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A REPORT ON THE "YEAR IN REVIEW—THE MAGNIFICENT SEVEN" PRESENTATION BY LAURENCE SHORE

by Munia El Harti Alonso

Delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 21, 2021.

This presentation considered both investor-state and contractual disputes in the energy sector. It cast an eye over the wide range of matters that have come before arbitral tribunals in 2020, and will attempt to identify the top seven rulings and industry trends that will have significant influence on energy arbitration in 2021 and beyond.

I. INTRODUCTION

Laurence Shore (Bonelli Erede, Vice Chair of the Executive Committee of the ITA) launched the second day of the Conference with an outlook on the top six rulings and one industry trend—the Magnificent 7—(the "Influencers") that ought to influence energy arbitration in 2021 and beyond. The presentation identified seven Influencers, with the first providing for a more nuanced approach to Fair and Equitable Treatment (FET) claims. The three following cases can be summarized as "words matter," providing for a cautionary recommendation to pay attention to textual approaches in the interpretation of legislation, contracts, and commitments with local communities. Influencers five and six regard mega-awards enforcement proceedings and the intricacies for states regarding sovereign immunity waivers and the provisional application of the Energy Charter Treaty (ECT). The last influencer is a technologic advancement, with the imminent commercialization of oceanic methane hydrates that might prompt a new dimension of hydrocarbon disputes.

II. INFLUENCER 1: *ESKOSOL* AND THE REASONABLE RETURN AS A NUANCED ASSESSMENT OF FET

Citing one of the ECT renewable photovoltaic disputes, Mr. Shore identified the recent *Eskosol* award[1] as a landmark case in the energy sector, whereby the tribunal determined that the Conto Energia IV and Romani Decree of 2011 general enactments apply to the whole PV production industry, and Italy made no specific commitments to the investor that the regulatory regime would not change.

In line with certain previous awards, the key issue was that the original plan was too successful and in 2011 it was apparent that the 2020 PV target would be met by 2013, so there was excessive energetic capacity. Thus, the tribunal crucially found that Italy's incentive program was nuanced from the start with a concern to manage consumers fair price and providing for a reasonable return for investors. The tribunal´s approach to understanding the consumer's interest (embedded in legislative incentives in the renewables field) will be an influencer for more nuanced FET assessments of FET claims.

III. INFLUENCER 2: *MCGIRT*, NEW GROUNDS OF AUTHORITY FOR NATIVE PEOPLE ON OIL AND GAS RESERVES

The Supreme Court of the United States' (SCOTUS) ruling in *McGirt v. Oklahoma*[2] is bound to have ramifications on the domestic statutory interpretation and rights of people on natural resources. The SCOTUS ruling attributes Indian authority on a Creek Nation tribal reservation that spans three million acres and includes most of the city of Tulsa, with four more such reservations encompassing the entire eastern half of the State—19 million acres. The rationale of the Court was that the grant of authority that was attributed by Congress to the Creek Nation remained intact. As pointed out by the dissenting opinion of Justice John Roberts, "[t]he decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental

[1] Eskosol S.p.A. in Liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, (Sep. 4, 2020).

[2] McGirt v. Oklahoma, 591 U.S. ___, 140 S. Ct. 2452 (2020).

law."[3]

Mr. Shore pointed out that the decision will entail challenges to operators of oil and gas wells, causing them to enter into new agreements, some of them including arbitration clauses.

IV. INFLUENCER 3: ROCKROSE, WORDS MATTER IN RECENT ENGLISH LAW INTERPRETATION OF JOINT OPERATING AGREEMENTS (JOA)

The *Rockrose* decision[4] of the English High Court concerned a long-term JOA for oil and gas blocks in the North Sea. Although agreements of this type typically contain an arbitration clause, this one did not. The nine participants decided to remove the operator pursuant to the JOA. The operator brought suit arguing that the operators had to act in good faith. The Court applied the contract verbatim, without reading into the contract's implied terms and dismissing the doctrine of good faith with sophisticated JOA parties. Systemically, in a *Lord Sumption v. Lord Hoffmann* tension,[5] this decision is likely to influence approaches to contract interpretation under English law in many energy arbitrations.

V. INFLUENCER 4: SINOHYDRO COSTA RICA, A SOVEREIGN CAUTIONARY CASE ON STATE-LOCAL COMMUNITY COMMITMENTS

The *Sinohydra Costa Rica* arbitration concerns a 400 Million USD contract for the construction of an electric dam in Mexico.[6] Claimants were the contractors consortium. One of the salient aspects regards labor union rights and blockades, and community demands for compensation promised by Mexico's Federal Electric

[3] *Id.* (Roberts J. dissenting).

[4] Taqa Bratani Ltd and Others v. RockRose UKCS8 LLC [2020] EWHC 58 (Comm).

[5] For a recount of the debate between the two former Supreme Court Justices on the extent to which judges should look behind parties' choice of words to determine their intended meaning *see* John Denis-Smith, *An Attack on the Past as a Guide to the Future? Lord Sumption's Latest Lecture*, THOMPSON REUTERS DISP. RES. BLOG, Jun. 30, 2017, http://disputeresolutionblog.practicallaw.com/an-attack-on-the-past-and-a-guide-to-the-future-lord-sumptions-latest-lecture/.

