

Dispute resolution in the international energy sector: an overview

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This article provides a comprehensive and succinct review of the essentials needed to deal with the disputes encountered in the international energy sector. It begins with explaining the reasons why this sector has more disputes than any other business sector and then discusses how parties can effectively manage that risk. The article covers the kinds of disputes found in the international O&G business, the types of dispute resolution mechanisms available along with their respective advantages, and the legal framework for international arbitration. It explains how to properly draft dispute resolution clauses and what to consider in selecting counsel and in appointing arbitrators. A section is included that specifically deals with disputes involving governments. The article finishes with a discussion on the increasing time and cost of international arbitration and how to address those concerns.

The article provides extensive references on each of the topics it covers, including appendices that provide details for all the important international arbitration centres and professional organizations, handy arbitration websites to source, and a complete list of the leading textbooks, articles and reference works from the world of international arbitration. The article arose from work that the author did for the Independent Petroleum Association of America and the Association of International Petroleum Negotiators.

1. Introduction

The international petroleum business invests in large, complex, capital-intensive projects that have long life spans. Circumstances, economics, governments and parties invariably change in these international oil and gas projects, which can often lead to a dispute. The petroleum sector is also a major global investor. The result is that the international energy sector, along with its associated construction projects, makes up the largest portfolio of international commercial and state investment disputes in the world as shown in Figures 1 and 2.

Disputes are therefore a significant risk in any international energy project. The risk is not whether a project will have a dispute, but rather in how well a party can manage that

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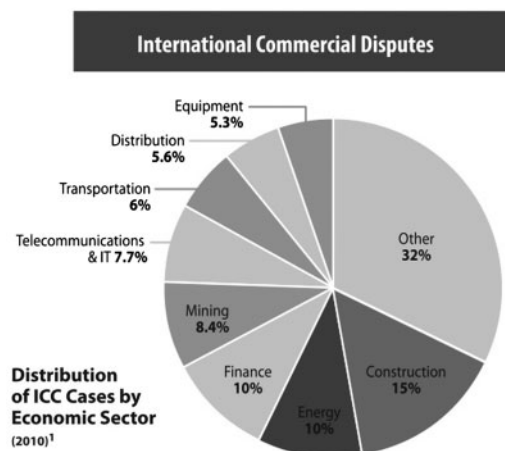


Figure 1. International commercial disputes.

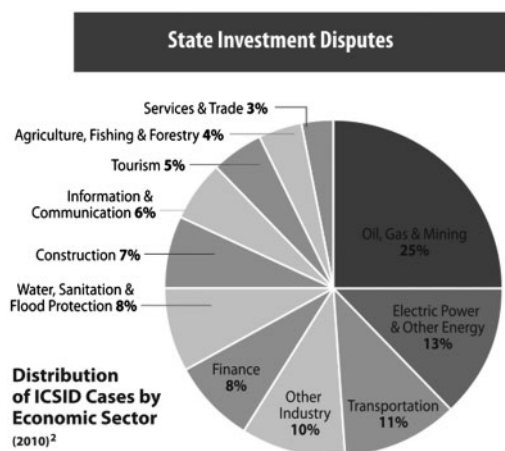


Figure 2. State investments disputes.

dispute to get a satisfactory result. Parties therefore need to continually manage that risk from the inception of the deal through to the point when a dispute arises and is eventually resolved. This article provides the knowledge and tools to do so.

2. Planning for disputes

There are several key junctures in any transaction where parties can have a significant impact on how their disputes will be managed and ultimately resolved. Those turning

¹ See ICC data on international commercial disputes at: <<http://www.iccwbo.org/court/arbitration/index.html?id=34704>>.

² See ICSID data on state investment disputes at <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>>.

points are: (1) when parties first make a deal and draft a dispute resolution clause into their agreement; and (2) when parties have an actual dispute and select their dispute counsel and the arbitrators, mediators or other dispute resolution facilitators. Parties need to plan and implement their dispute resolution strategy at these key junctures to maximize their potential benefits and to minimize their potential losses.

Nobody likes discussing potential future disputes when making a deal. It is a bit like discussing how you want to handle your divorce at the time you make your marriage proposal. So it is often the last item negotiated in an agreement. However, the dispute resolution clause should not be an afterthought. It is a very significant clause in any international agreement since it is the ultimate determinant of how the agreement will be interpreted, applied and enforced. Unlike domestic projects, a big risk in international energy projects is that a dispute will be submitted for resolution in a hostile forum using an unfavourable law and process. Parties need to ensure where and how they want it resolved, and who will resolve it. That usually does not include the local courts in many developing countries where oil and gas companies make their investments. Companies therefore need to give a great deal of thought to how they want any future dispute dealt with and how they can incorporate those processes into their agreements.

3. Types of disputes in the international oil & gas business

There are essentially four types of disputes found in the international oil and gas business. They are:

State versus state disputes

These are primarily boundary disputes concerning oil and gas fields that cross international borders, most of which are located in maritime waters. Strictly speaking, they only involve governments since only they are able to claim sovereign title and resolve boundaries with their neighbouring states. However, oil and gas companies get indirectly involved in these disputes when they are granted concessions that straddle disputed boundary lines. Companies are sometimes asked by developing nations to fund the dispute costs, and provide data and legal expertise to aid in resolving the boundary dispute. Companies therefore need to be familiar with these disputes and be able to manage them properly when they find themselves in the middle of one. More information on these disputes follows later in the article.

Company versus state disputes

These are often called investor–state or state investment disputes. They occur when governments significantly change the terms of the original deal or nationalize or expropriate an investment. The investor (in this case, an oil and gas company or a consortium of oil and gas companies) can base its claim on its investment contract (eg a production sharing contract (PSC) or risk service agreement (RSA)) or an investment treaty, or possibly both. Most treaty claims are made under bilateral investment treaties (BITs), which are negotiated and ratified by two sovereign states. There are presently more than

2,500 BITs involving some 180 countries in existence around the world. There is one multilateral investment treaty of significance to the oil and gas industry and that is the Energy Charter Treaty.³

Companies should structure their investments and negotiate their host government contracts to take advantage of the investment protection provided by these treaties and to access the facilities of the International Centre for the Settlement of Investment Disputes (ICSID) as the forum of choice for any dispute with a sovereign state. That is essentially accomplished by incorporating their investing company and managing their business out of a jurisdiction that has a strong BIT with the host country and by including an ICSID dispute resolution clause in their host government contract.

These disputes do not often happen to international oil companies (IOCs). But when they do occur, they involve large sums of money and therefore have a significant impact on a company's bottom line. Companies should therefore seek qualified legal advice on how best to structure their investments and draft the dispute resolution clauses in their host government contracts.

Company versus company disputes

These are usually called international commercial disputes. There are two subcategories of disputes occurring between energy companies. The first subcategory is amongst joint venture participants in contracts such as:

- Joint Operating Agreements
- Unitization Agreements
- Farmout Agreements
- Area of Mutual Interest Agreements
- Study and Bid Agreements
- Sale and Purchase Agreements
- Confidentiality Agreements.

The second subcategory of disputes is between operators and service contractors for the following kinds of agreements:

- Drilling and Well Service Agreements
- Seismic Contracts
- Construction Contracts
- Equipment and Facilities Contracts
- Transportation and Processing Contracts.

These disputes make up the majority of disputes in which oil and gas companies find themselves. They run the full gamut of size, complexity and financial significance.

³ See <<http://www.encharter.org>> for more details.

Individual versus company disputes

There are a number of situations where individuals initiate claims against oil and gas companies. The first is when an individual suffers a personal injury and begins a tort claim against a company. This is common in US jurisdictions but is increasingly happening in other countries. Foreign claims are usually started in local courts but can sometimes be filed in US courts using the Alien Tort Statute.⁴ The second group of claims by individuals arise when promoters of oil and gas deals allege they have an interest in a host government contract and the accompanying joint operating agreement, sometimes in the context of a claim of tortious interference by a third party. The final group of claims concerns agents or consultants who demand payment under their agent agreements for winning a government contract for a company. There are a series of arbitrations that have happened over the last 50 years where companies have refused to pay their agent based upon corruption allegations after securing the host government contract.⁵

4. Types of dispute resolution methods

There are a number of dispute resolution methods that parties can use in their international agreements. They can use one or several of them together. Some are better than others depending on the circumstances. Whatever parties choose, they need to draft their dispute resolution clause so that the different methods work properly together. Otherwise a party will receive some unpleasant surprises at the time of the dispute. The various types of dispute resolution methods include negotiation, mediation, expert determination, dispute review boards, litigation and arbitration.

Negotiation

Negotiation between the parties at the time of a dispute usually happens as a matter of course. A provision for negotiation may or may not be drafted into an agreement. It can be formalized as part of a multi-step dispute resolution process. If it is, the agreement needs to set a clear time frame when each step is finished. Otherwise, failure to complete one step can be used as an obstacle to get to a binding process. It is the least expensive of any dispute resolution method and potentially the most commercially viable solution. But it needs the full co-operation of the parties and a great deal of objectivity and detachment in the parties' behaviour to avoid negative emotions and entrenched views that get in the way of a settlement. It should not be the only dispute resolution method relied upon since it may result in no resolution.

