

Business

International energy disputes: Avoiding, resolving them, part one

By **Barry Leon**

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(June 9, 2023, 10:49 AM EDT) -- Arbitration, as well as alternative dispute resolution (ADR) and dispute avoidance, for energy disputes — including energy transition disputes — were considered in the recently released the Future of International Energy Arbitration Survey Report (qmul.ac.uk).

The 50-page report provides a picture of the state of international dispute resolution in the energy sector, including energy transition.

It is based on a survey that explored the views of over 900 users of dispute resolution from around the world, both energy practitioners and specialist dispute resolution practitioners. Among its valuable features is that it breaks out the responses of “end users” to questions from the overall responses.

The survey was conducted in May – October 2022 by Queen Mary University of London in collaboration with the Pinsent Masons law firm.

A key section of the report is “Arbitration of international energy disputes: is the process fit for purpose?” (at page 28). Four subject areas were considered respecting arbitration for international energy disputes:

“The core task of the survey was to understand how arbitration, as a means of international dispute resolution, is positioned to handle the challenges presented by the dynamic and rapid evolution of international energy disputes. First, we wanted to uncover where disputes were arising and where they were being submitted to arbitration. Second, we looked at the key features of international arbitration, and how well they are attuned to meeting the aims of the parties involved in international energy disputes compared to other forms of dispute resolution.”

The survey also looked at the role that third-party funding might play in the future of international energy disputes, and at how ISDS (Investor State Dispute Settlement) would factor into the mix of global energy disputes. This article does not discuss those areas of the report.

Suitability of international arbitration for resolving energy disputes (Question 33)

Respondents were asked to rate the suitability of international arbitration for resolving energy disputes from “1” to “5” (with “5” indicating it was considered most suitable).

Respondents overall strongly believe in the suitability of arbitration as a means of resolving international energy disputes, as follows:

- Fifty-five per cent of respondents and about 33 per cent of end users chose the highest rating of “5;”
- Twenty-six per cent of respondents and about 40 per cent of end users chose a “4;”
- Fourteen per cent of respondents and about 24 per cent of end users chose a “3;”

- Only five per cent of respondents chose a "2" or a "1," and even less than five per cent of end users chose a "2" or a "1."

Arguably there is value in considering the "5" and "4" rankings together, which would indicate strong suitability responses from 81 per cent of all respondents, and about 73 per cent of end users.

Which features of international arbitration are most important for resolving energy-related disputes? (Question 30)

The three features of international arbitration that were considered by respondents to be most important for resolving energy-related disputes were the following:

- Neutrality: 63 per cent
- Enforcement: 60 per cent
- Choice of arbitrators — technical expertise: 60 per cent

It is important to note that "technical expertise" in the survey was understood broadly to mean an understanding of legal issues in play, along with relevant arbitration laws and rules (i.e., the ability to run an arbitration effectively); technical knowledge of the commercial, engineering and other relevant factual aspects of a given case; and even mediation and conciliation skills relevant in bringing the parties to an amicable resolution of their dispute, without the need for prolonged enforcement of an eventual award.

There were contrasting views from respondents on how specialized/experienced the arbitrators need to be around the technical aspects of the dispute, although respondents' views were more united concerning the need for arbitrators to be flexible around procedural aspects to ensure efficiency.

Lower ranking features of international arbitration for energy-related disputes were the following:

- Confidentiality: about 45 per cent
- Speed: about 30 per cent
- Choice of seats: about 28 per cent
- Flexible case management: about 22 per cent
- Availability of interim and conservatory measures: about 18 per cent
- Choice of rules: about 16 per cent
- Choice of arbitrators — diversity of arbitrator candidates: about 14 per cent
- Commitment to "greener" arbitrations: about three per cent

Which procedural elements are most important for energy-related arbitrations? (Question 31)

The procedural elements that were most important for energy-related arbitrations were the following:

- Technical expertise (tribunal/counsel/experts): 76 per cent
- Expedited procedures (including faster constitution of arbitral tribunals and time limits for awards): 50 per cent
- Less formal/more flexible proceedings: 30 per cent.

Lower ranking procedural elements were:

- Emergency arbitrator mechanisms
- Ability to consolidate cases or join third parties
- Virtual hearings
- Earlier and more frequent case management conferences

- Availability of sector-specific rules
- Summary/early disposal
- Sanctions for delay tactics
- Restricting length and number of submissions
- No or limited document discovery
- Technical solutions such as institutions' case management platforms
- Documents-only arbitrations.

This is part one of a two-part series. Part two will look at suggestions by survey respondents for innovations to make arbitration more economic, accessible and efficient; survey respondents' views on the suitability of international arbitration for energy disputes; survey respondents' views on the importance of preventing disputes or resolve them early; and the arbitration community's greener practises.

The Honourable Barry Leon is an independent arbitrator and mediator with Arbitration Place, 33 Bedford Row Chambers (London) and Caribbean Arbitrators. He was presiding judge of BVI's Commercial Court (2015-2018) and is a former chair of ICC Canada's Arbitration Committee. This article is based on his presentation at the June 1, 2023 Young ICCA (International Council for Commercial Arbitration) / YCAP (Young Canadian Arbitration Practitioners) symposium in Vancouver, in connection with the ICCA / VanIAC (Vancouver International Arbitration Centre) Conference. He is a member of the VanIAC Domestic Arbitration, International Arbitration, and Mediation Panels, and of Campaign for Greener Arbitrations, North America.

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