Global Arbitration Review

The Guide to Energy Arbitrations

General Editor
J William Rowley QC

Editors
Doak Bishop and Gordon Kaiser

Third Edition

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Editor's Preface to the Third Edition

Economic liberalisation and technological change over the past several decades have altered the global economy profoundly. Businesses, and particularly those involved in the energy sector, have responded to reduced trade barriers and advancement of technology through international expansion, cross-border investments, partnerships and joint ventures of every description.

The move to today's 'internationality' of business and trade patterns alone would have been sufficient to jet-propel the growth of international arbitration. But when coupled with the uncertainties and distrust of 'foreign' court systems and procedures, the stage was set for a move to processes and institutions more suited to the resolution of a new world of transborder disputes.

Not surprisingly, the concept and number of international commercial arbitrations have grown enormously over the past 25 years. Bolstered by the advantages of party autonomy (particularly over access to a neutral forum and the ability to choose expert arbitrators), confidentiality, relative speed and cost-effectiveness, as well as near worldwide enforceability of awards, the system is flourishing. And if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor-state disputes, it must be the energy business. It is the poster boy of arbitral globalisation.

Led by oil and gas, the energy sector is marked by enormously complex, capital-intensive international deals and projects, frequently involving prominent parties and state interests. Transactions and partnerships are often long-term in nature, and involve 'foreign' places and players. Political instability and different cultural backgrounds characterise many of the sector's investments. In short, the energy sector is a natural incubator for disputes best suited to resolution through international arbitrations.

Indeed, over the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and in parts of Latin America, and the lessons learned in 'foreign courts', there is scarcely a major energy sector contract (whether oil, gas, electric, nuclear, wind or solar) that does not call for disputes to be resolved before an independent and neutral arbitral tribunal, seated, where possible, in a neutral, arbitration-friendly place.

The experience and statistics of the major arbitral institutions bear out the claim that the energy sector has driven, and continues to account for, major growth in international arbitration. ICSID is illustrative, where 42 per cent of its caseload in 2017 involved the energy sector. At the LCIA, case statistics for 2017 revealed that some 34 per cent of respondents were from the energy and resources sector. Between 2014 and 2015, the Stockholm Chamber of Commerce Arbitration Institute saw a 100 per cent increase in the number of its energy-related cases.

Although much of the evidence of the energy sector's arbitral demand is anecdotal, those arbitrators who are known in the field report growing demand and a steady increase in enquiries as to availability. And having regard to the multifaceted fallout from the oil price crash of 2014, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), together with Russia's continuing economic difficulties and a world where sanctions imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions to cope with the disputes that are surfacing daily.

Another driver towards arbitration is the fact that the number of substantive players in the sector is relatively limited. These parties will invariably have multiple agreements, partnerships and joint ventures with each other at the same time, many of which are long term. These dynamics call for disputes to be resolved by decision makers who are known to and trusted by all, and whose decisions are final. The simple fact about business is that the economic uncertainty associated with an unresolved dispute overhanging a long-term partnership is often considered to be more problematic than getting to its quick and definitive resolution, even if the resolution is unfavourable in the context of the particular deal.

Against this backdrop, when Gordon Kaiser raised the question with me in the summer of 2014 of producing a book that gathered together the thinking and recent experiences of some of the leading counsel in the sector, it resonated immediately. Gordon was also more than pleased when I suggested that we might try to interest Doak Bishop as a partner in the project.

With Doak's acceptance of the challenge, we have tried, in the first two editions, to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by those who do business in the energy sector and by their legal and expert advisers.

Before agreeing to take on the role of general editor and devoting serious time to the project, we needed to find a publisher. Because of my long-standing relationship with Law Business Research, the publisher of Global Arbitration Review, we decided that I should discuss the concept and structure of our proposed work with David Samuels, GAR's publisher, and Richard Davey, then managing director of LBR. To our delight, the shared view was that the work could prove to be a valuable addition to the resource material now available. On the assumption that we could persuade a sufficient number of those we had provisionally identified as potential contributors, the project was under way.

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Energy Arbitration*s being seen as an essential desktop reference work in our field. To ensure the high quality of the content, I agreed to go forward only if we could attract as contributors colleagues who were among the internationally recognised leaders in the field. The book is now in its third edition, and Doak, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors over the years.

