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A REPORT ON THE "ENERGY DISPUTES: AN UPDATE FROM THE ARBITRATORS" PANEL PRESENTATION

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

Energy disputes comprise a significant portion of commercial and investment arbitrations. This Panel will present observations on these disputes from the perspectives of the arbitrators who decide them, including trends in the matters that are coming before arbitral tribunals and learnings from energy arbitrations across different legal systems and geographic regions.

I. INTRODUCTION

In January 2021, the Institute for Transnational Arbitration ("ITA"), the Institute for Energy Law of the Center for American and International Law ("IEL"), and the ICC International Court of Arbitration ("ICC") held a virtual conference to discuss the latest advances in the energy sector and emerging trends in energy arbitration, focusing in particular on the impact the COVID-19 pandemic has had on the energy industry and energy disputes. The first panel discussion, titled *Energy Disputes: An Update from the Arbitrators*, presented recent observations on energy disputes from the perspectives of the arbitrators who decided them.

Moderated by Maria Chedid (Arnold & Porter, San Francisco), the panel discussion centered on four topics that have come up before arbitral tribunals in energy disputes: (1) the increasing reliance on force majeure provisions; (2) allegations of corruption; (3) the increasing presence of states and state-owned entities as parties in energy disputes; and (4) the role of expert witnesses in energy arbitrations. The participants also provided takeaways from energy arbitrations across different geographic regions and legal systems. The panelists were Mohamed S. Abdel Wahab (Zulficar & Partners, Egypt), Horacio Grigera Naón (Center on International

Commercial Arbitration at the American University Washington College of Law, Washington, DC), Matthew Secomb (White & Case, Singapore), and Maxi Scherer (WilmerHale, London).

II. TOPIC 1: FORCE MAJEURE CLAUSES

To start, the panelists noted an increasing trend in which parties to international energy agreements are invoking the force majeure clauses contained in energy contracts. A common contractual provision, force majeure clauses serve to relieve the parties from performing their contractual obligations when certain circumstances beyond their control arise and which make performance inadvisable, commercially impracticable, illegal, or impossible. In response to the COVID-19 pandemic and the unprecedented nature of the last year and a half, force majeure provisions have been increasingly invoked in the context of energy disputes, contributing to a heightened demand for force majeure determinations. Given the longevity of energy contracts, the pandemic has disrupted the contractual framework of these long-term energy contracts.

Scherer led the conversation regarding force majeure clauses in energy arbitrations. She noted that while she could not divulge specific issues in her cases without breaching confidentiality, she would try to infuse her experiences into a couple of remarks. First, Scherer touched upon statistics related to energy disputes during the COVID-19 pandemic. While dependent on the type of energy source at issue, global energy demand has declined in the EU and North America. In the first quarter of 2020, the overall global energy demand declined by about 4%, with coal dropping by 8%, oil demand by nearly 5%, and gas by approximately 2%. Unsurprisingly, the demand for energy from renewables remained high. By contrast, the second half of 2020 presented a mixed picture. In China, for example, demands were systematically up by 6% as compared to 2019 levels. This was not true for other parts of the world, particularly for Europe.

Scherer continued by identifying two notable cases related to the development of energy disputes and force majeure clauses. Her first selection involved a dispute related to the implementation of the force majeure provision contained in an

agreement between Electricité de France ("EDF") and Total Direct Energie ("TDE") in France. The substance of the dispute related to the suspension of obligations under a contract for the purchase of electricity at a regulated price due to the notable decrease in electricity consumption during the COVID-19 pandemic. The Paris Commercial Court found that the buyer could invoke the force majeure provision of the agreement because the conditions under the clause had been met. The Court found that the pandemic could not have reasonably been foreseen at the conclusion of the contract between EDF and TDE. Moreover, the Court found that the consequences of the pandemic were beyond the control of the parties and could not have been avoided. In this case, the force majeure clause broadened the scope of force majeure where performance of the contract would have been impossible under reasonable financial conditions. This is the first court decision recognizing the COVID-19 pandemic as a force majeure event.

