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Chapter 24

SERVING AS THE CHAIRPERSON IN INTERNATIONAL COMMERCIAL OIL & GAS ARBITRATIONS

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I. INTRODUCTION

The chairperson in a commercial oil and gas arbitration has two important mandates beyond ensuring that the result is fair and just. Those two mandates are to control costs and to keep the case on the legal rails. Owing to the large sums involved in international oil and gas arbitrations and the frequent inclination of the arbitrating parties or their counsel to take a "no holds barred" approach to preparing and arguing their case, these objectives can be difficult to attain.

While all members of a tribunal share the responsibility to regulate the conduct of an arbitration, the ultimate responsibility falls to the chair to ensure that the proceedings meet procedural and substantive law requirements in the venue of the arbitration, conform with applicable law requirements under the contractual documents and comply with international arbitration law requirements for the enforcement of the award. The buck stops at the chairperson to ensure that the tribunal remains within its jurisdictional envelope. The chairperson must propose and oversee the setting of procedural guidelines and compliance with those guidelines as well as ensure the fair and efficient conduct of the evidentiary hearings. The chairperson must ensure that the members of the tribunal remain independent and impartial throughout the proceedings both in respect of dealings with the parties and in respect of dealings amongst the tribunal members *inter se*. The chairperson will generally organize the writing and delivery of the final award, all the while

making sure that neither the proceedings nor the final award are vulnerable to attack for excess of jurisdiction or a denial of due process.

The first step for the chairperson is to examine the arbitration agreement and the underlying substantive contract to determine the correct procedures to be followed. The contractual documents set out the marching orders for the tribunal. Many oil and gas agreements will contain specifications on arbitral procedure and rules for substantive dispute resolution. There will invariably be a choice of law clause. Profit sharing clauses will often include a requirement for reports from accountants. Pricing provisions found in LNG and Gas Sales Agreements will contain formulae for price setting and adjustment. These provisions are paramount and must be followed by the tribunal. With the exception of laws of mandatory application from which there can be no derogation—such as anti-trust laws—the specific contractual agreements of the parties on procedural and substantive matters will trump statutory provisions or otherwise applicable common law.

Sometimes there are particular roles assigned to the chair under applicable laws and rules. For example, the chair must make the final decision if a majority cannot be reached in proceedings under the English Arbitration Act of 1996. The chairperson must review the relevant rules and statutes for such idiosyncratic duties as may be imposed.

II. ORGANIZING THE PROCEEDINGS

From the outset the chairperson must take the lead in organizing the arbitration. The chairperson first sets the agenda for the initial procedural meeting in consultation with the other arbitrators. Checklists are available from a variety of sources including the UNCITRAL Notes on Organizing Arbitral Procedures that cover such issues as the timing for pleadings, witness statements, expert reports and briefs of argument. The draft checklist is circulated amongst the members of the tribunal for suggestions and then delivered to the parties. While there are some cases where decision

making on procedural matters is left entirely to the chairperson it is far more common for all members of the tribunal to participate in all decisions on procedural issues from the commencement of proceedings through to the conclusion of the evidentiary hearings.

By maintaining rigorous procedural oversight the chairperson can have a dramatic impact on the cost, efficiency and fairness of the arbitral process. A proactive chair will raise agenda items that seek the agreement of the parties on issues that might later cause problems. The chair must rely upon his or her own experience to anticipate issues such as confidentiality of both the proceedings and the documentary record, the production and organization of documents, requirements for proof of disputed documents as well as guidelines for the creation of the documentary record at the evidentiary hearing. The benefits of a common book of documents cannot be overstated. The chair should keep in mind the fact that international commercial oil and gas arbitrations typically involve sophisticated parties represented by highly experienced counsel. By seeking the agreement of the parties on procedures to be adopted from the earliest stages, efficiencies can be maximized, misunderstandings can be avoided and grounds for challenge may be preempted. Likewise, challenges to the jurisdiction of the tribunal, whether in respect of its composition or in respect of the scope of issues to be decided, can be minimized by the issuance of a direction early on requiring that the parties identify such concerns as may exist.

