

THE GUIDE TO ENERGY ARBITRATIONS

EDITED BY J. WILLIAM ROWLEY, DOAK BISHOP, AND GORDON KAISER

Reviewed By: Glenn Zacher*

In his Preface to *The Guide to Energy Arbitrations*, J. William Rowley QC notes that “if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor state dispute, it must be the energy business. It is the poster boy of arbitral globalization.” As Rowley and other of the book’s contributors observe, the drivers of commercial arbitration operate in spades in the energy sector. Energy projects are international in scope; they are complex, long-term, capital-intensive projects; and, they bring together many parties of different nationalities and cultures from varied legal systems. These factors, as Rowley aptly remarks, make “the energy sector . . . a natural incubator for disputes” Likewise they create powerful incentives to bypass the uncertainty and distrust engendered by foreign court systems and ensure the appointment of neutral adjudicators who possess the requisite expertise to competently and efficiently resolve disputes. At the same time, as Andrew T. Clark, General Counsel of ExxonMobil International, cautions in the book’s Foreward:

While . . . international arbitration has become the primary mechanism by which disputes are resolved in the oil and gas industry . . . [u]nfortunately, the dispute resolution process itself is becoming increasingly complex and uncertain, adding a further layer of difficulty to the parties finding solutions to their disputes. The time and cost associated with international arbitration now compares unfavorably with litigation (which was never a good benchmark in the first place).

It is against this backdrop that Rowley and fellow editors Gordon Kaiser and Doak Bishop have gathered “the thinking and recent experiences of some of the leading counsel in the sector.” The *Guide to Energy Arbitrations* is not a textbook. The articles presume a basic knowledge of the energy sector and arbitration and the book is not comprehensive. For instance, there are no sections devoted to the enforcement of arbitral awards. That said, the book spans a lot of ground and the articles should for the most part be accessible to any in-house counsel, external counsel, or student possessing a basic knowledge of the field. Bishop et al provide a very good and useful Overview that considers: (i) the various agreements and phases which constitute an international energy project (and can give rise to disputes), (ii) the evolving role of host states in energy projects, and (iii) the instruments (conventions, treaties, and agreements) that have been developed to address disputes. This Overview provides a good starting point particularly for those readers who are not as familiar with the area. Many of the other chapters

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also mix practical guidance on how to approach issues with academic insights on emerging trends and how some of the key controversies and tensions in the international arbitration field are revealing themselves and playing out in the context of energy arbitration.

Part I of the book addresses “investor-state disputes” which many observers perceive as lying at the heart of international arbitration. This Part, which constitutes approximately one-third of the book, includes a very good introductory chapter by Mark Friedman et al examining the subjects of expropriation and nationalization which have historically featured in many high-profile cases. As Friedman interestingly notes, while expropriation and nationalization may hark back to the 1970s, “[i]n times of rising prices, energy resources represent easy opportunities to capitalize on the upward trend for investors and governments alike.” Friedman provides a good primer on the types and forms of expropriation, the remedies available and practical considerations for protecting against expropriation.

The remaining chapters in Part I take a deeper dive into specific types of investor-state disputes, focusing on the key issues at play and the relevant jurisprudence. Steve Jagusch et al provide a good summary of the broad range of disputes and the jurisprudence. Of particular interest to energy companies and their general counsel, Jagusch distinguishes the types of state regulatory actions that have not typically sustained successful arbitration claims and therefore represent risks which may be challenging to protect against. Jagusch also highlights the inherent tension between state sovereignty and freedom of contract that underlines many investor-state disputes.

Similar themes are explored by Constantine Partasides et al and Nigel Blackaby et al in ensuing chapters. Partasides addresses stabilization clauses as a fundamentally important means of protecting against political volatility and government intervention through changes in tax policy. He analyzes the types of stabilization claims, their historical treatment by arbitral tribunals, and how arbitral treatment of such clauses may be evolving. Blackaby likewise examines the management of long-term contractual risk through stabilization clauses in the utility context. He further traces the changes to the utility sector that have driven privatization and foreign investment, the unique and sensitive public interests that utility investments implicate, and the consequent (and pronounced) political and regulatory risks faced by utility investors. As Blackaby observes, the unique public interest dimension that attaches to utilities has made arbitration, including arbitrations conducted pursuant to investment treaties, controversial and unpredictable.

Parts II, III, and IV address disputes involving Construction of Major Capital Projects, Joint Ventures, and Gas Supply and LNG Arbitrations. These parts include a chapter by Doug Jones on why energy construction disputes particularly favor arbitration over state court proceedings and a more in-depth piece by Fred Bennett on Tort Claims for Massive Cost Overruns. Bennett explains the complex procedural and substantive law issues that arise when cost overruns on a project escalate to such a massive proportions that they exceed the scope of contractual provisions for adjudicating overrun claims. Given the amounts at stake and the susceptibility of megaprojects to cost overruns this is an instructive article for companies and their counsel. These Parts also include an interesting review by

Mark Levy on gas price adjustment mechanisms in long-term gas supply agreement. Noting the recent increase in gas price review arbitrations (triggered by price volatility arising from changes in global supply conditions, competition from new sources of energy, and other factors), Levy queries whether (and how) the unpredictability and risk that they have introduced will lead to industry-wide changes in how such arbitrations are conducted.

The final two parts of the book address Disputes Involving Regulated Utilities and Procedural Issues. The chapter by Gordon Kaiser on Regulated Utilities appears at first glance out of place in a book focused on arbitrating disputes arising from major international oil and gas and power projects. However, as Kaiser notes, for every large investor-state case “there are 10 significant commercial arbitrations in the downstream energy sector” in which “the center of gravity is not London, Stockholm or Paris, it is Houston or Calgary.” He further observes that what distinguishes these arbitrations from investor-state arbitrations is that they are between companies and that the companies are rate regulated. Kaiser, who served for a long time as Vice-Chair of the Ontario Energy Board and now principally arbitrates energy disputes, reviews the factors driving disputes between regulated utilities—the drop in the price of oil, the moratorium on pipeline construction, increases in shale gas, increases in the delivery of oil by rail, the growth of distributed generation and increases in renewable energy use. Kaiser then provides an insightful and thought-provoking analysis of how courts in the US and Canada are drawing jurisdictional lines between the authority of regulators and arbitrators over utility disputes. This section also contains a very good analysis by David Haigh et al on Multiple Contracts and Multiparty Arbitrations. Haigh offers practical guidance on drafting arbitration clauses to accommodate multi-contract and party arbitrations and as well on the considerations and procedural options available when agreements are more narrowly drafted.

The Guide to Energy Arbitration is a very useful contribution to the literature in the area. While as noted, it is not a comprehensive text, it nevertheless assembles the views and insights of leading counsel and arbitrators on many of the key issues and trends in the energy arbitration world. It should be a valuable guide to energy companies and their internal and external counsel, in addition to being of interest to commercial and litigation lawyers generally.