⁴ For more details on these claims worldwide, see J Drimmer, 'Human Rights and the Extractive Industries: Litigation and Compliance Trends' (2010) 3 Journal of World Energy Law & Business .

⁵ See A. Timothy Martin, 'International Arbitration and Corruption: An Evolving Standard' (2009) 20th Annual Institute for Transnational Arbitration. Available at <<http://www.timmartin.ca/qualifications/publications>>.

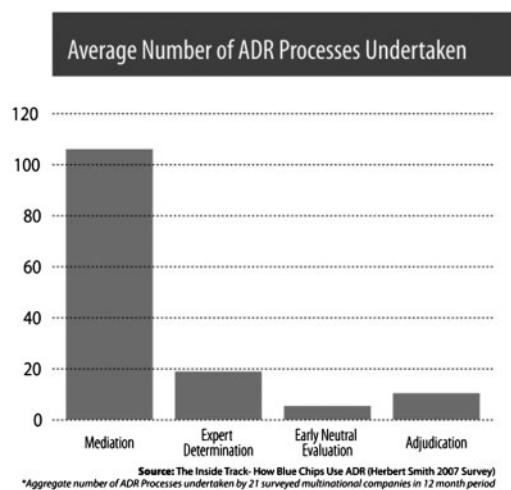


Figure 3 Average number of ADR processes undertaken. *Source:* The inside Track-how Blue Chips use ADR (Herbert Smith 2007 Survey). Aggregate number of ADR processes undertaken by 21 surveyed multinational companies in 12-month period.

Mediation

Mediation requires the parties to be well prepared and committed to the process, their decision makers at the table, and a skilled mediator to work properly. When that happens, mediation can be a very effective and successful dispute resolution tool. The focus is on the real interests of the parties, not their contractual or legal entitlements. It is frequently used domestically in common law jurisdictions such as the US, England, Canada and Australia. It is starting to slowly spread to civil law jurisdictions.

Mediation is the alternative dispute resolution (ADR) method of choice in the business community, ie alternative from litigation and arbitration. It is overwhelmingly chosen over other ADR methods across different jurisdictions as shown in Figure 3.⁶

Mediation is faster and cheaper than arbitration⁷ and has a high success rate of settlement.⁸ Mediation can cost less than 5 per cent of the cost of an arbitration dealing with a similar dispute, take less than 15 per cent of the time of an arbitration and have a success rate in the 75–85 per cent range. Despite those obvious advantages, it is still infrequently used in international disputes. There are a number of reasons for mediation not being widely used in international business disputes including lack of familiarity with the process, differences in culture, language and values, and the large distances separating

⁶ H Smith LLP, *The Inside Track: How Blue-Chips are Using ADR*, 6 (London UK, November 2007). This research is based on interviews with in-house lawyers at 21 leading multinational companies conducted by the Herbert Smith law firm in 2007.

⁷ See A. Timothy Martin, 'International mediation: an evolving market' in A Rovine (ed) *Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers, 2010.

⁸ Centre for Effective Dispute Resolution (CEDR), *The Fourth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience* (London, 2010) 8.

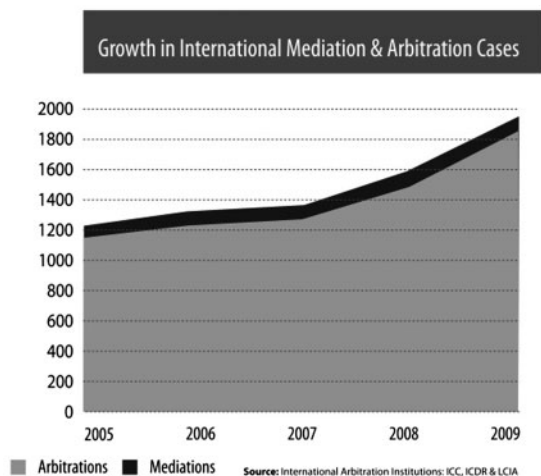


Figure 4 Growth in International mediation and arbitration cases. *Source:* International Arbitration Institutions: ICC, ICDR and LCIA.

the parties. Finally, successful mediation requires compromise from all parties involved and some disputes simply do not lend themselves to compromise.

Figure 4 illustrates how infrequently mediation is presently used to resolve international disputes. It shows that three of the most well known and frequently used international dispute resolution institutions, the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR), which is the international division of the American Arbitration Association, only administer about 100 mediations a year compared to over 1,800 arbitrations registered per year at all three institutions.⁹

An important thing to remember about mediation is that it is not a legally binding process. The results of mediation only become binding with a signed settlement agreement. It should therefore be seen as an adjunct and not as a replacement to a binding process, such as international arbitration. Despite its present infrequent use, it will likely grow as a useful and worthwhile international dispute resolution tool in appropriate circumstances with the support of companies and mediation organizations.¹⁰

Expert determination

Expert determination has been most often used in economic valuations or technical assessments in oil and gas disputes. The decision of an expert is not enforceable as an arbitration award but only as a contract between the parties in court systems around the world. It would require the written agreement of the parties. It is only effective in highly technical matters, but has difficulty when there are matters of both fact and law being disputed (which is the case for many disputes). It is not widely used in international

⁹ Martin (n 7 above).

¹⁰ See the International Mediation Institute at <<http://imimediation.org>> for more resources in this area.

disputes and when it is, it should be used only on narrow technical grounds. A number of international institutions, such as the ICC International Centre for Expertise, provide lists of experts and administered services in this area.¹¹

Dispute review board

Dispute review boards began in the US construction industry and have spread into the international construction industry. They usually consist of a three-member board that is appointed for the duration of a large construction project. They have proven to be quite effective in the construction industry, but have not spread to the energy sector in any significant manner. If they were used, they would be most effective in the construction of large energy infrastructure projects. A number of institutions provide assistance and services in this area.¹²

Litigation

Litigation in the courts is the most familiar dispute resolution tool to lawyers. It is most frequently used in the domestic energy business with parties from the same jurisdiction (in particular in the US, Canada, the UK and Australia). It is not the preferred forum for international disputes for a number of reasons including problems in enforcing court judgments in foreign jurisdictions, cost and length of trials, and aversion to local courts by foreign investors. As a result, it is rarely chosen as a dispute resolution mechanism in international oil and gas agreements.¹³ It is sometimes chosen in international oil and gas agreements when all the parties come from the same jurisdiction and they are all comfortable with the courts of their home country.

Arbitration

Arbitration is the most widely accepted and used dispute resolution method in the international energy sector. It is a legally binding process that provides the most flexibility to parties in how they want to resolve their dispute. Arbitration provides many advantages including allowing parties to choose their arbitrators, selecting the kind and extent of their arbitration process, and choosing the venue and forum where the arbitration will be held. It also has the advantage of the recognition and enforcement of arbitral awards in foreign jurisdictions, which court judgments generally do not have.

Along with that flexibility comes a number of problems, including that adverse parties can make the process look a lot like litigation resulting in high costs and time consuming processes. Companies can adopt a number of strategies to manage time and cost concerns in international arbitration that are discussed in Section 10 below entitled Time and Cost of Arbitration. Despite some of its shortcomings, when given a choice between the only

¹¹ See <<http://www.iccwbo.org/court/adr>> for more details on their services.

¹² This includes the ICC, the International Centre for Dispute Resolution (ICDR) at <<http://www.adr.org/sp.asp?id=28819>> and the Dispute Review Federation at <<http://dbfederation.org>>.

¹³ An example is the development of the AIPN Model JOA. The first two versions included the alternative of court litigation. That was eliminated in the third version of the AIPN Model JOA, and was continued in the most recent fourth version. The only binding process now provided is international arbitration.

two legally binding dispute resolution processes available—local courts and arbitration—international businesses always choose international arbitration.

5. Legal framework for international arbitration

There are a number of elements that together provide an effective and enforceable legal framework for international arbitration. They are the:

- Arbitration Agreement or Clause
- Arbitration Conventions and Investment Treaties
- Arbitration Procedural Rules
- National Laws
- National Courts.

Arbitration agreement

The arbitration agreement or dispute resolution clause is the foundation of international arbitration. It is based on the principle of party autonomy, ie parties have the right to decide how and where they wish to resolve their disputes and to provide for that in their contracts in a binding, enforceable manner. Given the flexibility of international arbitration, parties need to maximize their benefits while minimizing their risks by carefully drafting their dispute resolution clauses, which is described in more detail below.

