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THE ENERGY DISPATCH

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CONTENTS

The Energy Dispatch, the IEL's Young Energy Professional newsletter, contains substantive articles on trending legal issues in the energy industry, interviews, and professional development.

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IEL Industry Expert Interview with Sharon O. Flanery, Steptoe & Johnson PLLC

Interview by Laura Springer Brown, Liskow & Lewis

Hi Sharon, thank you for taking the time to talk to *The Energy Dispatch*. Can we begin by discussing your path to the practice of law?

My path to the practice of law was non-traditional. In high school, I liked math, so I began my undergraduate experience expecting to become a math teacher. Then, an advisor suggested I consider majoring in engineering. I followed that suggestion and eventually became the first female petroleum engineering graduate from West Virginia University. Out of undergraduate school, I worked as a petroleum engineer for several years, first in Appalachia and then in Saudi Arabia. My husband and I returned from Saudi Arabia in the mid-1980s due to the industry downturn. At that time, the petroleum engineering job market was tight, so I decided to go to law school to open more career opportunities. I attended law school at night, while continuing to work full time in engineering for three of the four years of law school. After graduating from law school, energy industry contacts from my engineering days were instrumental in helping me obtain my first associate position in private practice and later transition to in-house legal, and then business, departments of different energy companies. After practicing law and working on the business side in-house for several years, I joined Steptoe & Johnson PLLC, concentrating my practice in energy law.

That is fascinating and impressive! I'm sure your global work experience has been invaluable to your legal perspective. Your resume is so diverse. Can you describe more about what your career has been like?

My career has certainly been diverse, encompassing engineering, legal, and executive and management roles. On the engineering side, I worked as an engineer for Columbia Gas Transmission Corporation and Saudi Aramco, and as an engineer/supervisor for CNG Development. After law school and transitioning to a legal career, I started as an entry-level associate in a mid-size law firm in Pittsburgh. Next, I joined the corporate legal department at CONSOL Energy Inc., which at the time was a coal company that was growing into a gas company, too, through primarily coalbed methane development – so it was great timing for me, as I had worked on coalbed methane projects in my engineering days! From there, I went back to the company I had first worked for straight out of engineering school, Columbia Gas Transmission/ NiSource Corporate Services Company, a major transmission company, only this time I was working as an Assistant General Counsel. I later returned to the business side as an executive for Columbia Natural Resources, an Appalachian E&P company, to lead the reservoir, geology, marketing, and land groups. After Columbia was sold, I joined Steptoe & Johnson. At Steptoe & Johnson, I chair the Energy and Natural Resources Department. The growth of shale development enabled us to grow the ENR Department, which today consists of approximately 70 attorneys and 70 professionals and staff.

The answer to my next question seems a little obvious, given your background, but I imagine the legal world was full of potential directions for you. Why did you decide to pursue energy law?

Having graduated as a petroleum engineer, my career began in the energy industry. And, after working for almost 12 years as a petroleum engineer before graduating from law school, energy law was a natural fit with my background. Changing careers from engineering to legal was, for me, no indication of a desire to change industries. I was familiar with many of the legal issues in the energy industry, such as joint operating agreements, pooling and unitization issues, easements, storage, asset acquisitions and divestitures, and environmental, regulatory, and policy issues. In addition, I thoroughly enjoy the energy industry and the work that I do, and our clients—it is an honor to work with them. Every day and every project is different. Also, I am proud to work for an industry that has contributed so much to the betterment of our communities, not to mention an industry that provides good jobs to those in our communities.

Can you tell us about a time you took a risk that led you to a new phase of professional development?

The best example of a risk I have taken that was, in hindsight, a good decision, that led me to a new phase of professional development, is my decision to change careers and go to law school. Of course, going back to school at that point in my career was a challenge, but my prior work and life experiences helped accelerate my knowledge growth in energy law and led me down my eventual career path. I was also very fortunate to have mentors and prior industry contacts that helped me along my journey.

Most of *The Energy Dispatch*'s readership is newer to their professional careers. Do you have any advice to share with someone pursuing a career in energy law today?

It's an exciting time to be in the energy industry, and there will be many opportunities in both the traditional energy segments as well as the growing renewable areas. Many legal principles, such as contracts, land rights, environmental, and regulatory, span across all energy sectors and provide a solid base for an energy practitioner. In addition to learning these substantive legal areas, it is important to develop good team-based skills. Success in our industry requires one to work with all the groups that keep our industry in motion (not only legal, but also land, regulatory, operations, and others). Professionally, it is also important to develop good contacts and relationships with your colleagues and clients. These relationships will help support you along your journey. Also, consider seeking advice from a trusted advisor or mentor to aid you on career and non-legal issues. Ask that person if they would serve as your mentor. Having someone that you can reach out to may help you navigate your career and may also provide an opportunity for that other person to contribute to the success of the next generation of energy practitioners. Finally, remember to make time for yourself and your family and to pursue what gives you joy and purpose in your personal life.

