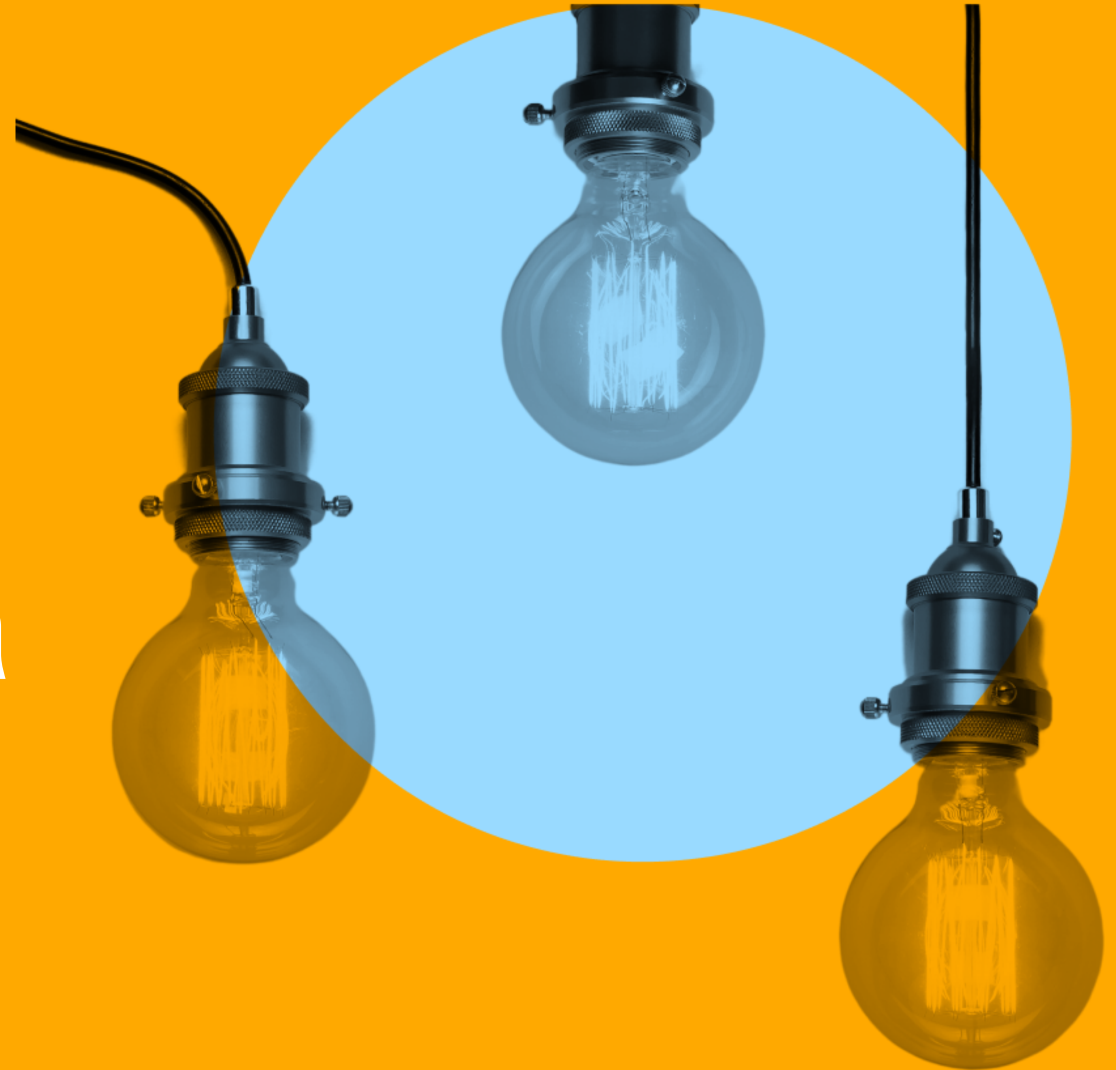
JUS CONNECT

INDUSTRY INSIGHTS ISSUE 8

Energy Arbitration Report



October 2023

A report prepared by Jus Connect

Table of Contents

Foreword 3

Introduction 5

Energy Arbitration Cases on Jus Mundi 8

Most Selected Arbitral Institutions 12

Most Popular Arbitration Seats 17

Most Appointed Arbitrators 22

Most Active Arbitration Teams 29

- Chambers
- Governments
- Law Firms
  - In America
    - Brazil
    - North America
  - In Asia-Pacific
  - In Europe
  - In the Middle East & Turkey

Most Active Expert Firms 39

Fuel for Thought: Regional Perspectives in Energy Arbitration 41

Annex 1 - 2022-2023 Energy Arbitration Cases Available on Jus Mundi 123

Annex 2 - 2023 Shortlist of Arbitral Institutions with an Energy Caseload by Region 134

Annex 3 - 2023 Shortlist of Top Energy Companies in Alphabetical Order 139

Foreword

This Report is part of Jus Connect's Industry Insights Series, a collection of industry-focused arbitration reports. In each issue, we examine the extensive international arbitration data available on our platform. We aim to provide valuable insights, backed by data, on arbitration within a particular economic sector.

In this issue, we present a goldmine of information based on the data available on Jus Mundi and Jus Connect as of September 2023 to explore the energy industry and including both the oil & gas and electricity & renewables sub-sectors. Due to the prevalence of confidentiality in arbitration, we cannot be exhaustive and include every existing energy arbitration case document in our analysis.

Still, Jus Mundi is proud to have the most comprehensive database in international arbitration, both in investor-State and commercial arbitration. As of September 2023, over 80,000 case documents are freely available on our platform, which is continuously updated for the most thorough legal research possible. In addition, over 70,000 individual and firm profiles are available on Jus Connect.

We collect data using artificial intelligence through local public resources and open sources. We also have over 20 partnership with major institutions — such as the ICC, AAA-ICDR, HKIAC, CBMA, and LACIAC — as well as collaborative partnerships with leading organizations — such as the IBA, which receives arbitral awards from various contributors globally, the CEA, and the UAA. These partnerships enable us to give you exclusive insights into the diverse commercial arbitration landscape. In fact, some of them are sharing their statistics and insights into their respective regions in this Report, *i.e.*, SCC and BAC.

Each edition presents a unique overview of arbitral institutions, arbitral seats, key actors involved, and exclusive statistics in a specific industry based on the data available on Jus Connect and Jus Mundi.

In this issue, you have access to:

- New statistics and data-backed insights in energy arbitration;
- Select regional rankings of the most active law firms in energy arbitration;
- A range of unique and in-depth energy insights and regional perspectives from leading experts from around the world — including lawyers, experts, arbitral institutions, and in-house counsel;
- A list of energy arbitration cases filed in 2022-2023, in Annex 1;
- A shortlist of the arbitral institutions per region managing energy arbitrations, in Annex 2.
- A shortlist of the top energy companies in the world in 2022 and their known lead in-house counsel, in Annex 3.

We hope you enjoy our complimentary Report and learn from the data available on our platforms.

You may also enjoy our other Industry Insights Reports on:

- Construction Arbitration,
- Mining Arbitration,
- Electricity & Renewables Arbitration, and
- Maritime Arbitration.

Explore emerging trends in energy arbitration. Dig in!

Acknowledgments

We would like to express our gratitude to all the excellent contributors, their firms, as well as the arbitral institutions that have collaborated with us in producing this Report. It has been a true pleasure to work with such esteemed arbitration practitioners from all around the world.

Thank you to the Jus Connect and Jus Mundi teams for making these extensive Reports possible, especially to Helene Maïo, Fernanda Mello Alves, Thioro Sylla, and Jean-François Perrault

Clémence Prévot

Editor-In-Chief of Daily Jus
Senior Content Marketing Manager of Jus Connect and Jus Mundi

ABOUT THE CHIEF EDITOR

Clémence Prévot *is a former arbitration lawyer, qualified in New York and Paris, who now manages* **Jus Mundi** *and* **Jus Connect***'s original publications, content collaborations,* **newsletter***, and our famous* **Industry Insights Reports***. She is also the Editor-in-Chief of* **Daily Jus***, your all-in-one resource for all things arbitration.*

She brings practical insights to the content created at Jus Connect and Jus Mundi, thanks to her all-around experience in arbitration. She has worked in law firms and an arbitral institution, as a mediator, and with third-party funders, in different jurisdictions.

