

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

***Part 2: The Merits Hearing:
Getting the Message to the Tribunal***

PROGRAM GUIDE

ACT I — ASSEMBLING YOUR CASE AND EVIDENCE

(23:09) Introduction to the Workshop and Act - Prof. Guido S. Tawil, Workshop Co-Chair

**Act I, Scene I — Document Production in International Arbitration:
A Compromise of Civil and Common Law Approaches**

As the parties move toward the June 2011 hearing, each scrambles to amass the evidence in support of their respective claims and defences and counterclaims. TorGas and Drill-BD have exchanged document requests and, following objections by both parties, the tribunal has ordered the parties to produce certain documents that the tribunal determined to be “relevant to the case and material to its outcome.”

On TorGas side: TorGas’ senior executive and local counsel resist the tribunal’s document production order, which they perceive to be imposing Longhorn-style document disclosure on TorGas. Discussion ensues about the rules governing the conduct of TorGas lawyers versus Longhorn ethical rules, and how the IBA Rules on the Taking of Evidence in International Commercial Arbitration provide for a system of document disclosure that is a hybrid of civil and common law evidentiary practices.

TorGas Senior Executive **José María Alonso**
TorGas In-House Counsel..... **Eduardo Silva Romero**
TorGas Local Counsel..... **Luca G. Radicati Di Brozolo**
TorGas Arbitration Counsel. **John Gardiner**

(6:50) **Act I, Scene II — Document Production in International Arbitration:
Role of Professional Ethics**

On Drill-BD side: Drill-BD’s senior executive suddenly discovers a forgotten tranche of documents that are relevant within the scope of the tribunal’s order. Some are damaging to Drill-BD’s defenses and counterclaims. The existence of the documents is disclosed to outside lawyers and a discussion ensues on disclosure and obligations under IBA Rules.

Drill-BD Senior Executive **David Arias**
Drill-BD In-House Counsel..... **Sylvia Noury**
Drill-BD Local Counsel..... **Fernando Serec**
Drill-BD Arbitration Counsel **Pierre Bienvenu**

**(13:07) Act I, Scene III — Witness Preparation in International Arbitration:
A Compromise of Civil and Common Law Approaches**

On TorGas side: A junior arbitration counsel from TorGas’ outside law firm has a difficult discussion with TorGas’ senior executive witness about the content of his witness statement. The senior executive believes that, as an employee of TorGas, he may not give evidence. In-house counsel and senior outside counsel intervene to comfort the witness and support the lawyer.

TorGas Senior Executive **José María Alonso**
TorGas In-House Counsel..... **Eduardo Silva Romero**
TorGas Arbitration Counsel **John Gardiner**
TorGas Junior Arbitration Counsel..... **Wade Coriell**

**(9:12) Act I, Scene IV — Witness Preparation in International Arbitration:
Role of Professional Ethics**

On Drill-BD side: Some fairly overt witness coaching occurs in the course of preparing a witness for cross-examination, including in-house counsel telling the witness what to say in response to difficult questions and asking arbitration counsel to script his answers and have practice runs-through.

Drill-BD Witness **Hilmar Raeschke-Kessler**
Drill-BD In-House Counsel..... **Sylvia Noury**
Drill-BD Arbitration Counsel **James Loftis**
Drill-BD Arbitration Counsel **Pierre Biennvenu**

**(27:02) Discussion: CAN PARTIES AND COUNSEL ADOPT A COMPROMISE OF CIVIL AND
COMMON LAW APPROACHES WITHOUT COMPROMISING THEIR OWN LEGAL
PROFESSIONAL ETHICS?**

Moderator..... **Prof. Tawil**

Moderated Audience Q&A

ACT II — THE MERITS HEARING: PRESENTING YOUR CASE

(28:45) Introduction to Act II Wendy J. Miles, Workshop Co-Chair

Act II, Scene I — Prelude: Preliminary Issue on Non-Disclosure of Documents

Drill-BD requests to be heard on a preliminary issue regarding TorGas’ alleged non-disclosure of a broad category of documents previously ordered to be produced by the Tribunal. TorGas, in response, decides to raise with the Tribunal Drill-BD’s last minute disclosure of thousands of new documents (disclosed three days before the hearing, allegedly having been “discovered in a shed”) which are not sorted or systematized in any way. Ultimately, both parties are forced to insist on directions or an order from the Tribunal.