The third edition of *The Guide to Energy Arbitrations* has been expanded with a new chapter on upstream oil and gas disputes. The remaining chapters have all been updated to reflect developments since 2017.

In future editions, we hope to fill in important omissions, such as the changing dynamics of investment cases under the Energy Charter Treaty, including the consequences of the *Achmea* decision of the European Court of Justice; the contours of fair and equitable treatment; injunctions against and the setting aside of awards; bribery and corruption; sovereign immunity and enforcement issues; *force majeure* and contractual allocations; and intellectual property and insurance disputes in the energy sector.

Without the tireless efforts of the GAR/LBR team this work never would have been completed within the very tight schedule we allowed ourselves. David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all of my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this third edition will obviously benefit from the thoughts and suggestions of our readers, for which we will be extremely grateful, on how we might be able to improve the next edition.

J William Rowley QC
September 2018
London

Part II

Commercial Disputes in the Energy Sector

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Upstream Oil and Gas Disputes

Mark Beeley and Sarah Stockley[1]

Despite a few notable oilfield service disputes having recently trespassed into the courts,[2] international arbitration remains the dispute resolution mechanism of choice for upstream oil and gas contracts.[3] This is certainly the case if your project is not located in a predictable and familiar jurisdiction (matters might look different if you are in the Gulf of Mexico or the North Sea, as opposed to dealing with a block in Equatorial Guinea). Arbitration provides a fairly reliable mechanism to avoid disputes being heard in the courts of host states; allows some confidentiality that may help in protecting long-term relationships; and provides a wealth of enforcement options compared with a court judgment.

Disputes in this area broadly fall into three categories: disputes between investors and the host state; disputes between investors; and disputes between investors (typically via the operator) and third parties (e.g., oilfield services providers, insurers). Each category gives rise to unique issues (some of which will be examined in this chapter), but all must deal with the multiparty nature of these arrangements.

Given the propensity of these disputes to be arbitrated, there is not a wealth of publicly available judgments and awards to illustrate these issues, but when possible examples will be given.

Multiple parties, multiple contracts

Given the huge amounts of capital necessary to explore and develop a hydrocarbons field, it is highly unusual for states to be dealing with sole investors. Rather it is typical to have

1 Mark Beeley is a partner and Sarah Stockley a senior associate at Orrick, Herrington & Sutcliffe (UK) LLP.

2 See, for example: *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd* [2018] EWHC 1640 (Comm), and *Transocean Drilling UK Ltd v Providence Resources PLC* [2016] EWCA Civ 372.

3 As reported by the drafting committee, the Association of International Petroleum Negotiators 'emphasized international arbitration as primary method of dispute resolution' when crafting the 2017 Second Model Dispute Resolution Agreement.

consortiums of investors. While often the investors operate through an unincorporated joint venture, in some regions (e.g., the former USSR and China) it is common for there to be an operating company. This 'opco' may or may not be a party to the host state agreement in its own name.

On the host state side of the ledger, many countries have dedicated state enterprises that are involved in domestic hydrocarbon exploitation and that may function as separate commercial actors, in which case they may form part of the investing consortium (e.g., ONGC in India), or that may serve as the face of the host state (e.g., Uzbekneftigas in Uzbekistan) and may be the government's agent in administering the contract. If there is no state enterprise, then typically the host state agreement will be administered by the relevant energy ministry who may be assisted by further subdivisions. For instance, investors in India, who execute their production sharing contracts (PSCs) with the government of India, will need to be familiar with not only the Ministry of Oil and Natural Gas, but also the Directorate General of Hydrocarbons. While investors (and possibly international law) may consider all of these to be emanations of one party (the state), domestic law and politics is unlikely to take the same approach.

And then there is a wealth of material suppliers, third-party service providers, insurers and others, each of whom will be operating under their own contract. Such third parties normally contract with the designated operator from within the investment consortium, either in the operator's own name (more common), or on behalf of the entire consortium as express agent.

At a minimum, there can accordingly be expected to be: a host state agreement (commonly a production sharing contract or licence) between the state and the investors; an inter-investor agreement (commonly the joint operating agreement (JOA), but sometimes a shareholders' agreement, technical services agreement or financial services agreement), and a plethora of contracts between the nominated operator and third parties (e.g., rig hire agreement, insurance policies, tubing purchase contracts).

