

***The Practice of International Commercial Arbitration:  
Beginning, Middle and End***

***Part 1: Commencing an International Commercial Arbitration:  
Fundamentals and Strategy***

**PROGRAM GUIDE**

**ACT I — DRAFTING AND NEGOTIATING THE ARBITRATION CLAUSE**

(25:20) **Introduction to the Workshop and Act I - Prof. Christopher Gibson, Workshop Co-Chair**

**Act I, Scene I — WHAT SHOULD BE IN THE DISPUTE RESOLUTION CLAUSE?**

Counsel for TorGas and Drill-BD in separate conversations discuss the provisions they want to include in the dispute resolution clause of the Turnkey Contract being negotiated between the parties. What are the relevant components of a dispute resolution clause that the parties might consider? How may the parties' respective civil law and common law traditions influence their views as to what provisions the clause should contain? TorGas has been disappointed by a prior interminable arbitration and is concerned about costs and potential foot-dragging in arbitral deadlines and procedures. To what extent does the designation of a certain governing law and rules of arbitration affect the content of the clause?

**Stage Left — Drill-BD's Discussion:**

First, Drill-BD's in-house lawyer and external counsel (who is not a litigator but rather a commercial lawyer specializing in the field) are in Torvia in the midst of tortuous negotiations on the contract. They still need to discuss the dispute resolution provisions and ring an arbitration partner at home in the USL to get some headline points. A sleepy lawyer in the USL answers the phone and recites a series of things to look for – widest possible discovery, extension of grounds of appeal (notwithstanding Mattel), NY seat, avoid Torvian law and courts, and so on and so forth.

In-House Counsel for Drill-BD, Inc. .... **Thomas Sprange**  
Outside Counsel for Drill-BD, Inc. .... **Abby Cohen Smutny**  
Arbitration Counsel for Drill-BD, Inc ..... **Audley Sheppard**

**Stage Right — TorGas's Discussion:**

Next, the in-house lawyer and external counsel for TorGas discuss their position on the conclusion of the Turnkey Contract. On the dispute resolution clause, as is traditional in civil law countries, these lawyers engage in a wider practice than one sees in common law countries where specialism kicks in early in practice. They are therefore well versed in arbitration and know what they want to achieve – a relatively quick and efficient procedure. They want an ICC arbitration in Torvia, which they believe will reflect traditional civil law litigation.

In-House Counsel for TorGas ..... **Marc Veit**  
Outside Counsel for TorGas ..... **Philippe Pinsolle**

**(16:30) Act I, Scene II — CAN WE GET WHAT WE WANT: NEGOTIATING THE DISPUTE RESOLUTION CLAUSE**

All of the counsel for the TorGas and Drill-BD meet to negotiate the dispute resolution clause. How might the parties’ conflicting positions be reconciled, including how may arbitration rules be modified to accommodate the parties’ interests?

In-House Counsel for Drill-BD, Inc. .... **Thomas Sprange**  
Outside Counsel for Drill-BD, Inc. .... **Abby Cohen Smutny**  
Arbitration Counsel for Drill-BD, Inc. .... **Audley Sheppard**  
In-House Counsel for TorGas ..... **Marc Veit**  
Outside Counsel for TorGas ..... **Philippe Pinsolle**  
Ministry of Energy Official ..... **Eduardo Zuleta**

**(28:43) Discussion: DRAFTING AND NEGOTIATING THE DISPUTE RESOLUTION CLAUSE**

Moderator.....**Prof. Christopher Gibson**

**Moderated Audience Q&A**

**ACT II — REQUEST FOR ARBITRATION, RESPONSE AND COUNTERCLAIM, AND ARBITRATOR APPOINTMENT ISSUES**

**(31:27) Introduction to Act II .....Klaus Reichert, Workshop Co-Chair**

**Act II, Scene I — PUTTING THE SHOW ON THE ROAD – TOR GAS STARTS THE ARBITRATION**

The arbitration counsel for TorGas (based in Francophonía) meets with a Torvian in-house counsel for TorGas and a Francophonian TorGas executive to discuss strategy.

TorGas’s arbitration counsel encourages TorGas to provide her with all relevant documentation and witnesses knowledgeable about the dispute. TorGas’s in-house counsel and executive immediately push back on subjecting their personnel to cross-examination and to the notion of providing any documentation to Drill-BD, or, for that matter, to arbitration counsel. Arbitration counsel assures TorGas that she will convince the tribunal that only minimal – and delayed – disclosure to Drill-BD is warranted, if any.

Arbitration counsel recommends nominating an experienced arbitrator with some familiarity with Torvian law. TorGas, instead, favors nominating someone with a penchant for ruling with Torvian entities.