[6] Omega Construcciones Indus., S.A DE C.V., Sinohydro Costa Rica, S.A., Desarrollo y Construcciones Urbanas, S.A. DE C.V. and Caabsa Infraestructura, S.A. DE C.V. v. Comisión Federal de Electricidad, LCIA Case No. 163471, Award (Jun. 22, 2020) *available at* https://jusmundi.com/en/document/decision/en-omega-construcciones-industriales-s-a-de-c-v-mexico-sinohydro-costa-rica-s-a-costa-rica-desarrollo-y-construcciones-urbanas-s-a-de-c-v-mexico-and-caabsa-infraestructura-s-a-de-c-v-mexico-v-comision-federal-de-electricidad-mexico-final-award-monday-22nd-june-2020.

Commission ("The Commission"). The consortium decided to terminate the contract based on a radical change of conditions since the time of tender, contending that the Commission was aware of the issues with the community and failed to resolve them. The tribunal determined that the Commission failed to honor its commitments to compensate the community residents, which led to foreseeable blockades and shutdowns. This case is a likely influencer because of the state-local community conflict implications for massive energy projects where the contractor must rely on community relations.

The last two cases deserve inclusion in these highlights, as the underlying industries of these recent decisions are oil and gas, with significant billion-dollar dispute amounts. Both are under appeal, and thus might deserve to be included in the 2022 ITA Conference.

VI. INFLUENCER 5: *P&ID*, SOVEREIGN IMMUNITY MOTIONS AND THE FISA

P&ID v. Nigeria,[7] a dispute worth USD 10 billion, concerned a gas supply and processing agreement, whereby Nigeria would supply wet gas and PI&D would refine the gas to produce lean gas for Nigeria. The agreement could not secure the requisite amount of wet gas. PI&D initiated an arbitration seated in London and won the case for 6.6 billion. However, in the set-aside proceedings, an English Court found that Nigeria managed to prove a strong prima facie case that the contract was procured by bribery.[8] PI&D moved to confirm the award in the District Court of Columbia in 2018. The District Court heard the sovereign immunity motion, but the Court decided that Nigeria waived its immunity, declining the motion to dismiss as well as the stay.[9] The operation of the waiver of sovereign immunity under the 1976 Foreign Sovereign Immunity Act ("FISA") is a key finding of the P&ID case, pending its final resolution.

[7] Process and Indus. Dev. Ltd. v. The Ministry of Petroleum Res. of the Fed. Republic of Nigeria, *ad hoc*, Final Award (Jan. 31, 2017), *available at* https://jusmundi.com/en/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017#decision_5289.

[8] Nigeria v. Process & Indus. Dev., Ltd., [2020] EWHC 2379 (Comm).

[9] Process and Indus. Dev., Ltd. v. Fed. Republic of Nigeria, 506 F.Supp.3d 1, 6–11 (D.D.C. 2020).

VII. INFLUENCER 6: YUKOS RELOADED, PROVISIONAL APPLICATION OF THE ECT BACK INTO THE DEBATE

The Hague Court of Appeal decision of February 2020[10] reinstating the Yukos awards[11] is of particular relevance. The Dutch Supreme Court hearing Russia's appeal decided to refuse the stay of the enforcement while its petition is being heard. With this ruling, the Court of Appeal is putting the construction of Article 45 of the ECT in circumstances in which provisional application would bind the Contracting State back into debate.

VIII. INFLUENCER 7: OCEANIC METHANE HYDRATES COMMERCIALIZATION, THE NEXT HYDROCARBON FRONTIER

A technology development that year after year will lead to arbitrations in the medium term: the soon to happen commercial production of oceanic methane hydrates. While it may not be as energy altering as the fracking of shale gas, its commercialization will be significant. It has long been a focus of government energy research programs, and recent projects have shown that the production of natural gas from oceanic methane hydrates is technically feasible, though with greenhouse gas emission consequences. The hydrates are in many countries Exclusive Economic Zone waters, particularly those of China, Japan, and South Korea. Territorial disputes are bound to arise, and the exploitation of these hydrates will lead to a new wave of arbitration clauses to deal with significant and expensive engineering challenges on the ocean floor.

IX. CONCLUSION

The dynamic presentation provided for a panorama of recent and most relevant disputes and developments in energy arbitration. The seven trends identified are indicative of the intrinsically evolutive nature of energy disputes, yet the lessons

[10] Rechtbank-Den Haag [District Court], , Apr. 20,l 2016 Case No. C/09/477160/HA ZA 15-1, *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230&showbutton=true&keyword=ECLI%3aNL%3aRBDHA%3a2016%3a4230 (English translation).

[11] Hulley Enterprises Ltd (Cyprus) v. Russian Fed., Permanent Court of Arbitration 2005-03/AA226, Final Award (Jul. 18, 2014); (ii) Yukos Universal Ltd (Isle of Man) v. Russian Fed., Permanent Court of Arbitration 2005-05/AA227, Final Award (Jul. 18, 2014); and (iii) Veteran Petroleum Ltd (Cyprus) v. Russian Fed., Permanent Court of Arbitration 2005-05/AA228, Final Award (Jul. 18, 2014).

learned provide for a systematic understanding of the current landscape in the field for the past year, and beyond.

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INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

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Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning–an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

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The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. *Programs.*

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

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