

***The Practice of International Commercial Arbitration:
Beginning, Middle and End***

***Part 3: The Final Curtain:
Post-hearing Submissions, Deliberations and Enforcement***

PROGRAM GUIDE

ACT I — POST-HEARING ISSUES

(33:57) **Introduction to the Workshop and Act I** **Jennifer M. Smith, Workshop Co-Chair**

An acrimonious merits hearing in Tor in June 2011 has concluded and the parties are preparing to file written closing submissions. The Tribunal ordered simultaneous closing submissions with no right of reply and, in addition to page limits, specified that the parties were not to refer to any new arguments or new evidence. The Tribunal did permit each side to submit one additional witness statement, the scope of which was limited to late-discovered documents. The order further provided that the parties were to file written costs submissions simultaneously a week after their closing submissions.

Act I, Scene I — Closing and Costs Submissions

The parties separately discuss the form and content of their closing and costs submissions. Drill-BD has discovered new evidence and wishes to introduce it. TorGas is concerned with the post-hearing behavior of one of its key witnesses and considers how to minimize the damage. With regard to the costs submissions, Drill-BD's in-house counsel grapples with some troublesome time sheet entries from its outside arbitration counsel. For its part, TorGas has paid all the costs to date in the arbitration, is upset at the length of the proceedings, and is concerned as to its chances of recovering these costs from Drill-BD.

Stage Right – Drill-BD Discussions

Drill-BD Executive..... **William H. Knull**
Arbitration Counsel for Drill-BD..... **Elie Kleiman**
In-House Counsel for Drill-BD **Richard D. Deutsch**

Stage Left – TorGas Discussions

TorGas Executive..... **Lucy Greenwood**
Arbitration Counsel for TorGas..... **Jonathan Sutcliffe**
In-House Counsel for TorGas **James Loftis**

(08:18) **Act I, Scene II — Reaching a Deal or Waiting For the Award, Late Settlement Issues**

After Drill-BD submitted its new evidence, without first seeking leave of the Tribunal, it learned that the new evidence might have been fabricated. Drill-BD is trying to minimize the harm to its reputation. Drill-BD has reached out to TorGas to see if a deal can be reached to resolve the arbitration and move on. The parties independently discuss different aspects of possible settlement negotiations and the impact on the timing of the award.

Stage Left – TorGas Discussions

TorGas Executive..... **Lucy Greenwood**
Arbitration Counsel for TorGas..... **Jonathan Sutcliffe**
In-House Counsel for TorGas **James Loftis**

Stage Right – Drill-BD Discussions

Drill-BD Executive..... **William H. Knull**
Arbitration Counsel for Drill-BD **Elie Kleiman**
In-House Counsel for Drill-BD **Richard D. Deutsch**

(46:44) Discussion: NAVIGATING TRICKY EVIDENTIARY ISSUES WHILE MAINTAINING PARTY EQUALITY

Moderator..... **Ms. Smith**

Moderated Audience Q&A

ACT II — DELIBERATION: THE UGLY, THE BAD AND THE GOOD

(16:01) Introduction to Act II Philippe Pinsolle, Workshop Co-Chair

The parties have filed their closing and costs submissions. The Tribunal meets to discuss the case and render an award. The Tribunal must decide three issues:

Preliminary issue: Drill-BD has filed new evidence with its closing submission that it considers crucial to the outcome of the case. Three days before the Tribunal meets to deliberate, TorGas objected to the new evidence and requested that the Tribunal strike it from the record. TorGas reserved its rights to challenge the award if its request was not granted.

Issue on the merits: The Tribunal must decide whether TorGas or Drill-BD should be held liable for the delays in commencing drilling. The Tribunal discusses the effect of Clause 7.2 of the Turnkey Contract that provides: *“Drill-BD shall meet the milestones set out in Annexe E to this Agreement. A party can only be held liable for delays which are within the parties’ reasonable control. Parties shall make their best efforts to mitigate the effects of delays and enter into good faith discussions.”*

Issue on costs: After ruling on the merits, the Tribunal must decide on costs. The discussions focus on how costs should be allocated and whether they are reasonable. The Tribunal also discusses whether management costs are recoverable.

Act II, Scene I — The Ugly

One of the arbitrators informs the other members of the Tribunal that he and his family will face serious harm if he does not render an award in favor of the party that has appointed him. His behaviour during deliberations is erratic and he leaves the room frequently before key decisions are to be made. The remaining two arbitrators address how to handle the situation.

Arbitral Tribunal – Chair..... **Jennifer Price**
– Drill-BD Appointee **Klaus Reichert**
– Tor-Gas Appointee **Wendy Miles**

(11:10) Act II, Scene II — The Bad

During the deliberation, one of the arbitrators is obviously biased: he will discuss all issues at stake for the sake of it and “bargains” his vote. At the end of the process, when all points have been discussed, the biased arbitrator suddenly decides that he will not sign the award and that he will render a dissenting opinion.