Reach out *to her with feedback, content ideas, and suggestions! (She doesn't bill for her time anymore, so don't hesitate to get in touch!)*

Introduction

In the ever-shifting landscape of the energy industry, where innovation and change are constants, resolving complex disputes has become not just a necessity but a linchpin for progress. The sector has undergone a remarkable transformation, driven by cutting-edge technology and an urgent global focus on sustainability. Traditional energy sources have been reimagined, paving the way for ingenious renewable alternatives and intelligent, eco-friendly solutions.

Setting the Stage: The Dynamic Energy Environment

Enter energy arbitration, a specialised form of dispute resolution that stands as a cornerstone in this intricate sector, encompassing both traditional fields like oil & gas as well as emerging sectors such as renewables. It ensures that conflicts, inherent in an industry of large-scale projects and substantial investments, are efficiently resolved. Within its ambit, energy arbitration navigates through a myriad of challenges – from contractual disputes between energy producers, suppliers, and investors to disagreements regarding project development and financing, as well as disputes arising from regulatory compliance and environmental concerns.

Energy arbitration provides a structured framework overseen by arbitrators possessing industry knowledge, which ensures the consideration of the complexities of energy contracts, regulatory frameworks, and environmental regulations. In the conventional realm of oil & gas, where global demands persistently surge, stability in contractual relationships is paramount. Energy arbitration acts as the bedrock, settling disagreements, averting disruptions in energy supplies, and ensuring the flow of resources. This stability is the fertile ground from which innovation springs forth. Energy companies, secure in the knowledge that disputes can be efficiently resolved, can divert their focus towards groundbreaking research and development, propelling advancements in the extraction, processing, and transportation of fossil fuels.

Yet, energy arbitration extends its crucial role into the burgeoning sectors of renewable energy. As the world pivots towards sustainable practices, investments in renewables have reached unprecedented levels. Disputes in these progressive sectors often revolve around intricate matters such as project financing, technology licensing, and meticulous compliance with ever-evolving environmental regulations. In this context, energy arbitration ensures stakeholders a balanced resolution process. This assurance goes beyond mere legal protection; it stimulates innovation in the industry. Knowing that disputes can be efficiently handled through arbitration encourages collaborative efforts. Industry players share their expertise, pushing the boundaries of what renewable energy can achieve.

In essence, energy arbitration not only upholds stability but also fosters innovation, propelling the entire energy industry, both traditional and emerging, toward a sustainable future. Its ability to resolve disputes efficiently and with profound industry insight makes it an indispensable component in the intricate tapestry of the global energy landscape. Therefore, at the intersection of innovation and sustainability, addressing conflicts within energy-related relationships is not just a routine task—it is a practical step forward.

Recent Trends Shaping Energy Arbitration

Recent events have significantly shaped the industry, reflecting the pivotal role of energy in modern economies and the challenges posed by geopolitical tensions and climate change.

One such trend is the notable growth of third-party funding in energy disputes, as exemplified by the new 2022 Dubai International Arbitration Centre (DIAC) Arbitration Rules, containing some innovations attractive to such type of funding in arbitration proceedings. Similarly, in 2022, Nigeria passed a new Arbitration and Mediation Bill containing novel and elaborate provisions concerning third-party funding in arbitration.

Furthermore, the rise in energy investor-State disputes has become a focal point, with debates ranging from the enforcement of foreign arbitral awards (*e.g.*, Preble-Rish v. Haïti and BMPAD), to conflicts between public policies and investor rights. As nations respond to the climate crisis, regulatory shifts might clash with investor protections in investment treaties. Moving ahead, countries could aim to redefine treaty obligations for greater flexibility in transitioning from fossil fuels to renewables and safeguarding climate policies. On the other hand, energy investors may pursue litigation to safeguard their interests during the transition, potentially shifting their focus towards renewable energy ventures.

Government policy changes contribute to the complexity of the energy industry. This complexity is further intensified by the conflict between public policies and investors' interests (See, for instance, the recently initiated arbitration, Lansdowne v. Ireland). A recent example highlighting this conflict is the surge in energy-related cases in Spain under the Energy Charter Agreement (ECT). These cases (*e.g.*, Infracapital v. Spain and OperaFund v. Spain) stem from the country's amendments and the withdrawal of economic support for developers involved in renewable energy projects. According to the Report on Compliance with Investment Treaty Arbitration Awards 2023 (2nd Edition), the country is facing 51 Energy Charter Treaty (ECT) claims, all of them concerning the renewable energy sector.

Additionally, the emergence of Environmental, Social, and Governance (ESG) policies has become a common ground, especially in the oil & gas sector. These policies, while imperative for sustainable practices, also raise concerns among investors about political pressures. The confidential nature of arbitration becomes crucial in navigating this complex terrain, ensuring fair resolution while addressing the growing number of conflicts arising from ESG policies.

According to the 2022 Queen Mary University of London and Pinsent Mason's Future of International Energy Arbitration Survey Report, in the midst of these challenges, common causes of litigation persist, including the construction of energy infrastructure, supply chain disputes, and price volatility of raw materials. This scenario has been aggravated by the war in Ukraine, affecting the energy supply in Europe and with effects worldwide (*e.g.*, Naftogaz and others v. Russia). Conflicts across upstream, midstream, and downstream oil & gas activities are still a very common reality in this landscape.

All these factors create a multifaceted environment where energy arbitration plays a vital role in ensuring stability, fostering innovation, and driving progress in the global energy industry. The industry's dynamic and evolving nature necessitates a robust framework for dispute resolution, making energy arbitration an indispensable component in navigating the complexities of the modern energy landscape.

Diverse Insights: a Global Perspective

To comprehensively explore these pivotal factors impacting various regions, Jus Connect meticulously curated insights from arbitration practitioners across the globe. By engaging with arbitrators, legal counsels, institutional representatives, in-house legal teams, and experts, we have crafted a panoramic perspective on the current energy landscape.

The 2023 Energy Arbitration Report covers a spectrum of critical topics. From navigating the challenges encountered by renewable energy projects in Africa, emphasizing the pivotal role of arbitration in overcoming supply chain obstacles, to discussing Brazil's newly approved Arbitration Convention, shedding light on its implications for the country's dynamic electricity market.

Addressing the complexities of the modernized Energy Charter Treaty (ECT) in the United States, another insightful piece advocates for a harmonious balance between investor rights and climate goals. Meanwhile, in Europe, the impact of economic sanctions on the oil & gas supply chain is meticulously examined, offering practical strategies for managing disputes in this challenging environment.

In the Middle East, the report delves into the intricate legal framework governing oil and gas exploration in Oman, specifically Exploration and Production Sharing Agreements (EPSAs). This in-depth analysis provides valuable insights into potential disputes arising from these agreements, along with methods of resolution guided by specific EPSAs and Omani law.

From an Asian perspective, we dig into the effects of the energy crisis in China with carbon emissions goals and ESG liabilities likely to cause more energy disputes in the upcoming years.

The 2023 Jus Connect Energy Report provides a comprehensive and nuanced understanding of the intricate challenges in global energy arbitration. Readers can expect valuable insights and innovative solutions, ensuring they are well-informed about the complexities and resolutions shaping the current energy landscape.

Explore data-backed insights and enlightening in-depth analysis into the continuous evolutions of the energy sector worldwide.