Her second selection was the UK's Financial Conduct Authority's ("FCA") test case on business interruption insurance. In this case, the English High Court found that a number of representative business interruption insurance policies would cover financial losses caused by the pandemic. The Court refused the argument by the insurer, who claimed the indemnity was not due because economic loss would have been suffered regardless because of the economic downturn. Scherer noted she selected this case because it demonstrates important developments in the EU with respect to the impacts of the pandemic.

From an arbitrator's perspective, Scherer believes it all comes down to the wording of the force majeure clause. Throughout the pandemic, she has heard of clauses that were drafted before and after the pandemic started that did not include the word "pandemic." As such, it will become a matter of interpretation for arbitral tribunals. Grigera Naón commented on an energy dispute he presided over, which involved Chilean and Argentine parties. In the same vein as Scherer's remarks, Grigera Naón also recognized the importance of word choice in the force majeure provision. He recalled how in that case, the issue turned on the translation of the word "preventing." In the clause at issue, the translation contained the wording

equivalent of "impede" in English. Yet, "impede" does not imply "absolute impossibility." Nonetheless, the arbitral tribunal accepted the party's force majeure argument. Because of the wording in the provision, an event that would not have qualified as "impossibility" did qualify as such under the "impede" text of the contract.

Secomb concluded the discussion on force majeure clauses by touching upon the kinds of cases currently seen in Asia in this context. He identified two types: (1) cases in which a big project (*e.g.*, a large-scale infrastructure project) is being interfered with by a government action and where the dispute concerns the consequences of such action; and (2) cases in which there is a massively changed commercial outcome which leads parties to call upon force majeure.

III. TOPIC 2: CORRUPTION ALLEGATIONS IN ENERGY DISPUTES

To transition into a discussion regarding allegations of corruption in energy arbitrations, Chedid inquired about the impact these allegations have on arbitrators' perspectives and their evaluations of such allegations. Abdel Wahab led the discussion on this topic. He started by stating that corruption is one of the "most fascinating" topics in arbitration, both in the commercial and investor-state arbitration settings. In the realm of energy disputes, there have been increased allegations of corruption in many parts of the world. From an arbitrator's perspective, Abdel Wahab believes allegations of corruption color the arbitrators' discussions, deliberations, and views on the matter.

According to Abdel Wahab, several factors have led to an increase in allegations of corruption. Among these is a global growing focus on bona fide dealings between parties. In addition, references to bona fide dealings in the proliferations of texts and treaties make these types of dealings an indispensable requirement. He observed that arbitral awards routinely deal with issues of corruption. The involvement of states and state-owned entities, polarized practices mandated by cultural differences, as well as political and socio-economic changes and regional volatility have all impacted the increasing visibility of corruption allegations in arbitration, particularly in energy dealings.

Abdel Wahab listed four "magical words" to keep in mind when considering the

subject of corruption allegations in arbitral proceedings: (1) perception; (2) framing; (3) proof; and (4) impact.

An arbitrator's perception about what constitutes corruption and the importance of the allegation itself is informed by a variety of factors, such as past experiences, previous cases, perceptions based on the jurisdiction where the alleged action has taken place, and the jurisdiction where the arbitrator is from.

Framing refers to the way the parties in the dispute frame the allegation of corruption. This element is also impacted by an arbitrator's perceptions on the issues raised. Framing is an essential element in identifying and distilling issues of corruption. Abdel Wahab noted that whether an arbitrator is proactive and reactive regarding the corruption allegation depends on the different approaches taken by the parties and on the arbitrator's background.