One of the proactive steps that a chairperson can take from the earliest stages is to inquire of the parties as to the need for the members of the tribunal to review all of the documents that are listed and produced as reliance documents whether attached to pleadings or produced in response to discovery requests. It will be a very expensive proposition for three arbitrators to read all of the lengthy documents when they may need only review excerpts in advance of the hearings. The parties may agree that a common book of documents will be prepared and delivered in advance of the hearings such that it will only be necessary for the tribunal members to review the contents of the common book or identified excerpts. The use of a common book can eliminate or substantially reduce the number of

repetitive documents—particularly foundational evidence relating to calculation of damages—that otherwise will be provided *in extenso* to the arbitrators in a complex oil and gas case.

Other sources of law, albeit soft law, that may assist in organizing the proceedings are international documents such as the IBA Rules on the Taking of Evidence in International Arbitration and the College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration. These documents represent a consensus of experienced arbitration specialists regarding suitable procedures and practices in commercial arbitrations. The IBA Rules, for example, are widely accepted as a fair and balanced approach to the taking of evidence in international cases and cover the gamut of matters from the production of documents to procedures for the presentation of witnesses of fact. The CCA Guide is a wide ranging treatise covering everything from duties of arbitrators to standards for discovery in commercial arbitrations.

III. APPLICABLE LAW REQUIREMENTS

The chairperson must review the governing arbitration statute in the arbitral venue. Domestic and international arbitrations are usually governed by different statutes in the venue state. The applicable statute will govern such matters as the role of the courts in the arbitral process, the arbitrability of certain types of disputes, requirements for a valid arbitration agreement, grounds to challenge members of the tribunal, the availability of interim measures of protection, grounds for review of arbitral awards, costs and requirements for the form of the final award. Authority for the issuance of subpoenas, the taking of oaths or the awarding of pre- and post-award interest may also be contained in the local law governing the procedure of the arbitration (known as the *lex arbitri*).

The chairperson has the ultimate responsibility for ensuring that the arbitration does not go off the legal rails. Nowhere is this more important than in making sure that the dispute in issue is caught by the arbitration agreement. If both parties do not agree early on that the claims made in the arbitration are within the scope of the

arbitration agreement then procedures must be adopted to address that arbitrability issue whether as a preliminary issue or as an issue to be decided on the main hearing.

An example of a situation in which the chairperson must be vigilant to ensure that the tribunal proceeds within its jurisdictional envelope is in respect of matters that arise after the date on which the arbitration has commenced. An arbitral tribunal does not have plenary authority to decide any issue that might come within the scope of the arbitration agreement but rather has jurisdiction only to deal with those issues that the parties have referred to that particular tribunal. This may be described as the two contract theory of arbitral jurisdiction. The arbitration contract contained in the arbitration clause of a commercial contract is the principal arbitration contract. The referral to arbitration is a second contract that is created upon the commencement of an arbitration. While the parties in the primary arbitration contract may provide that all disputes arising out of or in connection with the underlying substantive contract must be decided by arbitration, once an arbitration has been commenced the tribunal only has jurisdiction to rule on the specific issues identified in the second contract created upon the referral to arbitration. Disputes that arise after the reference to arbitration would not come within the jurisdiction of the tribunal unless the parties expressly agree to so expand the tribunal's mandate. The empanelled tribunal is not the policeman of the primary arbitration contract. It is only the policeman of the second referral contract.

Two examples may assist in delineating this two-contract distinction. The first is in relation to the grant of an anti-suit injunction. The tribunal may enjoin a party from bringing litigation proceedings in respect of the same issues and the same parties involved in the case under arbitration so as to prevent an abuse of that particular arbitral process but the tribunal would not have jurisdiction to enjoin a party from bringing litigation proceedings in respect of a different claim or a different entity not involved in the current arbitration even though such claims and parties may have been covered by the primary arbitration contract and even though such litigation would be in violation of that primary arbitration