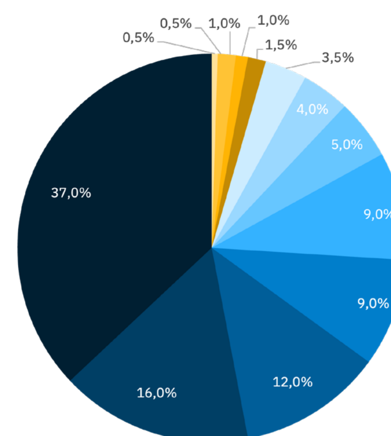
Energy Arbitration Cases on Jus Mundi: an Overview of the Industry

For this Report, we only surveyed the data you can access, double-check, and monitor on Jus Connect and Jus Mundi. Overall, we have found 1,174 arbitration cases available for energy disputes in our multilingual search engine, of which 544 are commercial arbitration cases and 261 investment arbitration cases.

The Evolution of Energy Arbitration Cases

Energy arbitration covers various sub-sectors ranging from renewable energy to nuclear and fossil fuels. Our all-time data reveals a significant prevalence of arbitration cases in the Oil & Gas sector (62%) compared to the Electric Power sector (38%), which historically makes sense. Despite the growing adoption of renewable sources, the prevalence of fossil fuels persists, resulting in an increased need for dispute resolution mechanisms worldwide.

The 2022 Queen Mary University of London and Pinsent Mason's Future of International Energy Arbitration Survey Report sheds light on the root causes of disputes in recent years. Predominantly, disputes have arisen from the construction of energy infrastructure, provision of equipment (including supply chain issues), and activities across upstream, midstream,



- Exploration, extraction and production (upstream): 37%
- Refining, marketing and distribution (downstream): 16%
- Electric power transmission and distribution: 12%
- Renewable – solar: 9%
- Processing, storage and transportation (midstream): 9%
- Fossil fuel: 5%
- Renewable – hydro: 4%
- Renewable – wind: 3.5%
- Nuclear: 1.5%
- Renewable - general: 1%
- Renewable – geothermal: 1%
- Renewable – biomass: 0.5%
- Service activities: 0.5%

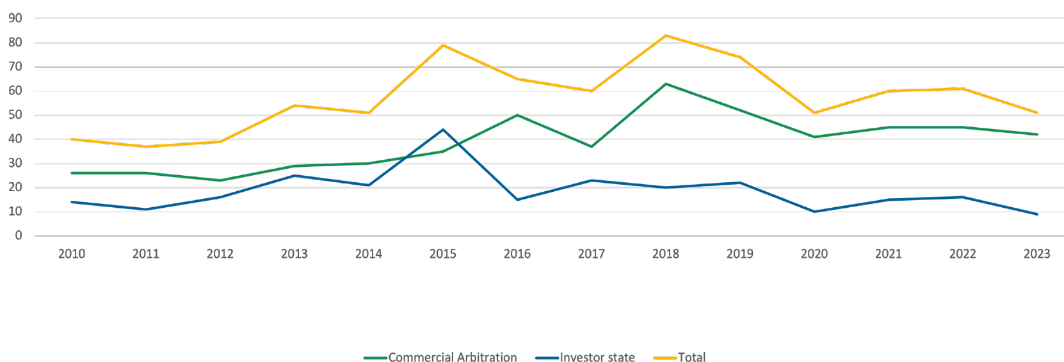
Distribution of cases in Energy Arbitration per sub-sector

- according to our database as of September 2023 -

and downstream oil and gas sectors. Price volatility of raw materials and energy supply, particularly in the oil & gas industry, has also been a significant source of conflicts.

Furthermore, energy-related disputes have a symbiotic relationship with arbitration, making it the preferred choice for resolution. This mechanism of dispute resolution stands out due to confidentiality, enforceability, and the technical expertise of arbitrators.

The 2014 Initial Report on Dispute Resolution in The Energy Sector of the International Centre for Energy Arbitration, which surveyed international arbitration users in the energy industry, indicates that arbitration emerges as the favored dispute resolution method with 33% of the surveyed preferring it. When variations like med-arb, arb-med, and arbitration with a conciliation option are considered, arbitration leads by a significant margin, garnering a combined score of 56%. Litigation is not considered a viable options in most cases.



Evolution of the number of Energy Arbitration cases filed between 2010 & 2023

- according to our database as of September 2023 -

To find cases in the field, simply use our Industry filter for Energy – Electric Power and Energy – Oil & Gas. You can also search per sub-sector to get an even more specific result

Examining the historical data, the number of energy arbitration cases has displayed fluctuations in recent years. However, there is a discernible upward trend highlighted by industry experts and arbitration practitioners, indicating a likely increase in proceedings in the upcoming years.

Renewable Energies and Climate Change-Related Disputes

INVESTMENT TRENDS IN RENEWABLE ENERGIES

The 2022 World Energy Investment Report sheds some light on the state of the renewable energy sector, which helps draw conclusions about the consequences for arbitration in the field.

While investment in renewable energies remained steady between 2011 and 2015, since then and likely due to the adoption of the Paris Agreement, investment in fossil fuels has decreased while it increased in renewable power. As a reminder, the Paris Agreement is a legally binding international treaty on climate change adopted by 194 countries (and the European Union).

Renewables are set to remain the number one power sector category for investment in 2022. Since 2021, the solar photovoltaics (“PV”) subsector has received the most investment within the power sector and comprises nearly half of all renewables investment. Together, solar PV and wind

account for more than 80% of total investment in renewables globally.

Inevitably, the increased investments in the electricity & renewables sectors led to an increase in related disputes, and especially in arbitrations.

The private sector accounts for over 60% of all investments made in renewables. That being said, governments have been, for the most part, providing strong policy support, which has been critical in stimulating private investment in the sector.

The dichotomy between both also led to numerous investor-State arbitrations: the Electric Power and Other Energies sector (as defined by the 2022 World Energy Investment Report) accounts for 24% of the new cases registered before ICSID in the 2022 fiscal year.

As is well-known, the general trend in ISDS cases is for developing nations to be the most frequent respondents. However, renewable energy cases are in stark contrast since they are mostly brought against developed countries.

THE GROWTH IN CLIMATE CHANGE-RELATED DISPUTES

The ongoing revolution in renewable energy technologies and the burgeoning challenges related to innovations like carbon capture are fueling a surge in arbitration cases. The shifting landscape of energy sources necessitates robust dispute resolution mechanisms, making arbitration indispensable in addressing conflicts arising from these developments.

Arbitration is increasingly becoming a platform for climate change-related disputes. As environmental laws and standards are evolving towards greater sustainability, States are finding themselves entangled in investment arbitration cases linked to climate change issues. The recent events surrounding the Energy Charter Treaty (ECT) illustrates this trend whereby environmental concerns are impacting arbitration outcomes.

Indeed, the ECT – under which most energy arbitrations are brought – is currently undergoing a reform to modernize it and address public criticism that the Treaty impedes the clean energy transition. As they currently stand, the ECT's environmental provisions are virtually never referred to by parties or arbitral tribunals in investor-State arbitrations, according to the 2022 Climate Change Counsel report entitled "The Energy Charter Treaty, Climate Change And Clean Energy Transition: A Study of the Jurisprudence".

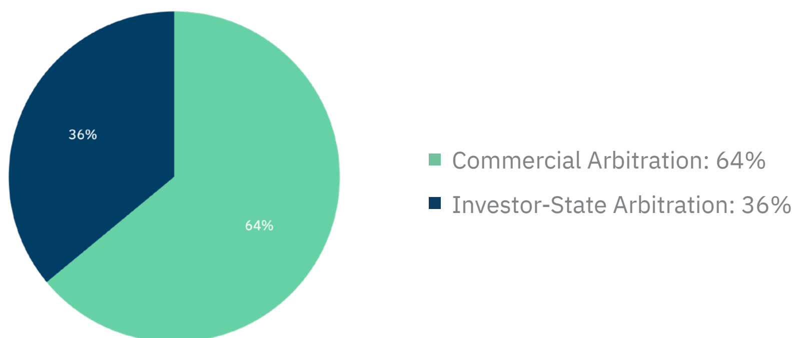
The Treaty was signed in 1994 and entered into force in 1998. Due to the lack of substantial updates to the ECT since the 1990s, it has grown progressively outdated and no longer aligns with the climate ambition set by the European Union (EU) and the international community. There are currently 56 signatories, some of which have officially notified the Depositary of the Energy Charter Treaty of their withdrawal. France, Germany, and Poland's withdrawal notifications will take effect in December 2023.

