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KEYNOTE REMARKS:
6TH ANNUAL ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION

by Eileen Akerson

Keynote address delivered at the 6th Annual ITA-IEL-ICC Joint Conference on International Energy Arbitration held in Washington, D.C., on March 27, 2019.

When I became KBR's General Counsel, I inherited a full docket of litigation and arbitration matters. That docket predominately included claims and litigation arising from our US Government Services business. Fortunately, along with it, came KBR's highly capable Head of Litigation, Mark Lowes. Mark deserves the credit for building and managing an excellent team of internal and external lawyers that deftly handled those disputes for KBR.

Over the last several years, as the Government Services matters have been successfully resolved, they have been replaced by a rise in disputes involving our Hydrocarbons business.

As a backdrop for some of my comments today, I would like to provide a little background on the types of services KBR offers and the types of projects we perform around the world.

KBR is a global provider of professional services and technologies across the Hydrocarbons and Government Services sectors. We employ approximately 38,000 people worldwide (including our joint ventures) with customers in more than 80 countries, and operations in 40 countries.

In the Government Services industry, we are serving government customers globally, including capabilities that cover the full lifecycle of defense, space, aviation, and other government programs and missions, from research and development, through systems engineering, test and evaluation, and program management, to operations, maintenance, and field logistics.

Since the early days of the US oil and gas industry, KBR has been at the forefront of some of the major milestones in the global hydrocarbon industry. From building

the first offshore platform out of sight of land in the mid-1940s, to revolutionizing fertilizer production in the 1960s through to the creation of a new ammonia process and pioneering the Liquefied Natural Gas (LNG) industry by designing and constructing one-third of the world's LNG production.

Our capabilities include a wide portfolio of proprietary technologies, such as those related to ammonia production. These technologies enable owners to operate efficient, low-cost, and reliable ammonia production plants as well as improved environmental compliance with reduced carbon dioxide and nitrogen oxide emissions. In addition, as some of you know, green production of ammonia is gaining attention as a low or carbon-free source of fuel.[1]

Our portfolio of LNG projects includes facilities in some of the world's most remote and demanding locations: an island nature reserve in Australia, coral reefs in Yemen, mangroves in Indonesia, and pristine coastlines in Africa and Australia.

Each of these projects, and those like them, involve a unique set of risks that could impact project design requirements and execution strategy, with the potential for associated cost increases and schedule delays.

Comprehensive analysis is required for a multitude of potential issues, including applicable regulatory or environmental requirements, logistics constraints, political stability, safety and security, local content requirements, soils conditions, and many other issues.

For the project on the nature reserve in Australia, stringent quarantine requirements were in place to ensure that the natural habitat remained pristine. Requirements included an interim staging area off the island for all items to be inspected prior to final shipment to the project site on the island. This requirement factored into schedule and logistics planning, with the associated risks allocated between the parties.

Accordingly, project risks require thoughtful discussion by the parties and clear

[1] Robert F. Service, Ammonia– a renewable fuel made from sun, air, and water– could power the globe without carbon, Science Journals (July 12, 2018), https://www.sciencemag.org/news/2018/07/ammonia-renewable-fuel-made-sun-air-and-water-could-power-globe-without-carbon.

agreement as to which party should bear the impact of a particular risk.

I always say that "the devil is in the details," and by that I am referring to the exhibits and definitions in a project agreement. Perfectly drafted terms and conditions are not much use if they do not align with the commercial terms and scope of work. I view the terms and conditions, commercial terms, and scope of work like the three legs of a stool: if they are not aligned, the stool falls over.

KBR may perform engineering, procurement, and construction (EPC) contracts under various commercial models, whereby portions of our services may be compensated on a lump sum, unit rate, and/or reimbursable basis, respectively. It is imperative that the commercial terms, scope of work and related exhibits, and terms and conditions all align within the contract.

When I started at KBR nearly 20 years ago, the typical Total Installed Cost (TIC) for a LNG project was between US$1-2 billion, and that was considered sizeable at the time. In this era of megaprojects, estimates for TICs may reach tens of billions of dollars. Indeed, a single purchase order or subcontract issued on a project alone may be valued at US$1-2 billion.

As owners and contractors seek to minimize costs for more competitive and viable projects, they are exploring innovative technologies that create prototype risk, with significant financial consequences for the party assuming the risk if the technology does not perform as intended.

