Kluwer Arbitration Blog

LIDW 2019: Energy Disputes in a Disrupted World: Leveraging Our Expertise for What Lies Ahead, 9 May 2019

Samuel Pape, Duncan Graves (Latham & Watkins LLP) · Saturday, May 18th, 2019 · Young ITA

The session on Energy Disputes of the LIDW 2019, hosted by Latham & Watkins and chaired by **Sophie Lamb QC** and **Philip Clifford QC**, took place on 9 May 2019 at Painters' Hall. The session was divided into two panels.

The first panel, titled 'A commercial landscape in transition – lessons from the past as we prepare for the future' was moderated by Philip Clifford QC and featured Sean Wilken QC (39 Essex Chambers), Veronique Buehrlen QC (Keating Chambers), John Judge (39 Essex Chambers), John McCaughran QC (One Essex Court), Barbara Benzoni (Eni S.p.A.), David Streatfeild-James QC (Atkin Chambers), Jostein Kristensen (Oxera Consulting LLP), Kieron O'Callaghan (Hogan Lovells), and Colin Johnson (Charles River Associates).

Philip Clifford opened the panel by observing that significant global trends, including the effect of climate change and campaigns for decarbonisation, in the face of increased demand for energy, were having a turbulent effect on the market, increasing the likelihood of disputes. The panel addressed subject matters from across the energy industry, setting out key developments and how the legal market is reacting to meet these changes.

Sean Wilken addressed border issues, investment loss and sanctions as the main geo-political risks affecting the oil and gas industry, and also as key drivers of disputes. In particular, he stressed the need for commercial parties to take potential disputes arising out geo-political risks into account when drafting their Joint Operating Agreements, to ensure that, for instance, their force majeure clause is sufficiently flexible to protect against licensing areas being held to fall outside the sovereign territory of the granting state.

Veronique Buehrlen focused on the Court of Appeal's recent decision in *Spirit Energy Resources v Marathon Oil*, highlighting how it provides important guidance on the key principles underpinning Joint Operating Agreements and the interpretation of its terms, in particular the obligations between the operator and non-operators. Further, she stressed that although the impending decommissioning of production areas in the North Sea had not yet been felt in the disputes market, this was a likely growth area in the coming decade.

John Judge summarised developments in LG pricing clauses and disputes arising from them. He noted that clauses often gave wide discretion to tribunals and therefore there was often broad scope for parties to introduce large volumes of external evidence; one option being used to address this

and encourage cost-efficient settlement is the best last offer, where each party makes an offer on pricing and the arbitrator is required to select one of them. **Barbara Benzoni**, giving an important commercial perspective, noted both that the correct pricing method was often dependent on the relevant geographical market, and that although other mechanisms were increasingly being considered, she still approached them conservatively, with arbitration remaining the 'least worst' option for dispute resolution. Barbara also observed that in her experience institutional arbitration was preferable as it gave clearer structure to a dispute.

John McCaughran applied the developing notion of good faith in English law to contracts central to the oil and gas industry. Although there have been some judicial attempts to introduce a wider notion of good faith, it remains limited to relational contracts and contracts where a discretion is conferred upon one party to make a decision on behalf of another. While it was unlikely that a duty of good faith would be found in long term gas supply contracts, it was far more likely in Joint Operating Agreements. Importantly, even where a duty of good faith was found, it should not be used a platform to imply additional specific positive obligations, but instead set a standard for the obligations identified explicitly within the contract.

Jostein Kristensen and **David Streatfeild-James** provided insight into the economic, legal, and geo-political trends affecting the renewables market. A key area of focus was subsidies and regulations, with both speakers encouraging authorities to consider not only competition between renewables and existing fuels, but also the effect of subsidies on future innovation and energy sources. The panel stressed that it was important to have well-research and long-term policy which matched renewables' long asset life in order to reduce risk and therefore increase capital expenditure. Further, with innovations in technology, careful legal drafting was required and reliance on precedents may create significant risk.

The panel closed with a discussion on damages presented by **Keiron O'Callaghan** and **Colin Johnson**. They highlighted the need for experts, counsel, and tribunals to work harder to understand valuation methods and quantum from the outset of disputes in order to understand the core issues and focus resources accordingly. In particular, it was important that experts presented the assumptions underpinning their calculations to tribunals and where a dashboard system was in use, educate the tribunal on how to understand and operate the model. When used effectively, this method could improve the quality of decision-making on quantum, but without such guidance there was a risk that it only contributed further to a lack of transparency in how the final value for a damages award was reached.

The second panel, titled 'The environment and society – activism, pollution / remediation and disputes concerning climate change', was moderated by Sophie Lamb QC and featured Mr Justice Fraser (Judge in Charge of the Technology and Construction Court), Serena Cheng QC (Atkin Chambers), Rachel Lidgate (Herbert Smith Freehills), Alice Garton (Client Earth) and Julianne Hughes-Jennett (Hogan Lovells).

