

IPBA Manila 2009 - *The Energy Charter Treaty: Dispute Resolution of Construction Claims*

Session Rapporteur: Juliet Blanch

This session was a joint session between the Dispute Resolution and Arbitration Committee and the International Construction Committee and was chaired by Mohan Raviendran Pillay of MPillay Advocates and Juliet Blanch of McDermott Will & Emery.

The session commenced with an introductory explanation from Michelle Sindler of Olswang & Co who provided a very informative guide to the Energy Charter Treaty and, in particular, its relevance to the dispute resolution of construction claims. Michelle explained the political imperative for the Energy Charter Treaty coming into being and she then explained how it worked to protect investments in the energy sector. She highlighted the dispute resolution provisions which enable investors to bring claims against a host state for compensation where the investment has been impaired either through remedies in the local courts or by going to international arbitration at the Investment Centre for the Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce or UNCITRAL.

After Michelle had set the scene, Girolamo Abbatescianni of Abbestiano Studio Legale e Tributario explained how a real current dispute as to the construction of a power station in Nepal could have been resolved had the Energy Charter Treaty applied. Girolamo first looked at dispute resolution under the FIDIC rules and then compared the remedies with those available under the Energy Charter Treaty. The talk was very thought provoking as Girolamo took the delegates through the advantages and disadvantages of FIDIC and Energy Charter Treaty dispute resolution provisions.

Finally, Philip Bruner of the Global Engineering & Construction Group of JAMS looked specifically at the issues of fraud and corruption in the energy construction sector with particular reference to the impact of an investor's rights to claim relief under the Energy Charter Treaty. Philip analysed statistics showing the incidence of fraud and corruption in the construction sector and he also considered the potential impact of the US Foreign and Corrupt Practices Act on both the construction company and also its professional advisers

were it to be shown there had been fraud or corruption in the investment or operation of the investment.

The topic engendered some lively discussion as to the role of the arbitral institutions in trying to take a stand against corruption and also as to one delegate's own experience as to her difficulties in seeking to persuade the US to assist investors where there were allegations of corruption.