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Challenges and Opportunities in International Energy Arbitration: a Report from the 3rd Annual ITA-IEL-ICC Joint Conference

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The 3rd 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 14-15, 2016, in Houston, Texas. Under the guidance of conference co-chairs C. Mark Baker (Norton Rose Fulbright, Houston), Karl Hennessee (Halliburton, Houston), and Toni D. Hennike (Hess Corporation, Houston), the conference endeavored to examine in detail the essential influences on, and challenges to, arbitration in the energy sector. The speakers canvassed the myriad commercial and political risks challenging participants and users in today's international energy sector, including dispute resolution in failed or failing states, the potential for effective emergency relief prior to the constitution of an arbitral tribunal, and cybersecurity threats specific to international dispute resolution.

Managing Commercial and Political Risk

Charles D. ("Chuck") Davidson (Former Chairman and CEO, Noble Energy, Inc., Houston) set the theme of the conference in his keynote speech, entitled "The Future of International Energy – Weaving Through the Maze of Commercial and Political Risk." Davidson analyzed the nature of risk in international energy exploration, and the processes, including arbitration, by which it could be effectively mitigated and managed. He distinguished between "below-ground" risk, which geologists are able to quantify to within relatively narrow margins of error, and "above-ground" risk, like political and legal instability, which is less susceptible to precise forecasting or risk analysis.

Building on his extensive experience with exploration and investment in Latin America and the Middle East, Davidson proposed three core tools to manage "above-ground" risk in international energy investment. First, the country entry process must be disciplined, defined, and documented. Geologic risk is one very important consideration in that process, as are the country's history, the legal terms applying to foreign direct investment, the country's compliance with contracts with investors, and even the security and stability of the country's claimed international boundaries. Second, the company must engage in an early comprehensive risk assessment, and diligently update its risk analysis throughout the life of the planned investments. Putting in place adequate legal safeguards, including substantive protections like contractual terms and the right to invoke

them in arbitration, can be key. Third, companies operating in challenging geopolitical environments need to implement a global compliance management system in order to avoid costly financial penalties and potential reputational damage. Davidson closed by inviting the panelists to bring their experience to bear on specific issues and challenges related to international energy developments.

Energy Dispute Resolution in Failed or Failing States

Responding to Davidson's invitation, an illuminating panel, moderated by James E. Castello (King & Spalding, Paris) and comprised of Suzana M. Blades (ConocoPhillips, Houston), James L. Loftis (Vinson & Elkins, London), and Marc D. Veit (LALIVE, Zurich), focused on investor-state and commercial dispute settlement issues arising out of failed or failing states. The panelists first turned their attention to the question of whether international arbitration is a valid forum for resolving energy disputes with failed or failing states. One panelist responded affirmatively, emphasizing that countries like Syria and Libya have entered into bilateral investment treaties (BITs) and private contracts with arbitration clauses that remain in force. While challenges exist in invoking such legal rights (for example, in determining the political entities entitled to participate in the arbitration or even where to serve legal papers), recent practice in investor-state matters against Libya, amongst others, provided concrete guidance on addressing or mitigating these difficulties. The panelist then projected that, while fair and equitable treatment has received by far the most scrutiny in recent investor-state arbitral jurisprudence, three different BIT provisions would soon receive extensive attention and development in arbitrations against failed or failing states:

(1) the requirement of full protection and security;

(2) the requirement of most-favored-nation treatment with respect to compensation for losses owing to war or to other armed conflict, state of national emergency, revolution, insurrection, civil disturbance or any other similar event; and

(3) the requirement of compensation for indirect expropriation.

The panel then turned to the impact of sanctions on international energy arbitration. After an overview of the nature of current sanctions regimes against Russia, which have impacted the energy sector heavily, one panelist stressed the complexity of the current sanctions regime. He identified the potential and diverse impact of sanctions on arbitrability, on a tribunal's decision on the merits of such a dispute, on judicial set-aside actions, and on efforts to enforce any resulting awards under the New York Convention. He observed that, in light of the current sanctions regime, many Russian entities now prefer to arbitrate claims in jurisdictions like Hong Kong and Singapore.

Emergency Interim Relief

The ability to obtain urgent interim relief prior to the constitution of an arbitral tribunal can be significant in mitigating risks associated with international energy investments. While the past five years have seen many major arbitral institutions begin to offer parties the ability to seek this type of interim relief before an emergency arbitrator, a critical mass of emergency arbitrator decisions is only now beginning to materialize. An assessment of the emergency arbitrator's scope of authority and efficacy was, therefore, ripe for discussion by a panel moderated by Kevin O'Gorman (Norton Rose Fulbright, Houston) and comprised of Rocío Digón (ICC International Court of Arbitration,

SICANA, Inc., New York), Mark W. Friedman (Debevoise & Plimpton, New York), and Aníbal Sabater (Chaffetz Lindsey, New York).

The panel addressed the standards and procedures that govern in practice the granting of interim relief by emergency arbitrators, focusing in particular on the panelists' collective experience under the ICC Rules of Arbitration. One panelist opined that, despite its growing popularity, the emergency arbitrator suffered from enforceability concerns given the inherently temporary nature of its decisions or orders. Apart from jurisdictions expressly accepting the enforceability of emergency arbitrator orders or decisions (e.g., Singapore and Hong Kong), the vast majority of jurisdictions have not directly addressed the issue yet. However, in practice, the potential for sanctions or costs awards at later stages in the arbitral process appear to provide a strong incentive for parties to comply with emergency arbitrator decisions or orders.

Data Privacy and Cybersecurity

Data security is a particularly important topic in international arbitration, particularly in the wake of the recent hacking of the website of the Permanent Court of Arbitration during the hearing of a maritime boundary dispute between China and the Philippines. One panel, moderated by Robert Carlton (Haynes and Boone, Houston) and comprised of Melinda L. McLellan (BakerHostetler, New York), Jennifer Permesly (Chaffetz Lindsey, New York), and Jonathan Fairtlough (Kroll, Los Angeles), suggested that the risk of data breaches for international arbitration users, arbitrators, and advocates cannot be understated. Many common filing or correspondence practices, such as circulating sensitive documents by email, exacerbate those risks. Energy disputes, which frequently involve significant monetary claims, sensitive geologic and financial information, and a myriad of politically-significant issues, heighten these risks further. While arbitral institutions have implemented strong data security protections, it was recommended that parties and counsel consider encrypting documents, as well as implementing two-factor authentication for email accounts.

Lessons Learned

While the panels focused on challenges, risks, and other current issues confronting dispute resolution in the energy sector, one theme that emerged in the course of the conference was the unique opportunity presented by international energy arbitration. Since the well-known mid-century North African and Middle Eastern concession disputes, arbitrations in the energy sector have developed cutting-edge procedural and substantive doctrines that spread to, and now benefit, all industry sectors. Core tenets of modern international dispute resolution, like the standing of shareholders to sue in arbitration, stabilization clauses, internationalization of contracts, the protection of an investor's "legitimate expectations," and methods of quantifying damages in long-term projects, owe their genesis and development to energy arbitrations.

For this reason, international energy arbitration users and practitioners enjoy the unique opportunity and responsibility to address the challenges confronting international dispute resolution generally. The scope and effect of international legal protections in failed or failing states, the nature and efficacy of emergency interim relief before an arbitrator, and data security practices in international dispute resolution, amongst others, are issues confronting the energy sector today. The devices, doctrines, and techniques that will be developed in the energy sector to address these and other challenges—many of which were proposed and debated at the Joint Conference—can be expected to be at the cutting edge of the development of international dispute

settlement.

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