

Dispute Resolution in Energy Mega-Projects

Presenters:

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1. “Routing” Disputes – Multiple Dispute Resolution Mechanisms

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“ROUTING” DISPUTES

Megaproject dispute resolution considerations:

- Ongoing operations with tight project timelines
- No time or willingness to disrupt project while resolving a dispute

“ROUTING” DISPUTES, CONT'D

Expert Determination v. Arbitration or Court

- Speed / Process
- Cost
- Technical Nature of Dispute

“ROUTING” DISPUTES, CONT’D

Examples:

- Pricing Index
- Withdrawal Payment
- Joint Account disagreements
- Project Cost or Operator Cost
- ROFR calculation

“ROUTING” DISPUTES, CONT’D

- Selection/Identification of Experts
- When is Court action permitted?
 - Injunctions
 - Other interim orders
- When to Arbitrate?

2. Procedural Considerations– Benefits and Pitfalls

David Tupper

Partner

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Pros & Cons of Megaproject Arbitration

Pros	Cons
<ul style="list-style-type: none">• Confidentiality (sometimes)	<ul style="list-style-type: none">• Increasingly resembles litigation
<ul style="list-style-type: none">• Ability to tailor the process	<ul style="list-style-type: none">• Limited ability to appeal unfavourable decision
<ul style="list-style-type: none">• Choice of arbitrator	<ul style="list-style-type: none">• Lack of qualified arbitrators
<ul style="list-style-type: none">• Award is binding and enforceable	<ul style="list-style-type: none">• Erosion of jurisprudence
<ul style="list-style-type: none">• Potentially quicker resolution (sometimes)	<ul style="list-style-type: none">• Fewer opportunities to discuss settlement
<ul style="list-style-type: none">• Right to appeal – more certainty	<ul style="list-style-type: none">• Less reliance on precedent – less certainty

Appeal Process

- Limited appeal rights
- *Sattva* - enhanced deference in review of arbitral decisions
 - Factual matrix
- Statutory right of appeal - on questions of law (with leave of the court)
- Benefits vs. Drawbacks

Increased Speed of Process

- Benefit or a hindrance to settlement?
- Lack of off-ramps
- Focus on the arbitration procedure rather than on settling the dispute

Interim Relief

- Protects a party's rights pending the resolution of a dispute
- Disputes relating to the choice of arbitrator can leave a party in a difficult position regarding available interim relief
- More difficult in *ad hoc* proceedings than institutional proceedings
 - Institutional arbitration often has set rules regarding interim relief

Tools for Efficient Megaproject Arbitration

- Limits on document production and questioning process
- Carefully defined process – prior to dispute
- Proper process for selection of arbitration panel
- Involvement of internal counsel

3. Controlling Costs and Other Business Considerations

Jody Johnson
Senior Legal Counsel
TransCanada Pipelines Limited



In-house Counsel's Role in Arbitration

- Manage the dispute
- Case intake
- Document retention policy
- Ongoing communications oversight
- Coordinate with co-venturers
- Managing commercial representative's expectations

Internal Budgeting Considerations for Clients

- Scope of the dispute
- Timeline
- Market conditions
- Use of external counsel
- Arbitration vs. Litigation
- Process

Satisfying Client's Expectations

- Goals:
 - Effective resolution of the dispute
 - On time
 - On budget
 - Fairness
 - Certainty
- Methods:
 - Communication
 - Set client's expectations early
 - Understand client needs

In-house Counsel's Role in Justifying Expenses

- Arbitration versus Litigation
- Preparation of arbitration budget
- Document discovery

4. Stabilization Clauses - Maintaining regulatory stability during the life of a large project

Michael McCachen

Partner

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What is an Economic Stability Clause?