The EU has taken a leading role in addressing this issue and initiated a modernization process in November 2018. Despite advocating for the Treaty's modernization, EU Member States failed to achieve the necessary majority to ratify the proposed modernized Treaty, as put forth by the European Commission in October 2022.

On July 7, 2023, the European Commission formally introduced a coordinated withdrawal of the European Union from the ECT. This decision was motivated by the ECT's inconsistency with the EU's ambitious climate goals outlined in the European Green Deal and the Paris Agreement.

Learn more about What is Fueling the Future of the ECT?

Trendspotting in Investor-State Arbitration of Energy Disputes



Proportion of Commercial and Investor-State Arbitrations in Energy Arbitration overall

- according to our database as of September 2023 -

64% of all energy cases on Jus Mundi are commercial arbitrations, emphasizing the prevalence of business-related disputes within the sector.

In investor-State arbitration, however, regulatory disputes are the most common since the industry tends to be heavily regulated. In Europe especially, investment in renewable energy was particularly encouraged until regulatory changes cutting down incentives led to a number of arbitrations (*e.g.*, the case of Spain). So much is currently bearing on global energy investment that the number of arbitrations in the field is bound to explode: high fuel prices, economic uncertainty, energy security concerns, climate imperatives, and the Russian-Ukraine conflict are also likely to lead to further investment in renewable energies.

However, trust in the ISDS as a whole is eroding as it faces a legitimacy crisis. For instance, the Report on Compliance with Investment Treaty Arbitration Awards 2023 (2nd Edition) shows the increasing refusal by States to honor adverse awards, thereby failing to comply with their international law obligations.

According to the study, Spain has garnered attention for its lack of compliance with arbitration awards. It is the most uncompliant State in the number of unpaid arbitral awards (15 awards), ex aequo with Venezuela and ranking before the likes of Russia and Argentina. The total amount of unpaid awards by Spain has surged, reaching an alarming USD 1.3 billion, mostly involving renewable energies. The country's stance is part of a larger pattern within the European Union, where several Member States, including Italy, Czech Republic, Croatia, and Poland, are among the top 20 States that have failed to comply with adverse awards.

The EU arguably exhibits an anti-arbitration attitude, leading to increased enforcement success outside its territory, particularly in the UK, Australia, and the US. This shift in enforcement patterns signifies a broader international dynamic where countries outside the EU uphold arbitration awards, creating a more favorable environment for successful enforcement.

CONCLUSION: FORESEEABLE ADDITIONAL DEVELOPMENTS

Geopolitical events, such as Russia's invasion of Ukraine, have given rise to global energy supply and security worries. These concerns have the potential to reshape the course of the worldwide energy shift. As a result, dormant fossil fuel initiatives might make a comeback, and conflicts tied to energy transition may be delayed, presenting distinctive challenges for mid-term energy arbitration.

TOOLTIP

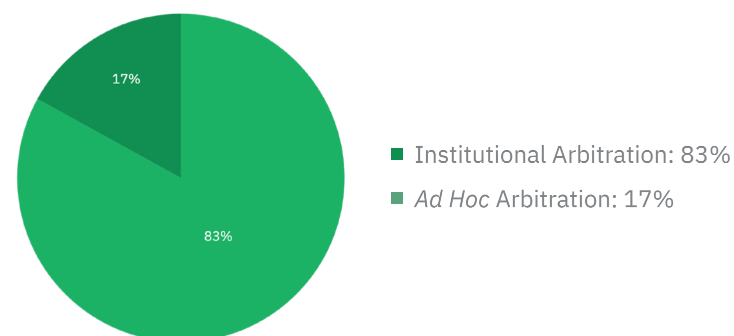
Try Jus Mundi's Monitoring & Alerts feature to get updates on cases, search, arbitrators and arbitration practitioners, or even parties. Legal intelligence automated!

Most Selected Arbitral Institutions

Try our institutions and arbitration rules filters.
Use **CiteMap** for rules of arbitration to find related jurisprudence.

Our exhaustive analysis of Jus Mundi's comprehensive database revealed that parties involved in energy disputes have consistently opted for a variety of local and international arbitral institutions. 51 arbitral institutions have administered energy arbitrations over the years, according to our data, while ad hoc arbitration has remained a steadfast choice.

Ad Hoc Arbitration in Energy Arbitration



Proportion of *Ad Hoc* and Institutional Arbitration in Energy Arbitration overall

- according to our database as of September 2023 -

While institutional arbitration naturally dominates the energy arbitration sphere, *ad hoc* arbitration has maintained its status as a viable option over the past decade. Our data illustrates that ad hoc arbitration consistently ranks as the third most preferred type of arbitration. It invariably follows the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC) in terms of popularity

The attractiveness of *ad hoc* arbitration lies in its perceived cost-effectiveness due to the absence of administrative fees. However, it is worth noting that administrative fees are typically not the primary cost center in arbitration. Moreover, several institutions have introduced expedited arbitration rules, with a substantial portion of their cases concluding within 12 months. A prime example is the Stockholm Chamber of Commerce (SCC), where 67% of cases in 2022 resulted in an award within a year (See SCC Statistics 2022).

Nonetheless, *ad hoc* arbitration can become protracted and costly when managed inefficiently. Nevertheless, it offers a unique advantage: a customizable level of confidentiality. A survey in the 2014 Initial Report of the International Centre for Energy Arbitration (ICEA Report) emphasized the energy sector's preference for confidentiality in arbitration proceedings, with 80% of respondents favoring it. 37% of them favor an enhanced privacy and confidentiality offered in some jurisdictions. For instance, the 2010 Scottish Arbitration Act renders confidentiality actionable and court proceedings anonymized.

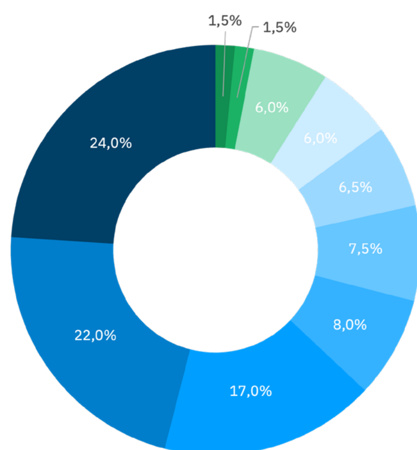
Only 20% of the surveyed supported transparency in arbitration, including 12% in favor of publishing arbitral awards.

Confidentiality in arbitration hinges on three key factors: the parties' willingness to agree on a confidentiality clause, the arbitral rules governing the proceedings (usually institutional rules), and the local laws of the arbitration seat's jurisdiction.

Ad hoc arbitration's popularity in energy disputes can be attributed, in part, to these considerations, which grant flexibility for the parties to tailor the confidentiality provisions according to their specific needs, unburdened by mandatory rules imposed by arbitral institutions (subject to the selection of a favorable seat of arbitration).

In recent times, some parties have become more wary of arbitral institutions due to a growing trend towards transparency in arbitration. Several institutions have amended their arbitral rules to allow for the publication of awards. Far from compelling parties to forego confidentiality or even to publish their awards, these updated rules simply offer the possibility to publish awards and usually involve the pseudonymization of such awards. These changes aim to balance privacy and confidentiality concerns while fostering consistency and legal certainty in arbitration.