Arbitration conventions and investment treaties

There are a number of international conventions and treaties that provide for the recognition and enforcement of arbitral awards and the protection of investments. They are:

New York convention

The first and most important convention in the international arbitration world is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) that came into force in 1958. This is the primary convention to recognize, enforce, and challenge international arbitral awards. There are currently 144 parties to this convention.¹⁴ To access the benefits of this convention the seat of the arbitration should be in a country that is a signatory to the Convention and the counter-party (or its assets) against whom an agreement or award is to be enforced should be from a country that is a party to the New York Convention.

Regional conventions

There are a number of regional conventions that replicate the benefits of the New York Convention. One is the Inter-American Convention on International Commercial

¹⁴ Current status of the NY Convention is available at <<http://www.uncitral.org/>>.

Arbitration (Panama Convention) that came into force in 1975. There are a total of 19 signatories, including the US and many of the Latin American countries. In the US, the Panama Convention applies over the New York Convention if a majority of the signatories to the arbitration agreement are citizens of states that have ratified the Panama Convention and are members of the Organization of American States.

Other regional conventions include the Arab Convention on Commercial Arbitration (Amman, 1987), the European Convention (Geneva, 1961) and the Moscow Convention (1972).

Washington or ICSID convention

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention or ICSID Convention) came into force in 1966. It provides for the resolution of disputes between host States and foreign investors. The International Centre for the Settlement of Investment Disputes (ICSID), which is a branch of the World Bank in Washington, DC, administers this convention. There are currently 157 states that have signed the treaty, of which 144 states have ratified it. Ratifying States are called 'Contracting States' under the Convention.¹⁵ Contracting States improve their investment climate through ratifying the ICSID Convention and investors gain direct access to an effective forum that provides its own enforcement mechanism.

ICSID provides facilities for arbitration or conciliation where investors in foreign countries can have a fair hearing and access a self-enforcing mechanism for awards issued under the Convention. In order for this to work effectively, sovereign governments that are signatories to the Convention waive their sovereign immunity from lawsuits and claims and their courts are required to accept the awards without review.¹⁶ To ensure that this waiver is treated properly, the Convention requires that strict conditions must be met before it can be invoked. An investor initiating a claim under the provisions of ICSID must satisfy the Secretariat of ICSID that the claim properly falls within its jurisdiction. In particular, three conditions must be fulfilled:

- parties must agree in their investment contract that disputes will be submitted to ICSID arbitration.
- the dispute must be between a Contracting State and a national of another Contracting State.
- the claim must be a legal dispute arising directly out of a qualified investment.

The issue of jurisdiction is disputed in many ICSID proceedings by States that want to stop claims against them. Arguments to prevent jurisdiction include the nature of the dispute, the nature of the investment, whether the investor has exhausted its local remedies, whether the dispute is with the State, the identity of the investor, and whether the

¹⁵ Current status of the ICSID Convention is available at <<http://icsid.worldbank.org/ICSID>>.

¹⁶ The reality is that ICSID awards must still be enforced in local courts, which have sometimes ignored this requirement.

State has consented to jurisdiction. A Contracting State can notify ICSID that it chooses not to submit certain classes of disputes, such as disputes dealing with natural resource investments, to ICSID jurisdiction. Also consent by a constituent subdivision or agency of a Contracting State, such as a national oil company, requires the approval of that State unless the State notifies ICSID that no approval is required. It is therefore important for companies to obtain qualified legal advice prior to making investments in foreign countries and negotiating host government agreements to access the benefits of the ICSID Convention.

Advance consent by member states may be found in BITs and in multilateral trade agreements such as the Energy Charter Treaty, the North American Free Trade Agreement (NAFTA), the Central American Free Trade Agreement (CAFTA), the Cartagena Free Trade Agreement, and the Colonia Investment Protocol of Mercosur. In addition, ICSID has its Additional Facility Rules for certain types of disputes falling outside the scope of the Convention.

Energy Charter Treaty

The Energy Charter Treaty (ECT)¹⁷ entered into force in April 1998. As its name implies, the ECT focuses on energy investments, in particular upstream and transit investments in Eastern and Western Europe. It provides investment promotion and protection, including prohibitions on expropriation, and dispute resolution mechanisms for those investments. There are 51 member states in addition to the European Community, 47 of whom have ratified the treaty. There are 23 observer states and 10 international observer organizations (NGOs). Observer states include the US, Canada and China. Russia withdrew provisional application of its member status effective 20 October 2009. The ECT provides for provisional application of the ECT to signatories even if not yet ratified by the State. The protections of the ECT continue for 20 years after the effective date of withdrawal from ECT for investments existing at the time of withdrawal. The ECT allows states to elect in advance to deny the advantages of investment protections from certain individuals, such as mailbox companies.

The ECT provides dispute resolution mechanisms for disputes between parties to the treaty (ie States), transit disputes, trade disputes, competition and environmental disputes, and disputes between investors and host governments. An investor can choose to arbitrate its dispute in any of the following fora:

- ICSID if the Contracting Party and the Investor's state are both parties to the Washington Convention
- ICSID under the Additional Facility Rules if one state is a party to the Washington Convention
- Ad hoc arbitration under the UNCITRAL Rules and

¹⁷ See <<http://www.encharter.org>> for more details.

- Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under its rules.

Unless a State has previously elected so, there is no ‘fork in the road’ provision that would prevent an investor from pursuing an action under the ECT after attempting redress in another forum.

Bilateral investment treaties (BITs)

BITs are treaties between two countries designed to encourage and protect investments between the two countries. The first BIT was signed between Germany and Pakistan more than 50 years ago. There are now more than 2,500 BITs and growing. A BIT would usually contain provisions for:

- no direct or indirect expropriation
- fair and equitable treatment of investments
- most favoured nation status

Investors may be able to take advantage of terms in BITs between the host state where it is making its investment and other countries either when the other BIT is more favourable than those in the BIT between the state and the investor’s originating country or when the investor’s originating country does not have a BIT with the host state. An investor accomplishes this by incorporating its investment company and carrying out its business through the other State with the more favourable BIT. Criteria for qualifying as an investor vary from one BIT to another, so qualified legal advice is needed in structuring such investments.

A BIT may contain a ‘fork in the road’ provision for initiating disputes, ie, the investor must choose either litigation in the local courts, arbitration under the contract, or arbitration of its treaty claims through ICSID or its additional facilities. An election to follow a certain path will prevent following another path later on; ie choosing to arbitrate under the contract will constitute an election not to proceed under the BIT at ICSID. This provision is found in the standard form US BIT.

Multilateral trade agreements

There are a number of multilateral trade agreements including NAFTA and CAFTA. Both agreements contain provisions requiring the signatory States to encourage international commercial arbitration and arbitration provisions for state to state disputes and investor-state disputes.

Arbitration procedural rules

All arbitrations are subject to the procedural rules of the *lex arbitri*, ie, the arbitration laws of the place of arbitration. However, those rules tend to be broad and non-specific. Therefore, the parties need to agree upon a detailed set of procedural rules to conduct

their arbitration. They have basically two choices—ad hoc or institutional arbitration. An ad hoc arbitration is one that is conducted pursuant to rules agreed by the parties or determined by the arbitration tribunal. An institutional arbitration is one that is conducted using the rules of a specialized arbitration institution and which is administered by that institution. These rules are described in more detail later in the article. A list of the better recognized international arbitral institutions is provided in Appendix 1.

In addition to the arbitration procedural rules, parties often need to agree upon more detailed evidentiary rules in large, complex arbitrations. The most well-known and used rules are the IBA Rules on the Taking of Evidence in International Arbitration¹⁸ and for more guidance on the production of documents and exchange of information, the ICDR Guidelines for Arbitrators Concerning Exchanges of Information¹⁹ are being increasingly relied upon. Parties can agree upon these additional evidentiary rules either in their dispute resolution clause or in the procedural order issued by the tribunal at the beginning of the arbitration.

National laws

The national laws of a country implement the rights and obligations of the arbitral conventions and treaties described above. They provide the enforcement mechanisms for arbitration agreements and awards, along with filling in the gaps in parties' arbitration agreements or dispute resolution clauses. In addition, national laws govern the nullification or setting aside of awards rendered in a country and the waiver of sovereign immunity.

Most countries have laws that deal with both domestic and international arbitration, including how their courts recognize, deal with challenges of and enforce arbitral awards. Many countries have adopted, either entirely or substantially, the UNCITRAL Model Law on International Commercial Arbitration as their law dealing with international arbitration.²⁰ The US and the UK are exceptions with their respective US Federal Arbitration Act and English Arbitration Act, 1996.²¹

National courts

The national courts provide the muscle to enforce arbitration agreements and awards. They also provide orders in aid of arbitration, such as interim relief and measures to preserve evidence, documentary disclosure and the attendance of witnesses. Courts ensure procedural due process and the fundamental fairness of arbitral proceedings.

Courts can also stymie, derail and undo the arbitral process, which emphasizes the importance in selecting the seat of the arbitration since it is those courts that will either support or obstruct the arbitration.