Obviously there will not be an identity of parties across all these contracts. Similarly, it can be expected that there will be no unity of governing law or choice of forum. Even between the PSC and the JOA it is highly typical to have different governing laws and different forums (normally because the state does not feel comfortable in the same forums as the investors might).[4] Consolidation is accordingly often impossible, and may be highly undesirable in any event. In the event of a dispute between investors, would they want to air their dirty laundry in front of the state as well? This can lead to some awkward situations. Take this example, illustrated by two challenge decisions before the Malaysian courts:[5]

India, ONGC and three investors are all party to a PSC, and ONGC and the three investors are party to a JOA. A dispute arises on the proper way of calculating profit petroleum

4 By way of recent example of this sort of issue – see Tullow's interrelated disputes involving Kosmos and Seadrill, one via ICC arbitration (https://globalarbitrationreview.com/article/1172083/win-declared-in-west-african-offshore-drilling-case) and one via the English courts – *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd* [2018] EWHC 1640 (Comm). (Also a good example as to why it is best to avoid labelling anything 'Project Voldemort' see *Seadrill* para. 52).

5 See: *India v. Cairn Energy and another* [2011] 6 MLJ 441, *India v. Petrocon* [2016] 3 MLJ 435 and *India v. Cairn Energy and others* [2014] 9 MLJ 149.

under the PSC. Investors 1 and 2 together commence arbitration against India. Investor 3 commences a second arbitration against India on the same issue. ONGC is not a party to either arbitration. As it happens both arbitral tribunals reached the same conclusion – but what if they had not? Is ONGC bound by either (or both) outcomes?

Disputes between investors and host states

PSCs are long-term contracts (typically running for 20 or 25 years). It is inevitable that disputes will not wait until the final day of the contract to arise, and so disputes with the host state must inevitably be managed in a manner that does not destroy the working relationship if possible. Being in arbitration (and thus hopefully behind closed doors) helps with this – but equally the manner in which an arbitration is brought must reflect this point. Ritualistic incantations of bad faith can be disastrous.

In addition to the need to consider the political (and potentially diplomatic) dimensions to such relationships, the evaluation of claims in this context is often hampered by uncertainty as to how to measure the various contractual commitments made. Host states typically insist that their own domestic laws should govern the PSC. Investors are often concerned that either the relevant law is not developed enough or provides a home town advantage. All too often this leads to unsatisfactory compromise, with an uncertain outcome the result. Take, for example, the following clause from an Oman PSC: 'In construing and interpreting this Agreement, the arbitrators shall apply the generally accepted customs and usages of the international petroleum industry and principles of law generally recognised by the nations of the world'.[6] Either the principles to be applied are so generalised as to be uncertain (as in this example), or unwieldly compromises are reached with multiple legal systems layered on top of each other. While some argue that there is now a developed *lex petrolea*,[7] (representing a transnational body of law surrounding oil and gas contracts), others pour cold water on such an idea – and indeed even on the grammatical correctness of such a label.[8] Uncertainty on both sides is the only reliable result.

When the decision is made to sue, regard has to be had as to the correct entity to claim against. Careful note needs to be taken as to who is actually legally responsible – the PSC may be administered by a state-owned company, or the ministry of oil and gas, but is it actually in the name of the country or the government of the country?[9] Complicated questions may then arise as to whether the counterparty to the PSC is actually responsible for the wrongful conduct in question. If international law applies, then theories of attribution

6 As reported in *The Advancement of International Law,* Leben, 2010 at page 33.

7 See 'International Arbitration of Petroleum Disputes: The Development of a Law Petrolea,' Bishop, XXIII YB COM ARB 1131 (1998) and 'Update on Lex Petrolea: The continuing development of customary law relating to international oil and gas exploration and production', Childs, *J World Energy Law Bus* (2011) 4(3):214.

8 Against '*lex petrolea*', Daintith, *J World Energy Law Bus* (2017) 10, 1-13.

9 By way of example Indian PSCs are typically executed by the Prime Minister in the name of the government of India, and administered through the Ministry of Oil and Natural Gas, acting through the Directorate General of Hydrocarbons.

come to the fore.[10] If domestic law applies, careful consideration needs to be given to the relevant law of agency, as well as to the question as to whether one party has committed to procure the behaviour of other parties. Service may present real issues if not addressed in the PSC.