As an EPC contractor on a large LNG project, there are interactions with a wide variety of project participants, such as the Project Owner, joint venture partners, local and international subcontractors and suppliers, as well as technology licensors. Our clients may be state-owned or publicly listed companies as well as developers. Needless to say, the potential for disputes among project participants is high. Thus planning ahead for those disputes must be a priority during negotiations and not deferred to the last possible moment.

Considering our global footprint and the challenging aspects of our operations, it follows that we encounter a fair number of international disputes. It is my responsibility to oversee our efforts to avoid disputes in the first instance and

position us for successful resolutions when they do arise, which they inevitably do.

International arbitration for multinational companies often is the only option when it comes to cross-border dispute resolution. With respect to the option of arbitration, I have a few statistics for you to consider.

In 2017, which is the most recent year for available data, energy cases represented 19% of the new arbitration case load at the International Chamber of Commerce (ICC)[2] and 24% of all arbitrations referred to the London Court of International Arbitration (LCIA).[3]

The US remained the most frequent nationality among parties to arbitrations before the ICC, comprising 8.4% of parties in 2017 filings.[4]

In addition, according to more than 60% of respondents to Queen Mary University's 2018 International Arbitration Survey, enforceability of awards and avoiding specific legal systems or national courts were identified as two of the most valuable characteristics of international arbitration.[5]

I would caution, however, to monitor the solvency of your counter-party throughout the process and have a strategy on enforcement and collectability of an award. You may "win the battle but lose the war" if you fail to collect on a favorable decision.

Often from a user standpoint, however, the system does not work as it should. By way of example, some of you may be familiar with the *Commisa v. Pemex* matter.[6] In

[2] 2017 ICC Dispute Resolution Statistics, *in* ICC DISP. RESOL. BULL. 2018 ISS. 2, 61 (2018), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf.

[3] LCIA Facts and Figures: 2017 Casework Report, 5 (2018), *available at* http://www.lcia.org/News/lcia-releases-2017-casework-report.aspx.

[4] 2017 ICC Dispute Resolution Statistics, *in* ICC DISP. RESOL. BULL. ISS. 2, 53 (2018), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf.

[5] Queen Mary Univ. of London Sch. Of Int'l Arb., 2018 International Arbitration Survey: The Evolution of International Arbitration, 7 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

[6] Corporación Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex-Exploración y

the *Pemex* case, a dispute arose between Pemex and one of our subsidiaries, Commisa, relating to a platform project in Mexico. Commisa had completed 94% of the work when the project was seized and our workers were ejected from the site.[7] While an arbitration between our subsidiary and Pemex was pending before the ICC, Mexico passed a new law exempting the government from the type of proceeding we were engaged in.[8] Nevertheless, in December of 2009, the ICC found largely for us and in August 2010 that award was enforced in the Southern District Court of New York. Pemex appealed that decision and simultaneously sought to have the arbitral award annulled via an amparo action in a Mexican court. While Pemex's appeal of the award was pending, the court in Mexico ruled to annul the arbitral award.[9]

Following the annulment decision in Mexico, Pemex successfully petitioned the Second Circuit to remand the case back to the District Court, which again found for KBR.[10] This ruling was also challenged, and we finally prevailed before the Second Circuit prior to settling amicably with Pemex.[11] This was the first time the Second Circuit confirmed an annulled international award.[12]

From the date, the Notice of Arbitration was filed in December of 2004 to the eventual settlement of the matter in early 2017, the arbitral process took a little over 13 years—as you can see, we had a few detours along the way to the recovery of nearly half a billion dollars.

Producción, 962 F. Supp. 2d 642 (S.D.N.Y. 2013); Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622 (2017).

[7] *Pemex*, 832 F.3d at 98.

[8] *Id.* at 99.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 112; Press Release, KBR, Inc., KBR Recovers Almost Half Billion Dollar Judgment, Resolves Lengthy Commercial Dispute (Apr. 10, 2017), https://kbr.com/Pages/KBR-Recovers-Almost-Half-Billion-Dollar-Judgment-Resolves-Lengthy-Commercial-Dispute.aspx.

[12] In its first decision on the issue in Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 196 (2d Cir. 1999), the Second Circuit upheld the district court's refusal to enforce an award that had been set aside in Nigeria, where the arbitration was seated.