Great advice. Thank you, Sharon!

YEP Public Service Project

Tod Everage, Kean Miller LLP

In 2021, the Young Energy Professionals Committee was finally able to put a long-awaited goal into action with the inclusion of public service into its conference and practice groups. Last October, at the YEP Annual Conference in Austin, Texas, the YEPs partnered with Caritas of Austin to package and donate 238 pounds of food and water to be handed out to those in need at their center. This was only the first of many more public service projects to come as the YEP Committee has committed to partnering with a local charity wherever the YEP Annual Conference is held. Next on the agenda is the coordination of the anticipated YEP National Day of Service to be held in as many YEP member cities as we can coordinate. If you are interested in assisting with the YEP Public Service Committee, please reach out to Vickie Adams.

Young Energy Professional Highlight: Stefanie Burt (EQT)

Interview by Carl Stenberg, Kirkland & Ellis LLP

CS: What did you study in college, and why did you want to become a lawyer?

SB: I studied philosophy at the University of Pittsburgh and at the time, was considering going into teaching. However, in my last year of college, I decided to apply to law school and then attended the George Washington University Law School.

CS: Please give us a brief history of your legal career as of today.

SB: I started my legal career at Vinson & Elkins in their Washington D.C. office as a summer associate and later joined the firm as an energy and environmental litigator. After two years at Vinson & Elkins I moved to my hometown Pittsburgh to work for Fulbright & Jaworski's (today Norton Rose Fulbright) for about a year. I later joined Reed Smith and practiced there for a number of years and became a partner in the Energy & Natural Resources group.

CS: Why litigation and not transactional law?

SB: I've always enjoyed litigation work, starting from when I was a summer associate with Vinson & Elkins where I really enjoyed the work of the white collar crime litigation practice. From there on I was leaning towards litigation work and had the opportunity to start out as a litigator after law school.

CS: How did your career in energy start, and what are your thoughts on the oncoming energy transition?

SB: I have been working in the energy field my entire legal career, starting with environmental litigation at V&E. All of this was around 2009 when the Marcellus Shale Play was being developed and there started to become more oil and gas related work centered around Appalachia. Because I grew up in Pittsburgh, it was a natural pathway for me to focus my energy-related litigation into the oil and gas work in Appalachia.

Much of the energy transition work is still in the contracting phases, and not as much rising to the dispute level. In the future, there may be regulatory, contracting, and other disputes that we normally see arise as the energy transition goes on.

CS: Could you please describe what you do on a day-to-day basis, and what are some of the most common types of disputes EQT is facing?

SB: I manage EQT's litigation docket, meaning that I work with outside counsel to manage a number of specific matters, work to develop the overall litigation strategy, and provide counsel on litigation risk and avoidance.

We have a variety of litigation, including class action litigation and land disputes.

CS: Do you get to go to court these days?

SB: I used to go to court all the time when I worked at law firms. These days, I occasionally go if it is something like a mediation, trial or certain pre-trial hearings or conferences. When I worked at law firms, I used to go to many state and federal courts in West Virginia, Pennsylvania, Ohio, and other states.

CS: What is the biggest difference between working in-house and at a law firm?

SB: When working as a litigator at a law firm you are hired on very specific cases and you have the opportunity to get deep into the weeds and become a subject matter expert on the particular case. In-house litigation management is more often about seeing the big picture, developing a cohesive strategy, and making decisions that manage risk overall.

CS: Have you had any mentors in your career that helped you reach where you are today?

SB: Absolutely, I have worked a lot with Kevin Abbott when I was at Reed Smith, and had the opportunity to learn from his decades of experience with oil and gas litigation.

CS: What advice do you have for someone seeking to move in-house?

SB: When people are working at law firms they often become highly specialized subject matter experts in very specific areas of their field. For example, most people at large law firms would not say "I am a litigator" but would instead say "I am a class action lawyer". To move in-house it really helps to show that you are adaptable and can work on a broad variety of things. It is also very important to keep expanding your network. It also always helps to be a nice person, if you are a nice person then clients will tend to think of you when they have an opening for an in-house position, other lawyers at other firms may think of you when they know of an opportunity, etc. The energy – legal world is pretty small so you will see the same folks repeatedly.

CS: Do you have any other tips for young lawyers seeking a career in the energy space?