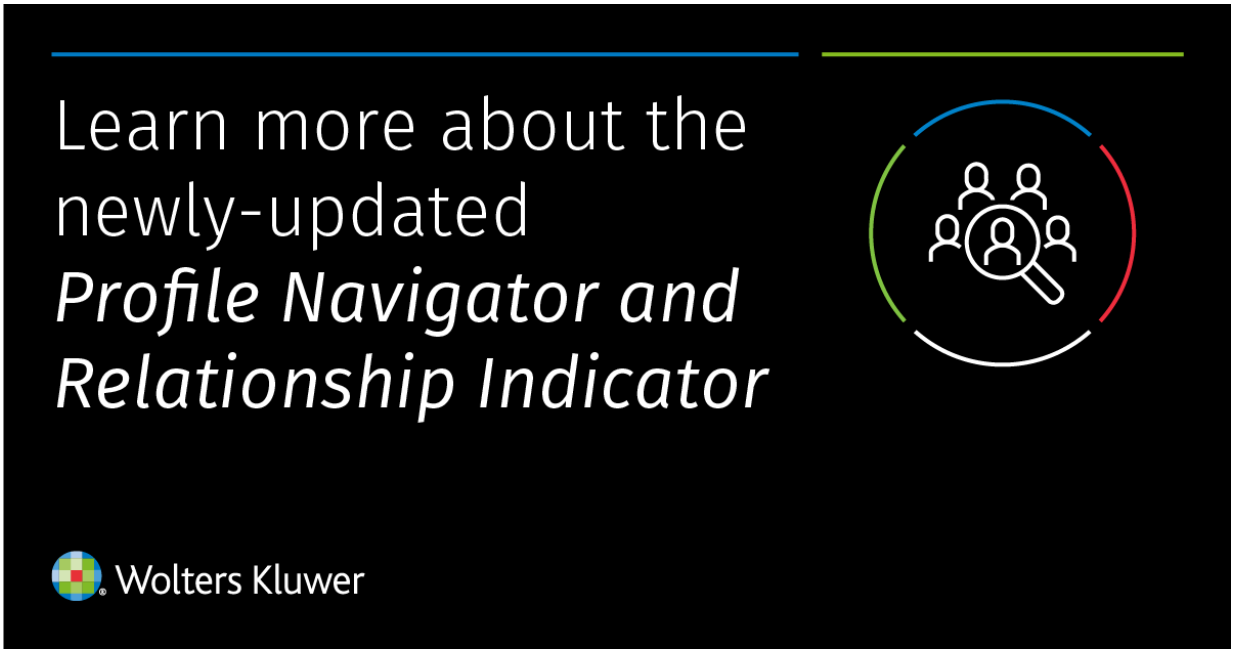
Mr Justice Fraser opened the discussion with a spotlight on London as the premier venue in the world for resolving disputes. He highlighted the international nature of the High Court's caseload and noted the depth and breadth of the TCC's specialisms, spanning all types of energy work including in specialist areas such as windfarm, FPSO, pipeline and environmental disputes. He noted that the TCC is also one of only two courts empowered to hear arbitration claims under the Arbitration Act, and its judges are all Queen's Bench Division (QBD) Judges, meaning that they also sit in criminal cases including, in some cases, terrorism trials. He explained that the major

difference between the TCC and arbitration is party autonomy: TCC judges must manage cases in accordance with the CPR's overriding objectives, which means always trying to find the answer as cost effectively and expeditiously as possible notwithstanding that the parties' may have other views on the appropriate procedure.

Serena Cheng and **Rachel Lidgate** focused on the international element of the TCC's environmental caseload, noting that the Supreme Court's recent decision in Lungowe v Vedanta opened the door to claims concerning foreign environmental damage by upholding Coulson J's decision in the TCC finding jurisdiction over claims relating to environmental pollution in Zambia. In that case, the Supreme Court held that environmental harm can properly be tried in England regardless of where the environmental damage occurs, provided the relevant jurisdictional gateway is satisfied. The decision arguably creates a tension between applying group-wide policies and training schemes that could give rise to a duty of care for the actions of overseas subsidiaries, and the duties of listed multinationals to have global systems of controls and risk management.

Alice Garton presented on ClientEarth's approach to fighting climate change through engagement with corporate actors, referrals to regulators and strategic litigation. ClientEarth is Europe's only public interest law firm, whose aim is to use the law as a strategic tool for the benefit of the environment. Its model came out of the US Civil Rights Movement, and it is currently working to ensure that climate change is integrated into decision-making and for capital expenditure and capital application to align with the Paris Goals. ClientEarth does so by targeting companies on both the supply and demand side as well as financial institutions and their professional advisors, and leveraging corporate and financial laws to ensure that climate change is addressed appropriately.

Julianne Hughes-Jennett discussed the challenges and opportunities of arbitration as a mechanism for resolving climate change and business and human rights related disputes. Arbitration is a consensual process, which renders its use by certain categories of litigants (such as groups of victims alleging violations against a company) limited to instances in which all parties agree to arbitrate on an ad hoc basis. The applicable laws in such disputes are also an issue, as the UNGPs are soft laws and, traditionally, hard laws in this area apply only as against states. These types of disputes also inevitably give rise to issues concerning transparency, time sensitivity, funding, safeguards to protect the procedural rights of vulnerable individuals, and the need to guard against spurious claims.



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