Most Selected Arbitral Institutions: Key Takeaways



- International Centre for Settlement of Investment Disputes (ICSID): 24%
- International Chamber of Commerce (ICC): 22%
- *Ad hoc*: 17%
- Permanent Court of Arbitration (PCA): 8%
- American Arbitration Association - International Centre for Dispute Resolution (AAA-ICDR): 7.5%
- London Court of International Arbitration (LCIA): 6.5%
- Others: 6%
- Stockholm Chamber of Commerce (SCC): 6%
- China International Economic and Trade Arbitration Commission (CIETAC): 1.5%
- Singapore International Arbitration Centre (SIAC): 1.5%

Most selected arbitral institutions in Energy Arbitration overall

- according to our database as of September 2023 -

The **top 3** arbitral institutions in energy arbitration –namely the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), and the Permanent Court of Arbitration (PCA) – have administered an impressive **53.5%** of all energy arbitration cases available on Jus Mundi.

Although these institutions are reputable and dependable, our analysis underscores a certain lack of diversity in institutional choices within the energy arbitration arena.

Our database reveals that European institutions are prominently featured in energy arbitration, closely followed by institutions in the Americas, primarily the United States (See Annex 2). In contrast, a limited number of institutions in Africa and the Middle East handle energy disputes, according to our data. Notably, in the Asia-Pacific (APAC) region, an increasing number of arbitral institutions are managing energy cases, with the China International Economic and Trade Arbitration Commission (CIETAC) and Singapore International Arbitration Centre (SIAC) gaining popularity in recent years, according to our data.

ICSID: A DOMINANT FORCE IN ENERGY ARBITRATION

Unsurprisingly, ICSID stands as the primary arbitral institution in energy arbitration, with 229 energy cases available on Jus Mundi as of September 2023.

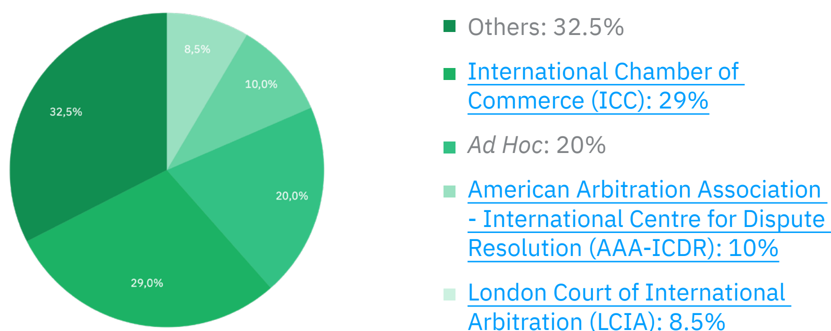
Insights from ICSID Annual Reports offer valuable perspectives on developments in energy arbitration.

Historically, the extractive (*i.e.*, Oil, Gas & Mining) and energy (*i.e.*, Electric Power & Other Energy) sectors, as defined by ICSID Annual Reports, have consistently vied for the highest number of cases registered with ICSID in any given fiscal year. However, since the adoption of the Paris Agreement in 2015, the Electric Power & Other Energies sector has frequently taken the lead, with an upswing in renewable energy investment claims driven

by policy changes to meet climate targets, notably in Europe (*e.g.*, the infamous Spanish renewable energy saga).

In 2022, ICSID reported 24% of its cases related to Electric Power and Other Energies, surpassing any other economic sector, including Oil, Gas & Mining, and marking a noteworthy shift from the preceding year.

COMMERCIAL ARBITRATION TRENDSPOTTING IN ENERGY ARBITRATION



Most selected arbitral institutions for Commercial Arbitration in the Energy Sector

- according to our database as of September 2023 -

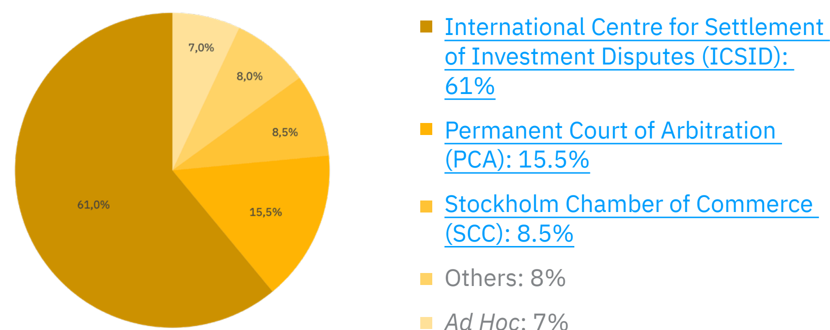
While ICC administers both commercial and investor-State arbitrations in the energy sector, our data reveals that 97% of its energy caseload pertains to commercial disputes.

The ICC registered its 27,000th arbitration case in May 2022, with a case involving African parties active in the energy sector.

In its 2022 Annual Casework Report, the London Court of International Arbitration (LCIA) indicates that Energy & Resources cases represented 11% of its caseload, making it the third most prolific industry for the institution.

Meanwhile, the Hong Kong International Arbitration Centre (HKIAC) reports that a small but growing 0.9% of its caseload comprises energy cases, in its 2022 Statistics (these cases are not available on Jus Mundi at the time of writing).

INVESTOR-STATE ARBITRATION TRENDSPOTTING IN ENERGY ARBITRATION



Most selected arbitral institutions for Investor-State Arbitration in the Energy Sector

- according to our database as of September 2023 -

ICSID maintains its dominant position in investor-State arbitration, including in the energy industry, administering 61% of all investor-State arbitrations in this sector, according to our data. Interestingly, only five arbitral institutions have handled investor-State arbitration cases in the energy field, according to our data.

According to the ICSID Caseload – Statistics, Issue 2023-1, 44% of new cases registered in 2022 were related to the Oil, Gas & Mining and Electric Power & Other Energy sectors (42 % of its all-time caseload (*i.e.*, 1966-2022) in these economic sectors).

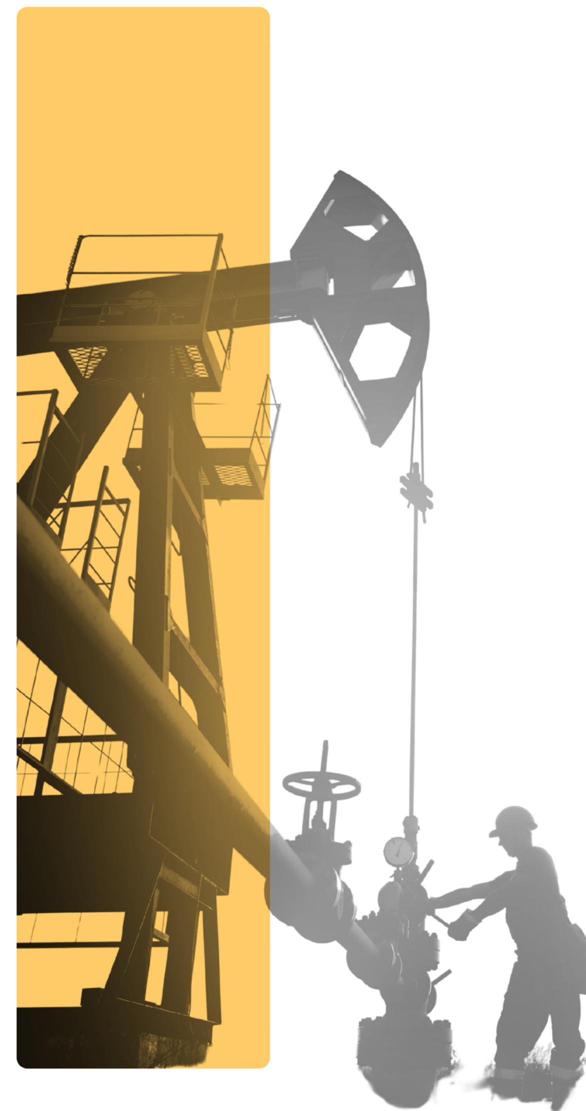
The legitimacy of the investor-State dispute settlement (ISDS) regime has faced increased criticism in recent years, so much so that it has been said to be facing a legitimacy crisis. This was supposedly the reason Bolivia and Venezuela denounced the ICSID Convention in 2007 and 2012 respectively, as well as Ecuador in 2009 (which ended up signing the ICSID Convention again in 2021). It also led to the demise of the intra-EU ISDS system in the wake of the CJEU landmark decision in Slovak Republik v Achmea BV.

