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# Kluwer Arbitration Blog

## **New York Arbitration Week 2021 Redux: The In-house Counsel's Roundtable: Discussion on Their Approach to an International Oil and Gas Arbitration**

Luis M. Martinez (International Centre for Dispute Resolution American Arbitration Association (ICDR-AAA)) · Thursday, December 9th, 2021 · International Centre for Dispute Resolution (ICDR)

On November 15, 2021, the AAA-ICDR hosted a webinar entitled “In-House Counsel’s Virtual Roundtable” as part of New York Arbitration Week. The webinar focused on the use of alternative dispute resolution in the oil and gas industry. The panel was moderated by Eric P. Tuchmann, the Senior Vice President, General Counsel and Corporate Secretary for the AAA-ICDR, and featured in-house counsel Suzana Blades (Associate General Counsel, ConocoPhillips), Edward Diggs (Senior Counsel and Manager of Claims, Bechtel Energy), Kevin Feeney (Senior Legal Counsel, Shell Oil Company), F. Teresa Garcia-Reyes (Vice President of Litigation, Baker Hughes) and Eugene J. Silva II (International Disputes Group, Exxon Mobil Corporation).<sup>1)</sup> The panel discussed their views and approaches to participating in and conducting international oil and gas arbitrations and mediations. The highlights are recapped in this blog post.

### **The Panel Has Not Seen An Increase In Claims Due to the Pandemic**

Eric Tuchmann observed that there has been significant disruption and price drops in the energy field over the last 18 months because of the pandemic, although the energy sector is now recovering. In spite of this, the panel did not see an increase in claims due to the pandemic. Ms. Blades stated that at the beginning of the pandemic, ConocoPhillips saw many force majeure notices being exchanged. While no claims had been filed on this basis, ConocoPhillips expected a wave of lawsuits and arbitrations that did not materialize. With the recovery of gas prices, Ms. Blades believes everyone wants to get back to business and try to settle outstanding disputes amicably. Mr. Diggs of Bechtel, citing his perspective from the construction side, stated that they also saw an uptick in force majeure notices, but they have not seen an increase in claims related to the pandemic. Mr. Diggs is seeing more of an impact from supply chain problems, where the project may be beyond the procurement phase resulting in disruption and related claims being filed. Mr. Diggs believes the supply chain problems are because of pandemic-related uncertainty and differing restrictions across the country. Due to the foregoing, claims are not being pressed because they are difficult to quantify. Mr. Silva of Exxon Mobil echoed the experiences and expectations shared by Ms. Blades and Mr. Diggs.

Ms. Garcia-Reyes of Baker Hughes noted that while she has not seen as many force majeure claims as expected, the issues arisen have been interesting. For example, usually with a claim based on force majeure, the parties are aligned as when an event occurs, but with the pandemic, parties situated at different parts of the supply chain experiencing disruptions have taken differing positions regarding whether delays were due to force majeure qualifying events. Ms. Blades added that both Winter Storm Uri (which hit the Texas region in February 2021) and the pandemic raised very interesting questions from a legal perspective about force majeure, as companies found themselves on both sides of the equation (both issuing and receiving force majeure notices), which raised consistency questions regarding the positions taken on these issues.

### **The Panels' Perspective On In-Person Versus Virtual Hearings**

The discussion then moved to the panel's perspectives on in-person and virtual hearings, in light of their experiences during the pandemic. Now that everyone is experienced with virtual hearings and the choice exists, the panel considered whether virtual hearings are here to stay. Mr. Tuchmann prefaced the discussion by noting that the virtual hearing technology now being used had been around for some time at the AAA-ICDR, although there was not much demand for it pre-pandemic.

Ms. Garcia-Reyes' experiences in virtual mediations converted her to a believer. She believes that in some cases, virtual mediations can be more effective, due to reduced travel costs and the ability to schedule the virtual option quickly. Moreover, having heard that mediators believe it is beneficial to have parties in a room for an extended period, as they are "worn down" and more susceptible to an agreement, Ms. Garcia-Reyes noted that long virtual hearings have the same effect and would certainly motivate her to reach a settlement if possible. As for arbitrations, she stated that the jury is still out. For smaller cases for shorter periods, virtual hearings work well, but she has not formed an opinion on longer cases. Mr. Feeney agreed on in-person hearings for larger cases, which minimize distractions and ensure useful interactions.