SB: I would recommend joining a law firm that works with energy clients. That is how you get the experience and exposure as few attorneys go directly in-house. However, there are many law firms that are highly specialized in energy work offering an opportunity to get in the weeds of energy-related work.

CS: What do you like to do when you are not working?

SB: I like to spend time with my family, read, go on walks and hikes with my dogs, and in the summer I like gardening. Now that springtime is coming up in Pittsburgh, my family and I will also golf together.

Force Majeure and The Great Supply Chain Disruption

Rebecca L. Jordan, Foley & Lardner LLP

I. Supply Chain Crisis and the Oil and Gas Industry

In response to the coronavirus pandemic and an anticipated decline in consumer demand, numerous global industries shut down for a period of weeks to months in 2020. Holly Ellyatt, *Supply chain chaos is already hitting global growth*. And it's about to get worse, CNBC (Oct. 18, 2021, 6:28 AM), https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html. Combined with natural disasters, inaccessible shipping containers, labor and truck driver shortages, and a surprising skyrocket of consumer demand, this halt in manufacturing and distribution left the 2021 supply chain full of broken links, backlogs, and production delays. *See Global Catastrophe Recap: First Half of 2021*, AON (2021), http://thoughtleadership.aon.com/Documents/20212107_analytics-if-1H-global-recap.pdf; Jackie Northam, *The pandemic economy's latest victim? The lowly shipping container*, NPR (Nov. 16, 2021, 9:33 AM), https://www.npr.org/2021/11/16/1055131668/shipping-container-demand-supply-chain-delay; Nicole Goodkind, *A shortage of 80,000 truck drivers is wreaking havoc on the supply chain—and it's about to get worse*, FORTUNE (Oct. 28, 2021, 6:00 AM), https://fortune.com/2021/10/28/truck-driver-shortage-supply-chain-80000/. In the first year of the pandemic, 97% of supply chain professionals and organizations encountered supply chain problems, surging demand, and continuity challenges. *See 97% of supply chains disrupted as a result of COVID-19*, REUTERS (July 6, 2020), https://www.reutersevents.com/supplychain/supply-chain/97-supply-chains-disrupted-result-covid-19. Experts suggest that supply chain troubles will continue to worsen in 2022 as demand remains insatiable and businesses struggle to catch up.

Like other industries, the oil and gas industry is reeling from a breakdown in the supply chain. Access to electronics, pumps, and skilled oil and gas workers is limited, which dramatically increases operating costs. Delivery delays and shortages in specialized materials disturb drilling production, transportation of produced oil or gas from the field to its end location, and provision of worker tools and safety supplies. These performance interruptions may lead to contract breaches. For example, lack of drilling rigs or seismic tools may prevent a lessee from complying with the covenant of further development and exploration. In light of this "unprecedented" disruption to the supply chain, parties may look to the force majeure clause to find relief.

II. Force Majeure Clauses

Since the start of the pandemic, the typically ignored force majeure clause was propelled into the legal spotlight. Force majeure clauses address the risks of events that may not be foreseeable or within a party's control. The occurrence of a force majeure event often releases or suspends a party from performance, depending on the language of the contract.

There is no generally-held definition of a force majeure event, rather it must be contractually defined, often through lists of events that constitute force majeure—and few contracts use the same definition. Many force majeure definitions also include catch-all language to capture similar performance-altering events not otherwise outlined.

The following is a sample force majeure clause in an oil and gas lease, with the catch-all provision emphasized for purposes of this article.

> Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, equipment, services, material, water, electricity, fuel, access or easements, or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, strike or labor disputes, or by inability to obtain a satisfactory market for production or failure of purchasers or carriers to take or transport such production, **or by any other cause not reasonably within lessee's control**, this lease shall not terminate because of such prevention or delay, and, at lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production or other operations are so prevented or delayed.

6 West's Tex. Forms, Minerals, Oil &Gas § 3:3 (4th ed.).

Jurisdictions vary in analysis of force majeure, though the majority of courts strictly construe the clause according to its terms. *Gulf Oil Corp. v. Southland Royalty Co.*, 478 S.W.2d 583, 590 (Tex. App.—El Paso 1972), aff'd, 496 S.W.2d 547 (Tex. 1973). For a catch-all provision to apply, courts will analyze the alleged force majeure event and relevant context to determine if it is similar to the events specifically delineated in the clause. In reviewing a catch-all provision, or if a catch-all provision does not exist, courts may consider contract defenses such as frustration of purpose, impossibility, unconscionability, or impracticability.