This has prompted amendments to the ICSID Rules and Regulations, which entered into force in July 2022, aiming to enhance transparency. Transparency is recognized as essential, as observed in the Vivendi v. Argentina (II): “public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function” (para. 22).

According to the ICSID Caseload – Statistics, Issue 2023-1, 10% of ICSID’s all-time caseload (*i.e.*, 1966-2022) was initiated under the Energy Charter Treaty (ECT), against which 22% of cases were brought in 2022 alone. However, the ECT, one of the world’s largest multilateral investment treaties, is encountering its own challenges.

TOOLTIP

Discover all the data you need about each arbitral institution through our **Arbitral Institution Profiles**.



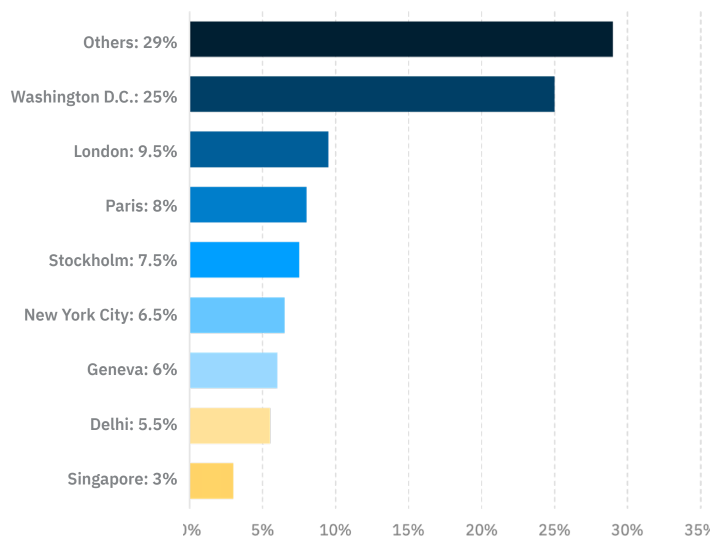
Most Popular Arbitration Seats

The selection of the seat of arbitration holds paramount significance in international arbitration, and this strategic choice is particularly critical in the context of energy arbitration. The seat impacts several key aspects of the arbitral process, making it a pivotal decision in complex energy disputes.

The 2014 Initial Report of the International Centre for Energy Arbitration (ICEA Report) found that of the surveyed international arbitration users in the energy industry, 40% declared that whether the jurisdiction of a given seat of arbitration is party to the New York Convention is the most important factor in selecting a seat of arbitration. The survey shows that the suitability of the local arbitration acts (chosen by 10% of the surveyed) and the stance of local courts toward arbitration (selected by 11% of the surveyed) mean less to parties to arbitrations than the local courts' general reputation for probity (chosen by 21% of the surveyed).

DISCLAIMER:

In investor-State arbitration, ICSID is the primary arbitral institution for electricity & renewables disputes. Although ICSID arbitrations technically do not have a legal seat, our database registers these cases as seated in Washington D.C. in order to differentiate them from cases with unavailable information.



Most selected seats overall in Energy Arbitration

- according to our database as of September 2023 -

Among these, we observe a duality: established seats with a rich history in arbitration and emerging seats that have garnered increasing favor in recent times. However, it is important to note that in numerous instances, the seat of arbitration remains undisclosed, primarily due to the imperative of safeguarding confidentiality.

Remarkably, our findings underscore a noteworthy trend, with the most preferred seats in energy arbitration predominantly concentrated in the United States and Europe. This concentration of popularity in these regions parallels the lack of diversity witnessed in the choice of arbitral institutions for energy disputes.

This overarching pattern reflects the crucial interplay between the choice of the arbitral seat and the overarching strategy in energy arbitration. The preference for well-established seats aligns with the need for a conducive legal framework, expert arbitrators, and procedural infrastructure, which are often characteristic of these jurisdictions. It also underscores the significance of familiarity, accessibility, and efficiency in the arbitration process, all of which these established seats can offer.

However, as the dynamics of the energy sector evolve, new challenges and opportunities are arising, prompting the emergence of alternative seats. These evolving preferences could potentially herald a more diverse and adaptable landscape for energy arbitration in the future, reshaping the traditional contours of choice in this complex and ever-evolving field.

Key Takeaways

- **Paris (**France**)** and **London (**UK**)** remain prominent choices for commercial arbitrations in the energy sector. Remarkably, they also emerge as substantial picks in investor-State arbitrations, albeit with Paris holding a slight edge, as per our data. These cities undeniably serve as two of the world's preeminent arbitration hubs, embodying the trust and reliability of seats nestled within arbitration-friendly jurisdictions. Their popularity across industries is undeniable.

What further bolsters London's allure is the ongoing reform of the English Arbitration Act. This endeavor, set to unfold in the coming years, is poised to elevate London's status as an even more attractive seat. The anticipated enhancements in the legal infrastructure will likely solidify London's position as a leading global center for arbitration, reaffirming its prominence not only in energy disputes but across the entire spectrum of international arbitration.

- Singapore is increasingly gaining recognition as a preferred seat for energy arbitration and many other industries, both within the Asia-Pacific (APAC) region and globally. A pivotal factor in this surge is Singapore's modifications to its arbitration laws in recent years, which have undeniably bolstered its appeal.

- However, **Delhi (India)** takes the lead as the favored seat of arbitration in the APAC region, according to our data. It is even the third most chosen seat in the Energy - Electric Power sub-sector. India, akin to Brazil, boasts a robust tradition of domestic arbitration, providing a strong foundation for the development of international arbitration within its jurisdiction.

Over the past decade, concerted efforts have been made to make India's legal framework more arbitration-friendly, culminating in amendments to the Arbitration and Conciliation Act of 1996 in 2021. These changes, while occasionally sparking controversy, reflect India's aspirations to align itself with other prominent arbitration hubs in the APAC region, such as Singapore and Hong Kong, and to emerge as an international arbitration epicenter.

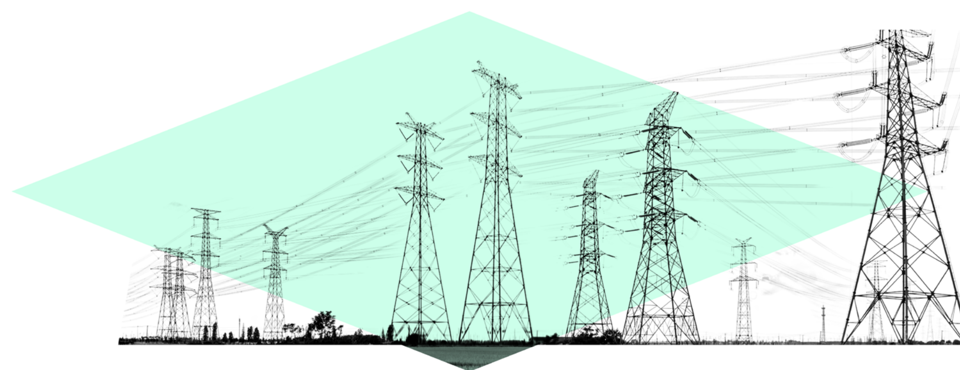
India's commitment to fostering international openness and attracting foreign parties to arbitrate their cases within its borders is evident. However, it is worth noting that while significant progress has been made, India still grapples with certain restrictions that may create the impression of a less arbitration-friendly environment compared to some of its regional counterparts. Despite these challenges, India's dynamic efforts to establish itself as a competitive player in the international arbitration arena remain a noteworthy development in the field.

- **Houston (US)** is steadily emerging as a favored seat for arbitrations in the Energy - Oil & Gas sub-sector. It is often considered the energy capital of the world, with a concentration of major energy companies, including oil and gas corporations, renewable energy developers, and related service providers.

