Pride and Prejudice: energy arbitrations and gas price reviews

J William Rowley QC and David Lewis QC

In this second edition of *Arbitration Classics*, David Lewis QC interviews renowned arbitrator William Rowley QC and discusses issues around arbitration in the energy sector.

1. **It has been said that the international energy industry has been the single largest user of international arbitration. Yet, on a daily basis, our inboxes are flooded with reports of unenforced awards and challenges to awards in this sector. Is it still a truth, universally acknowledged, that a General Counsel in the energy industry who can expect to face large disputes will arbitrate rather than turn to the courts?**

Arbitration press coverage, taken out of context, may convey a prejudicial view of the status quo. There is a huge volume of international arbitration disputes around the world. In the majority of cases, there is voluntary compliance with arbitral awards, but these are not the cases that make the headlines. Further, the odds of successfully challenging an award in a non-interventionalist seat remain quite low.

Virtually every case I see, regardless of the industry or sector, involves disputants from different jurisdictions. For such parties, and in particular those in energy disputes, arbitration continues to be the overwhelmingly preferred method of solving disputes. Such counterparties will almost never have sufficient trust in the state courts of the others' jurisdiction to consider dispute resolution before a national court. This does not mean that every arbitration is without fault, or that arbitrators, counsel and institutions do not need to work hard to provide a better service. More than ever, arbitrators need to manage their cases and workload, be respected for their true independence and impartiality, be known as always being fully prepared, run a good hearing and deliver their awards promptly. The best arbitrators do this already and this explains why in the energy industry, where millions, and often billions, are at stake, the parties turn to international arbitration as their preferred dispute resolution method.

2. **In recent years there has been a notable increase in gas price review arbitrations involving the European gas markets. Are there particular aspects to these arbitrations that require special skill sets and expertise on the part of arbitrator and counsel, that differ from other arbitrations?**

The increase in arbitrations involving worldwide gas markets has occurred when price review negotiations have been taken place in challenging circumstances including: fall in gas demand; the emergence of liquid traded gas hubs which undermine the link between oil and gas prices; competition from other sources of energy, including renewable energy/ shale gas and major fluctuations in oil prices. The distinctive aspects of gas price review arbitrations (which, unlike many disputes, do not involve allegations of a legal wrong or a breach of contract) lie in the commercial background of the arbitration. This requires arbitrators and counsel to adopt and present arguments in a specific commercial context and the experts and parties to be more closely involved. Further, the recurring nature of these disputes within the confines of a single agreement over a period of 20 years or more raises issues in respect of the efficiency and confidentiality of the proceedings and the binding nature of past determinations. The reality is that most experienced arbitrators and counsel with a reasonable exposure to oil and gas practice are bound to have the skill sets required to determine and present the issues in such disputes.

3. **If you could recommend one particular practice to improve the conduct of arbitration for the ultimate users in energy industry – what would it be?**

There is nothing like good quality, concise advocacy. With globalisation and the exponential growth of the arbitration field, a skilled arbitration bar has developed. I particularly remember a high-value energy dispute which arose in Iraq. The case is memorable not because of the sums involved (between US$20 billion and US$30 billion at one stage), but because of

the exceptional quality of counsel appearing and the many surprises which kept the tribunal on its toes. There was also the thrill of seeing one of London's greatest silks perform the perfect cross-examination of an expert witness. There was no delight in seeing the credibility of the expert destroyed; the pleasure was in the craftsmanship of the destruction.

4. Major energy arbitrations seem to be determined amongst a relatively small pool of international arbitrators. Is it possible that there are few arbitrators of whom the big energy companies think well?

There is undoubtedly a relatively select group of arbitrators who are regularly appointed in major energy disputes. But there is nothing unusual in this. For "bet the company" cases, it is only sensible for parties (and their lawyers) to approach as potential appointees arbitrators they know (or know of), who are experienced in the sector in which the dispute has arisen and who are considered to be able, timely and sensible. This emphatically does not mean that a big energy company will only appoint someone who has decided in its favour in the past. The key to an appointment is a party's knowledge that, win or lose, it had a fair, well-managed hearing in the past (its arguments were properly heard) and that this is likely to be the case for the current dispute.

The existence of a so-called arbitral "Mafia" made up of individuals who are called on time and again to the exclusion of others has, for years, given rise to complaints from non-members of unfair barriers to entry, tantamount to monoplisation. However, the perceived problem is overstated and, in any event, is self-correcting. This is because the make-up of the so-called Mafia is dynamic. Members of the group change regularly. Those who become gaga, unduly impatient, short-tempered, or who end up in Geneva when the hearing is scheduled for Paris soon cease to be selected. Rather, they are replaced by younger members of the community who have previously shown their credentials as arbitrators or counsel in other cases.