¹⁸ IBA Rules on the Taking of Evidence in International Arbitration (International Bar Association) adopted by a resolution of the IBA Council on 29 May 2010. Available at <<http://www.ibanet.org>>.

¹⁹ ICDR Guidelines for Arbitrators Concerning Exchanges of Information (International Centre for Dispute Resolution, the international arm of the American Arbitration Association). Effective 1 June 2008. Available at <<http://www.adr.org>>.

²⁰ See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html> for more details.

²¹ See <<http://www.legislation.gov.uk/ukpga/1996/23/contents>> for more details.

Arbitration provides finality in the resolution of an international dispute. But that means it is not appealable on mistakes of law or fact, and can only be challenged in very limited circumstances. All of this reinforces the need to draft the dispute resolution clause properly.

6. Drafting dispute resolution clauses

Parties cannot anticipate what a future dispute will be about, including what side of the dispute they will be on when it arises. A company may not even know what party it will have a dispute with since interests are transferred, companies merge and governments change over the long span of an international energy project. Therefore, simplicity and clarity in drafting dispute resolution clauses are essential. Trying to build in provisions that are specifically suited for a particular type of anticipated dispute may be counter-productive at the time of the dispute. Parties need to harmonize related provisions in the agreement including the dispute resolution, choice of law and stabilization clauses. They should also avoid duplication of provisions, such as specifying the applicable law in the arbitration clause when there is already a separate choice of law provision in the contract.

Given the complexity of international arbitration, each new 'creative' paragraph added to a dispute resolution clause by an inexperienced drafter will likely result in a drafting mistake and a potential problem in resolving the dispute. There are a number of good precedents for international energy agreements and some excellent reference works for drafting dispute resolution clauses.²² Companies should have drafting guidelines on what dispute resolution clauses they want in their agreements that should not be deviated from without the advice and approval of the company's international arbitration counsel.

Many companies are concerned about disputes that take a lot of time and money to resolve. There are constructive and pragmatic ways to deal with those concerns. However, one must be careful in doing this. It is not done with overly aggressive timetables, mandates, and limitations. They are often unhelpful and sometimes backfire in the dispute resolution process itself. The main drivers of time and costs are evidentiary matters, which are essentially document production (or discovery) and the number of witnesses. These can be managed in fairly commonsense ways that are discussed below.

The following are the components to be included in or considered with a dispute resolution clause in international agreements:

- Broad Form Clause
- Arbitral Rules
- Arbitrator Appointment
- Seat of Arbitration

²² See the AIPN Model Dispute Resolution Agreement (June 2004) which can be found on their website <www.aipn.org>. There is also the recently published IBA Guidelines for Drafting International Arbitration Clauses (October 2010) that can be found at <<http://www.ibanet.org>>. There are also two excellent reference books on drafting international arbitration clauses: P Friedland, *Arbitration Clauses for International Contracts* (2nd edn, 2007) and G Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3rd edn, 2010).

- Choice of Law
- Language
- Confidentiality
- Consent to Judgment and
- Multi-Step Clause

Broad form clause

Parties should draft their clause to cover all the disputes that may arise from their agreements. Defining it narrowly to exclude certain types of disputes can be dangerous. It could result in disputes over the scope of the clause or have the potential of ending up in multiple forums with multiple costs. There are a number of variations of a broad form clause. The language can be as simple as: ‘Any dispute arising out of or relating to . . .’

The definition of disputes can be covered in an agreement with broad language such as: ‘Dispute means any dispute, controversy, or claim (of any and every kind or type, whether based on contract, tort, statute, regulation, or otherwise) arising out of, relating to, or connected with this Agreement, or the operations carried out under this Agreement, including but not limited to any dispute concerning the existence, validity, interpretation, performance, breach, or termination of this Agreement’.²³ Parties should only define ‘Dispute’ once in the agreement. Otherwise they may end up with contradictory definitions that will present problems when a dispute arises.

Arbitral rules

As previously mentioned, there are two basic choices with regards to the procedural framework in an arbitration: use the arbitral rules of an arbitration institution that will administer the arbitration for the parties or use non-administered rules for an ad hoc arbitration. Regardless of which of these two methods parties choose, they should incorporate a set of modern international arbitration rules in their dispute resolution clause, rather than draft arbitration procedures on their own or rely on the arbitration law at the place of arbitration.

Most parties should choose the arbitration rules of a well-established and respected arbitral institution. Running an ad hoc arbitration should be left to parties and their counsel who are very experienced in international arbitration and who will be professional and co-operative at the time of the arbitration. If parties do decide to use ad hoc arbitration, good non-administered arbitration rules to consider are the rules from the United Nations Commission on International Trade Law (UNCITRAL)²⁴ or the CPR International Institute for Conflict Prevention & Resolution.²⁵

The better-known international institutions that have well-drafted arbitration rules and have the experience to properly administer arbitrations are the ICC, the LCIA and the ICDR. There are also a number of excellent regional institutions that may be

²³ See AIPN Model Dispute Resolution Agreement (June 2004).

²⁴ See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html>.

²⁵ See <<http://www.cpradr.org/ClausesRules/tabid/40/Default.aspx>>.

appropriate depending on the location of the project and the parties. They include the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the Kuala Lumpur Regional Centre for Arbitration, the Dubai International Arbitration Centre (DIAC), the Bahrain Chamber for Dispute Resolution (BCDR), the DIFC/LCIA Arbitration Centre at the Dubai International Finance Centre (DIFC), LCIA India and the Arbitration Institute of the Stockholm Chamber of Commerce (SCCI). For a more specialized set of arbitral rules for the energy sector, the Permanent Court of Arbitration (PCA) has a set of Optional Rules for Arbitration of Disputes Concerning Natural Resources and Environment.²⁶ Appendix 1 provides a list of international arbitration institutions, their websites and the model clauses that they recommend to designate their centre and rules.

Each set of rules has its own ‘personality’. Be sure to know the institution, its rules, its case management skills, the quality of its arbitrator panels along with its default appointment mechanisms and fee structure before agreeing to use a particular institution and its arbitration rules.

Arbitrator appointment

The appointment of an arbitrator or an arbitral tribunal is one of the most significant determinants on the outcome of a dispute. This article describes below some of the important things to consider in appointing an arbitrator or arbitrators at the time of the dispute. There are also some important things to consider at the time of drafting the arbitrator appointment mechanism.

The first thing to consider is the number of arbitrators. A single arbitrator is usually sufficient for small disputes that are not complex or do not deal with a lot of money. Three member arbitral panels are justified for complex, high stakes disputes, which are typical of many energy projects. Arbitral panels usually cost more and take longer to render their decisions than single arbitrators. Parties can build flexibility into their dispute resolution clauses by providing for both a single arbitrator and a three arbitrator panel as long as they clearly define when each would be triggered. Usually a monetary sum for the claim (somewhere between US\$ 1–5 million) is the clearest determinant.

Parties can either control the process of appointing the arbitrators themselves or give that decision to an institution. Most parties want to retain control of the process since this has such a significant impact on the outcome of their dispute. This can be done by simply providing that each party will appoint an arbitrator and that those two arbitrators will appoint the chair of the tribunal. Where the two party-appointed arbitrators cannot agree on a chair, the designated institution can act as the defaulting appointer. Silence on the appointment process in the dispute resolution clause will result in the application of the default appointment mechanism in the chosen arbitral rules. At a minimum, this will likely result in the institution appointing the chair of the tribunal without input from the parties.

²⁶ See <http://www.pca-cpa.org/showpage.asp?pag_id=1189>.

It is not necessary to specify the arbitrators' qualifications. But if you decide to do so, you should not be overly specific. Setting unrealistic qualifications only limits the possible arbitrator candidates and may result in no one qualifying. Do not name a particular person as arbitrator because if he or she dies, is incapacitated, or refuses to serve as arbitrator, it is an instant default in the appointment process.

Defaults may result when a party fails to appoint or when an appointed arbitrator dies, is disabled, has a conflict, fails or refuses to act. Parties can simply provide in the agreement that the replacement arbitrator will be selected by the same method by which the original arbitrator was appointed.

If arbitrating under the UNCITRAL Rules or other non-administered rules, the parties should designate an Appointing Authority in case the parties encounter problems in appointing their tribunal. All the major arbitral institutions will act as an appointing authority for arbitrations under the UNCITRAL Rules. However, non-arbitral institutions should not be designated as an appointing authority because they will not act in such a capacity. Under the UNCITRAL Rules, failure to designate an appointing authority results in having to apply to the Secretary General of the Permanent Court of Arbitration at The Hague to designate an appointing authority, who will then make the arbitrator appointment. This will take more time and expense to accomplish.

Seat of arbitration

Selecting the seat of the arbitration is one of the most important decisions to make in the negotiation of a dispute resolution clause. The seat of the arbitration normally determines the procedural law of the arbitration, including enforcement of and challenges to the arbitral award and procedures. Be sure to choose a seat in a jurisdiction that has a developed arbitration law you know and understand (such as the UNCITRAL model law), that has ratified the NY Convention and where you are comfortable with how the local courts deal with international arbitration. The actual hearings can always be held elsewhere if that is important to one of the parties.