While delays in the arbitration process may not always be avoidable, the *Pemex* case highlights the significant challenges for in-house counsel in managing stakeholder expectations, controlling costs, and mitigating delays.

I recognize that I am speaking to a room of highly skilled in-house and external counsel, arbitrators, and consultants. Indeed, when asked to give the keynote speech at this conference, I replied that I would be the least qualified person in the room to do so. I hope, however, that I can share some helpful insights that I have learned from my experiences at KBR.

What the *Pemex* matter reinforces for me, as well as some of the other matters KBR is currently handling, is that successful outcomes in disputes are shaped by many factors. In *Pemex*, we had several excellent firms that worked collaboratively together, a well-thought-out strategy, and a well-respected panel. It also helps that over the passage of time, emotions dissipate with the turnover of personnel.

Positioning for the successful resolution or avoidance of disputes starts at the very beginning—during the negotiation of your transaction.

You need to understand your counter-party and their business drivers, assess the likelihood that a dispute may arise, and negotiate an appropriate dispute resolution clause. Too often the discussion of dispute resolution is addressed at the end of the negotiation and inadequately drafted in the contract or, if so, subsequently traded away for another deal point. Having been a transactional lawyer negotiating those deals, I know all too well the pressures to do so. I recently heard someone describe the dispute resolution clause as the "Cinderella clause", arguably "the hardest working, least appreciated clause in the contract."

Do not wait until you are ready to trigger the dispute resolution process to involve external counsel and technical or claims consultants. Engage them early to help frame your strategy for avoiding a dispute or, if inevitable, to assist you in shaping your arbitration strategy. As Mark often remarks to me, "hope for the best but plan for the worst."

On our large international projects, we often partner with one or two other companies for additional expertise and to share risks. Do not assume that they have

the same experience or appetite for arbitration or litigation. You need to be respectful of their views and experience as you seek alignment on the formation and execution of a dispute resolution strategy.

To that end, we typically form a legal committee comprised of a legal representative from each partner company. In the early phases of a project, KBR often selects a transactional lawyer from the business to be its representative. As the project progresses and the potential for a dispute increases, however, it may be necessary to replace that individual with someone with more dispute resolution experience.

In KBR's experience, a successful working relationship with external counsel requires the following:

- A good understanding of our business and appreciation of the expectations of the many stakeholders (such as a Board, Executive Management, Investor Relations, Finance) that in-house counsel may be managing throughout the dispute process. We may engage outside counsel in those discussions, and the ability to provide clear and pragmatic guidance is highly valued;
- Clear lines of communication and reporting between internal and external counsel, which is critical when there are multiple disputes and different firms handling them;
- Alignment with our business objectives and drivers, as well as flexibility and creativity as and when those objectives change;
- Assurance that we are meaningfully involved in the arbitration process, including case management, selection of arbitrators, approval of documents and attendance at hearings; and
- A balance struck between cost, quality, speed and certainty of outcome. I recognize that we have a large role in assisting external counsel to achieve that balance.

In conclusion, I would like to remind you that the dispute resolution clause could become the most important provision in your contract. Unfortunately, much like Cinderella, it is too often overlooked until it is needed.

EILEEN AKERSON is Executive Vice President and General Counsel at KBR. Eileen is responsible for overseeing legal issues for KBR, a global provider of differentiated professional services and technologies across the asset and program life cycle within the Government Services and Hydrocarbons sectors. KBR employs approximately 34,000 people worldwide, with customers in more than 80 countries. Prior to becoming General Counsel, Eileen served in an operational role at KBR as Senior Vice President, Commercial, responsible for project commercial management and oversight of the review and approval process for significant transactions and joint venture relationships. In this role, Eileen developed particular expertise in the area of risk management of lump sum and cost reimbursable contracts. Previously, Eileen served at KBR as Vice President–Legal & Chief Counsel, responsible for managing the global legal functions for the Hydrocarbons Business Group. She also provided advice to senior management on company policies affecting ethics and compliance matters. Before joining KBR in 1999, Eileen was in private practice as a lawyer in Washington D.C. practicing in the areas of toxic tort and public and private sector construction litigation. Eileen is a graduate of The Catholic University of America, Washington, D.C., J.D. 1991; B.A. 1987.

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