SQUIRE PATTON BOGGS

Recent Trends in Oil and Gas Arbitration in the Asia Pacific Region

Introduction

The trend that has seen arbitration establish itself as the preferred method of dispute resolution for parties to disputes in the Asia Pacific region continues to gather momentum. For example, recent statistics show that the Singapore International Arbitration Centre (SIAC) administered 402 new cases in 2018, up 48% from 271 in 2015 and 71% from 235 in 2012. The Chinese International Economic and Trade Arbitration Commission (CIETAC) administered an unprecedented high of 2,962 new domestic and foreign-related cases in 2018, up 50% from 1,968 in 2015 and 279% from 1,060 in 2012. The Hong Kong International Arbitration Centre (HKIAC) also fielded 521 new cases in 2018, of which 265 were arbitrations, 21 were mediations and 235 were domain name disputes.

Following a similar trajectory, the Asia Pacific region:

- Consumes more oil than any other region (35% of total global oil consumption)
- Has the highest annual oil consumption growth rate (2.9% per annum)
- Is the second-largest consumer of natural gas (21% of total global natural gas consumption)
- Has increased its production of natural gas by 4% per annum over the past 10 years, such that it now accounts for more than two-thirds of the global LNG growth[1]

Disputes arising out of the oil and gas sector vary considerably but typically involve high-risk and complex commercial arrangements requiring highly technical expertise. Given that arbitration provides parties with an avenue for obtaining an internationally enforceable award,[2] as well as the opportunity to select arbitrators with specialist knowledge of the industry, it is a particularly attractive method of dispute resolution for disputants in the oil and gas sector.

Interestingly, the pattern of LNG importation within Asia has shifted in recent years, with China, India and other developing countries overtaking the more established markets of Japan and South Korea. Australia, China, Malaysia, India and Indonesia are now the largest oil and gas producers in the Asia Pacific region. There is also a rapid trend towards commercialising previously unexplored oil and gas resources in places such as Vietnam, Timor-Leste and the Philippines.

In an effort to accommodate these developments, the rules of the leading arbitration centres in the Asia Pacific region have been regularly updated, with an observable degree of convergence. For example, CIETAC and HKIAC revised their rules in 2015 and 2018, respectively, with the latest version of the rules, like that of SIAC,[3] also including comprehensive provisions dealing with multiple contracts, joinder and consolidation, emergency interim relief, early dismissal of claims and expedited procedures.

Legislative Changes

As discussed in our September 2018 article, legislative changes in Singapore and Hong Kong have now made third-party funding more accessible to parties involved in disputes in the Asia Pacific region.[4]

However, unlike Singapore,[5] Hong Kong does not mandate third-party funders to adhere to particular regulations. Instead, it has adopted a broader definition of a third-party funder that is not limited to professional funders, such that:

"(1) A third party funder is a person –

(a) who is a party to a funding agreement for the provision of arbitration funding for an arbitration to a funded party by the person; and

(b) who does not have an interest recognized by law in the arbitration other than under the funding agreement."[6]

1 BP, "Statistical Review of World Energy June 2018", available at: https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/statistical-review/bp-stats-review-2018-full-report.pdf, at pp 17, 28, 29.

2 The New York Convention, to which 160 international states are signatories, requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states. It is widely considered the founding instrument for international arbitration and applies to arbitrations that are not considered as domestic awards in the state where recognition and enforcement is sought.

3 2016 SIAC Rules:

- Schedule 1: emergency arbitrator mechanism – allows parties to obtain expedited interim relief before the constitution of the tribunal within 14 days
- Rule 5: expedited procedure – allows parties to obtain an award within six months of the constitution of the tribunal

4 Singapore introduced amendments to the Civil Law Act 1909 with effect from 1 March 2017 that abolished the common law torts of champerty and maintenance, and also provided that third-party funding is not contrary to public policy or illegal when it is provided by qualifying funders in prescribed dispute resolution proceedings (Civil Law (Third Party Funding) Regulations 2017). In June 2017, Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017 to permit third-party funding. This law came into force in February 2019.

5 Singapore Civil Law (Third-Party Funding) Regulations 2017, section 4; Singapore Civil Law Act, section 5B(8).

6 Hong Kong Arbitration Ordinance (Cap 609), section 98J(1).

Therefore, pending any public policy issues that may arise, such as in circumstances where third-party funding is prohibited in a jurisdiction where enforcement may be sought, these changes may provide additional options to arbitration-users in the oil and gas sector looking for ways to fund their claims.

In countries that are signatories to the New York Convention, enforcement of an award made in another signatory state shall not be refused except on certain specific grounds, including that recognition or enforcement of the award would be contrary to the public policy of the country where recognition or enforcement is sought.

"Public policy" is not defined in the New York Convention, and its meaning generally differs between jurisdictions. However, in 2015, the IBA Subcommittee on Recognition and Enforcement of Arbitral Awards surveyed 45 countries to find that few enforcement refusals were made on the grounds of public policy and none on the basis of a funded award.