Typically, market downturns and economic hardships do not trigger force majeure, because they are generally viewed as foreseeable risks. How then, is a global supply chain disruption viewed? Is it more like an economic hardship, precluding force majeure relief? Or is it an unforeseeable interference with a party's ability to perform, thereby triggering the force majeure clause? Courts have not yet addressed the current supply

chain problems in the context of force majeure. Precedent provides helpful insight into how a court may decide today.

III. **Case Law Observations**

A. Events not specifically listed in the force majeure clause must be unforeseeable to excuse nonperformance.

In *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 181 (Tex. App.—Houston [1st Dist.] 2018, no pet.), TEC Olmos agreed to test-drill on ConocoPhillips' lease in order to locate oil and gas. The parties' agreement included a force majeure clause that listed specific qualifying events and a catch-all provision providing for "any other cause not enumerated herein but which is beyond the reasonable control of the party whose performance is affected . . . ." Before TEC Olmos began drilling, the price of oil crashed and TEC Olmos invoked force majeure to extend the drilling deadline. The court found that an event not specified in the force majeure clause but which may fall under the "catch-all" provision must be unforeseeable to excuse nonperformance. Fluctuations in the oil and gas market are foreseeable, the court reasoned, therefore, TEC Olmos' failure to drill was not excused as a force majeure event.

B. Events outside of a supplier's control that make performance impossible may release performance under force majeure.

In *Gulf Power Co. v. Coalsales II, LLC*, 661 F. Supp. 2d 1270, 1280–81 (N.D. Fla. 2009), Coalsales contracted with Gulf Power to provide coal sourced from three mines. When the mine containing the primary source of coal closed due to adverse geological conditions, Coalsales could not deliver the required amount of coal and declared force majeure. The court found that the conditions forcing the mine to close were not in the control of Coalsales, however, nonperformance was not excused because other sources of coal were approved in the parties' agreement.

C. Nonperformance may not be excused when a force majeure event can be mitigated.

In the often-cited case, *Butler v. Nepple*, 54 Cal. 2d 589, 598–99 (1960), a drilling company could not acquire necessary tools from its supplier due to a labor strike and declared force majeure. The force majeure clause specifically listed "strikes" as a triggering event. The court, however, did not excuse the drilling company's nonperformance because the drilling company should have found an alternate supplier (even if it would incur higher costs). The court also noted that procurement of alternate drilling tools or methods was not extreme or unreasonably dangerous.

D. Industry custom may dictate which party bears the cost of nonperformance and the extent of mitigation measures required.

In *Ergon-West Va., Inc. v. Dynegy Mktg. & Trade*, 706 F.3d 419, 426 (5th Cir. 2013), Dynegy provided natural gas to Ergon under a contract that released performance if a party "remedied with all reasonable dispatch" the force majeure event. Following Hurricanes Rita and Katrina, much of the nation's gas production was shut down and Dynegy's upstream suppliers declared force majeure. Dynegy subsequently declared force majeure and limited its supply of gas to Ergon. Dynegy maintained contacts with its upstream suppliers as a mitigation effort, but did not secure replacement gas, which forced Ergon to buy gas at a higher price on the open market. The court found that Dynegy's response was reasonable because expert testimony revealed that it was customary in the gas industry for sellers to pass down increased costs when their upstream suppliers have declared force majeure. Additionally, the court found that maintaining contacts with upstream suppliers was a sufficient mitigation measure and remedying with "all reasonable dispatch" did not require provision of alternative gas. Thus, Dynegy was entitled to force majeure relief.

E. The aftermath of a force majeure event does not excuse nonperformance unless the after-effects were themselves qualifying force majeure events.

In *OWBR LLC v. Clear Channel Communs., Inc.*, 266 F. Supp. 2d 1214, 1223 (D. Haw. 2003), a music event scheduled at a resort was cancelled by the media companies hosting it following the September 11, 2001 terrorist attack. The media companies claimed force majeure, arguing that the aftermath of September 11, the fragile economy, and the fear of travel for many Americans made the event inadvisable. The court found for the hotel, reasoning that a force majeure clause does not excuse nonperformance for undesirable economic conditions even when they are the result of a force majeure event. While OWBR is not an energy case, it reiterates the general principle applied in oil and gas cases: the only events qualifying for force majeure are those delineated as such in the clause. *See Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, no pet.) (explaining that the scope and application of the force majeure clause is "utterly dependent" upon the terms of the contract in which it appears).

Undoubtedly, force majeure clauses in the future will specifically enumerate supply chain disruption as an event that excuses nonperformance. Presently, the outcome is not so clear. Relief from nonperformance is most viable where the magnitude of the supply chain breakdown is demonstrated to be unforeseeable, the force majeure clause contained catch-all language, and mitigation measures were taken or excused by industry custom. Differentiating the current supply chain crisis from an economic hardship or market risk will be crucial to affording force majeure relief.

