

Global Arbitration Review

The Guide to Energy Arbitrations

General Editor
J William Rowley QC

Editors
Doak Bishop and Gordon E Kaiser

Fourth Edition

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Energy Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Most know us for our daily news and analysis service, but we also provide much, much more – technical books and reviews, conferences and handy workflow tools, to name just a few, that go into more depth than the exigencies of journalism allow. (Do visit us at www.globalarbitrationreview.com to see our full range of output.)

The Guide to Energy Arbitrations, fourth edition, is one such volume.

Because GAR is so central to the international arbitration community, we regularly become aware of gaps in the literature. *The Guide to Energy Arbitrations* was the first example of identifying such a gap and we are delighted at the successful way in which it has been filled, with the help of so many leading firms and individuals, and the enduring appeal of this Guide.

If you find it useful, you may also like the other books in the GAR Guides series. They cover construction, mining, post-M&A disputes, IP, advocacy, damages, and the challenge and enforcement of awards in the same practical way. We also have a citation manual – UCIA (*Universal Citation in International Arbitration*).

On behalf of the whole GAR team, I'd like to thank our editors – Bill Rowley, Doak Bishop and Gordon Kaiser – for the energy they've put into the project, and my colleagues in production for the élan with which they've realised our collective idea.

David Samuels

October 2020

London

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Preface

Economic liberalisation and technological change in the past several decades have altered the global economy profoundly. Businesses, and particularly those involved in the energy sector, have responded to reduced trade barriers and advancement of technology through international expansion, cross-border investments, partnerships and joint ventures of every description.

The move to today's 'internationality' of business and trade patterns alone would have been sufficient to jet-propel the growth of international arbitration. But when coupled with the uncertainties and distrust of 'foreign' court systems and procedures, the stage was set for a move to processes and institutions more suited to the resolution of a new world of transborder disputes.

Not surprisingly, the concept and number of international commercial arbitrations have grown enormously during the past 25 years. Bolstered by the advantages of party autonomy (particularly over access to a neutral forum and the ability to choose expert arbitrators), confidentiality, relative speed and cost-effectiveness, as well as near worldwide enforceability of awards, the system is flourishing. And if a single industry sector can lay claim to parental responsibility for the present universality of international arbitration as the go-to choice for the resolution of commercial and investor-state disputes, it must be the energy business. It is the poster boy of arbitral globalisation.

Led by oil and gas, the energy sector is marked by enormously complex, capital-intensive international deals and projects, frequently involving prominent parties and state interests. Transactions and partnerships are often long-term and involve 'foreign' places and players. Political instability and different cultural backgrounds characterise many of the sector's investments. In short, the energy sector is a natural incubator for disputes best suited to resolution through international arbitrations. And despite recent international trade disputes and the appearance earlier this year of the novel coronavirus, both of which are leading to a degree of restructuring of cross-border investments and supply chains, there is no sign that this will diminish the popularity of (and need for) international arbitration.

Indeed, in the past 50 years or so, following a rash of nationalisations in North Africa, the Gulf States and parts of Latin America, and the lessons learned in ‘foreign courts’, there is scarcely a major energy sector contract (whether oil, gas, electric, nuclear, wind or solar) that does not call for disputes to be resolved before an independent and neutral arbitral tribunal, seated, where possible, in a neutral, arbitration-friendly place.

The experience and statistics of the major arbitral institutions bear out the claim that the energy sector has driven, and continues to account for, major growth in international arbitration. ICSID is illustrative, where 42 per cent of its caseload in 2019 involved the energy sector. At the LCIA, case statistics for 2019 revealed that the energy and resources sector had the highest number of parties, both as claimants and respondents. Between 2014 and 2015, the Stockholm Chamber of Commerce Arbitration Institute saw a 100 per cent increase in the number of its energy-related cases.

Although much of the evidence of the energy sector’s arbitral demand is anecdotal, those arbitrators who are known in the field report growing demand and a steady increase in enquiries as to availability. And having regard to the multifaceted fallout from the oil price crash of earlier this year, a revival of resource nationalism (which exacerbates the natural tension between energy investors and host states), with Russia’s continuing economic difficulties and a world in which sanctions, as well as the covid-19 pandemic, imperil contractual performance, the only realistic expectation is for further reliance on arbitrators and arbitral institutions coping with the disputes that are surfacing daily.