- A contractual covenant with a host country that the legal/regulatory regime will persist over the economic life of a project
- Meant to protect investors against changes in law that would negatively impact their investment
 - Tax structure, royalty regime, economic balance of the project

History

- Historically common in connection with large projects in less-developed or developing jurisdictions:
 - Common practice for international oil companies operating in these areas
 - Used to protect against political risk
 - Case law/awards originate from Middle East and North African oil and gas concessions
 - More recent claims for compensation arising from nationalization in South America

Are You in a Volatile Jurisdiction?

- Stabilization clauses should not be overlooked for large projects based in Western industrialized countries
- Canada is presently 5th in the world for the number of international investor claims brought against it under international investment treaties (e.g. NAFTA Chapter 11)
 - 1. Argentina; 2. Venezuela; 3. Czech Republic; 4. Egypt; 5. Canada; 6. Mexico...
- Is there heightened political or legal risk in Canada?
 - No constitutionally protected right to property
 - Environmental activism
 - First Nations land claims
 - Changing tax/royalty regimes

Obtaining a Stabilization Clause

- Depending on the applicable industry, enter into a customized investment agreement with the host government
 - Production sharing agreements
 - Oil and gas licenses
 - Royalty agreements
 - Overarching project development agreements
- Decide on the most appropriate form of stabilization clause, including given relevant legal / constitutional considerations
 - Regime “freeze”
 - Likely unenforceable under Canadian law (see slides #25-26)
 - Compensation for material changes
 - Re-negotiations to account for changes to economy, public interest, etc.
 - Can your arbitrator amend the agreement?

Governing Law

- Governing law to include international law in addition to the domestic law
 - In the case of a conflict, international law shall govern
- International law provides certain benefits:
 - Expropriation requires prompt and adequate compensation under international law
 - Canada does not constitutionally protect right to property
 - Stabilization clauses have been upheld and enforced in a variety of international investment disputes, including those involving large infrastructure projects and the oil and gas industry

Dispute Resolution

- Mandatory dispute resolution procedure:
 - ICSID is preferable, because its rules and associated convention has been designed specifically to accommodate disputes between private investors and sovereign states
 - ICSID arbitration is probably preferable to arbitration proceedings that would rely on the New York Convention for award enforcement given that this convention provides greater room for liable parties to seek to vacate the award before national courts

Canadian Constitutional Considerations

- The rule against “fettering”
 - Government’s legislative authority cannot be fettered by its agreements with other parties
 - A contract cannot require a legislature to enact, maintain or repeal a particular law in the future
 - However, a contract can validly provide that a government that breaches its contractual obligations must pay damages
- Draft the stabilization clause so that it does not restrict government’s legislative ability but requires compensation for regulatory changes

Canadian Cases:

- *Wells v Newfoundland* (1999) SCC
- *Pacific National Investments v Victoria (No 1)* (2000) SCC
- *Pacific National Investments v Victoria (No 2)* (2004) SCC
- *Rio Algom* (2012) ONSC

Do You Have a BIT?

- BIT = Bilateral investment treaty
 - Treaty between two countries
 - Called FIPAs (Foreign Investment Promotion and Protection) in Canada
 - Canada has ratified 29 FIPAs (6 other FIPAs have been signed but not yet ratified)
- Usually covers matters such as expropriation, non-discriminatory treatment, minimum standards of treatment, senior management appointments, etc.
- Generally sets international law as governing law
- Grants corporations recourse to international arbitration
 - ICSID (World Bank-backed International Centre for Settlement of Investment Disputes)
 - UNCITRAL Arbitration Rules
- Potential ability to overlook validly-enacted domestic law if it violates the investment agreement, the BIT or international law

Enforcement

- While BITs typically do not include stabilization clauses, they do include protective guarantees that can be triggered by the same government conduct that would contravene a stabilization clause, e.g. arbitrary or discriminatory legislative treatment or egregious undermining of an investor's legitimate expectations

Interested in Learning More?

- Large amount of academic writing on this topic
- Easy-to-read comprehensive source
 - *International Energy Investment Law – The Pursuit of Stability*
Peter D Cameron, Oxford University Press, 2010