Africa's Energy Transition: An Opportunity to Implement Efficient Local Content Policies?

Luís Miranda, Miranda & Associados

Due to its vulnerability to the effects of climate change, Africa is facing the cumulative challenges of providing much needed energy to the Continent, while at the same time tackling those effects and coping with their consequences on production,

growth, and employment in all economic sectors. While adaptation efforts are already underway, and will continue to be needed, preventing the worst possible impacts of climate change from materializing is also critical. Otherwise, the achievement of the 2030 Agenda for Sustainable Development may be compromised.

Indeed, over the past decade, climate change and extreme weather events have caused unprecedented damage to African countries, ruining infrastructure, threatening economic activity, and destroying jobs. The most visible manifestations are the droughts in southern Africa, floods in West Africa, and desertification of entire areas in the Maghreb region. The mass migrations that the World has witnessed in recent years cannot be dissociated from climate change and its impact on economic development.

It is noteworthy that certain African countries have focused a significant amount of their attention on adaptation to climate change. An increasing number of governments across the Continent consider a sustainable energy transition as a central aspect of their climate strategies. In this regard, realistic and efficient local content policies will certainly have an important role to play.

Challenges in Africa's Energy Transition

Compared to the majority of fossil fuel-dependent industrialized countries, the energy transition in Africa presents a distinct feature. With the exception of a few nations, such as South Africa, most African countries are not under pressure to phase out coal to meet energy needs through alternative energy sources. Africa's energy transition instead faces two important challenges: modernization and expansion.

Modernization is linked to exploiting the continent's vast endowment of renewable energy resources, including biomass, wind, solar, and hydro-power potential. Africa currently has roughly 1.2 billion inhabitants. And over 700 million people in the continent are using inefficient and hazardous sources of energy, even for daily tasks like cooking, heating, and lighting. In the fossil fuel sector (notably oil and gas), both resource and labor productivity need to be improved. In turn, expansion is about bringing scale-adapted technologies to meet the energy needs of a growing population, where only 30 percent have access to reliable electricity supply.

Globally, we are witnessing a shift in the energy landscape away from fossil fuels and towards less-polluting sources of energy. In Africa, however, a closer look reveals a slightly different picture. On the one hand, there is a clear expansion in energy generation from renewables, including with the recently launched Taiba Ndiaye Wind Project in Senegal that will generate 158-megawatt of additional capacity and the Nzema Solar Power Station in Ghana, the largest installation of its kind in Africa, increasing Ghana's electricity generating capacity by 6 percent and allowing nearly 100,000 homes to benefit from clean energy.

On the other hand, since 2004, there has been a wave of significant oil and gas discoveries and increased interest in countries such as Chad, Ghana, Guinea-Bissau, Mauritania, Mozambique, Sao Tome & Principe, Senegal, and Togo, that also open up the opportunity for domestic gas-to-power projects. According to the Africa Energy Outlook 2014, 30 percent of global oil and gas discoveries made between 2010 and 2014 have been in sub-Saharan Africa. A number of countries that were previously net energy importers will become energy exporters in the upcoming years due to increasing oil exports. Based on certain estimates, sub-Saharan Africa is expected to outpace Russia as a global gas supplier by 2040. In turn, these discoveries have also spurred renewed interest in less polluting gas-to-power projects, including the 450MW gas fired Temane power project in Mozambique. Once completed, the project will increase the supply of efficient and affordable energy to households, businesses, and industries, contributing to social and economic development in the country and the region.

Therefore, while the African energy landscape is changing, it is not in a single direction. The energy transition is complex and has important ramifications for the structure of economies and future development prospects. Climate change is an essential aspect to it, but so are many other key aspects of the sustainable development goals.

Towards the Emergence of a Skilled Work Force

More than 10 million young Africans are expected to enter the labor market each year over the coming years. Most analysts tend to agree that the traditional public sector will not be able to absorb this new work force. Entrepreneurship and self-employment are indispensable to create quality jobs in large numbers, and the energy transition can play a central role in this regard. For that to happen, skills development and upgrading, entrepreneurship promotion, and enabling policy and governance frameworks are required.

A global review of skills for green jobs in several African countries revealed the existence of a gap between the goals and targets set in environmental policies and the human resources available for their implementation. The same applies in the energy sector. Some skills gaps already exist for technical and engineering positions and could grow as the renewable energy sector continues to expand. Skills gaps could lead to project delays or even cancellations, cost overruns, and faulty installations. Efforts are needed in education and training systems to develop renewable energy curricula, integrate modules into vocational training courses, support apprenticeships, and establish common quality standards. Nonetheless, there are promising experiences. For example, Cape Verde launched a Renewable Energy and Industrial Maintenance Center ("CERMI"), whose main activity

is the training of professionals in the areas of design, assembly, and maintenance of photovoltaic installations.