contract. Another way of saying this is that an existing arbitral tribunal does not have authority to enforce the principal arbitration contract between the parties by requiring that the parties honour that primary arbitration contract. That would be a matter for the courts. The existing arbitral tribunal may only enjoin a party from commencing litigation involving what is essentially the same matter or parties before the tribunal. The chairperson must be vigilant to ensure that the arbitral tribunal does not exceed its mandate by assuming jurisdiction over matters not encompassed by that existing mandate. This issue does periodically surface in international oil and gas arbitrations, in part due to the fact that many oil and gas projects involve a variety of contracts that sometimes contain different arbitration provisions or involve a different mix of parties. Confusion often arises when the contracting parties attempt to seek a resolution of their dispute by relying on differing arbitration provisions or by commencing different arbitrations that sometimes involve additional parties. When such a situation arises, the chair in a pending arbitration must remain focused on the case at hand and the arbitration provision under which the case was commenced.

Another example where the two-contract distinction comes into play is in respect of a claim related to facts that have arisen subsequent to the commencement of the arbitration proceeding. In theory, absent specific agreement of the parties, no such matter could come within the mandate of an existing tribunal except perhaps for damage calculation issues. The existing tribunal's jurisdiction can only embrace disputes that have arisen prior to the appointment of the tribunal. New claims arising after the referral to arbitration normally would require express consent of the parties to be included in the mandate of the existing tribunal or, absent agreement, referral to a new tribunal. While there is a power to allow an amendment of an existing claim the amendment would in most cases be factually linked to the original claim. A specific example of a new claim that would not be factually linked would be a dispute relating to breach of confidentiality by one party in respect of documents that were produced in an arbitration relating to the sale of oil and gas drilling technology. There are three logical forums for the resolution of a

dispute related to a claim of breach of confidentiality in relation to information produced in the course of the arbitration. The matter could be taken to the courts, could be decided by the existing tribunal or might require referral to a newly constituted tribunal. While intuitively it may seem that the existing tribunal should be able to control its own process and potentially award damages for breach of confidentiality in respect of documents produced in the course of the arbitration, it may be a matter that, if caught within the scope of the original arbitration agreement, mandates referral to a new tribunal. If not caught by the language of the original arbitration clause of the commercial contract because the issue is not considered to be a dispute arising out of or in connection with the substantive commercial contract, it may be a matter that only a court can decide. The chairperson may anticipate this type of problem and seek the positions of the parties at the outset as to whether or not claims arising out of a breach of confidentiality in the arbitration are agreed to fall within the mandate of the existing tribunal. Failing such agreement the existing tribunal's jurisdiction may not extend beyond the imposition of cost sanctions for abuse of the arbitral process and may not include authority to compensate the aggrieved party for damage suffered.

It falls to the chairperson to ensure that the law applicable to the merits of the dispute is followed in respect of substantive issues at the same time that the *lex arbitri* is followed in respect of procedural issues. For example, the availability of punitive damages or limitation periods may be a matter to be governed by the proper law of the contract, i.e., the law specified in choice of law clause in the commercial contract, rather than the law that is applicable in the venue to govern arbitration procedure.

IV. CONDUCT OF THE HEARING

The chairperson is responsible to maintain the integrity of the arbitral record, to mark the exhibits and to preserve the exhibits that have been marked. The chairperson must also ensure that all members of the tribunal remain independent and impartial. Protocols

for communication with the parties must be maintained and the chairperson must ensure that all members of the tribunal are consulted on all issues. This latter subject can be awkward with respect to international oil and gas arbitrators and legal counsel, many of whom appear as speakers at a broad variety of conferences and meetings around the globe or who cross paths in connection with other arbitrations. That fact, however, merely underscores the importance of establishing the boundaries of communication protocols in international oil and gas arbitrations at the earliest possible time.

How does a chairperson deal with perceived bias on the part of a member of the tribunal? Must any suspicion or concern be notified to the parties? This is a controversial topic in international arbitration circles and occasionally arises in international oil and gas arbitrations. The prevailing view seems to be that the chairperson should be alert for bias and make sure that such bias does not infect the proceedings or the award. This may be as simple as giving less weight to the views of a co-arbitrator who is displaying signs of bias or perhaps confronting that member with improper behaviour. There may come a time, however, when the chairperson must report improper conduct. In an egregious case such as where the chair learns of unilateral communications with just one of the parties, the chair may be bound both as a matter of ethics and as a matter of law to bring the matter to the attention of the parties. Failing to do so not only may imperil the final award but also may expose the chairperson to personal liability.