The selection of the arbitral seat is also important because the local courts have supervisory jurisdiction over the arbitration. They are the courts that have jurisdiction over ongoing jurisdictional challenges, power to grant interim measures, and any challenges to set aside arbitral awards. Parties need to have the reassurance that the courts in the arbitration seat have a proven track record of being supportive to the international arbitration process. One should therefore perform a site 'due diligence'. Legal considerations are more important than practical ones in this decision. Expressly state what is the seat of arbitration (ie the city and country).

Parties must be careful not to include a provision regarding the procedural law of any other country, such as stating that 'the arbitration shall be governed by the procedural law of X', unless they explicitly intend to override the designated seat of arbitration. Specifying the law to 'govern the arbitration' could be interpreted as a designation of the procedural law for the arbitration. Doing so may result in the arbitral award being

subject to vacatur in the courts of two countries (the actual seat of arbitration and the jurisdiction of the procedural law chosen by the parties). There are very few good reasons for doing that.

IOCs should not normally agree to the home country of the host government as the arbitration seat in their investment contracts (ie PSCs and RSCs). Otherwise, the host government's courts will have the ability to decide whether to vacate an award that an IOC won against the host government or its agencies or instrumentalities, such as the national oil company (NOC). Under the New York Convention, only the courts in the country in which the award was issued or under whose procedural law the arbitration was conducted may set aside an arbitral award.

Choice of law

Technically speaking, the choice of law provision or what is commonly known as the governing law of the contract is not and should not be part of the dispute resolution clause. It should be in a separate clause of its own, distinct from the dispute resolution clause. The choice of law clause is meant to provide the applicable substantive law in governing the agreement and is not meant to be the applicable procedural law, which is determined by the seat of arbitration. It is reviewed here because the substantive law and procedural law are often confused and parties are often forced to select one over the other in their contract negotiations.

The substantive law in an international contract should be the law of a neutral country with a well-developed law, unless the other party will agree to your local law or the other party's domestic law is developed and acceptable to all parties. Parties need to be aware of the different approaches of civil law and common law in dealing with the sanctity of a contract. Common law generally considers that a contract is a contract and the parties assumed the risk of their deal, even if it ultimately proves unfair. Civil law generally requires that contracts be fair and performed in good faith.

There should be only one choice of law provision in an agreement. Commercial contracts should not contain multiple choices of law. It will only cause confusion and problems at the time of dispute. Host governments will often insist on local substantive law. Before agreeing to apply the local law of a host government, an IOC needs to be familiar with it and should examine the areas that may be important to its rights, obligations and remedies. IOCs need to recognize that under most circumstances, host governments can unilaterally change their laws in ways damaging to the IOC's investments. If an investor is not comfortable with the law of the host government in a granting instrument, then multiple sources of law, including international law, may be considered as an alternative if the government is insistent on designating its law as the substantive law of the contract. However, it must be done with a clear understanding of the implications and with careful drafting by qualified legal advisors. Companies need to be careful in doing so since multiple substantive laws in a host government contract usually result in more confusion than clarity.

If the parties do not designate the applicable substantive law in their contract, it will likely be left to the arbitrators to decide.²⁷ So this item needs to be specifically and clearly addressed in the contract, whether it is called the choice of law, the substantive law, the applicable law or the governing law of the contract.

Language of arbitration

This is an important but not normally a critical component to a dispute resolution clause. It is helpful to clarify this point if the parties speak different languages. Failing to designate a language for the proceedings can possibly result in a dispute over which language applies (and subsequently the pool of arbitrators to choose from) or a need for multiple languages in the pleadings and hearings along with all its increased cost.

Confidentiality

Generally, there is no requirement that the arbitration will be confidential, either under the law at the seat of arbitration or in the governing arbitral rules. Confidentiality is not provided in many sets of arbitration rules.²⁸ The courts of England recognize an implied duty of confidentiality with respect to arbitrations in England. That is not the case in jurisdictions such as Australia. Parties may need to provide for protection of intellectual property and trade secrets and they should include a provision for exceptions under required regulatory reporting, shareholder disclosures, as required by law and in legal proceedings.

Consent to judgment

This is not seen as a necessary addition to an international dispute resolution clause in most jurisdictions. It is a requirement under the US Federal Arbitration Act for domestic arbitration. So if the seat of arbitration is in the US, the addition of a simple sentence such as 'Judgment on the award may be entered by any court of competent jurisdiction' may be a prudent step.

Multi-step clauses

Most parties that are sophisticated in managing their disputes believe that mediation clauses in their contracts are unnecessary. Their main priority is to retain maximum flexibility in their dispute resolution options. They are therefore usually satisfied with raising the use of mediation at the time of the dispute rather than insisting upon a mandatory mediation clause in their agreements. Parties that require compulsory mediation clauses in their agreements usually have substantial exposure to disputes in the US. They are willing to sacrifice flexibility in order to mitigate the prohibitive costs of discovery of documents and depositions.²⁹

²⁷ See, for example AAA/ICDR International Rules Article 28(1) – 'The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.'

²⁸ See, eg, AAA/ICDR International Rules Art 34, which provides for arbitrators and administrators to maintain confidentiality, but does not require parties to do so.

²⁹ Herbert Smith LLP (n 6 above) 36.

If parties insist upon mandatory mediation in their dispute resolution clause, then the best alternative is to use a multi-step dispute resolution process. Use of stepped dispute resolution (or escalation) clauses is common in those sectors that typically deal in long-term project contracts.³⁰ The energy sector fits that description.

If there is going to be a multi-step process, then there can be either two steps (mediation followed by binding arbitration) or three steps (negotiation between decision-makers, followed by mediation, followed by binding arbitration). It is extremely important to set defined timeframes in a multi-step process. Failure to do so may result in the parties being stuck in the first stages of the process without being able to get to a final, binding process. The clause should therefore require a written notice of the existence of a dispute, which triggers the running of the time limits. There should be a tolling of limitation periods during the negotiation and mediation. It may be helpful to require that the notice and the response include a description of the scope and nature of the dispute, and the party's basic position.

Good faith may or may not be expressly required during the negotiation and mediation steps. As a general rule, parties should avoid the requirement to negotiate in good faith, since it will likely be used to prevent them from proceeding to the final, binding step in the dispute resolution process. However, a duty of good faith may be implied in the local law applicable to the contract. A failure to negotiate in good faith may then give rise to liability for breach of duty.

If a multi-step clause is used, then the following items should be considered for inclusion in the part of the clause dealing with the negotiation stage:

- negotiation period before initiation of mediation or arbitration
- requirement to respond to notice of dispute
- if a party refuses to negotiate, other party may have immediate resort to arbitration
- participation by representatives having authority to make agreements, subject to appropriate approvals
- participation by persons having knowledge of the underlying project and source of the dispute
- extension of time limits if parties agree
- confidentiality of negotiations
- settlement negotiations are handled on a without prejudice basis
- prohibit raising the amount or substance of the offers and responses made in the negotiations in the arbitration
- allow negotiation by meeting in person or by other means, such as telephone or video-conference
- parties will provide information reasonably requested, but not confidential, trade secret, proprietary, or privileged information.

³⁰ Herbert Smith LLP (n 6 above) 38.

The part of the clause dealing with mediation can include provisions for:

- required participation of the parties
- ad hoc or institutional rules (and their accompanying administration)
- time frames and deadlines to complete each stage of the process
- notice and response of mediation after negotiation or after dispute arises if no negotiation
- appointment of mediator, with default appointment provision
- if one party refuses to engage in mediation process, the other party has immediate resort to arbitration
- extension of time limits if parties agree
- site (city) of mediation meetings
- language of the proceedings
- confidentiality of the proceedings
- responsibility for costs of mediation
- if using administered mediation, many of these matters will be addressed in the governing mediation rules.

7. Disputes involving governments

Potential disputes involving governments entail special consideration and unique planning challenges. The first area is state investment disputes and the host government contracts that IOCs sign to access petroleum rights around the world. The second area is boundary disputes where companies are granted concessions that straddle international borders.

