Arbitration and dispute resolution in the electricity industry

Arbitration traditionally resolves to settle disputes quickly and painlessly, but there are always further issues to consider

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Arbitration and dispute resolution were to be produced in a court.

Arbitration
Arbitration is a procedure for the resolution of disputes by an arbitral tribunal comprising one or more arbitrators, chosen by or on behalf of the parties. The arbitration is conducted pursuant to an agreement of the parties and the tribunal’s decision upon the dispute submitted to it is binding, subject to any right of appeal or challenge against the award that may exist under an applicable law. If the losing party fails to honour an arbitration ruling – the award – the award may be enforced through court proceedings and assets may be seized to satisfy the award.

As indicated, arbitration has certain distinct advantages over litigation, especially in an international project.

Neutrality
National courts apply rules of procedure that may be unfamiliar to foreign litigants, which would be obliged to retain local counsel to conduct litigation before those courts. Proceedings will be conducted in the national language, which may be unfamiliar to one, some, or even all of the parties. The location of the national court exercising jurisdiction may be inconvenient and not easily accessible to the parties.

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The frequency of travel required of key personnel to attend audiences required by local procedure may be onerous. Consider, for example, a project finance transaction where the principal financiers/contractors/sponsors are companies and financial institutions from the US, Japan and Europe and the project is in Kazakhstan, a situation which would be likely to present all of these problems.

The foreign litigant may also perhaps justifiably fear that a national court may favour a local party or parties. A national court may lack or appear to lack complete independence if one of the parties in the litigation is the government, a state entity or even a major investor-owned corporation of that country. In contrast, international arbitrations are generally conducted in a country that is neutral vis-à-vis the parties. The arbitrators will not be the judges of the courts of a nation which is home to one of the parties, rather they will be an international panel.

The arbitral proceedings will not be governed by local rules of civil procedure. Instead, the proceedings will be governed by the rules of arbitration of an arbitral tribunal or ad hoc rules selected by the parties with knowledge of those rules, and any additional rules expressly agreed to or, if the parties in dispute fail to so agree, that the arbitral tribunal may adopt.

Therefore, the parties may agree on a more convenient location for the proceedings, on a limited number of hearings or indeed on an entire schedule for the proceedings, on detailed procedures, including discovery procedures, and on a language in which the proceedings will be conducted which is familiar to all parties. Such arrangements will also permit the parties to utilise their usual international litigation counsel, without the need for local counsel.

Appointing experts
Another advantage of arbitration is the parties’ role in selecting the arbitrators. The procedure will vary, depending upon the number of parties and the number of arbitrators. In most straightforward alignments – two parties and an arbitral tribunal of three arbitrators – each party is generally entitled to select, or nominate for confirmation by some other authority, one arbitrator. The third arbitrator, who serves as chair, is then selected by agreement of the parties or the party-appointed arbitrators, or by some appointing authority.

In most international arbitrations, the arbitrators are required to be impartial and independent of the parties and, of course, their counsel. In some ad hoc proceedings conducted under rules agreed upon by the parties and not under the auspices and rules of any established arbitration institution, the parties may agree that only the neutral third arbitrator must be impartial and that the party-appointed arbitrators may act as advocates for their party’s position within the arbitration panel and, perhaps, may even continue during the proceedings to communicate ex parte with the party which appointed them, but not with the neutral arbitrator. Such a procedure is sometimes adopted because the parties believe that it will assist them in dealing with the questions which are actually troubling the neutral arbitrator, and increase the possibility of reaching a resolution by settlement.

Subject to the applicable rules regarding independence and impartiality, the parties may select arbitrators who have a particular profile.
in terms of nationality, professional qualifications and experience. The parties can thereby have some confidence that their case will be decided by arbitrators who understand the subject matter of the dispute and the parties’ respective positions. This can be an especially important consideration because the industry expertise of the arbitrators will tend to produce a decision which is reasonable within the context of the contractual relationships and the ultimate business objectives of a project.

Moreover, having an expert tribunal can considerably shorten the length of a proceeding by avoiding the need to submit extensive evidence designed to educate the decision-maker regarding the technology or industry economics within which the controversy arises. With an expert tribunal, the evidence of the parties can go right to the heart of the dispute in question.

Confidentiality

Parties often value the confidentiality of arbitral proceedings, in contrast to court litigation, which may be open to the public and subject to unwelcome publicity. In fact, the confidentiality of arbitral proceedings is not absolute. Parties may be obliged to disclose information about a pending arbitration in connection with audits and in reports to shareholders or regulatory agencies. Information about arbitration sometimes enters the public domain during ancillary court proceedings or in an action to enforce the award. Nonetheless, it is certainly possible and easier to attempt the protection of confidential information in the context of an arbitral proceeding than in the context of court proceedings.