Arbitration Counsel for TorGas ..... **Wendy J. Miles**  
In-House Counsel for TorGas ..... **Arif Hyder Ali**  
TorGas Executive.....**David Brynmor Thomas**

**(22:47) Act II, Scene II — DRILL-BD RISES TO MEET THE CHALLENGE**

Drill-BD’s in-house counsel, who views international arbitration very much through the prism of USL litigation, meets with its USL arbitration counsel (a USL-trained litigation partner) and an executive of the company.

Arbitration counsel advises Drill-BD’s internal counsel and executive that they should expect: much less “discovery” of documents than they would get in USL-style litigation; a more substantive Response and Counterclaim; and expedited evidence gathering for both the defense and the counterclaim. They agree a strategy to push hard for document disclosure before any substantive merits briefing and to delay the proceedings by filing several preliminary motions, including a request for interim relief to preserve evidence covering communications with Torvian officials. They also discuss the merits of nominating a “hired gun” as arbitrator, and whether to challenge the TorGas nominee.

Arbitration Counsel for Drill-BD, Inc. .... **John Fellas**  
In-House Counsel for Drill-BD, Inc. .... **John L. Gardiner**  
Drill-BD, Inc. Executive ..... **Carla Powers Herron**

**(24:09) Discussion: HOW IMPORTANT ARE THE INITIAL FILINGS? REALITY V. PERCEPTIONS**

Moderator..... **Klaus Reichert**

**Moderated Q&A**

**ACT III — THE PRELIMINARY HEARING TO ORGANIZE THE ARBITRATION PROCEDURE**

**(15:23) Introduction to Act III ..... Jean E. Kalicki, Workshop Co-Chair**

**Act III, Scene I — TORGAS PREPARES FOR THE PRELIMINARY HEARING**

TorGas’s in-house counsel meets with external arbitration counsel to discuss strategies for the preliminary hearing. TorGas’s main goal is to expedite the proceedings and push for strict deadlines, in the hope that an early award will deflect mounting criticism in Torvia of TorGas’s own performance. With this objective in mind, TorGas’s in-house counsel suggests a tight schedule of written submissions accompanied by supporting documentary evidence, but no additional delays for document production and no need for witness testimony. Arbitration counsel explains that international arbitration represents a compromise between civil law and common law traditions, and that the Tribunal will likely reject suggestions that significantly depart from this notion of compromise. He nonetheless pledges to try, to the extent possible within the applicable framework, to limit the scope of information exchange and expedite the proceedings.

In-House Counsel for TorGas ..... **Suzana M. Blades**  
Arbitration Counsel for TorGas ..... **Carlos Loperena**

**(10:14) Act III, Scene II — DRILL-BD PREPARES FOR THE PRELIMINARY HEARING**

Drill-BD’s in-house counsel and external arbitration counsel likewise meet to discuss strategies for the preliminary hearing. Drill-BD hopes to bifurcate the merits of the arbitration, first addressing the impact of alleged delays caused by the Torvian government and only later addressing any additional delays attributable to Drill-BD. In-house counsel urges aggressive discovery not only from TorGas, but also from Qualité de l’Essence and the Government of Torvia, since she suspects TorGas is shifting blame to Drill-BD for delays attributable to Torvian officials. She also seeks an interim order requiring preservation of communications with Torvian officials. Arbitration counsel explains that the Tribunal is unlikely to accept an extremely broad approach to discovery. He succeeds to some extent in moderating the client’s expectations, but pledges to be as aggressive as possible without offending the Tribunal.

In-House Counsel for Drill-BD, Inc. .... **Ann Ryan Robertson**  
Arbitration Counsel for Drill-BD, Inc. .... **James M. Hosking**

**(34:21) Act III, Scene III – THE PRELIMINARY HEARING**

The preliminary hearing commences in London, which the Tribunal has requested as more convenient for that session than the arbitral seat in the City of Tor. External counsel present positions that are not quite as far apart as each client originally sought, but that still differ significantly. The Tribunal defers to the parties in areas where they have reached agreement, forges further middle-ground compromise in other areas, and rules (after a short deliberation) on disputed issues where the parties are still far apart. The group then turns to scheduling issues, and discovers that the Tribunal members’ own calendars impose additional constraints for the final hearings, which require revisiting some of the earlier discussions and rulings. The parties ultimately each leave the hearing with a sense of partial satisfaction.

In-House Counsel for Drill-BD, Inc. .... **Ann Ryan Robertson**  
Arbitration Counsel for Drill-BD, Inc. .... **James M. Hosking**  
In-House Counsel for TorGas ..... **Suzana M. Blades**  
Arbitration Counsel for TorGas ..... **Carlos Loperena**  
Arbitral Tribunal – Chair..... **Judith Gill**  
    – Drill-BD appointee..... **Mark Kantor**  
    – TorGas appointee..... **Teresa Giovannini**

**(33:35) Discussion: THE PRELIMINARY HEARING**

Moderator..... **Jean E. Kalicki**