As to proof, arbitrators must evaluate who bears the burden of proving the allegation of corruption. Abdel Wahab noted that, in practice, the weighing of evidence is very "interesting" when a state is involved. This is because there may be local court rulings related to corruption, and arbitrators must decide what weight (if any) to accord to such decisions. He questioned whether these decisions were something arbitrators should take as concrete evidence or whether they are challengeable by the parties to the dispute. From an arbitrator's perspective, Abdel Wahad emphasized the increasing use of expert evidence in allegations of corruption, particularly relating to the interpretation of local law and whether certain activities meet the threshold of corruption.

Regarding impact, Abdel Wahab explained this element refers to the consequences and ramifications of an arbitral tribunal finding there has been corruption. He identified two parts to the impact element: causation and magnitude. By causation, he questioned whether it is necessary for there to be causation between the activity and harm suffered and the relief sought by a party. As to magnitude, he stated that assessing the magnitude or seriousness of an allegation of corruption can be demonstrative of the perceptions and backgrounds of arbitrators.

Abdel Wahab and Secomb both agreed that the increased visibility of corruption,

rather than an increased number of instances of corruption, is what may be causing the increased frequency of corruption claims in energy arbitration. Secomb highlighted that the legal community is looking at allegations of corruption "with a magnifying glass" because of anti-corruption legislation, internal investigations, and repeated reporting of allegations of corruption in the media. Both panelists noted that oftentimes a party will make an allegation of corruption or illegality in an attempt to undermine the credibility of the opposing party before the arbitral tribunal.

IV. TOPIC 3: STATES AND STATE-OWNED ENTITIES

In the third topic of the panel, Grigera Naón addressed whether the presence of a state or state-owned entity as a party to a dispute can potentially change an arbitrator's approach to management of the proceeding. In particular, he pondered the different considerations an arbitrator may consider when dealing with these types of parties. By way of example, Grigera Naón considered contracts for the construction of an refinery and a powerplant. He highlighted the different types of disputes that arise in energy arbitration. Given the complex and distinct nature of these disputes, each case and subject matter requires a different level of analysis and expertise on the part of the arbitrator.

Grigera Naón urged parties to be careful in how they draft their contracts. His warning is based on trends he has seen with respect to interpreting and construing the provisions of a contract, including the force majeure clause. Grigera Naón considered a scenario in which a contract for the construction of a refinery was drafted in accordance with common law guidelines in a case where the counsel for both sides were common law lawyers, but the contract was drafted under Venezuelan law and needed to be interpreted under Venezuelan law. In his view, these types of contracts should be interpreted in light of "custom and usage", both of which are relevant in energy disputes, particularly when a state is a party. These are some of the elements arbitrators may take into account when deciding cases. Grigera Naón stressed that these are the types of practical issues he has experienced in his energy arbitration practice.

Other issues Grigera Naón has dealt with in energy disputes involving a state or

state-owned entity include issues of applicable law, public international law (i.e., treaty interpretation), evidentiary and procedural matters, as well as concerns related to privilege. He also discussed interpreting issues of domestic law, which require an arbitrator to understand both the industry and legal issues raised in the dispute under national law. In this respect, he inquired about the kind of expertise and experience that should be required from arbitrators who are going to be sitting in these complex cases. These considerations are relevant in the context of disputes involving states or state-owned entities, specifically within the framework of bilateral investment treaties ("BITs"), which oftentimes refer to the laws of the country in which the investment is made. Before concluding the dialogue on the involvement of states and state-owned entities, Abdel Wahab commented on the broad range of disputes in the energy industry. From an arbitrator's perspective, he cautioned against having a bilingual contract, calling it a "deadly combination." Contracts should have one prevailing language. Additionally, he commented on the pressure some arbitrators feel when they are nationals of the state now involved in a dispute before them. This added dimension finds its way into a tribunal's deliberations and discussions.

V. TOPIC 4: EXPERT EVIDENCE IN ENERGY ARBITRATIONS

Lastly, the panel discussed another notable feature of energy arbitration: the dominance of expert opinions across a wide range of disciplines. Secomb took the lead in providing insight into the way arbitrators see experts. From an arbitrator's perspective, Secomb noted that experts do not always help arbitrators in their role as decision-makers, particularly in energy arbitrations. To support his point, Secomb divided experts in this field into the following three types: (1) data bundlers and "repackagers"; (2) quasi-lawyers; and (3) real experts.