International commercial oil and gas arbitrations often involve a broad variety of complex issues relating to such matters as government regulation, economic indices, reservoir engineering, and offshore drilling and production handling. As a result, arbitrators often require clarification of certain aspects of the written statements of the witnesses or their responses to counsel's inquiries on cross-examination. The manner in which the arbitrators inquire of witnesses should be a matter of concern for the tribunal and should be agreed upon prior to the commencement of the hearing. When inquiring of witnesses the arbitrators must not usurp the function of

counsel while at the same time ensuring that all necessary information is elicited. Parties and arbitrators from civil law jurisdictions are more familiar with a more inquisitorial approach by the tribunal but in international cases the arbitrators ought to remain as neutral as possible. It is generally accepted that the arbitrators ought not to enter the arena, suggest possible defences or claims that have not been pleaded or engage in extensive examination or cross-examination of witnesses.

Another relevant topic is the appointment of experts by the tribunal and the chair's duty to oversee the expert's work. Most international arbitration rules permit the tribunal to appoint its own expert when it deems it appropriate to do so. Because technical testimony is a hallmark of international commercial oil and gas arbitrations, tribunals hearing oil and gas cases might be tempted to obtain expert guidance through the appointment of one or more experts. Such appointments are relatively rare, however, and should be made only when absolutely necessary. When the tribunal is considering appointing an expert the IBA Rules are a starting point. The parties should be first consulted and if it is deemed appropriate for the tribunal to appoint an expert the parties should have input on qualifications and selection. Procedures for obtaining information from the parties must be decided as well as any independent role for the chair or the tribunal in communicating with the expert.

V. FINAL DELIBERATIONS

The chair must be vigilant in consulting the co-arbitrators in the preparation of the final award from the very earliest stages of the proceedings. In that regard, the chair should recognize that each of the arbitrators may bring unique oil and gas and international arbitration experience to the process and that the tribunal is mostly likely to reach the correct result when all members of the tribunal benefit from each other's expertise and background. The members of the tribunal must hold all deliberations together. Two-person discussions are off-limits. There are many advantages to be gained by the arbitrators discussing various aspects of the case as it unfolds.

Divergent views can help to focus attention on controversial issues in the course of the evidentiary hearing.

Final deliberations are best held in person immediately after the conclusion of the hearings but can also he conducted on conference calls. The chair will often write or assign the writing of parts of the first draft of the award after the deliberation process and then circulate the draft for input from the other arbitrators. There is no reason why one of the party-appointed arbitrators cannot write the first draft on one or more issues if all members agree that to do so is appropriate after agreeing the tentative result in deliberations. The drafting of the final award is part of the deliberation process. A tentative conclusion may not survive the writing of the award. Sometimes the initial view of the tribunal will just not write. The discipline of writing the award may expose a fatal weakness in the theory of liability or the quantum of damages.

It is generally accepted that the chairperson ought to encourage unanimity. This is usually just a matter of moral suasion. Except in the most unusual of circumstances involving matters of important principle or jurisdiction, there is no utility in a dissenting opinion. There is no appeal from an international arbitration award for errors of law or fact so a dissenting opinion may have little practical value. The consensus seems to be that unanimity promotes confidence in the arbitral process and a greater sense of justice in the final result.

But the integrity of the final award should not be sacrificed on the altar of unanimity. The chair must not go too far in seeking unanimity if the result would be to reach an unholy compromise that falls short of the correct result. A chairperson would not want to acquire a reputation for cutting the baby in half just to achieve a unanimous decision.

VI. FINANCIAL MATTERS

The chairperson must make sure that there are sufficient deposits for arbitrators' fees whether through liaison with a governing arbitral institution or through direct arrangements with the parties. A chair who fails to ensure that panel members get paid will not be a popular

choice for re-appointment. As with virtually all matters, the securing of adequate deposits for fees is something that the chair must be alive to from the very commencement of the proceeding.