In recent years, Australia has made a number of changes to its arbitration legislation aimed at making it an attractive location for the resolution of arbitrations in the region. For instance, in 2015, the International Arbitration Act was amended to expressly provide that arbitrations seated in Australia are presumptively confidential, subject to a number of limited exceptions, namely:

- Consent
- Third-party rights
- Enforcement of awards
- Public interest
- Natural justice[7]

Confidentiality can be particularly important for the oil and gas industry, given that disputes typically traverse information that is highly valuable and proprietary in nature, especially in upstream exploration and appraisal ventures. In 2018, further amendments were introduced to broaden the tribunal's discretion in awarding costs and to clarify the provisions governing confidentiality of arbitral proceedings subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[8]

Investment Treaty Arbitrations

Countries in Asia are party to more than 1,200 bilateral investment treaties or investment agreements, with each instrument typically providing for commitments by host states to certain standards of conduct. These instruments typically relate to the treatment of foreign investments, and facilitate the states' consent that breaches of such standards may be submitted to arbitration. As such, it is unsurprising that a significant number of oil and gas disputes in the Asia Pacific region have also been submitted to arbitration under various investment instruments.

A number of multilateral treaties also cover the Asia Pacific region, including the 2009 ASEAN Comprehensive Investment Agreement (ACIA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), with both providing for arbitration.

As discussed in our July 2018 article in the context of the Belt and Road Initiative, there have so far been few China-related investor-state arbitrations. This is because, historically, these types of disputes have been resolved diplomatically or by direct settlement between the parties. It remains to be seen whether China, the biggest economy in the region, will join the CPTPP,[9] or whether it will focus on other multilateral treaties with other trade partners in the Asia Pacific region, including the Regional Comprehensive Economic Partnership (RCEP) and the Free Trade Area of the Asia-Pacific (FTAAP).

Market Influence

The majority of energy-related contracts persist over a long period of time. For example, LNG contracts typically have 20 to 30-year terms. As such, parties to those types of contracts, often formed and negotiated in a different price environment, may find themselves or their counterparts tied to agreements that are no longer as profitable as anticipated.

For that reason, price movements in oil and gas markets are a key driver of change in the industry. They are also a driver of disputes, especially where parties look to get out of, or revise, a bad bargain.[10] This is evident in "low price environments", where disputes tend to arise following the non-payment of invoices or cost overruns; or the suspension, renegotiation or cancellation of exploration and drilling obligations.[11] In "high price environments", disputes are typically fuelled by divergences in gas prices.[12]

7 Australian International Arbitration Act 1974, sections 23D and 23G.

8 Australian Civil Law and Justice Legislation Amendment Act 2018, Schedule 7.

9 China would have to conduct a rapid transformation of its economy in order to meet the CPTPP's rigorous requirements. This rapid opening-up is in contrast with China's current practice of gradual economic reform. China is also critical of the CPTPP's "competitive neutrality approach" to state-owned enterprises (SOEs), which would mean that state-owned and private businesses compete on a level playing field; see: F. Wong, "What the CPTPP and RCEP Mean for China and Asia-Pacific Trade", 10 December 2018, available at: https://www.china-briefing.com/news/cptpp-rcep-impact-china-asia-pacific-trade/.

10 We are renowned in representing international clients in price review arbitrations under long-term natural gas and LNG supply contracts.

11 R. King, "Disputes arising from oil price decline", Globe Law and Business, dated 1 April 2015.

12 This tends to be more prevalent in Europe due to the development of competitive natural gas markets and liquid gas hubs in certain locations, leading to a mismatch between spot prices for gas and the prices paid under long-term gas supply contracts that predate those developments.

Going Forward

Globally, of the more than 1,000 respondents[13] to the *2018 Queen Mary University of London International Arbitration Survey: The Evolution of International Arbitration*,[14] the vast majority recorded that the practice of international arbitration is most likely to increase in the energy (including oil and gas) and construction/infrastructure sectors.[15]

In recent years, Australia has hosted almost US$200 billion worth of LNG-related construction projects,[16] with the recent build-up of the domestic LNG industry also leading to cost overruns of almost US$50 billion at various facilities operated by major oil and gas companies.

With the Asia Pacific region forecast to account for 48% of total global energy consumption by 2040,[17] we look forward to monitoring the impact this has on the region's facilitation of arbitration as it deals with unprecedented levels of commercial and economic activity in the oil and gas sector in years to come.

We moved up five spots this year to be ranked 18 in Global Arbitration Review's (GAR's) annual rankings of the top 30 international arbitration firms. With a team of more than 100 lawyers with arbitration experience, our International Dispute Resolution Practice Group is a leader in international commercial and investment treaty arbitrations and has participated in many of the world's largest international cases.

Contacts

Gregory Steinepreis
Partner
T +61 8 9429 7505
E greg.steinepreis@squirepb.com

Timothy O'Shannassy
Associate
T +61 8 9429 7602
E tim.oshannassy@squirepb.com

13 Including senior in-house counsel, senior representatives of arbitral institutions, private practitioners and arbitrators.

14 See page 30, available at: http://www.arbitration.qmul.ac.uk/research/2018/.

15 85% and 82% of respondents indicated that they thought it was "likely" that the use of international arbitration for resolving cross-border disputes will increase in relation to energy (including oil and gas) and construction/infrastructure, respectively.

16 Australian Financial Review, "Australia Reaches for LNG Crown as $US200b Boom Ends", 12 June 2019, available at: https://www.afr.com/business/energy/gas/australia-reaches-for-lng-crown-as-us200b-boom-ends-20190612-p51x06.

17 BP, "Energy Outlook 2019 Edition", available at: https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/energy-economics/energy-outlook/bp-energy-outlook-2019.pdf.