International Arbitration: a brief synopsis

1. Introduction

Increasingly, the traditional dispute resolution clause in upstream oil and gas agreements with its straightforward recourse to the courts is being replaced by submission to international arbitration.

Often, however, companies have little idea of the world into which arbitration will take them: quite a few believe arbitration will be quicker or less expensive than going to court. Unfortunately, this is rarely so. Also, even the lawyers drafting arbitration clauses sometimes do not have the necessary experience to avoid the real problems that poorly crafted arbitration clauses lead to.

This article gives a brief overview of international arbitration: looking at why parties choose arbitration, its legal foundation, key points in an arbitration dispute resolution clause, and whether arbitration awards can truly be confidential or final. It concludes by summarising arbitration's present day status.

2. Why Arbitration?

International arbitration has become increasingly popular in the upstream oil and gas business. Why?

Time and money.

It is presumed by many clients that international arbitration will be both quicker and cheaper than going litigating. Neither is necessarily true. Although some countries have notoriously slow court processes that is not always the case. The Netherlands' court system, for example, is recognised as quick an efficient, whilst in contrast a poorly drafted arbitration clause could lead to endless squabbles over a variety of issues, sometimes themselves necessitating rulings from courts. The cost of arbitration is not low. The parties need to pay for (a) the arbitrators (often retired judges that do not come cheaply), (b) increasingly for specialist counsel experienced in arbitration practice and (c) often for institutions to run the process, such as the LCIA or ICC[1]. Thus for a low cost dispute arbitration is often simply too expensive.

Confidentiality

Commercial clients often find the confidential nature of arbitration compelling. For some private companies this indeed may be *the* reason for choosing arbitration over a public court procedure. This needs to be tempered however by the realisation that publically listed companies may need to make regulatory disclosure of any awards that are made, thus vitiating this aspect to a great degree.

Enforceability

International oil and gas deals frequently see companies from different countries choosing to work on an opportunity (exploration, development or production) in remote locations. Courts are not particularly proficient at enforcing judgements in other jurisdictions: for example, it would not be straight forward for a Dutch company, owed money by a Ukrainian counterparty, for drilling a well in Tanzania, under a contract governed under English law, to chase this through the courts' system. Any award from the English court would need to be "exported" and enforced in Ukraine.

Enforcement of court awards from one country in another, however, relies on explicit bi-lateral agreements, and this, often leads to a complicated and expensive process.

One of the major attractions of international arbitration is its claim to simplify greatly such complexities. Although some might imagine this might in some way takes outside or place it "above" of national laws and courts this is not so. International arbitration sits firmly within both international and national legal structures and requires them both to function. The instrument that

[1] The London Court of Arbitration and International Chamber of Commerce, respectively

provides arbitration its enforceability is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958). The Convention aims to make arbitration awards directly enforceable in the national courts of Contracting States[2]. An award given by an arbitration tribunal in, say, Singapore should without legal ado be enforced by a court in, say, Mongolia. This is unquestionably one of arbitration's greatest strengths, for upstream oil and gas with its global reach.

3. Arbitration's legal systems

The New York Convention by itself, however, is not enough to enable international arbitration as a process. Arbitration sits also within several national legal systems:

(i) the substantive law of the dispute: i.e. the law governing the contract or agreement between the parties. This is (generally) at the discretion of the parties, i.e. Dutch and Ukrainian parties could choose Tanzanian law;

(ii) the lex arbitri: this is the law that governs the arbitration process per se, e.g. for England, the Arbitration Act 1996. This is generally at the discretion of the parties, i.e. Dutch and Ukrainian counterparties could choose the so-called "seat" of the arbitration of be England. This will make England the legal "home" for the arbitration, meaning the English courts will have jurisdiction and would apply the English Arbitration Act. This is true even should they decide physically to locate the arbitration in Singapore, however regard must be paid to,

(iii) the national law applicable in the location the arbitration is taking place. This law is not discretionary once a location is selected, and the level of its interaction with the arbitration differs from country to country, so although in the above example the parties chose the seat as London, they nevertheless remain subject to Singaporean law;

(iv) the rules governing the arbitration procedures, e.g. number of arbitrators, level of awards, etc. This is (almost) entirely at the discretion of the parties; i.e. they can choose to use Rules of any major institution[3] or adopt entirely new ad hoc rules of their own making.