Another driver towards arbitration of energy disputes is the fact that the number of substantive players in the sector is relatively limited. These parties will invariably have multiple agreements, partnerships and joint ventures with each other at the same time, many of which are long-term. These dynamics call for disputes to be resolved by decision makers who are known to and trusted by all, and whose decisions are final. The simple fact about business is that the economic uncertainty associated with an unresolved dispute overhanging a long-term partnership is often considered to be more problematic than getting to its quick and definitive resolution, even if the resolution is unfavourable in the context of the particular deal.

Against this backdrop, when Gordon Kaiser raised the question with me in the summer of 2014 of producing a book that gathered together the thinking and recent experiences of some of the leading counsel in the sector, it resonated immediately. Gordon was also more than pleased when I suggested that we might try to interest Doak Bishop as a partner in the project. With Doak’s acceptance of the challenge, we have tried, in the first three editions of this guide, to produce coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by those who do business in the energy sector and by their legal and expert advisers.

Before agreeing to take on the role of general editor and devoting serious time to the project, we needed to find a publisher. Because of my long-standing relationship with Law Business Research (LBR), the publisher of *Global Arbitration Review* (GAR), we decided that I should discuss the concept and structure of our proposed work with David Samuels, GAR’s publisher, and Richard Davey, then managing director of LBR. To our delight, the shared view was that the work could prove to be a valuable addition to the resource material available. On the assumption that we could persuade a sufficient number of those we had provisionally identified as potential contributors, the project was under way.

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Energy Arbitrations* being seen as an essential desktop reference work in our field. To ensure the high quality of the content, I agreed to go forward only if we could attract as contributors colleagues who were some of the internationally recognised leaders in the field. The guide is now in its fourth edition, and Doak, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors over the years.

The fourth edition of *The Guide to Energy Arbitrations* has been expanded with a new chapter on gas supply and LNG arbitrations. The remaining chapters have all been updated to reflect developments since 2018.

In future editions, we hope to fill in important omissions, such as the changing dynamics of investment cases under the Energy Charter Treaty, including the consequences of the *Achmea* decision of the European Court of Justice; the contours of fair and equitable treatment; injunctions against and the setting aside of awards; bribery and corruption; sovereign immunity and enforcement issues; *force majeure* and contractual allocations; and intellectual property and insurance disputes in the energy sector.

Without the tireless efforts of the GAR/LBR team, this work not would have been completed within the very tight schedule we allowed ourselves. David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this fourth edition will obviously benefit from the thoughts and suggestions of our readers, for which we will be extremely grateful, on how we might be able to improve the next edition.

J William Rowley QC

October 2020

London

Appendix 1

About the Authors

J William Rowley QC

Twenty Essex

J William Rowley QC has chaired or participated as a tribunal member or counsel in more than 200 international arbitrations, involving more than 50 national or state laws or treaty systems. He is described as ‘one of the elite international arbitrators’ (*The New Peace Keepers*), a ‘Star Performer’ (*Legal Business Arbitration Report*), one of London’s ‘Super-Arbitrators’ (*Global Arbitration Review*), ‘exceptional’, ‘Olympian’, ‘no one ever leaves the chamber with a sense of injustice’, a ‘big character on the scene’ (*Chambers UK*) and an ‘extremely strong’ arbitrator and a ‘sensible chairman’ (*Chambers Global 2013’s Most In Demand Arbitrators*).

He served as board chairman of the LCIA from 2013 to 2017 and is a former member of the LCIA Court. He is a member of the ICSID Panel of Arbitrators, the ICC Canadian Panel and multiple regional panels (such as AAA/ICDR, SCC, DIAC, KLRC, SIAC and HKIAC). He is a past member of the NAFTA 2022 Committee.

He was general editor of *Arbitration World* from 2004 to 2012. He is the chair of the editorial board of *Global Arbitration Review*, a past chair of the IBA Business Section and IBA Antitrust Committee, and co-author of *Rowley & Baker: International Mergers – the Antitrust Process*. He served as chairman at McMillan LLP from 1996 to 2009, and as chairman emeritus and special counsel from 2009 to 2014.

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The energy industry nurtured and shaped what we now know as international arbitration and, for a host of reasons – resource nationalism, oil price drops, geopolitics, climate change, sanctions and pandemics among them – it has remained one of the discipline’s biggest clients.

The Guide to Energy Arbitrations, published by Global Arbitration Review, provides coherent and comprehensive coverage of the most common, difficult and unusual issues faced by energy firms, from some of the world’s leading authorities. The book has been edited by J William Rowley QC, Doak Bishop and Gordon E Kaiser.

The Fourth Edition is fully updated and has new chapters on gas supply and LNG arbitrations.

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