Host government contracts

International petroleum granting instruments, such as PSCs, RSAs or Tax-Royalty Concessions, can last 30–50 years. In making these investments, IOCs have historically faced the problem of the ‘obsolescing bargain’³¹ with host governments that often emerged as follows:

After the bulk of the investment has been made, the allocation of risks shifts rapidly from the capital-hungry host state to the investor. Negotiating leverage shifts during the project life cycle: the investors require a long period to achieve their expected return while, once the investment is made, the host state has what it requires. For a variety of reasons, the host state may then conclude that the original bargain is obsolete and force a revision of its terms. These reasons may include: a change of government and the introduction of new policies; the discovery of natural resources in commercial quantities and commencement of development, offering the prospect of large and speedy accumulation of wealth, and the social and economic

³¹ R Vernon, ‘Long-Run Trends in Concession Contracts’, Proceedings of the American Society for International Law (April 1967).

implications for the host state of the operation of the pricing or tariff regimes for electricity and gas. In the years following the making of an investment—often a very large, fixed one in this sector—the investor therefore faces an increasing risk that the host state may exercise its sovereign powers to modify the terms of the contract in ways that achieve a new government’s policy goals. Such sovereign powers are likely to be used in more subtle ways to reduce the value of a project than through outright expropriation of the assets³²

The reaction of IOCs to this ‘obsolescing bargain’ risk has been to ensure contract stability through a variety of contractual mechanisms, in particular stabilization clauses:

The inclusion of a clause or clauses on stability is a common practice in contracts between investors and host states in the international energy industry, originating from as far back as the 1930s. Although there are a variety of ways in which contract stabilization may be achieved, the essential idea is the same: the parties to the agreement seek to provide contractual assurance that the investment terms at its core on the date of signature will remain the same over the life of the agreement.³³

To protect their investments, IOCs developed four different kinds of stabilization clauses³⁴ that they negotiated into their host government contracts:

Freezing

In its strictest form, this stabilization clause prohibits a host state from changing its laws. It effectively restricts the host state from exercising its sovereign right to unilaterally change its laws.

Intangibility

This clause attempts to freeze the contract rather than the law. It prohibits unilateral changes to the host government contract and requires the consent of both parties before any changes can be made.

Rebalancing

These are clauses that require the renegotiation of contract terms in the event of specified circumstances. If a triggering event occurs that damages the economic benefits to the investor, a rebalancing must take place. These clauses recognize the limitations that investors may have in enforcing their contracts against sovereign states. They do not seek to prevent a change in the law (or even the contract) by the host state, but seek to address

³² PD Cameron, *International Energy Investment Law: The Pursuit of Stability* 4–5 (Oxford University Press, 2010).

³³ *ibid* 68.

³⁴ *ibid* 70–80.

the economic impact of such a change in the original bargain and establishes a framework to renegotiate or rebalance that bargain.

Allocation of burden

These are clauses that shift the burden of changes in the laws applicable to the investment contract to the NOC. They do not attempt to rebalance the situation; they simply transfer the economic impact of the change to the NOC who is the representative of the state in the contract.

It is therefore important that companies consider the inclusion of stabilization clauses in their contracts with host governments or NOCs or other state enterprises. This type of clause is intended to insulate the investor from uses of government power to reduce or eliminate the benefits, or increase the burdens, of the contract to the parties. The goal is to manage the political risk of unilateral actions by the host government or its agencies in changing the laws or the rules. Companies need to begin managing that risk from the moment they negotiate their host government contract. In doing so, they should use qualified legal advice. In addition, there are a number of research papers on expropriation and stabilization provisions available from the AIPN.³⁵

Boundary disputes

IOCs do not regularly encounter boundary disputes in their operations. But when they do, they will have a unique challenge to manage. The AIPN has published a very helpful book on boundary disputes that will guide companies through the issues found in these kinds of disputes.³⁶ The number of these disputes has increased as the industry has moved into deeper waters and further offshore with improving technology; certainly more than one would expect:

It is difficult to provide definitive figures for the number of maritime boundaries around the world... The International Boundaries Research Unit has counted 430 potential maritime boundaries around the world... Of the 430 potential boundaries, 210 have one or more agreements addressing them... What can be noted with confidence is that over half of the world's potential maritime boundaries are yet to be agreed in any shape or form. At the current average rate of just over five agreements per year, it will take until 2051... for all of the world's maritime boundaries to be at least partly agreed.³⁷

³⁵ See PD Cameron, *Stabilisation in Investment Contracts and Changes of Rules in Host Countries: Tools for Oil and Gas Investors* (Association of International Petroleum Negotiators 2006) and AFM Maniruzzaman, *The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends* (Association of International Petroleum Negotiators 2006) available at <<http://www.aipn.org>>. Professor Cameron's book on International Energy Investment Law is the most comprehensive review of stabilization clauses in petroleum host government contracts. See also 'Expropriation Of Oil And Gas Investments: Historical, Legal And Economic Perspectives In A New Age Of Resource Nationalism' (2008), which is another AIPN research paper available at the AIPN website.

³⁶ D Smith and M Pratt, 'How to deal with maritime boundary uncertainty in oil and gas exploration and production areas (AIPN, 2007) available at <<http://www.aipn.org>>.

³⁷ *ibid* 16–17.

In general, there are three possible results when an IOC enters into a host government contract covering an area which includes a disputed boundary: (1) confirmation that the contract area belongs to the host state; (2) prolonged dispute and continued uncertainty; and (3) a determination that some or all of the contract area is not under the authority of the host state, but that of its neighbour and a resulting loss of rights to the area.³⁸ An IOC faces a number of risks in that situation, including incurring expenditures during the boundary dispute, the possible loss of the host government contract and the failure of the sovereign state's ownership claim.

The typical kinds of expenditures that IOCs face during the dispute can include legal costs, the study of existing data, seismic acquisition and processing, exploration drilling, development and production. Companies are usually comfortable with the first two kinds of expenditures, may consider the third, start balking at the fourth and usually do not proceed with the last two until the boundary uncertainty has been definitively removed.

It should always be kept in mind with boundary disputes that only a sovereign state can settle the boundaries with its neighbour nations. The IOC has no standing to attack the claims of a sovereign, absent a contractual relationship that allows such (which almost never occurs). The IOC's role should therefore be neutral. It should not and cannot participate directly in the dispute. It may provide funding for the activities listed above and carry out some of the operations, but that is as far as it can go.

Despite those limitations, there are a number of ways that IOCs can manage boundary risks and limit its exposure:

Host government contract terms

The IOC can negotiate a number of terms into its host government contract including: indemnities from the host government, a limitation on the IOC's obligations in regard to the boundary risk, and a force majeure provision that includes non-host government claims.

Operate in undelimited waters

The IOC can carry out limited operations on its concession. This is a risky strategy as the equipment and operations become more permanent in nature.

Assist government

Many developing countries have neither the funds nor the legal expertise to deal with an international boundary dispute. They often turn to the companies that have been awarded concessions within the disputed territories for such assistance. This presents challenges to an IOC, but can be effectively managed if the proper parameters are set up front and maintained throughout the dispute.

³⁸ *ibid* 25–6.

Ownership on both sides of boundary

One solution is for all governments to accept a single investor or consortium on both sides of the boundary dispute by issuing matching concessions and then work towards settling the sovereignty issue. Or the governments can accept a single investor or consortium and then enter into a joint sharing arrangement, such as a Joint Development Zone which is explained below.

The United Nations Convention on the Law of the Sea (UNCLOS) mentions 'provisional arrangements of a practical nature' between sovereign states to resolve boundary disputes absent a permanent setting of boundaries; in other words, a Joint Development Zone (JDZ). Joint development zones have taken a variety of forms but they are usually zones in which two states agree to share resource revenues for a specified period of time, typically 30 to 50 years. There are more than 20 JDZs around the world, most of them offshore. Some JDZs are more complicated and some are more successful than others in their implementation. They should not be taken as a panacea.

There are a number of effective dispute resolution methods that can be used to resolve boundary disputes between sovereign states. On the non-binding side, they include: negotiation, mediation and conciliation. On the binding side, they include the following fora: the International Court of Justice, the International Tribunal for the Law of the Sea, and finally ad hoc arbitration managed by the countries themselves.

8. Selecting counsel

The kind of counsel a party selects for handling its dispute will have a significant impact on how the dispute will be managed, its resolution and final costs. Parties need to retain experienced and knowledgeable counsel to handle their dispute. International arbitration and mediation is a specialized area requiring a knowledge base and skill set quite different from trial lawyers experienced in domestic court litigation, or even domestic arbitration.

Parties therefore need to turn to law firms with strong international arbitration experience. External counsel should have the following attributes:

- experience in international arbitration cases
- an advocacy style that can handle both common and civil law procedures
- knowledge of important arbitration rules and institutions
- ability to handle laws from different jurisdictions
- knowledge of the international arbitration legal framework, including international treaties and national arbitration laws
- insight on qualified arbitrators and mediators.

9. Appointing arbitrators

Importance of appointing the right arbitrator

When parties to a dispute appoint arbitrators, they put their destiny in the hands of those arbitrators. This is an important decision in the process and needs to be taken with as

much knowledge as possible. The objective is to appoint an arbitral tribunal who will be independent and impartial, give each party equal and fair treatment, and make every effort to fully understand each party's case. A party therefore starts by appointing a well-qualified party-nominated arbitrator with those qualifications. The party-appointed arbitrator, along with all of the arbitrators on the tribunal, must be independent and impartial as required by the applicable arbitration rules and law. International arbitration practice does not allow arbitrators to advocate on behalf of parties that appoint them. In addition to the legal and ethical concerns around appointing a biased or conflicted individual, arbitrators that are not independent and impartial are limited in their credibility and persuasiveness within the tribunal's deliberations. It therefore makes sense on all fronts to appoint someone who is independent and impartial. However, there is nothing wrong with appointing arbitrators who will listen to a party's position in an understanding and sympathetic manner.³⁹

The appointment and confirmation of the tribunal chair needs to be done within that overall framework. The tribunal chair is the most powerful member of the tribunal. He or she will direct the procedural aspects of the arbitration and can ultimately have the deciding vote.