The question as to with whom you have contracted also plays a large role when it comes to enforcing any arbitration award. Sovereign immunity is obviously a key question in any contract with a state. While most domestic laws regard a submission to arbitration as a waiver (at least of immunity from suit) this position is not universal, and is certainly not synonymous with a waiver of an immunity from execution. But which government entity has given the waiver and how far does that waiver run?

The nature of the dispute with the host state can be many and varied, but frequent examples include: disputes as to what costs are recoverable before profit is allocated; the allocation of profit petroleum; the application of real and notional tax rates; how the geological risks are allocated; claims by investors to invoke stability provisions (as detailed elsewhere in this book); and (increasingly) issues arising in the intersection between the application of the contract and local law audits (which might give rise to concurrent or competing issues about the administration and audit of the joint venture accounts), or claims of criminal conduct for following the PSC procurement procedure that may override or conflict with local tender board guidelines. Away from the contractual arena, claims for pollution and environmental damages may be very significant.

In addition to claims under the investment contract, claims between investors and host states might also arise under investment treaty contracts – when the claims may either be for breach of the 'umbrella clause' (a commitment to honour contractual commitments), the guarantees of fair and equitable treatment, or full and fair compensation for expropriation. Events such as windfall taxes, forced conversions of investment modalities, outright expropriation, and changes in the legal and fiscal regime have all given rise to oil and gas related claims in recent years.[11] These can either be complementary to a contract claim, or may overlap with it.

Disputes between investors

Disputes between investors typically either arise out of a JOA or a shareholders' agreement. Common examples are set out below.

Tensions between the operator and the non-operators

It is neither unusual nor surprising that there is tension between the operating party, who is in charge of carrying out operations (i.e. spending money), and the non-operators, who must watch their money being spent with limited control over that expenditure.

10 See, for examples, Articles 4-6 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

11 See, by way of non-exhaustive example, *F-W Oil Interests Inc v. Trinidad & Tobago* ICSID Case No. ARB/01/14 (withdrawal of an offered PSC post tender); *City Oriente Ltd v. Ecuador* ICSID Case No. ARB/06/21 (imposition of windfall tax on production revenue); *Caratube International Oil Company v. Kazakhstan* ICSID Case No. ARB/08/12 (cancellation of licence after five years of successful operations); *Mobil Corp v. Venezuela* ICSDID Case No. ARB/07/27 (forced expropriation).

Overrunning drilling campaigns, the purchase of inventory that is not required, or the costs of administration can all be regular touch points, causing non-operators to scrutinise JOAs for excuses not to pay their shares. Operators typically point to the provisions in such agreements that indemnify them save in the case of 'gross negligence' and 'physical' loss, and argue that the only remedy is to remove them as operator. Non-operators push for narrower interpretations of these provisions, arguing that the indemnity provision does not excuse operator's failure to work the contractual consent mechanisms, particularly when it comes to obtaining authorisations for expenditures (AFEs) in advance of costs being incurred. Even under the standard form agreements, there are no clear answers to this question of risk allocation.

Defaults in meeting payment obligations

There are typically no *de minimis* contract breaches when it comes to funding obligations under a JOA. Hence the Texas expression – 'a day late and a dollar short'. When a party to a JOA fails to make a cash call in a timely and full fashion, most JOAs provide for draconian remedies – often leading to a party forfeiting its interest without compensation. Arbitration can therefore be expected. The defaulting party will typically seek interim relief, whether from an emergency arbitrator or from the court of the seat,[12] seeking to avoid the effect of the forfeiture until some wider dispute (e.g. about the correctness of the cash call or the balance of the joint account) can be resolved. However, this is a high-risk strategy: if interim relief is not granted, a defaulting party faces the (at least temporary) loss of its interest pending a full arbitration. Most JOAs are designed to force parties to 'pay now, dispute later', backed by the commercial imperative to allow operations to proceed. Interim relief is achievable,[13] but the stakes are high. When the JOA is governed by English law and the default leads to a straight forfeiture without compensation, the argument can also be expected that the provision is an unenforceable penalty. How successful such an argument can prove post *El Makdeshi*[14] remains to be seen, but many JOAs feature sliding scale compensation provisions or withering interest mechanisms in the hopes of avoiding the argument entirely.