Having chosen the applicable laws and rules this is captured in the arbitration clause which sits in the principal contract or agreement

4. Arbitration Clauses

This is the dispute resolution clause providing for arbitration. Let's turn now to some of the critical issues that should be covered:

Institutional or ad hoc arbitration?

State whether it's to be an ad hoc or institutional arbitration, i.e. state the applicable rules and which body is to apply them. If it's to be ad hoc, how are the rules to be determined?

The seat of the arbitration

Remember this is ***not*** the same as the location - it is the legal home of the arbitration.

The location of the arbitration

Where shall it take place?

Substantive law of the contract, the lex arbitri, and the procedural rules

These all, as discussed above, need to be made clear, but try to avoid creating a legal tangle by mixing and matching in an attempt to "cherry pick" legal systems.

Language of the arbitration

This is advised to be the same as that of the substantive law, otherwise the confusion caused could be considerable. For example, the word "trust" when used as an English legal term comes hundreds of years of jurisprudence. It will not readily translate to, say Dutch.

The Arbitrators

How many? Who should they be? How are they to be selected? One or three is standard, one being cheaper and quicker, but three allowing each party to select an arbitrator and one "neutral".

[2] There are now some 150 Contracting States – countries that are signatories to the New York Convention

[3] The International Chamber of Commerce and the London International Court of Arbitration being popular

Interim Measures

It takes time to empanel the arbitral tribunal. Ensure therefore that recourse to the courts is permitted and also for remedies that only courts can impel, e.g. injunctions, or specific performance.

Finality

Do the parties want the arbitrator's award (outcome) to be "final"? If the arbitrator makes a manifest error, either of fact or in law, should that be appealable? Parties may think they want an arbitration award to be "final and binding" - *until* it goes against them.

Costs and awards

Institutional arbitration is not cheap. The parties need themselves to pay for everything and everyone. They might well be required to pay-out some US$ 50,000 each, if not more, for the arbitration to proceed. Provision needs to be made for whether this should be recoverable or not. Should awards include or exclude punitive damages, commercial interest rates, consequential losses or equitable remedies? Would a punitive arbitration award be enforceable? If part of an award were struck down in a particular country would the rest of the award also be unenforceable?

Summarising, drafting an arbitration clause requires care. This may be challenging when the parties are focussing on the "commercials" but their involvement is crucial.

5. Finality: really the end?

A major attraction of arbitration is that it should bring finality to the dispute, particularly where otherwise a dispute would be open to appeals from one court to the next, often over many years and at great cost. Parties often insert clause such as "*The Parties hereby explicitly waive all recourse or right of appeal in respect of any ward made pursuant to this arbitration agreement, before any court or tribunal that may have or claim jurisdiction in respect of the arbitration award.*" or words to that effect.

Practice however shoes that it may not be quite that simple. More parties currently appear to be looking to appeal arbitration awards or obstruct enforcement on a variety of grounds. This issue is highly complex, but several countries' courts have recently shown interventionist tendencies, this being the so-called "battle for supremacy". It is all the more reason to ensure the arbitration clause is clear and precise, and covers the key issues.

6. Conclusion

Arbitration originated with the desire to resolve disputes quickly, inexpensively, less formally and more confidentially than through court litigation. The New York Convention armed international arbitrations with a seemingly straightforward and powerful mechanism for ensuring enforceability across many countries. This aspect is highly attractive to the international oil and gas business, a truly global enterprise.

Arbitration has however become a complex, specialist arena. Parties need to be informed appropriately when choosing arbitration and their involvement is essential. This can be challenging when decision makers' attention is focussed on commercial matters and considers dispute resolution as boiler-plate.

Even winning at arbitration might not be the end of the affair. Parties should be made aware that even after opting for arbitration and having won, they may still end up in court.

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