Independent and impartial

An independent arbitrator has no close relationship—financial, professional or personal—with a party or its counsel. An impartial arbitrator is not biased in favour of, or prejudiced against, a particular party or its case. A neutral arbitrator can refer to national neutrality (ie, when a sole or presiding arbitrator is from a different country from either party). The term can also refer to a party-appointed arbitrator who is expected to vote for a party with a better case, despite a shared background, tradition or culture. All international arbitral rules and laws expect arbitrators and mediators to be independent and impartial. There may be certain cases where the protocol or the terms of the agreement also require the arbitrators to be neutral.

There are a multitude of international rules requiring independence and impartiality, one of which will likely apply to your arbitration. These are some of the more commonly used codes/rules:

- AAA Code of Ethics for Arbitrators
- AAA/ABA/ACR Model Standards of Conduct for Mediators
- CIArb Code of Conduct
- IBA Guidelines on Conflicts of Interest in International Arbitration
- ICC Arbitration Rules
- LCIA Arbitration Rules
- ICSID Arbitration Rules.

³⁹ CR Seppala, 'Recommended strategy for getting the right International Arbitral Tribunal: a practitioner's view' (2008) 25 *International Construction Law Review* 198.

Disqualifying factors

Factors that will disqualify an arbitrator from being appointed are:

- significant financial interest in the relevant project or dispute, or in a party or its counsel
- close family relationship with a party or its counsel
- non-financial involvement in the project, dispute or subject matter of the dispute
- public position taken on the specific matter in dispute
- involvement in settlement discussions of parties
- adversary relationship with a party.

Factors that will not disqualify an arbitrator are:

- professional writings and lectures
- professional associations
- position in same industry or similar position in another government and
- relationship with the arbitral institution.

Arbitrator qualifications

Parties should look for the following qualifications in candidates for an arbitrator appointment:

- know the Law
- know the Process
- know the Business
- know the Language
- be Personable
- be Persuasive
- be Available.

It is not likely that parties will be successful in finding, let alone appointing, someone who fills all of the above qualifications. They should make sure however that they conduct a thorough search for candidates that fill the criteria that are important to them before making the final selection for an arbitrator.

Selection process

There is always a challenge in finding meaningful information on arbitrator candidates in the selection process. Most parties and their in-house counsel are not intimately familiar with the worlds of international arbitration and mediation. They usually do not know who the best arbitrators are. In-house counsel therefore tend to rely upon the advice of their experienced external counsel in making such selections. In some ways, law firms that specialize in international arbitration have a 'monopoly' on good information in this

area. Even though they will turn to public databases such as lists of arbitrators from various services, institutions' panels and arbitrator rankings by publications, their experience in working with and seeing the top arbitrators in action will be invaluable in making the final selection on choosing the best arbitrator suitable for your dispute.

The selection process for a tribunal chair can be slightly different from the wing arbitrators. It is best if the parties can agree upon the tribunal chair. But if they are unable, most institutions are quite capable in appointing the chair. There are different ways in getting agreement on the chair appointment. They do not have to start with a list of names. Instead, they can first agree upon a list of qualifications. Once the parties agree upon the suitable qualifications, the list of qualified chairs becomes much shorter and the selection process much more manageable.

Arbitrator interview

There are certain guidelines that parties need to be aware of in interviewing arbitrator candidates.⁴⁰ They have been listed in the Chartered Institute of Arbitrator's 'Practice Guideline: The Interviewing of Prospective Arbitrators'.⁴¹ They are not legally binding and may not be applicable in all cases, but they are a good starting point.

The conduct of the interview should be in the range of 30–60 minutes. Any longer would be questionable. The candidate may want to take notes of the interview to memorialize them so as to produce them in case there are future questions on how the interview was conducted.

The following are considered allowable subjects to discuss when interviewing the candidate:

- identities of parties, counsel and witnesses
- estimated timing and length of hearings
- brief description of case
- arbitrator's background and qualifications
- arbitrator's published articles and speeches
- expert witness appearances of arbitrator, including positions taken
- prior service as arbitrator, including decisions rendered
- arbitrator's background that would raise doubts about independence or impartiality
- disclosures that arbitrator should make
- arbitrator's competency to determine parties' dispute
- fluency in relevant languages
- arbitrator's fee if not set by arbitral institution
- availability of arbitrator.

⁴⁰ D Bishop and L Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, Arbitration International (1998).

⁴¹ <<https://http://www.ciarb.org>>.

A discussion on the following would be questionable: the arbitrator's general position on issues relating to the arbitration in generic terms. The following are forbidden questions: the merits of the case and the arbitrator's position on the issues in dispute.

Arbitrator disclosure

In order to avoid conflicts of interest and potential voiding of arbitral awards, there has been much development in the international arbitration world around what arbitrators need to disclose, what is not disclosed and institutional expectations, the process and conduct around arbitrator disclosure. The leading guidance in this area comes from the 'IBA Guidelines on Conflicts of Interest in International Arbitration'. It provides a series of Red, Orange and Green lists that determine what potential interests need to be disclosed to the parties. It has been tested and accepted in national courts and has proven to be the most widely accepted litmus test for arbitrator conflicts.⁴²

10. Time and cost of arbitration

As international arbitration has become more widely used and more sophisticated in its application, parties have become concerned about the increasing time and cost of international arbitration. In many cases it has become similar to litigation with all its attendant delays and cost. Some companies' lawyers have formed a group in response called the Corporate Counsel International Arbitration Group (CCIAG)⁴³ to specifically address these concerns and improve the processes around international arbitration.

Root of the problem

The factors that increase the time and cost of arbitrations are:

- amount of discovery or document production
- number and complexity of motions
- number and length of hearings
- number of witnesses and the amount of expert evidence and
- poor case management by the arbitrators.

These are complex factors to properly address and require the cooperative interaction of the parties in the dispute (companies and governments), legal counsel, the arbitrators and the arbitral institutions. This is not easy to achieve, but parties and their counsel do have the opportunity to address some of these factors on their own when they arise at key points in an arbitration, which is when parties:

- draft the dispute resolution clause
- select their arbitration counsel

⁴² The IBA Conflicts of Interest Subcommittee, 'The IBA guidelines on conflicts of interest in international arbitration: the first five years 2004–2009' (2010) 4 *Dispute Resolution International* 1.

⁴³ See <<http://www.cciag.com>> (presently under construction).

- select the arbitrators
- agree upon the Procedural Order or Terms of Reference that sets the schedule and process for the arbitration.

The challenge of evidence

The primary factor that determines the length of time and the ultimate cost of an international arbitration is the amount of evidence demanded and produced by the parties. This will arise in three areas: the production of documents, the length of hearings and the extensive use of witnesses. If parties want to limit the costs and time in their arbitration, then they have to limit the amount of discovery and the degree to which witnesses are used (which directly impact the length of hearings). They can effectively do that by clearly stating those intentions from the very beginning in the dispute resolution clause of their agreement.

There are three ways that the parties can address this in their dispute resolution clause:

1. They can say nothing and rely on the default provisions of the governing procedural law, which leaves it to the discretion of the arbitrators to apply. Depending on the arbitrators selected, this may result in extensive discovery being allowed by the tribunal.
2. They can adopt a well-regarded set of international arbitration evidentiary rules or guidelines that limit the amount of discovery. Good arbitrators will apply the evidentiary rules stated by the parties. The two primary references are the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) and the ICDR Guidelines for Arbitrators Concerning Exchanges of Information (ICDR Guidelines). Even though these rules and guidelines are quite general in nature, they go a long way in promoting a timely and cost-effective process. Parties can be clearer in their expectations by stating that the arbitration must be conducted in the most timely and procedurally efficient manner possible. Good arbitrators respond positively to these instructions and act accordingly once given that authority.
3. They can devise their own standards for document production. At one extreme, the parties can limit document production to those documents that are in the possession of each party (and which are only produced by that party as it deems appropriate) with no right to demand documents from the other party. The other extreme is to adopt US discovery rules, such as the US Federal Rules of Civil Procedure. In any event, parties should not state that local rules of civil procedure or evidence apply to the arbitration. They would essentially replicate a court experience in an arbitration.