Rights of pre-emption or rights of first refusal

JOAs frequently contain provisions that if one party wishes to sell its percentage interest (or part thereof) in the JOA then the other parties have a right of first refusal, or a right to pre-empt any third party offer (i.e. the option to buy the percentage interest on the same terms as those being offered by the transferring party to the third party). Some JOAs may also include consent provisions, whereby any transferring party requires the consent of its co-venturers before being able to dispose of its interest to a third party. While such clauses ought to be capable of simple operation, in fact these provisions are rich sources of disputes

12 Or, frankly, from any other court it can convince to take jurisdiction.

13 For a recent example where it was, see *Pan Petroleum AJE Ltd v. Yinka Folawiyo Petroleum Co Ltd and others* [2017] EWCA Civ 1525.

14 *Cavendish Square Holding BV v Talal El Makdeshi* [2015] UKSC 67.

between the co-venturers,[15] particularly when, in the case of a pre-emption right, the provision is not clear on what happens if the disposal is not of the underlying asset but rather an upstream sale of shares of the corporate vehicle holding the asset (i.e. an indirect or direct change of control). Similar problems arise where the proposed sale is part of a wider bundle of assets: How do you allocate a purchase price for the asset alone? Do you have to offer for the entire bundle? What if the other assets are not part of a right of first refusal? Or where non-cash consideration is offered: how do you match an offer to swap fields? If a party does elect to purchase the transferring party's interest, this will lead to the purchasing party increasing its percentage interest in the project, which will often result in a dispute with any other co-venturer. These sorts of disputes involving pre-emption rights are frequently punctuated by applications for interim relief from courts and tribunals, in attempts to freeze any attempted sale said to be in breach of the pre-emption right. It can be the case that if a pre-emption provision is too onerous or restrictive on the parties, it may cause more of a headache when seeking to transfer an interest than one that is light on details.

Other M&A disputes

In addition to the transfer of interests leading to three-way right-of-first-refusal disputes, farm ins (and farm outs) can lead to a broad spread of disputes between the buyer and the seller without the need for third party intervention. Oil and gas transactions regularly throw up breaches of warranties,[16] as is common in any sale transaction, but particularly where underlying businesses are so uncertain. This uncertainty can come about as a result of estimations and predictions that are used for various components (such as seismic data, future oil prices or reserves) relevant to the fundamental nature of the business. Giving warranties when such uncertainty exists can also lead to additional disagreements, such as the value of any loss determined (and the impact of any exclusions set out in the contract).

Another common area of dispute is in relation to the purchase price, and there can be some last minute negotiations, particularly if the price is based on predicted reserves rather than actual hydrocarbons found. Often the parties will undertake an expert determination method to resolve any dispute; however, this can at times lead to further disputes and accusations that inaccurate or misleading information was given to the expert or that the report was biased.

Tax disputes are also common between parties and can arise by way of a warranty claim, an indemnity claim (where the buyer has had to make a tax payment on the basis of a claim that should have been covered by the seller), or a claim as a result of an (inaccurate) assumption being made during the transaction as to how the tax would be handled. When governments (unexpectedly) impose tax on sales, it is quite likely that disputes will be seen not only between the buyer and the seller for who should be liable for the tax, but also

15 By way of example, see Global Arbitration Review's report of *FAR v. Woodside* at https://globalarbitrationreview.com/article/1143307/claim-filed-over-senegal-oil-field.

16 For an example of a dispute over an alleged fundamental breach of warranty (as to title), see the Global Arbitration Review report of *ConocoPhilips v. Green Dragon and Greka* (2013) SCC at https://globalarbitrationreview.com/article/1032531/siac-panel-finds-for-conoco.

before a domestic tax tribunal or even against the host state in an international arbitration for breach of a treaty or investment agreement.[17]

Overriding royalty interests

Typically granted where one party exits a block but wishes to retain an interest in any subsequent production, overriding royalty interests (ORRIs) generally create an economic interest, expressed to be a percentage of hydrocarbons produced or sold. Disputes frequently arise, however, on how exactly that percentage is to be calculated (what costs are entitled to be deducted or the impact of selling via a long-term sales agreement rather than on the spot market). Parties will typically look for any ambiguity to exploit. On this issue, the choice of substantive law may well win the day. English law does not recognise any separate class of interests, applying normal principles of contractual construction. Texas law on the other hand has a richly developed case law bringing with it certain default presumptions of entitlement – potentially complicated by the fact that Texas regards an ORRI as a real property right, in conflict with most PSCs.

