



War stories on disputes in environmental and energy cases

Energy related construction disputes

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Facts of the case

- Contract for work and labour re construction of customized boiler membrane walls for a steam boiler in a steam power plant facility
- Claimant: German multinational leader in design, supply and installation of power generation systems
- Respondent: Polish boiler manufacturer, specialised in design/manufacture of a wide range of boiler units
- New supercritical steam boiler technology, incl. welding specifications, introduced and prescribed by Claimant (Principal)
- Boiler membrane walls to be constructed and delivered by Respondent (Supplier)

Facts of the case (2)

- Supplier expressed doubts in the welding technique/steel prescribed by Principal for boiler construction on a large scale
- Doubts re compliance with EU Directive 97/23/EC (Pressure Equipment Directive; in force at the time)
- Long story short: cracks emerged in several weld points on the membrane walls, which led to extensive repair work, interruptions of the production process and ultimately significant delays in delivery
- Principal claimed over EUR 15 million in damages (administrative costs, quality assurance, various prolongation costs, etc.)
- Counterclaim for Supplier's (unpaid) remuneration

Arbitration

- German Claimant, Polish Respondent/Counterclaimant
- ICC Rules, 3 arbitrators, place of arbitration in Zurich/Switzerland
- Swiss substantive law applicable
- Contract apparently drafted by Claimant's US counsel
 - critical clauses inconsistent with Swiss substantive law on contracts for work and labour;
 - general provisions on reporting duties in case of incidents/deviations were not in line with Principal's actual conduct/instructions.
- Early result: Expert report and several independent reports made Claimant's case difficult (on the merits)

Claimant's procedural tacticts

- Extensive submissions and countless exhibits
 - statement of claim: 42 pages/3 binders of exhibits;
reply: 100 pages/8 binders of exhibits
- Various unsolicited briefs
- Excessive and broad document requests
- Lengthy written witness statements/(over-)use of forensic experts
- Parallel State Court proceedings in Poland (preliminary injunction)
- Disregard of relevant legal questions and isolated focus on broad contract interpretation

«David vs. Goliath» problems in arbitration

- Client with limited funds vs. client with considerable litigation budget
- Amendments of the prayers for relief as the proceedings continue
- Procedural justice in arbitration? Who is responsible?
- Bifurcation: separate issues of contractual breach from quantum issues
- Discussion:
 - (1) bifurcation in energy disputes
 - (2) “David-Goliath problems” in (energy) arbitration?

Thank you

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