The extent to which a particular arbitration is confidential may depend upon the parties’ agreement. Arbitration rules generally provide that hearings are private, unless the parties agree otherwise, but the rules may have strikingly different provisions regarding other aspects of confidentiality. For example, the rules of arbitration of the International Chamber of Commerce (ICC) simply stipulate that the arbitral tribunal “may take measures for protecting trade secrets and confidential information”, while the arbitration rules of the World Intellectual Property Organisation (WIPO) include four detailed articles on confidentiality. Parties are well advised to consider whether specific provisions on confidentiality in arbitration should be included in their contracts.

Awards and enforcement

Most arbitration rules provide that the tribunal’s award will be final and binding. To the extent permitted under the law governing the arbitration, the parties waive any right of appeal against the award. Most modern arbitration laws stipulate limited grounds for setting aside an arbitral award such as, for example, violations of procedural rights, or questions of jurisdiction and public policy. The arbitrators’ decisions on the merits are generally not subject to review by any other panel or court. Thus, the arbitral proceedings should not lead to a long succession of appeals to higher courts. Of course, there are instances in which a party may regret having little or no recourse against a decision that it considers to be mistaken in its interpretation of the facts or the law.

One of the most important advantages of arbitration, compared to litigation, lies in international enforcement procedures. The laws governing the enforcement of court judgements are a patchwork of bilateral and multilateral agreements, with many gaps. Certain European countries have gone far in granting enforcement of each other’s court judgements, concluding in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters among members of the European Community. These were modified by subsequent conventions as new members joined the EC, now the European Union and the 1980 Lugano Convention among members of the EC and members of the European Free Trade Association. Regulation No.44/2001, adopted by the European Council on 22 December 2000, incorporates the Brussels Convention into Community law, with certain modifications. This regulation took effect on 1 March 2002. Member states of the Organisation of American States have concluded the Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards (1979). However, the US is not a party to any such treaty, and the enforcement of judgements there is subject to the laws of the various states, for example in New York, pursuant to the Uniform Foreign Country Money-Judgments Recognition Act.

In contrast, international arbitral awards may be enforced, inter alia, under the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards generally known as the New York Convention. At present, 129 countries are parties to the New York Convention.

In order to enforce an arbitral award in a country that is a party to the New York Convention, one must submit copies of the award and of the relevant arbitration agreement plus translations, if necessary, to the court where enforcement is sought. The Convention stipulates limited grounds for refusing enforcement. The party resisting enforcement has the burden of proving, for example, that the arbitral tribunal lacked jurisdiction, that the arbitral procedure was not in accordance with the parties’ agreement, or that the award has been set aside in the country where the arbitration was conducted. In addition, the court may, on its own motion, refuse enforcement if the subject matter of the dispute was not capable of settlement by arbitration under the law of that country or if enforcement would be contrary to that country’s public policy.

The New York Convention also permits parties seeking enforcement of arbitral awards to avail themselves of any rights they may have under a national law that is more favourable to enforcement than the Convention. Thus, arbitral awards that have been set aside in the place of arbitration, for example in Switzerland and Egypt, have been enforced in other countries such as France and the US.

Flexibility

One of the leading advantages of arbitration is its flexibility. The arbitral procedure can be adapted to the subject matter of the dispute, the number and identity of the parties, the need for decisions in real time and so forth. Parties negotiating contracts should consider procedural issues that could arise in an eventual arbitration and incorporate provisions designed to deal with those issues in the contractual documents. For example:

- Place and language of arbitration: It is advisable to stipulate the language and place of arbitration in the contract. If this is not done, and the parties cannot agree later upon the place of arbitration, the choice will be made by the selected arbitral institution or the arbitral tribunal. Various factors may dictate the choice of a place of arbitration, including neutrality, liti-sui-ris, the parties, the arbitration law of the country and convenience or a balancing of relative convenience for each of the parties. Generally, it is advisable to select a country that is a party to the New York Convention, because some countries
Multiple parties and contracts: In a major power project there will ordinarily be a multiplicity of parties and interrelated contractual relationships. The cost to the customer of the electricity generated, for example, will often vary with the cost of fuel and other production costs. The presence of multiple parties and/or interrelated contracts may raise special issues some of which may be foreseen and contractually addressed. Moreover, in such a situation the traditional methodology for selecting a three person arbitral panel may not function well in view of the multiplicity of parties and, therefore, of sides or positions in a dispute. Consequently, the parties may simply agree that all of the arbitrators will be chosen by an arbitral institution or appointing authority. The parties may also decide to conclude separate arbitration agreements to govern the resolution of all disputes arising in connection with the project and its multiple interrelated contracts, and the differing sets of parties which may be involved in one such dispute or another. Such an agreement would normally include carefully drafted provisions for notice to all parties, intervention, joiner, and other such matters. The parties may also decide to agree on and appoint an arbitrator or panel of arbitrators to deal with any disputes. Such provisions also should prescribe a methodology governing the replacement of an arbitrator no longer willing or able to serve. In instances where such a provision is utilised, the desire of the parties to have disputes resolved by experts familiar with the project is often an important motivation.

Negatives of arbitration

Arbitration may nonetheless have drawbacks. For example, certain costs that would not arise in litigation before a court may have to be paid, such as fees and expenses of the arbitrators. On the other hand, in a major arbitration, the arbitrators’ fees and expenses may be greatly outweighed by other costs, such as attorneys’ fees. An efficient arbitration proceeding may also be more expeditious than litigation in the courts, resulting in savings outweighing the cost of the arbitrators. In addition, most rules of arbitration permit the arbitral tribunal to award costs to the prevailing party.

There is also a structural difficulty inherent in arbitration. Being based upon consent, arbitral proceedings generally cannot be extended to include third parties which have not agreed to be bound by the arbitration. Of course, what constitutes consent may be a matter of interpretation and the like, as a party may be bound by an agreement that it has not signed. Even where multiple parties may have agreed in one or more contracts to arbitration, there are procedural issues that may be difficult to resolve. For example, the consolidation of arbitral proceedings arising under different contracts, the parties’ rights to appoint arbitrators, the sharing of costs and the treatment of counterclaims and cross-claims. In contrast, rules of civil procedure in court generally permit the joinder of third parties and give judges the power to manage the multi-party litigation.

This factor can be significant in complex projects involving multiple parties and contracts, such as a build operate transfer (BOT) infrastructure project. Consequently, if arbitration is to be utilised in such situations, it is critical that the applicable arbitration rules be spelled out in some detail and that all parties, contractors and subcontractors be required to arbitrate and be bound to those rules.

Arbitrators generally do have the power to order interim and conservatory measures. For example, the power granted to the arbitral tribunal under Article 25 of the London Court of International Arbitration (LCIA) Rules is detailed and extensive, including the power to order a respondent to provide security, to order the preservation of evidence, sale or other disposal of any property under the control of a party and relating to the arbitration and also to order on a provisional basis any relief that the arbitral tribunal would have power to grant in an award. In addition, the arbitral tribunal has the power to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party.

Article 25 – in common with analogous provisions under other arbitration rules – also stipulates that the arbitral tribunal’s power to order interim measures does not prejudice any party’s right to apply to any national court or other national authority for interim measures before the formation of the arbitral tribunal and, in exceptional cases, thereafter.

A party’s right to resort to a national court may be very important, because the arbitral tribunal itself will lack the power to enforce its own orders. Similarly, arbitral tribunals lack the power to compel the attendance of witnesses or the production of documents or other evidence. Certain national laws provide expressly for the courts to assist the parties and the arbitral tribunal in this respect. For example, section 42 of the English Arbitration Act 1996 provides that the court may, upon the application of the arbitral tribunal or a party, order compliance with an order made by the arbitral tribunal, while section 43 provides that a party may, with the arbitral tribunal’s permission, apply to the court to secure attendance before the tribunal of a witness to give oral testimony or produce evidence. In Switzerland, a tribunal may request the assistance of the court to obtain compliance with its order, pursuant to Article 183 of the Private International Law Statute. Under federal arbitration law in the United States (9 USC § 7), a tribunal may summon a person to appear, provide documents or other evidence. If the person does not comply, the tribunal may petition the court for assistance.

Selecting the type of arbitration

These factors generally lead parties in an international energy project to agree upon arbitration to settle their disputes. However, such an agreement is, or should be, only the first step in determining how disputes will be settled. As indicated, the parties must also determine what type of arbitration tribunal to select and they should consider a number of procedural issues that may arise in an eventual arbitration.