Various intervention models and programs to promote job creation in clean energies have shown a clear advantage of combining technical and vocational training with entrepreneurship training. Particularly for African countries, entrepreneurship and self-employment are becoming priorities in youth employment strategies and policies. In view of Africa's specific business environment, micro-enterprises have an important role to play. In general, micro-enterprises are defined as businesses with up to 10 employees, small businesses as those with 10 to 100 employees, and medium-sized enterprises as those with 100 to 250 employees. In Africa, the majority of job creation is coming from the smallest businesses. This contrasts with other regions of the globe, such as East Asia and the Pacific region, where job growth is mostly concentrated in companies with 20–99 employees, and Latin America and Eastern Europe/Central Asia, where more than 40 percent of job creation is by businesses with more than 100 employees.

Typically, young entrepreneurs in the energy space face challenges related to (i) access to finance, (ii) lack of technical knowledge, and (iii) lack of experience in business management. It should also be noted that because of the prevalence of unemployment and underemployment, there are some entrepreneurs by vocation, but also a large number of entrepreneurs by necessity.

Nevertheless, many young Africans see the potential associated with the development of micro and small enterprises in the renewable energy sector. Remarkable initiatives are underway throughout Africa, with dynamic companies such as M-Kopa Solar, which operates in East Africa in the distribution and installation of solar kits. Many such small and micro enterprises active in the distribution of energy systems, maintenance and operation, and sometimes in assembly, would benefit from policies to support their integration in value chains and the development of local supply chains. Government policies favoring local content and after-sales services could, among others, contribute to improving the current landscape, if they are developed in a reasonable and sustainable manner.

Lessons Learned from Oil & Gas Local Content Policies

As governments look for ways to elevate local capacity and bolster economic development, setting adequate and reasonable local content policies and programs can incentivize financial investment and technical and technological transfers that will benefit countries competing to attract the best companies, as well as companies searching for the most attractive markets to maximize efficiencies and manage costs. Contrariwise, setting unreasonable and unachievable local content requirements scares away investors.

Pressure to use local content (e.g., local workers, companies, goods, and services) in large or mega-projects continues to increase throughout the Continent. For growing markets, particularly in Africa, it can be a catalyst for rapid development. However, striking the balance between short-term job creation and longer-term specialization, diversification, and supply chain development is a challenging issue for governments, companies, and communities.

Use of local workers and suppliers can be the most efficient way to execute key aspects of a project, while other jobs require specialized skills not available among nationals. This reality can become a source of socio-economic and political tension when local supply and project demand are not well understood by all stakeholders. This is compounded when there is a "ramping up" to thousands of skilled workers in a very short period of time compared to what is realistically accessible within the market, or when companies bring their own labor force into the project and leave behind very little that can be transitioned into meaningful local capacities.

Many oil rich countries have used their hydrocarbon resources as a major tool to propel development and improve the living conditions of their people. For example, the discovery in 2007 of oil in commercial quantities in Ghana was embraced with euphoria by many Ghanaians. This optimism was underpinned by the expectation that the new oil resource would contribute tremendously to an accelerated rate in Ghana's economic growth and development. The channels through which Ghanaians expected to benefit from the oil resources include the expansion and deepening of indigenous businesses in the oil and gas sector, increased job opportunities, possible access to cheaper fuel, and revenue from oil and gas resources for national development. However, the minimum threshold of 90% local participation in all aspects of the oil and gas value-chain by 2020 was far from being realistic and achievable.

Despite the expeditious enactment of various Local Content and Local Participation Regulations across the Continent, analysts and industry experts are still not convinced that the majority of the countries have done the necessary preparatory (or follow-up) work to ensure that the capacity of local businesses and companies is duly built up, so as to enhance their capability to deliver the desired quality of goods and services to the oil and gas sector.

Considering the foregoing, and in order to avoid the mistakes in the local content policies which have been adopted in the oil and gas industry across the Continent, African governments should seek to implement more realistic local content targets for long-lasting renewable energy projects. It is also crucial that they realize that channeling State funds to vocational and higher education is key to creating the conditions required for the local populations to take advantage of the new job and business opportunities.

Conclusion

Africa's energy transition is well underway, structured by national and regional contexts and priorities, as well as global policy frameworks and commitments that countries have made. In the African context, the inclusion of local content provisions in renewable energy legislation may be seen by Governments as a step in the right direction, but it must be carefully addressed if it is to have a successful and meaningful impact.