Drill-BD Arbitration Counsel	John Fellas
Drill-BD Local Counsel	Jennifer Smith
Drill-BD In-House Counsel.....	Eric Liebeler
TorGas Arbitration Counsel	Klaus Reichert
TorGas Local Counsel.....	Philippe Pinsolle
TorGas In-House Counsel.....	Alexis Mourre
Arbitral Tribunal – Chair.....	Judith Gill
– Drill-BD Appointee	Mark Kantor
– TorGas Appointee	Teresa Giovannini

(17:12) Act II, Scene II — The Tribunal Reacts: A Requirement for Compromise of Civil and Common Law Approaches and Sanctions for Ethical Breaches

The Tribunal responds by refocusing the parties on the issues and de-escalating the situation. The Tribunal members recognise the competing concerns of counsel and direct the parties to resolve the matter amicably. After private discussions, the parties agree that Drill-BD must search the documents through its electronic document management system and provide TorGas with non-privileged ‘shed documents’, and that the Tribunal shall be at liberty to draw negative inferences from TorGas’ failure to provide documents if, in the course of the hearing, it were to decide such non-disclosure was an issue (by reference to IBA Rules).

Drill-BD Arbitration Counsel	John Fellas
Drill-BD Local Counsel	Jennifer Smith
Drill-BD In-House Counsel.....	Eric Liebeler
TorGas Arbitration Counsel	Klaus Reichert
TorGas Local Counsel.....	Philippe Pinsolle
TorGas In-House Counsel.....	Alexis Mourre
Arbitral Tribunal – Chair.....	Judith Gill
– Drill-BD Appointee	Mark Kantor
– TorGas Appointee	Teresa Giovannini

(19:11) Act II, Scene III — The Evidential Hearing Commences: Opening Statements

Opening statements are critically important in international arbitration. They offer the first oral opportunity for each party to enable the Tribunal to see the case through the party’s own eyes (and speech). Opening statements are often relatively brief and restate points previously made in written form. Nevertheless, parties should not underestimate the effect of a well-presented opening statement, or indeed the damage (or at best worthlessness) of a poor opening. Counsel for the parties will demonstrate openings first from experienced local counsel and then from experienced international arbitration counsel.

Drill-BD Arbitration Counsel	John Fellas
Drill-BD Local Counsel	Jennifer Smith
Drill-BD In-House Counsel.....	Eric Liebeler
TorGas Arbitration Counsel	Klaus Reichert
TorGas Local Counsel.....	Philippe Pinsolle
TorGas In-House Counsel.....	Alexis Mourre
Arbitral Tribunal – Chair.....	Judith Gill
– Drill-BD Appointee	Mark Kantor

– TorGas Appointee **Teresa Giovannini**

(27:59) Discussion: EFFICIENCY AND EFFECTIVENESS IN DELIVERING THE MESSAGE

Moderator..... **Ms. Miles**

ACT III — THE MERITS HEARING: PRESENTING YOUR TESTIMONIAL EVIDENCE

Counsel for the parties test their opponent’s evidence. This final act demonstrates the good, the bad, and the ugly of examination-in-chief, cross-examination, and tactical decisions, as well as the deliberations of a Tribunal behind closed doors. It also shows how parties may attempt to apply novel procedural tools – some of questionable application and value – to seek procedural advantages.

(22:35) Introduction to Act III Michael S. Goldberg, Workshop Co-Chair

Act III, Scene I — Testimonial Evidence: Examination-in-chief, Cross-examination and Re-examination

Tribunals can keep a hearing running smoothly – or throw it into chaos. The Tribunal heads off gamesmanship in TorGas’s designation of its corporate representative and the order in which its witnesses will be cross-examined. Drill-BD oversteps its bounds in the examination-in-chief, and TorGas’s cross-examination of Drill-BD’s witness highlights some of the pitfalls that can result from ineffective witness preparation. Drill-BD decides whether and/or how to re-direct its witness and TorGas must consider how to handle Drill-BD’s overly-eager, party-appointed arbitrator.