Shareholders' agreements

When the joint venture operates through an incorporated joint venture, the relevant company law may give joint venture partners further arrows in their quivers. Concepts such as the oppression of minority interest may put tension on the ability of parties to enforce their contractual rights. Representatives of parties to the board of directors may find themselves caught between their duties to their employers and the fiduciary duties they owe to the joint venture company (particularly as to confidentiality). Without careful drafting, warring shareholders may find themselves having to fund the legal costs of the opposing side of the litigation where the joint venture vehicle is a party to the arbitration (whether because it is aligned with the other party or because the other party is bringing a derivative action) and is cash calling for the costs of its lawyers.

Disputes with third parties

Obviously in addition to disputes between the core parties, there is a terrific scope for disputes with third parties in connection with upstream operations. Often these involve service providers to the joint venture. By way of example, disputes may arrive with the third party specialist companies who shoot seismic,[18] in relation to drilling rig contracts,[19] or even with catering suppliers assisting in feeding workers in remote locations. While these disputes may be driven by genuine operational failings (e.g. equipment failures on a drilling rig), in the oil price volatility of past years many disputes have often been driven by financial pressures, with contracts having been negotiated in a tight market and the joint venture parties simply no longer having the revenue flow to meet such costs.

17 By way of example, see the multiple proceedings arising out of Vedanta's purchase of Cairn Energy's shares in Cairn India.

18 A method of geophysical prospecting.

19 See, for example, *Transocean Drilling UK Ltd v. Providence Resources PLC* [2016] EWCA Civ 372.

Disputes may also arise with other joint ventures engaged in similar operations. Rig share agreements and similar cost-splitting arrangements can often lead to disputes when timetables change or when equipment is not handed over in an operable state. Bigger disputes can arise where blocks abut each other and unitisation agreements are involved. Such disputes typically have a high geological element, and are driven by accusations that something done in one block has damaged the other or that one consortium has effectively drained the other's reserves.[20] International boundary disputes may have a catastrophic impact on operations and the very validity of licences.

Given the sums involved and the developing legal and regulatory framework where many operations are conducted (including domestic requirements to partner with local agents), bribery and corruption issues also give rise to disputes. With the global reach of the US Foreign Corrupt Practices Act and the UK Bribery Act, oil and gas co-venturers can expect scrutiny from an international smorgasbord of enforcement authorities,[21] as well as attacks on the validity of the interests they hold.[22] Similarly, oilfield services contracts have been historically shown to be vulnerable to such influences,[23] and companies may well discover their own employees are party to corrupt practices (leading in turn to claims between co-venturers and claims by host states for the reversal of cost recovery, etc.).[24]

Data and opportunity sharing agreements have also led to significant disputes, with both provisions relating to only using data for one particular purpose (e.g., the evaluation of an interest for a purchase) being broken when the data is used for a different purpose (e.g., to assess the likely geological prospects of a proximate block) or when there is an agreement to only pursue an interest via a particular route (so the introducer does not lose his commission). Two public examples of these disputes may be found in the form of *Loon Energy Inc and another v. Integra Mining (B) Sendirian Berhad and another* [2007][25] and *Excalibur Ventures LLC v. Texas Keystone Inc and others* [2014].[26]

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20 For a related example see *Reliance Industries v. India* (2018), as reported by Global Arbitration Review at https://globalarbitrationreview.com/article/1172530/india-loses-billion-dollar-case-over-gas-migration. Also, ExxonMobil v Rosneft (2018) as reported by Global Arbitration Review at https://globalarbitrationreview.com/article/1172659/exxon-and-rosneft-in-billion-dollar-dispute-over-oil-migration.

21 See, for example, the Petrobras settlement with the SEC of US$170 million for filing false financial statements (showing an inflation in project value) and facilitating payments to politicians and political parties in Brazil (27 September 2017); and Halliburton Company's settlement with the SEC of US$29.2 million for violating the books and records and internal accounting controls provisions in connection with making payments to an Angolan company in return for oilfield services contracts (27 July 2017).