Arbitral Tribunal – Chair..... **Lucy F. Reed**
– Drill-BD Appointee **Louis Degos**
– Tor-Gas Appointee **Oliver J. Armas**

(13:04) Act II, Scene III — The Good

The Tribunal discusses the three issues described above. The aim of this scene is to show how deliberation should normally unfold.

Arbitral Tribunal – Chair..... **Judith Gill**
– Drill-BD Appointee **Mark Kantor**
– Tor-Gas Appointee **Teresa Giovannini**

(36:05) Discussion: IS ARBITRATION LIKE GREAT RESTAURANTS: BETTER NOT SEE WHAT HAPPENS IN THE KITCHEN?

Moderator..... **Mr. Pinsolle**

Moderated Audience Q&A

ACT III — RECONSIDERATION – CHALLENGE – ENFORCEMENT

(21:47) Introduction to Act III Prof. Tai-Heng Cheng, Workshop Co-Chair

At long last, the Tribunal issues its award – a divided 2-1 decision favoring TorGas.

The majority award is signed by the Chairman of the Tribunal and by TorGas’s nominee. In its opinion, the majority concludes that under the terms of the Turnkey contract, Drill-BD was strictly responsible for meeting the contractual milestones necessary to prepare the site for drilling, and that its failure to meet those milestones on schedule gave rise to liability in the amount of \$7 million. Because TorGas is the prevailing party, the

majority also concludes that TorGas is entitled to its “reasonable costs and attorneys fees,” which it calculates at 75% of TorGas’ requested amount.

The arbitrator appointed by Drill-BD has filed a separate and withering dissenting opinion, accusing the majority of reaching an overly technical decision and committing various legal and deliberative errors. The dissent argues that because TorGas’s delays in obtaining certain necessary drilling permits prevented Drill-BD from meeting the contractual milestones, TorGas should not be entitled to any delay damages, and each party should bear their own costs.

Act III, Scene I — Debriefing

The LCIA has provided the award to both sides, and the executive of each party meets with in-house and arbitration counsel to discuss their very differing reactions to the award and to plot next steps. In particular, the parties analyze the procedural mechanisms at their disposal with regard to promoting or resisting confirmation and enforcement.

Stage Left – TorGas Discussions

TorGas Executive..... **Catherine Amirfar**
Arbitration Counsel for TorGas..... **Barry Leon**
General Counsel for TorGas..... **Jennifer Thornton**

Stage Right – Drill-BD Discussions

Drill-BD Executive..... **Dietmar Prager**
Arbitration Counsel for Drill-BD..... **Julie Bédard**
General Counsel for Drill-BD..... **Joseph Neuhaus**

(16:46) Act III, Scene II — Local Enforcement Challenges

A month has passed and just as TorGas’ lawyers are putting the finishing touches on a request for confirmation, TorGas has suddenly found itself served with notice of a petition that Drill-BD’s lawyers have filed in Torvian state court seeking to vacate the award. To their great surprise, TorGas notes that Drill-BD has attached an unsealed copy of the arbitral award and dissent to its request for vacatur, and TorGas soon learns that the dissent’s scathing and colorful attack on Torvia’s investor climate is already getting top billing on Longhorn’s leading evening financial news program. Each side’s executive convenes a meeting with general counsel, local Torvian counsel and arbitration counsel to discuss these developments and to plan next steps.

Stage Left – TorGas Discussions

TorGas Executive..... **Catherine Amirfar**
Arbitration Counsel for TorGas..... **Barry Leon**
General Counsel for TorGas..... **Jennifer Thornton**
Local Counsel for TorGas **Giovanna Micheli**

Stage Right – Drill-BD Discussions

Drill-BD Executive..... **Dietmar Prager**
Arbitration Counsel for Drill-BD..... **Julie Bédard**
General Counsel for Drill-BD.....**Joseph Neuhaus**
Local Counsel for Drill-BD **Julia Peck**

(41:35) Discussion: IS THE AWARD JUST THE BEGINNING? STRATEGIZING FOR POST-ARBITRAL PROCEEDINGS

Moderator..... **Prof. Cheng**

Moderated Audience Q&A

(73:35) Panel Discussion: CORPORATE COUNSEL AND ARBITRATOR PERSPECTIVES

This panel engages leading arbitrators in a conversation with corporate counsel to discuss what corporate officers think about international arbitrations, and the tools – and their limitations – available to the tribunal to provide the arbitration services that users want.

Moderator..... **Mark C. Morril**, Senior Vice President & Deputy General Counsel,
Viacom Inc., New York

Panelists:

Dominique Brown-Berset

Brown & Page
Geneva

Teresa Cheng

Hong Kong International Arbitration Centre
Hong Kong

Fred G. Bennett

Quinn Emanuel
Los Angeles

Mark L. Greenberg

Mercuria Energy
Houston

Moderated Audience Q&A

Closing Remarks Ms. Reed

(36:17) ADDRESS: ARBITRAL DECISION-MAKING AND JUSTIFICATION – R. Doak Bishop