

Arbitration of Energy Disputes: New Challenges

Panel V: Stabilization and/or Renegotiation Clauses in Long Term Energy Agreements

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Stabilization clauses in investor-state relationships

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www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_loe_stabilization_wci_131957794110
- > Freezing clauses / economic equilibrium clauses / hybrid clauses
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Art. 177 of the Swiss International Private Law Act:

- "(1) *Any dispute of financial interest may be subject of an arbitration.*
- (2) *A state, or an enterprise held by, or an organization controlled by a state, which is a party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement."*

Stabilization clauses in commercial relationships

- Purpose
- Conflicts-of-law theories on "*clause gèle de droit*"
- Effect → impact of new laws?

Consideration of mandatory rules

1. According to the state of origin, the provision in question must be given an extraterritorial reach;
2. Close connection between the subject matter of the contract/dispute and the state that sets forth the mandatory provision;
3. Result must be in line with the concept of truly international public policy or commonly accepted international standards ("content check")
 - i. Transnational public policy character; AND
 - ii. Universally recognized legally protected interest , or
 - iii. Strong public interest of concerned state (e.g. Article 9(1) Rome I Regulation)
4. Result must seem reasonable and appropriate given the overall circumstances ("reality check")

Renegotiation clauses

- > Purpose: introduce right to renegotiation
- > Example: Article 34.12 of Model Exploration and Production Sharing Agreement of Qatar of 1994:

"Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the effective date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties exceed [...] percent during the term of the Agreement, both Parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either party to arbitration pursuant to Article 31."

Renegotiation clauses (cont'd)

- > Important to define
 - > Triggering event
 - > Process for negotiations

- > Consequences of
 - > Breach of negotiations in good faith
 - > Negotiations but no agreement

- > Adaptation clause vs. renegotiation clause

Thank you for your attention.

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