22 By way of example, see *Vanco v. Ukraine* reported on by Global Arbitration Review at: https://globalarbitrationreview.com/article/1032143/parties-settle-ukraine-oil-block-dispute.

23 See, for example, the Panalpina World Transport (Holding) Ltd and Panalpina Inc. (a global freight forwarding company) settlement with the SEC of US$81.8 million for paying bribes to foreign officials in various countries in return for preferential treatment through the customs process on behalf of customers.

24 See, for example, the Mark Jackson (former Noble Corp. CEO) settlement with the SEC for authorising false paperwork showing oil rigs had entered and left Nigeria when they did not in fact move (saving Noble Corp. from losing business and huge costs).

25 [2007] EWHC 1876 (Comm).

26 [2014] EWHC 3436 (Comm). See also *Monde Petroleum SA v. Westernzagros Ltd* [2016] EWHC 1472 (Comm).

Concluding thoughts

Upstream disputes remain common with no sign of slowing down. Given the sums involved, those disputes are probably more likely than not worth pursuing despite the ever increasing cost and length of modern arbitration. The issues involved frequently touch on multiple jurisdictions and legal systems, and frequently run the risk of third party intervention, whether from the host state, a rival bidder or a joint venture partner.

Upfront planning for this can pay dividends. Legal advisers and negotiators (whether internal or external) need to pay particular attention to the dispute resolution regimes, and not treat the relevant clause as 'mere' boilerplate. Significant value can be protected if there is a comprehensive joined up dispute resolution regime, which has been specifically crafted with the individual parties and bearing the relevant assets (and likely potential disputes) in mind. Special consideration needs to be given to expert determination provisions (to ensure that the scope of what falls to the expert is clear) and tiered dispute resolution clauses. While a requirement to allow management 30 days to meet to resolve a dispute might encourage early settlement, if not carefully drafted it might bar a party from urgent interim relief to prevent its interest being forfeited during the course of that 30 days.

When disputes do arise, multiple considerations come into play. State parties face particular difficulties in settling disputes (these include the need to get blessing from perhaps the highest levels of government or the risk of a compromise being second-guessed by a subsequent government). The remaining length of the economic life of a field can mean that a dispute must be dealt with by way of the softest of touches,or an imminent withdrawal may allow for battle royale. Particular consideration must be given to where the money sits. Most PSCs allow for the contracting parties to administer the contract accounts – it is much better (for the contractor) to fight a cost recovery dispute with the money sitting in the contractor's bank account than to adopt the government's cost recovery interpretation and seek to reclaim money given away via arbitration. Payments under protest (perhaps driven by the threat of criminal proceedings, or a need to preserve a relationship) can present particular problems. Given the stakes involved, parties are incentivised to take points, regardless of their objective merits – where hundreds of millions are in play, the fear of paying the other side's legal costs has little impact.

Should a dispute arise, there are now a significant number of arbitrators with strong experience in the upstream environment, who bring with them a deep understanding of the contractual structures in this area and the economics which underpin them.[27] Of course, it may not always be to a party's advantage to appoint such an individual, but this specialised area has given rise to both a specialised bar and a panel of arbitrators to hear such arguments. Of course, no award is worth the legal and arbitrators fees if it cannot be enforced. But oil and gas exploration requires deep pockets, and cargoes of crude oil do tend to look suspiciously like floating piggy banks.

27 A by no means exhaustive list may be found at http://www.energyarbitratorslist.com/.

Appendix 1

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Mark is an international dispute resolution partner in the London office of Orrick. He primarily focuses on disputes arising out of the energy sector, but also has significant experience with construction, insurance, shareholder and white-collar/civil fraud matters, as part of a broader commercial practice.

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The energy industry shaped international arbitration and – thanks to resource nationalism, changes in the oil price, shifting geopolitics and febrile sanctions lists - remains one of its biggest users.

The Guide to Energy Arbitrations, published by Global Arbitration Review, provides coherent and comprehensive coverage of the most common, most difficult, and most unusual issues faced by energy firms, from some of the world's leading authorities. It's edited by J William Rowley QC, Doak Bishop and Gordon Kaiser.

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