An efficient arbitration proceeding may also be more expeditious than litigation in the courts. Commercial arbitration may be institutional, ad hoc. Well-known arbitral institutions which administer arbitrations under rules that they have developed, include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association, the International Centre for the Settlement of Investment Disputes (ICSID) and the China International Economic & Trade Arbitration Commission (CIETAC). Parties that opt for an ad hoc arbitration often agree to follow the Arbitration Rules of the United Nations Commission for International Trade Law (UNCITRAL).

While the parties in an institutional arbitration must pay the institution’s administrative fees, the services provided by the institution generally justify this additional cost. The institution will appoint an arbitrator if a party fails or refuses to do so and it will decide upon challenges against an arbitrator. The arbitrators’ fees are determined by the institution, in accordance with its rules, thus relieving the parties of direct contact with the arbitrators on this delicate subject. The institution may provide impartial advice on procedure. Under the ICC Rules of Arbitration, a draft award is subject to scrutiny by the ICC, which can require changes in the award’s form and draw the arbitrators’ attention to matters of substance.

Discovery: Parties from different countries may find that they have very different expectations and discovery rights. There are very few rules that would exclude evidence, such as the common law’s hearsay rule, are generally not applied in arbitration. The International Bar Association has published Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules) that reflect this.
Among the mechanisms which could be adopted in designing a fast-track procedure are:

- Advance selection of an expert or panel of arbitrators. Under this system, the parties agree upon a special, expedited procedure – a fast-track arbitration. In such a procedure, the parties will know which transactions can be settled through ADR and those requiring a court judgement. Among the leading institutions which have adopted the fast-track procedure are the ICC, the AAA, and the LMA. Among other things, the fast-track procedure will:
  - Ensure that the participants will know which transactions can be settled through ADR and those requiring court proceedings.
  - Save time and money by settling disputes as quickly as possible.
  - Provide a faster resolution of disputes.

One solution to this problem is to agree upon a special, expedited procedure – a fast-track arbitration. Great care, however, must be taken in drafting the terms of such a procedure to avoid locking the parties in at an early stage.

Convergence of different traditions within arbitration.

- Mini-arbitration: A mini-trial is an informal procedure in which the parties to a dispute present elements of their case, be it documents or oral arguments, in a hearing before a neutral adviser, often a retired judge, that may last one or two days. The neutral adviser then gives a preliminary opinion, indicating how a court or tribunal might decide the case. The mini-trial is meant to give the parties a realistic idea of their prospects in a real trial or arbitration. For this reason, it is expected that senior executives of the two parties will attend the mini-trial, which is then followed by negotiations.

- Expert determination: When a dispute concerns a technical matter, the parties may wish to refer the matter to an expert or panel of experts for an opinion or decision. A wide range of procedures is available. The parties may, for example, agree to institute a dispute review board (DRB), which will hear disputes and give an opinion that the parties may or may not accept. Alternatively, a dispute adjudication board (DAB) may be established to review disputes and render decisions that will be binding upon the parties unless challenged within a specified period of time. Depending upon the nature of the contract and the amounts of money at stake, the parties may establish the DRB or DAB at the beginning of their project, so that its members become and remain familiar with the project and are available on short notice to hear disputes.

These and other ADR techniques can promote rapid and relatively inexpensive resolution of disputes. They are less confrontational than litigation or court proceedings and therefore may facilitate the continuation of commercial relations between the parties. However, successful ADR ultimately depends upon the good faith of the parties and their willingness to compromise.

Pursuing ADR may be a waste of time and money if a settlement is clearly beyond reach. If parties agree to ADR, either in their contract or after a dispute arises, their agreement should include appropriate time limits and provisions for the binding settlement of disputes if their ADR proceedings do not produce a settlement or a party does not comply with a settlement reached through the ADR procedure.

**Conclusion**

In conclusion, working within the context of power project negotiation, it can be seen that the adoption of the appropriate dispute resolution procedures can save money and time. It can also act to minimise the stress on the overall commercial relationship and progress of a project, which might otherwise result from the need to resolve disputes.

**Biography**

Dr. June Dorgan is partner-in-charge in Milan for Jones, Day, Reavis & Pogue and has been active in the public utility and energy industries for more than 30 years, including major engagements in litigation, arbitration and project finance. Most recently, she has assisted in the restructuring of the electric and gas industries in the US and Canada, concentrating on the preparation of a master plan to provide mediation and other ADR services. Dr. Dorgan has also been involved in the settlement of large construction and electrical disputes, including disputes relating to the implementation of new technology, as well as in the settlement of long-term contracts and several construction contracts. She can be contacted via telephone on +39 02 5701 5450 or email at june@dorgan.com.