Drill-BD Witness **Hilmar Raeschke-Kessler**
Drill-BD Arbitration Counsel **James Loftis**
TorGas Witness. **E.Y. Park**
TorGas Arbitration Counsel **Klaus Reichert**
TorGas In-House Counsel..... **Alexis Moure**
Arbitral Tribunal – Chair..... **Judith Gill**
– Drill-BD Appointee **Mark Kantor**
– TorGas Appointee **Teresa Giovannini**

(10:43) Act III, Scene II — Procedural Antics – Demonstrating the Unpredictable Nature of Arbitration

TorGas makes a last minute attempt to supplement a witness statement with new, never before disclosed testimony. The Tribunal deliberates on whether to allow it to be introduced over Drill-BD’s objection, considering timing, relative prejudice to the parties, and other practical considerations. Will the Tribunal be able to craft a fair and workable solution?

Drill-BD Arbitration Counsel **James Loftis**
TorGas Witness. **E.Y. Park**
TorGas Arbitration Counsel **David Brynmor Thomas**
Arbitral Tribunal – Chair..... **Judith Gill**

- Drill-BD Appointee **Mark Kantor**
- TorGas Appointee **Teresa Giovannini**

(16:29) Act III, Scene III – Demonstration of Cross-Examination and Re-examination of TorGas Fact Witness

TorGas’s examination-in-chief is an example of the brief, introductory examination-in-chief usually expected in international arbitration hearings. Drill-BD follows with an effective and efficient cross-examination. In the midst of the cross-examination, it is discovered that TorGas has violated one of the Tribunal’s instructions. How will the Tribunal deal with this breach?

- TorGas Witness **Mike Lennon**
- Drill-BD Arbitration Counsel **Ronnie King**
- TorGas Arbitration Counsel **Carole Malinvaud**
- Arbitral Tribunal – Chair..... **Judith Gill**
 - Drill-BD Appointee **Mark Kantor**
 - TorGas Appointee **Teresa Giovannini**

(28:41) Discussion: KEEPING IT FAIR AND JUST: DEALING WITH TESTIMONIAL EVIDENCE AND LAWYER STRATEGIES IN AN INTERNATIONAL ARBITRATION CONTEXT

Moderator..... **Mr. Goldberg**

Moderated Audience Q&A

(72:40) Panel Discussion: PERSPECTIVES FROM CORPORATE COUNSEL: CHALLENGES TO DELIVERING THE PARTY’S MESSAGE EFFECTIVELY AND EFFICIENTLY

What “client management” considerations arise from the tension between civil and common law systems, particularly in relation to disclosure and witness preparation? How should the desire for an efficient hearing structure be balanced with the necessity to communicate the company’s message effectively? What value is testimonial evidence at the hearing following preparation of lengthy written witness statements? Are there better, fairer and more efficient approaches to ascertaining oral evidence? What are the best practices for establishing an efficient discovery plan (witness interviews, documents and data exchange) in coordination with outside counsel and the opposing party? Should corporate counsel insist on arbitration clauses in their contracts that specifically address testimonial evidence? What considerations must arbitration counsel always keep in mind when interacting with corporate in-house counsel and company personnel?

Moderator:

Alan R. Crain, Jr.
Senior Vice President and General Counsel, Baker Hughes Inc., Houston

Panelists:

Dennis J. Grindinger
Senior Vice President - Finance & General Counsel, Hunt Oil Co., Dallas

Javier Rubinstein

Global General Counsel, PricewaterhouseCoopers International, Ltd., New York

Eric C. Liebler

Vice President & Associate General Counsel - Litigation, Siemens Corporation,
Washington, D.C.

Audience Q&A

Closing Remarks Lucy F. Reed

(34:09) **ADDRESS: ADVOCACY IN INTERNATIONAL ARBITRATION – Toby T. Landau**