The ICDR Guidelines automatically apply to all ICDR cases after June 2008 but can be used in any arbitration if the parties have agreed. The Guidelines limit all document requests to those that are ‘material and relevant.’ E-discovery requests must be ‘narrowly focused’ and only have to be produced in the most convenient form. Depositions are not

appropriate. The tribunal is specifically charged with the responsibility of managing the arbitration in the most efficient and cost-effective manner that it can. In other words, US style litigation methods are discouraged.

The revised IBA Rules (May 2010) impose an obligation on the tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence. The IBA Rules also include a non-exhaustive list of matters that such 'consultation' may address. The updated Rules provide greater guidance to the tribunal on how to address requests for documents or information maintained in electronic form ('e-disclosure') and on requests for documents in the possession of third parties. These are all intended to make document production narrow and focused with the result of lower costs and quicker resolutions.

Effectively managing the arbitration process

There are a number of protocols and guidelines that provide tools that can be used in making arbitration more time- and cost-effective, one of which is published by the ICC Commission on Arbitration⁴⁴ and the other by the College of Commercial Arbitrators.⁴⁵ The ICC Report lists two primary areas where parties can address these issues:

Case management

- early and proactive case management
- clients should attend and agree upon the case management process
- set short and realistic time periods
- limit the number and length of submissions
- set out the full case early in the proceedings
- avoid repeating arguments
- limit the number of fact and expert witnesses and their statements
- limit the number and length of hearings.

Documentary evidence

- parties should produce the documents on which they rely
- limit the requests for document production
- exchange documents in electronic format
- documents should be organized in one index system
- only submit material documents to the tribunal
- avoid duplication—use a single document system
- use evidentiary rules that expedite proceedings, such as:
 - IBA Rules on Taking of Evidence
 - ICDR Guidelines for Information Exchange

⁴⁴ 'Techniques for controlling time and costs in arbitration' (ICC Commission on Arbitration 2007) at <<http://www.iccwbo.org/court/arbitration>>. Look under Tools/Controlling Time & Costs.

⁴⁵ TJ Stipanowich, Protocols for Expeditious, CostEffective Commercial Arbitration (The College of Commercial Arbitrators 2010) <<http://www.thecca.net>>.

11. Conclusion

Planning for the disputes that arise from international oil and gas agreements is essential for the long-term success of an international energy project. Disputes will arise. If they are not properly managed, they could undermine the economic viability of a project. Parties therefore need to begin addressing potential disputes from the drafting of their agreements to the selection of their external counsel to the appointment of the adjudicators of their disputes. Knowledge about these matters will mean the difference between success and failure.

There are many good precedents and guidelines that parties can use to achieve that success. This article has attempted to provide them in a succinct and clear manner. Parties that use them effectively will be successful in managing and resolving their disputes.

Appendix 1: International arbitration institutions

Major centres

AAA/International centre for dispute resolution (ICDR) <<http://www.adr.org>>

Model Clause: Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the ICDR [or the American Arbitration Association] in accordance with its International Arbitration Rules.

The parties may wish to consider adding:

1. the number of arbitrators shall be (one or three)
2. the place of arbitration shall be (city and/or country) or
3. the language(s) of the arbitration shall be ____.

International Chamber of Commerce (ICC) <<http://www.iccwbo.org>>

Model Clause: All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the ICC by one or more arbitrators appointed in accordance with the said Rules.

London Court of International Arbitration (LCIA) <<http://www.lcia.org>>

Model Clause: Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

- The number of arbitrators shall be [one / three]
- The seat, or legal place, of arbitration shall be [City and / or Country]
- The language to be used in the arbitral proceedings shall be []
- The governing law of the contract shall be the substantive law of [].

Regional centres

Europe

- (1) Arbitration Institute of the Stockholm Chamber of Commerce (SCCI) <<http://www.sccinstitute.com>>
- (2) Swiss Chambers Arbitration <<http://www.swissarbitration.ch>>
- (3) Netherlands Arbitration Institute <<http://www.nai-nl.org/>>

Asia

- (4) Singapore International Arbitration Centre <<http://www.siac.org.sg>>
- (5) Hong Kong International Arbitration Centre <<http://www.hkiac.org>>
- (6) China International Economic and Trade Arbitration Commission (CIETAC) <<http://www.cietac.org>>
- (7) Kuala Lumpur Regional Centre for Arbitration <<http://rcakl.org.my>>
- (8) LCIA India <<http://www.lcia-india.org>>

Americas

- (9) Inter-American Commercial Arbitration Commission <<http://www.sice.oas.org/dispute/comarb/iacac/iacac1e.asp>>
- (10) Mediation and Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO) <<http://www.arbitrajecanaco.com.mx>>
- (11) British Columbia International Arbitration Centre <<http://www.bcicac.com>>

Africa

- (12) Cairo Regional Centre for International Commercial Arbitration <<http://www.crcica.org.eg>>
- (13) Mauritius International Arbitration Centre <<http://www.miac.mu>>
- (14) Ghana Arbitration Centre <<http://ghanaarbitration.com/>>

Middle East

- (15) Dubai International Arbitration Centre <<http://diac.ae>>
- (16) DIFC/LCIA Arbitration Centre <<http://www.difcarbitration.com>>
- (17) Bahrain Chamber for Dispute Resolution <<http://www.bcdr-aaa.org>>
- (18) GCC Commercial Arbitration Centre <<http://www.gcac.biz>>

A comprehensive listing of websites for arbitration centres is at <<http://www.china lawblog.com/InternationalArbitrationCenters.pdf>>.

State investment centres

1. International Centre for Settlement of Investment Disputes (ICSID) <<http://www.worldbank.org/icsid>>
2. Permanent Court of Arbitration <<http://www.pca-cpa.org>>

3. Energy Charter Secretariat <<http://www.encharter.org>>

Ad hoc arbitration—non-administered rules

1. United Nations Commission on International Trade Law (UNCITRAL) Rules <<http://www.uncitral.org>>
2. CPR Institute: Rules for Non-Administered Arbitration of International Disputes <<http://www.cpradr.org>>

Professional and educational organizations

1. Chartered Institute of Arbitrators <<https://http://www.ciarb.org>>
2. Institute for Transnational Arbitration <<http://www.cailaw.org/ita>>
3. International Arbitration Institute <<http://www.iaiparis.com>>
4. College of Commercial Arbitrators <<http://www.thecca.net>>
5. International Council for Commercial Arbitration <<http://www.arbitration-icca.org>>

Appendix 2: Arbitration websites

- (1) An extensive and lengthy list of arbitration websites available online can be found at the International Council for Commercial Arbitration website <<http://www.arbitration-icca.org/related-links.html>> that includes links to:
 - Treaties and Conventions on Arbitration
 - Related Treaties, Conventions and Principles
 - National Arbitration Laws
 - International and Regional Arbitral and ADR Institutions
 - National Arbitral and ADR Institutions
 - Young Arbitration Practitioners
 - Other Arbitration Organizations
 - Arbitration Resources Online.

Another general source of arbitration links is <<http://www.arbitration-links.de>>.

- (2) In addition to the panels of arbitrators maintained by all of the arbitration institutes, lists of leading arbitrators and arbitration counsel can be found at:
 - International Arbitration Institute <<http://www.iaiparis.com>>
 - Energy Arbitrators List <<http://energyarbitratorslist.icdr.org/>>
 - College of Commercial Arbitrators <<http://www.thecca.net>>
 - Who's Who Legal <<http://www.whoswholegal.com>>
 - Chambers & Partners <<http://www.chambersandpartners.com>> *and*
 - Best Lawyers <<http://www.bestlawyers.com>>.
- (3) Investment Treaty News is an e-mail briefing that covers cases and treaty developments in the area of investment treaty arbitration. It is a service of the International Institute for Sustainable Development (IISD). IISD is an NGO

that is often very critical of the system of investment and trade treaties, including investment arbitration. Found at <<http://www.investmenttreatynews.org>>.

- (4) Investment Arbitration Reporter <<http://www.iareporter.com>> is a specialized news publication tracking developments in the area of international investment law.
- (5) Transnational Dispute Management <<http://www.transnational-dispute-management.com>> is an online journal on international disputes heavily focused on the energy sector.
- (6) Members of the International Bar Association can access 'World Arbitration News', a LEXIS-NEXIS search updated daily, from the Arbitration Committee's website <http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx>
- (7) Global Arbitration Review is an online monthly journal that provides personal insights into the world of international arbitration and annual rankings of international arbitrators which is found at <<http://www.globalarbitrationreview.com>>.
- (8) International Dispute Negotiations is a podcast series about international disputes. Each audio file is downloadable within the iTunes Music Store (search for 'arbitration podcast').
- (9) Juris International Arbitration and Mediation Centres at <<http://www.jurisint.org/en/ctr/index.html>> provides information on commercial arbitration, mediation, conciliation, expertise centres and other alternative dispute resolution centres or services including the full text of their rules and model clauses.

Appendix 3: Arbitration textbooks, articles & references

General references

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IBA Guidelines for Drafting International Arbitration Clauses (October 2010). <<http://www.ibanet.org>>.

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