Although it is natural that the countries try to emulate the actions taken in other sectors, care must also be taken to keep expectations reasonable. Too much local content, too quickly, can lead to the flight of investors and services and goods and projects of dubious quality, with long lasting negative effects on the environment and the economy. We wouldn't be surprised to see lower local content thresholds for renewable projects than those currently applicable to the oil and gas industry. In doing so, and by learning from the mistakes and excesses of the past in other sectors, African governments will be able to create progressive and comprehensive strategies to ensure the successful integration of their nationals and businesses into all the aspects of the renewable energy industry, without scaring away investors.

Choice of Arbitration Clause in Energy Contracts: ICC vs ICSID

Darya Shirokova, Ph.D., Queen Mary University of London

Introduction

It is undisputed that, apart from some Latin American countries, the parties to energy contracts prefer arbitration as a dispute resolution provision. A recent Queen Mary and White & Case International Arbitration Survey showed that 78% of practitioners consider arbitration well suited for the adjudication of international disputes in the energy sector.

Some energy agreements, like *2009 PSC for Contract Area Tsagaan between Petroleum Authority of Mongolia and DWM Petroleum AG*, contain a very general clause providing for "the arbitration of Mongolia" in case of possible disputes. This undeniably creates problems at the dispute resolution stage as all the modalities of such arbitration should be agreed on by the parties who are no longer in good relationships. Fortunately, most energy actors prefer the institutional arbitration.

The International Court of Arbitration of the International Chamber of Commerce ("ICC Court of Arbitration" or "ICC Court") and the International Centre for the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID" or "Centre") seem to have leadership in the number of dispute resolution clauses in energy contracts. This is evidenced, *inter alia*, by the caseload statistics of both ICC Court and ICSID. Energy disputes accounted for 17.9% of the ICC 2020 caseload (ICC Statistical Report for 2020) and 50% of the ICSID 2020 caseload with 30% of these cases related to the oil, gas and mining sectors (The ICSID Caseload — Statistics Issue 2020-2).

The question of choice between ICSID and ICC arbitration clauses is one of arbitration within the framework of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") or Investor-State Dispute Settlement ("ISDS") regime under ICSID Convention. This article being too short to explore both types in depth, it will nevertheless describe their most distinctive features and the advantages of each.

ICC Arbitration

With continuously increasing number of arbitral institutions, the parties to modern energy contracts have a choice between a panoply of institutional arbitration rules such as ICC, LCIA, SCC, CIAC, AAA, *etc.*

The ICC Court of Arbitration is the world's leading arbitral institution. In 2020, the Secretariat of the ICC Court registered 929 arbitration cases under the ICC Arbitration Rules (17 additional cases were filed under the ICC Appointing Authority Rules, but they are outside the scope of this article). Here an important remark is needed. Some contracts provide for the disputes to be administered by the ICC Court applying different applicable rules, which may create potential problems in the future. As an example, an Angolan PSA stipulated that a dispute could be submitted "to the Secretariat of the [ICC], as the administrator, to be finally and exclusively settled by arbitration, in accordance with the UNCITRAL Rules of Arbitration" (*2011 PSA (Area of Block 20/11) between Sonangol E.P., Cie Angola Block 20 Ltd, BP Exploration Angola, China Sonangol International Holding Limited*). The drafters seemed not to be aware that the ICC Court of Arbitration only administers the disputes "in accordance with ICC Rules," so the above-mentioned clause is not operational.

At the end of 2020, the ICC Court had 1,833 pending cases, and the total cases administered since its creation in 1923 constituted 25,960. Despite the global dimensions and a truly international character, the ICC arbitration is still part of the New York Convention regime with its advantages and disadvantages. As of December 2021, the New York Convention was ratified by 169 countries and was incorporated in the United States law by Chapter 2 of the Federal Arbitration Act. It is also one of the most 'exercised' and efficient international instruments related to arbitration. (UN Treaty Series webpage: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en). Thus, arbitration within the framework of New York Convention is a comprehensive and effective way of resolving international disputes.

It is important to keep in mind that ICC arbitration stays subject to the procedural rules of its seat (*Bremer Vulkan v South India Shipping Corporation* [1981] AC 909). Accordingly, an ICC award may be set aside or refused recognition and enforcement if not made in conformity with the law governing the arbitration procedure or not in conformity with that country's mandatory rules and public policy pursuant to Article V of the New York Convention. Thanks to a distinctive feature of the ICC arbitration

called “scrutiny,” only a modest amount of the ICC awards get annulled. An award can be signed by an arbitral tribunal only after it has been reviewed by the Secretariat and approved by the Court. The goal of this procedure is to increase the enforceability of arbitral awards.