5. What advice would you have for a fledgling arbitrator in search of substantial energy arbitral appointments?

There is no substitute for establishing your credentials in the energy field. In addition to gaining experience through counsel work or as a member of tribunals, one way to do this is by being seen to make an intellectual contribution. Aspirants should take the time to write and publish. Case notes are always welcome, chapters in practical texts are available and there are plenty of opportunities to speak and be seen at seminars and conferences. This will give possible appointers a chance to see what you are made of. All of these efforts require time and some may require expense, but aspirants have to be prepared to invest in themselves. Equally important, seek to become part of the arbitral energy community. Without being pushy, this means staying in touch and being seen. The fact that one is known to be alive and well is often a step toward an appointment. I have found that new appointments not infrequently come after meeting someone I have not seen for a while – perhaps because they are satisfied by the sighting that I am likely to survive another appointment.

6. Do you think that the current COVID-19 situation will lead to permanent changes in the way that major energy arbitrations are conducted?

The COVID-19 driven inability to travel and the requirement to practice social distancing is leading to the adjournment world-wide of the next four to six months of scheduled hearings. Of course, not every hearing will be cancelled. Some are proceeding virtually, assisted by technology such as Zoom and document management platforms similar to Opus 2. But virtual hearings suit only a limited number of cases. Larger, more complex and geographically diverse cases tend not to be candidates for virtual hearings. However, in a post COVID-19 world, for cases where virtual hearings have been shown to work, they will become more frequent. The cost savings will be enormous.

In addition, the need for all of us to work remotely during the crisis is bringing home the fact that it is indeed possible to go paperless. This will again lead to lasting cost savings. I have been an advocate for some time for the adoption of a common document management platform in the right cases for use by the parties and the tribunal. The present use by law firms of myriad different platforms is a nightmare for the tribunal. I am hopeful that the experience gained in the use of common document platforms (a necessity for a virtual hearing) will propel their wider adoption after COVID-19 has been contained.

J. William Rowley QC

J. William Rowley QC is an arbitrator member of Twenty Essex. He is immediate past Chairman of the Board of the LCIA, a former Member of the LCIA Court and also serves on the Board of LCIA India.

He is Editorial Board chair of Global Arbitration Review. Ranked by Chambers and Partners as one of the "Most in Demand Arbitrators: Global Wide", he is one of a few Canadians with a truly international arbitral practice and reputation. He has chaired or participated as a tribunal member or counsel in several hundred international arbitrations, involving a variety of national laws and investment treaty systems. He is General Editor, GAR's Guide to Energy Arbitrations, (4nd ed. 2020), GAR's Guide to Challenging and Enforcing Arbitration Awards, (1st ed. 2019), Founding Editor, Arbitration World, (2004–12) and is co-author, Rowley & Baker: International Mergers – the Antitrust Process.

Recent arbitrations have included a variety of high profile Eastern European commercial disputes; numerous petroleum industry joint ventures (Iraq gas fields, over US $20 billion, offshore Nigerian oil fields over US $4 billion, off-shore Indonesian gas fields), gas pricing and repricing formulae, and multiple commercial and investor-state disputes (ICSID, NAFTA, ECT and UNCITRAL). Mr Rowley is past Chairman of the International Bar Association, Section on Business Law, National Representative for Canada and co-founder and Chairman of the IBA Global Forum on Competition and Trade Policy. He is a past member NAFTA 2022 Committee and served as a non-executive director of AVIA Canada, (1997-2014).

Read his online bio ›

David Lewis QC

David is a specialist advocate who took silk in 2014 at the age of 36. He practises in a wide range of general commercial and private international law disputes, with a particular emphasis on energy and natural resources, civil fraud and the conflict of laws.

A substantial amount of his work is in international arbitration. David has acted as lead counsel in arbitration hearings in numerous jurisdictions worldwide, including frequently in Singapore, where he was based permanently from 2009 to 2010. He was nominated for 'International Arbitration Silk of the Year 2019' by The Legal 500.

He has also appeared before the courts of the British Virgin Islands (BVI), the Cayman Islands and Gibraltar. David is renowned for his strategic instincts as to how judges and arbitrators think, his incisive intellect and his responsiveness.

He also accepts appointments as arbitrator, and has acted as arbitrator under various institutional rules and ad hoc.

Read his online bio ›

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