Mr. Silva stated that virtual hearings work best for procedural issues but prefers in-person hearings, especially in the international arena where there is great value in personal contacts and interactions, which ultimately provide a better result. In the AAA-ICDR's experience as it relates to international cases, Mr. Tuchmann stated that it has been difficult to hold hearings in person; and while there was early reluctance to proceed virtually, more parties are now opting in for the virtual option.

Despite consensus that the legal profession is often conservative, Mr. Diggs has been impressed by the speed of alternative dispute resolution's pivot to virtual proceedings and the growth of related technology, which has led to new views on how best to select counsel, for example, by selecting those who are experienced with this technology. However, Mr. Diggs remains skeptical about how effectively technology allows for presentation of documents and visuals in virtual proceedings.

### **The Panel's Perspective on Adding Mediation Clauses to Agreements**

Citing the panel's positive experiences with virtual mediations, Mr. Tuchmann asked if this has led to the incorporation of mediation clauses in agreements. Ms. Blades stated that ConocoPhillips has

always been a proponent of mediation and considers using it in all cases, but virtual mediations are not part of an adopted company policy.

Mr. Feeney stated that he is generally a proponent of mediation. Mr. Feeney reminds stakeholders that they are in the energy business, not the legal disputes business, and therefore mediation presents a commercially-oriented exit ramp for the dispute that is sometimes better for the business as a whole. Mr. Silva stated that direct communications between parties is an important successful component of dispute resolution. Similarly, Mr. Diggs stated that litigation is the last resort once a dispute has arisen, so he is often looking for an amicable resolution, and mediation offers one such solution. Mr. Diggs added that he has had more success settling cases with senior management level, so he ensures that contracts always include an early opportunity for senior management to try resolving the matter.

### **The Panelists' Perspectives on the Arbitrator Pool**

Mr. Tuchmann asked the panel for thoughts on arbitrator selection. Mr. Diggs stated that there are great arbitrators, but he is concerned that he is not seeing the next generation of arbitrators who have the experience needed for complex cases. He recognized the challenge arbitral institutions face, because parties often re-appoint the same arbitrators in future cases. Mr. Silva stated that one of the greatest challenges for the development of younger arbitrators is that users need to be more flexible in who they are selecting and opt for younger attorneys who are still developing their careers and expertise. Ms. Garcia-Reyes echoed that sentiment. She added that corporate counsel has a duty to develop the next generation as well. In some of the smaller and medium cases, corporate counsel can take a chance on some of the unknown prospective arbitrators who perhaps have received positive feedback in other arbitrations. Ms. Blades agreed and stated that in-house counsel need to communicate to outside counsel the expectation of a diverse arbitrator list. She noted that arbitral institutions have a huge role to play in suggesting and promoting women and candidates who are more diverse so they can obtain experience and develop a record of accomplishment. Mr. Feeney agreed and stated that Shell is a signatory of the ERA pledge. In one case, Shell received a list that was not as diverse as they had hoped and he was told that it was because they were looking for a high level of experience. With further discussion and review, Mr. Feeney added that they were able to ultimately find a person who was bright, capable, and able to cut their teeth on the particular matter. He concluded that it does take that type of deliberate action to develop the next wave of diverse arbitrators. Ms. Blades agreed and noted that arbitrators interested in developing their careers work hard and dedicate their time to these cases. Mr. Tuchmann welcomed the panel's view regarding these suggestions and added that the AAA-ICDR encourages diverse candidates to apply to its international panel each year and hopes that it will be able to increase the selection of these new arbitrators who have fantastic backgrounds.

*A recordings of this program is available [here](#), and Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available [here](#).*

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### References

- ?1 The panelists made clear that the views expressed were their own and not necessarily the views of the companies they represent.

This entry was posted on Thursday, December 9th, 2021 at 8:00 am and is filed under [Mediation](#), [New York Arbitration Week](#), [Virtual hearings](#)

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