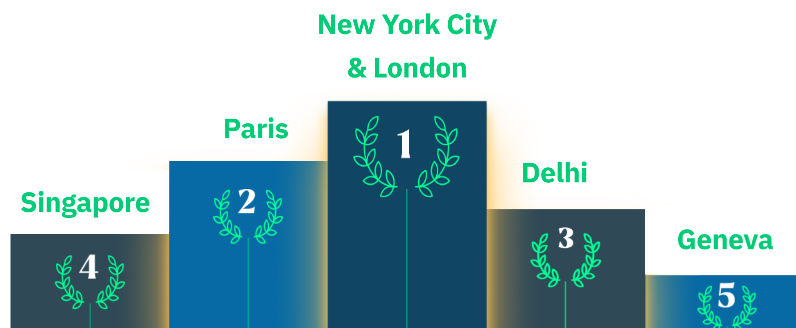
The city boasts an expansive pool of seasoned arbitration practitioners and arbitrators specializing in the energy sector. Texas, as a whole, offers an arbitration-friendly legal framework, marked by a proclivity for local courts to facilitate the enforcement of arbitral awards with minimal interference.

In the realm of energy arbitration, the paramount concerns of confidentiality and privacy cannot be overstated. This is underscored by findings from the 2014 Initial Report of the International Centre for Energy Arbitration (ICEA Report), which reveal that a staggering 80% of surveyed arbitration users in the sector express a strong preference for maintaining the confidentiality of energy arbitration. Among these, a substantial 37% advocate for an even greater degree of privacy and confidentiality available in select jurisdictions.

What further bolsters Houston's appeal in the context of energy disputes is its legal framework, which empowers parties to uphold a robust level of confidentiality and privacy throughout the arbitration process. This aspect proves particularly advantageous in the energy sector, where preserving the secrecy of sensitive commercial and technical information can be critical. Houston's unique combination of industry prowess, arbitration expertise, and a conducive legal framework positions it as a compelling choice for those navigating complex and confidential energy arbitrations.



Commercial Arbitration Seats Favored by the Energy Sector



Top 5 most selected seats in Commercial Energy Arbitration in the last five years

- according to our database as of September 2023 -

- **London (UK)** and **New York City (US)** are the most favored seats in commercial energy arbitration in the last five years, according to our data.

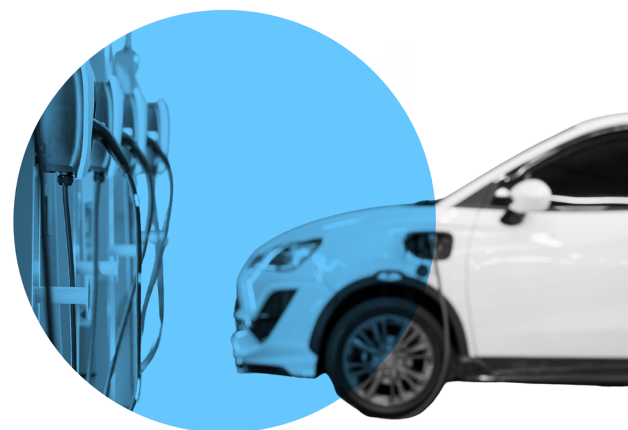
- However, in 2022-2023 (up to September 2023), **Stockholm (**Sweden**)** took first place along **New York City (US)**.

The popularity of Stockholm as an arbitration-friendly seat no longer needs demonstrating. Indeed, Sweden's reputation as an arbitration-friendly jurisdiction is well-established, and this standing has been further fortified by a reform of the Swedish Arbitration Act, effective as of 2019. The amendments introduced in the Act were meticulously designed to augment Sweden's allure to foreign users engaged in international disputes.

Sweden's appeal as a seat of arbitration is underpinned by a profound commitment to values such as transparency, neutrality, and adherence to the rule of law.

The growing popularity of the Stockholm Chamber of Commerce (SCC) in investor-State arbitration within the energy sector further enhances Stockholm's position as a premier seat of arbitration. Our data indicates a prevailing trend, wherein parties who opt for the SCC as the administering institution of their arbitration consistently select Stockholm as their arbitral seat.

Our data points to a notable and steady ascent of **Rio de Janeiro (**Brazil**)** as a favored seat of arbitration in energy disputes. Notably, in commercial arbitration, parties within the LATAM region often exhibit a predilection for a local seat of arbitration, except when foreign parties are involved, even when the object of the dispute or matter is set in the region.



The development of Brazilian arbitral institutions and seats in international arbitration can be primarily attributed to the favorable Brazilian Arbitration Act (BAA), which was enacted 26 years ago. Since its inception, commercial arbitration has emerged as the predominant method for alternative dispute resolution in the country, fostering trust and reliability in the local arbitration landscape.

Regrettably, the possible approval of Bill No. 3,923/21 by the Brazilian Congress, intended to amend the BAA, looms as a potential disruptor. According to the Brazilian Arbitration Committee (CBAr) -the main arbitration entity in Brazil- the proposed changes in this bill have the potential to heighten legal uncertainty and undermine the integrity of Brazil's arbitration system. Its approval could mark a significant step backward, introducing unwarranted State interference in private arbitration proceedings.

In the foreseeable future, it is expected that the number of arbitration cases within the LATAM region, particularly in the energy sector, will burgeon. This surge can be attributed to substantial investments, particularly in renewables, with a likelihood of continued growth. Energy projects, characterized by their capital-intensive and long-term nature, are susceptible to the region's political volatility and abrupt regulatory shifts, making arbitration an increasingly favored method for resolving disputes.

This anticipated growth in arbitration cases is not bound to be exclusive to local seats, as the regional preference for local seats tends to shift when foreign parties are involved, even when the dispute's matter remains within the region. Therefore, as the caseload expands in the LATAM region, it may not necessarily lead to a proportional increase in the utilization of local arbitration seats, underscoring the dynamic and evolving nature of arbitration trends in the region.

Most Appointed Arbitrators

Efficiently select your arbitrators with **Jus Connect**, the professional network tailored-made for the arbitration industry. What's more, verify in just a few clicks if they could possibly be conflicted with our **Conflict Checker**.

The appointment of arbitrators is a pivotal step in the arbitration process. In energy arbitration, a highly technical and intricately nuanced sector characterized by capital-intensive, long-term projects, the need for arbitrators with specialized expertise is paramount.

The task of appointing such arbitrators necessitates a comprehensive search, thorough evaluation, and meticulous consideration.

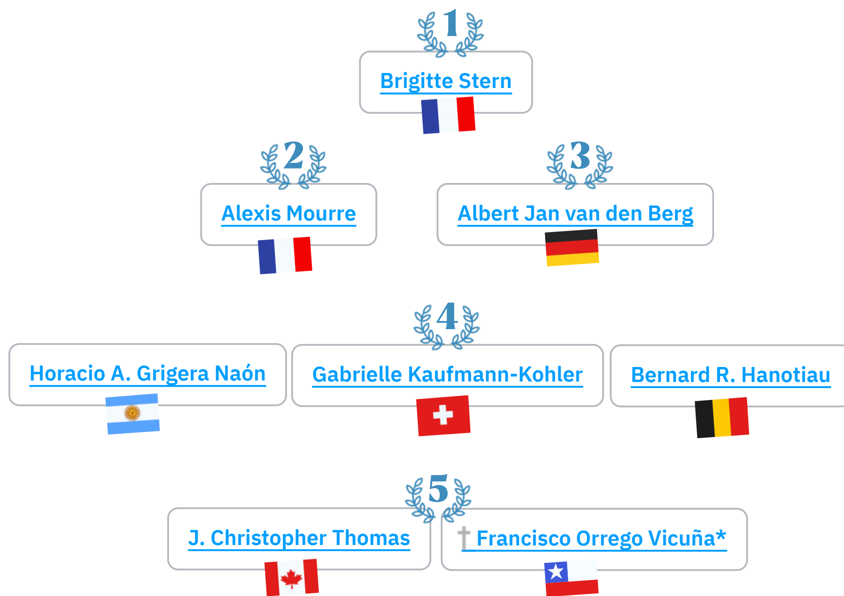
At the time of writing this Report, Jus Connect contains ***over 9,000 arbitrator profiles****, of which 1,391 have appeared in* **energy arbitration cases** *available on Jus Mundi.*

The 2014 Initial Report of the International Centre for Energy Arbitration (ICEA Report) delivers a decisive verdict on the criteria that parties within the energy sector prioritize when selecting arbitrators. The report highlights that, unequivocally, technical expertise reigns supreme as the most critical factor. It conclusively settles the long-standing debate regarding whether parties favor arbitrators proficient in the technical intricacies of disputes or those with procedural acumen, assuming the latter would lead to more efficient arbitral proceedings.