ISCID Arbitration

While ICC arbitration cannot be truly separated from national legal orders, ICSID arbitration has “a self-contained dispute settlement machinery governed by truly international rules” (George Delaume, “ICSID Arbitration” in *Contemporary Problems in International Arbitration*, Lew (ed) 1987). The main features of ICSID arbitration are a negligent role of the courts of the place of arbitration, a quasi-automatic enforceability of the awards, a possibility of annulment of the latter only within the ICSID system and a direct applicability of the international law (George Joffé, Paul Stevens, Tony George, Jonathan Lux, and Carol Searle, “Expropriation of Oil and Gas Investments: Historical, Legal and Economic Perspectives in a New Age of Resource Nationalism” (2009) 2(1) J World Energy L & Bus 3, 11). As rightly noted by the Paris *Cour d’Appel,* the provisions of the ICSID Convention “restrict the function of the [domestic] court … to ascertaining the authenticity of the award certified by the Secretary-General of [ICSID].” (*SARL Benvenuti & Bonfant vs Gouvernment de la Republique Populaire du Congo*, CA Paris [1981], 20 ILM 878 (1981)).

The main challenge of the ICSID arbitration from the point of view of energy contracts’ drafters is the limited availability of ICSID procedure. It mostly concerns the qualification of the parties’ transaction as investment and the signature of the contract by “a Contracting State.” According to Article 25(1) of the ICSID Convention, the Centre’s jurisdiction “shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.”

First, the ICSID Convention does not contain any definition of “investment,” leaving this task to arbitrators. The latter are divided between an “objective” approach identifying certain constitutive elements of “investment” and a “subjective” approach indicating that what is considered as “investment” is left at the discretion of the parties. As a result, the interpretation of this concept is deeply controversial. (Wenhua Shan, Lu Wang, “The Definition of ‘Investment’: Recent Developments and Lingering Issues” in *Evolution and Adaptation: The Future of International Arbitration*, Kalicki and Abdel Raouf (eds) 2019).

Second, it was noted that “if an investment dispute concerns a contract, the contract must be with a Contracting State or a designated subdivision or agency of the Contracting State” (History of the ICSID Convention, ICSID (1968), SID/62-2 (7 January 1963) Memorandum of the meeting of the Committee, December 27, 1962, para. 35). As an example, the Mozambican concession contracts stipulate that Empresa Nacional De Hidrocarbonetos, E.P. “has been designated to ICSID by the Government in accordance with Article 25(1) of the Convention.” In the same vein, the Ecuadorian contract for production of crude oil indicates that Petroecuador “has been registered at the ICSID since the year 1988, as a party appointed by the Republic of Ecuador” (*2000 Contract for the Production of Crude Oil and Additional Hydrocarbon Exploration in the Charapa Marginal Field between Ecuadorian State, Petroecuador, Petroproduccion, Tecnipetrol, Inc. and Bellwether International, Inc.*). However, in the absence of an express designation, the issue of whether the Contracting State is a party to the contract is left at the arbitral tribunal’s discretion and its interpretation may come as a surprise.

Conclusion

Surprisingly, in the eyes of certain drafters of energy contracts, ICC and ICSID arbitration are similar and are both “evidence of a weak bargaining power of the host countries” (Adede, “A Profile of Trends in the State Contracts for Natural Resources Development between African Countries and Foreign Companies” (1980) 12 NYU J Int’l L & Pol 479, 559). Yet some energy contracts foresee the combination of ICSID and ICC arbitration clauses: for instance, certain contracts concluded by Equatorial Guinea (*2017 PSC (Block “EG 21”) between the Republic of Equatorial Guinea and Kosmos Energy Equatorial Guinea (Cayman Islands)*), Gambia (*2012 Petroleum Licence Block A2 between the Republic of the Gambia and Camac Energy A2 (Gambia) Ltd. (Grand Cayman)*), Morocco (*2003 Petroleum Agreement Regarding the Exploration for and Exploitation of Hydrocarbons (Foum Assaka Offshore) between Office National des Hydrocarbures et des Mines, Kosmos Energy Deepwater Morocco (Cayman Islands) and Pathfinder Hydrocarbon Ventures Limited (Jersey)*), and Tanzania (*2003 Amended and Restated Implementation Agreement between the Government of Tanzania, Songas Limited (Tanzania), Pae Panafrican Energy·Corporation (Mauritius) and DC Group Plc (England and Wales)*). This way, the parties try to guarantee that an arbitration forum will be available even if for some reasons the ICSID arbitration is not possible.

At the end, both arbitration mechanisms serve their purposes, and what counts is the thoughtful approach towards their selection.

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