Thought Leadership Chair****;* ***Mentorship Program Chair****;* ***Regional Chairs*** *(one for each of the following regions: North America, South America (Spanish-speaking jurisdictions), Brazil, Mexico and Central America, United Kingdom, Continental Europe, Middle East and Asia).*

The applications deadline is April 20, 2019. For more information about these positions and how to apply, please click here.