As to the first type, experts in energy cases take very complicated data sets and re-package them in a way that lay lawyers sitting as arbitrators can digest and ultimately decide on. In some instances, delay experts will take data sets and package them in a way that allows for arbitrators to decide on two versions of events. Secomb considered whether this ability is really an indication of expertise or whether it is simply a tremendous skill these people possess.

As to quasi-lawyers, Secomb proposed that most of their expertise comes from being involved in disputes of a similar nature (for example, in the oil and gas fields), but not from being involved directly in the subject matter of the dispute. He considered gas pricing cases as the primary example. In that regard, he noted most of the experts in the field are not necessarily people who have worked for oil and gas companies. As such, they are not able to inform a tribunal about the way an executive or executive team negotiates gas prices. That being said, these quasi-lawyers play two roles: (a) data bundling and (b) giving their view on how gas price reviews should be resolved. It is important for arbitrators to remember that this kind of expert is advocating for a certain price. They can still be helpful to arbitrators, but arbitrators must decide the case based on the partisan role some of the experts are playing.

The third type of experts recognized by Secomb were "real experts." By this, Secomb explained he was referring to people who have spent their whole life studying a specific subject matter. In his view, this type of expert is the most helpful to a tribunal. Secomb touched upon a case before him in which there was an expert on coal blending. The case turned on the issue of how coal would react when it was blended on a molecular level. One of the parties had an expert who had spent his whole life "obsessed" with coal. As an arbitrator, Secomb gave this expert's testimony and views significant weight because the expert had experience with the subject matter at issue.

From an arbitrator's perspective, Secomb recognized experts are valuable but emphasized the importance of considering the expert's role and what they are purporting to bring to the table. In line with Secomb's remarks, Scherer addressed how experts can be most valuable to arbitrators. She expressed her preference for "expert conferencing" and discussed the importance of an expert testifying and being subject to a cross-examination. Scherer added that she has heard arbitrators suggest there should be a tribunal-appointed expert tasked with helping arbitrators digest the expert evidence presented by both sides. In her view, this scenario shows arbitrators are failing to understand the expert evidence presented to them and need someone to walk them through it.

Every panelist, except for Grigera Naón, indicated they prefer to have expert conferencing. Grigera Naón further expressed that while there may be different types of experts, not many of them are reliable, irrespective of their impressive credentials. In support of this view, Grigera Naón referenced a construction case he presided over in Texas, in which one of the parties had a distinguished expert from a leading construction jurisdiction in Europe. The expert gave an emphatic presentation, with one of the vital parts centering around a specific text. During the proceedings, the opposing party showed how the text emphasized so heavily by the expert had been taken verbatim from a fax in evidence, which came from the general counsel of the party who had instructed the expert. Clearly, the expert was not independent. Grigera Naón cautioned against being impressed by experts. Instead, he noted an arbitrator can really see a person's expertise by observing how the expert conducts himself in cross-examinations.

VI. CONCLUSION

Before her closing remarks, Chedid asked each panelist to leave the audience with a piece of advice from an arbitrator's perspective. Grigera Naón emphasized the importance of well-drafted briefs. Secomb cautioned parties against wasting an arbitrator's time. Scherer touched upon an arbitrator's ability to be proactive in case management. Lastly, Abdel Wahab urged arbitrators to consider every case on its facts and pleadings. He noted the danger in arbitrators being "too webbed" in their past experiences with energy arbitrations and thinking every case is "more or less" the same. In addition, Abdel Wahad stressed the importance of picking experts carefully.

In her closing remarks, Chedid noted the field of energy arbitration is destined to grow. Arbitrators will hear more and more of these types of disputes as the world transitions into new sources of energy.

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