The role of the chair in fixing fees for the members of the tribunal is more controversial. Where there is an imbalance in the fees being paid to different members of the panel it may be incumbent upon the chair to try to achieve some degree of parity having regard to the prevailing circumstances including the usual fee scale for each member. The concern is that one party may be paying its appointed arbitrator a disproportionately large fee. This might raise an apprehension of bias. In some cases the chair may discuss the matter with the members of the panel and ask that one member reduce his or her fee. The parties might also be canvassed to discuss the fees paid to members of the tribunal so as to achieve relative parity. One of the parties may object to this subject being addressed particularly when that party may have chosen its nominee because that person was less expensive. However, it may be that the other party will ultimately have to pay the fees of that expensive arbitrator in the allocation of costs! This is a sensitive matter calling for significant diplomacy on the part of the chairperson.

If there is no arbitral institution involved it generally falls to the chairperson to hold deposits for fees in escrow. The chair must ensure that the accounts of the tribunal members are paid. This protocol has unseen benefits since it allows the chairperson to monitor the accounts of all members of the tribunal and to subtly encourage the co-arbitrators to render accounts that are roughly comparable.

There are other sensitive concerns in the area of fees. JAMS arbitrators, for example, for the most part do not want the chair involved in fee arrangements in any way. Their deal is with the appointing party. Little more can be said about the benefits or detriments of unilateral arrangements in the present context. Arguments may be raised that there is a contractual or fiduciary relationship between all members of the tribunal and both parties such that direct dealing should be discouraged. Again, the situation may call for diplomacy on the part of the chair.

VII. ENFORCEABILITY OF THE AWARD

Most commercial oil and gas arbitrations will be international arbitrations because the parties are from different jurisdictions or because the subject matter is transnational. Interim and final awards may need to be enforced in a place other than the arbitral venue. The chairperson must ensure compliance with Article 5 of the New York Convention which sets out the grounds on which a foreign court may refuse to recognize or enforce an award. (In rare cases the arbitration award may be governed by the Panama Convention, by some other convention, or by no convention at all. In each case the chair must be familiar with the background documents and any jurisdictional imperatives for the conduct of the hearing or the content of the final award.) At the same time, the award must comply with the laws of the place where it was made. Ensuring compliance with local and international legal requirements may be as simple as ensuring that the award is signed in the place where it is made. The chairman must make sure that the place where the award is made is the same place that the parties have specified as the venue for the arbitration. It may also entail considerations of public policy in the place where the award might be enforced. One example is the prohibition of pre and post-award interest in some countries.

The chairperson must consider the requirements of Article 5 of the New York Convention both before and after the final award is completed. In the usual case, where the New York Convention applies, the tribunal must ensure that no party was under any incapacity, that the arbitration agreement is valid under the applicable law, that the party against whom the award is to be invoked was given proper notice of the proceeding, that due process was followed and that each party was allowed a full opportunity to present its case. Did the dispute fall within the scope of the arbitration agreement? Was the tribunal appointed in accordance with the agreement of the parties and with the laws of the arbitral venue? Does the award violate public policy in the arbitral venue? The chairperson is the ultimate guardian of the enforceability of an arbitral award. Many issues can be anticipated. The chair can take steps early on, such as

the obtaining of written confirmation from the parties that the dispute is within the scope of the arbitration agreement and that the composition of the tribunal is in accordance with the agreement of the parties.

Since most jurisdictions require an original copy of the final award for enforcement purposes the chairperson should ensure that all parties are provided with an original blue ink copy signed by all arbitrators.

VIII. CONCLUSION

The key role for the chairperson in an international commercial oil and gas arbitration is to ensure adherence to the agreement of the parties on procedural and substantive matters, to ensure adherence to applicable laws and rules, and to ensure adherence to principles of due process and fairness. The chairperson must also be proactive in organizing the proceedings in a way that minimizes cost and delay and that forecloses challenges for excess of jurisdiction. The chair is the person who must ultimately protect the integrity and efficacy of the arbitral process. The chair must also be courteous at all times and strive to foster the convivial and pleasant environment that is indeed the hallmark of arbitration.