For a substantial proportion of those surveyed, the arbitrator's expertise stands out as the single most crucial element in the dispute resolution process, be it in arbitration or mediation. Speed and cost of proceedings, while important, do not share the same level of priority, with only a fraction of respondents expressing these concerns. They are the number one concern for respectively 10% and 3% of the surveyed, demonstrating that procedural expertise is not a main concern for international arbitration users in the energy industry.

This data illuminates why litigation is met with relative unpopularity as a dispute resolution method within the energy sector. Judges in traditional litigation settings often lack the deep technical expertise that is readily accessible in the realm of arbitration. The specialized knowledge and industry insight brought to the table by arbitrators are prized attributes in resolving the intricate and highly technical issues that define energy disputes.

In essence, the ICEA Report's findings validate the enduring significance of technical expertise in the arbitration process, reinforcing the critical role played by arbitrators with specialized knowledge in the energy sector.



Top 5 most appointed arbitrators in Energy Arbitration overall (inc. *ex aeqo*)

- according to our database as of September 2023 -

** The international arbitration community mourns the loss of Francisco Orrego Vicuña, who passed away in October 2018. As a gifted legal expert, his remarkable contributions to the field will always be remembered.*

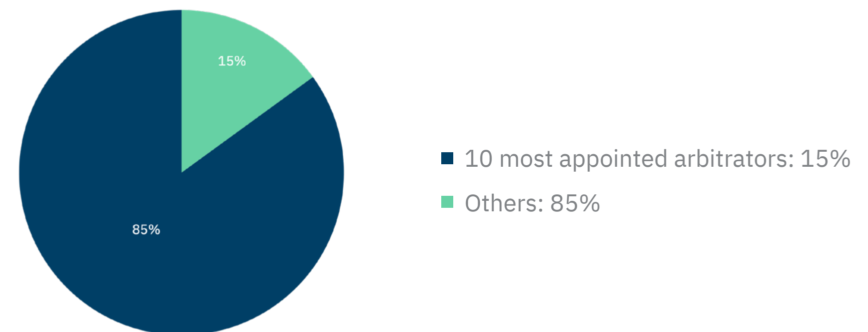
Key Takeaways

- Our top 5 contenders (inc. ex aequo) for the most selected arbitrators all have a heavy caseload in energy arbitration. In fact, some of them are mainly appointed in the field.

The top 5 most appointed arbitrators in energy arbitration, according to our database, prove that the same names tend to come back: most of them have also appeared in other rankings of our Industry Insights Reports.

Of course, their popularity is a testament to their expertise. But little diversity transpires so far in the data analyzed from the cases available on our database, in terms of the most selected arbitrators and the nationalities most represented in arbitrators.

- The late Latin American arbitrator, Francisco Orrego Vicuña, left an indelible mark on the field of energy arbitration. His prolific career and notable contributions continue to resonate, as he remains one of the most appointed arbitrators in energy arbitration to date, even after his unfortunate passing in 2018. Vicuña's enduring legacy serves as a testament to his exceptional expertise and enduring impact in the resolution of complex energy disputes, making his name synonymous with excellence and knowledge in the field.



Top 10 most appointed arbitrators represent 15% of all appointments in Energy Arbitration

- according to our database as of September 2023 -

- It is important to note that two of the top 5 most selected arbitrators in energy arbitration are female arbitrators, namely Brigitte Stern and Gabrielle Kaufmann-Kohler.

Brigitte Stern is the most active arbitrator in energy arbitration, according to our data. She was also in the top 5 most appointed arbitrators in our 2023 Mining and Construction Arbitration Report.

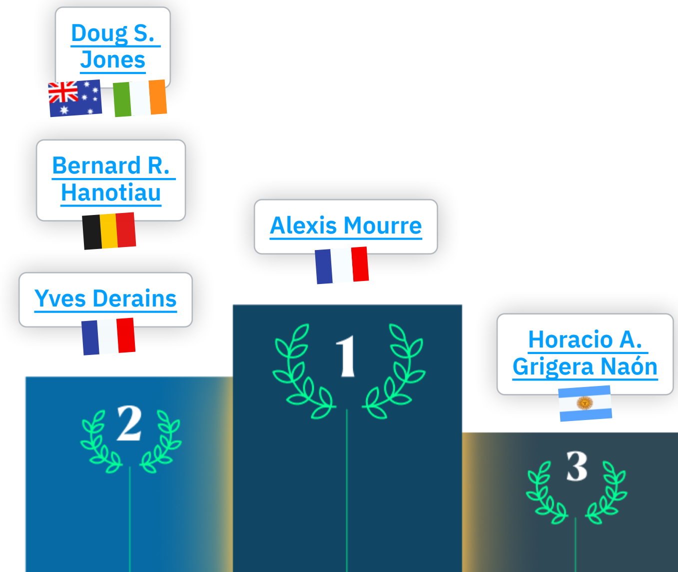
In fact, she is the most appointed arbitrator in the Energy sector and both the Oil & Gas and Electric Power sub-sectors.

-Energy arbitration, in general, tends to count more women acting as counsel and arbitrators. Both Brigitte Stern and Gabrielle Kaufmann-Kohler also appeared in our top 10 most appointed arbitrators in our 2023 Mining and Construction Arbitration Reports.

While there is no denying the expertise and experience of the arbitrators who have consistently been appointed in international arbitration, a prevailing concern remains the lack of diversity in this vital sphere. The composition of arbitral tribunals should ideally mirror the wide spectrum of stakeholders affected by their decisions, ensuring a more comprehensive and equitable approach to dispute resolution. A similar imperative extends to the makeup of counsel teams advocating for parties in arbitration.

A survey of the most frequently appointed arbitrators in the field reveals a stark pattern: a substantial majority of them hail from Europe or the United States, with a relatively small representation from Latin America, as per our data. This prevailing regional concentration underscores the need for greater inclusivity and broader geographical representation in international arbitration. By incorporating arbitrators and legal practitioners from a wider array of regions, the field can more effectively address the diverse interests and perspectives that often converge in the complex world of international disputes.

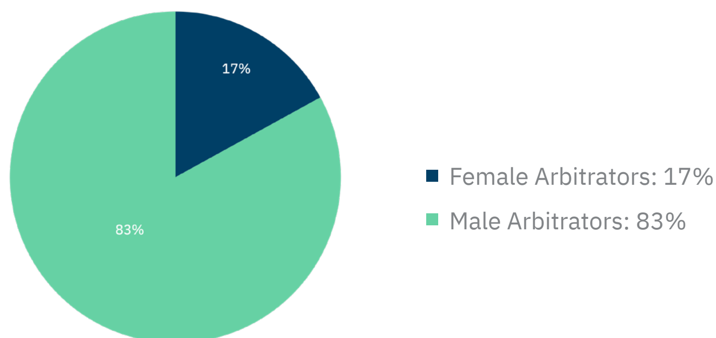
Promoting diversity in international arbitration is not only a matter of equitable representation; it also enhances the quality and legitimacy of the arbitration process. A more diverse and inclusive approach can foster a richer exchange of ideas and experiences, leading to more robust and well-rounded decisions that better serve the global community.



Top 3 most active arbitrators overall in Commercial Energy Arbitration (inc. *ex aequo*)

- according to our database as of September 2023 -

Gender Representation in Arbitrators Appointed in Energy Arbitration



Representation of women as arbitrators in Energy Arbitration overall

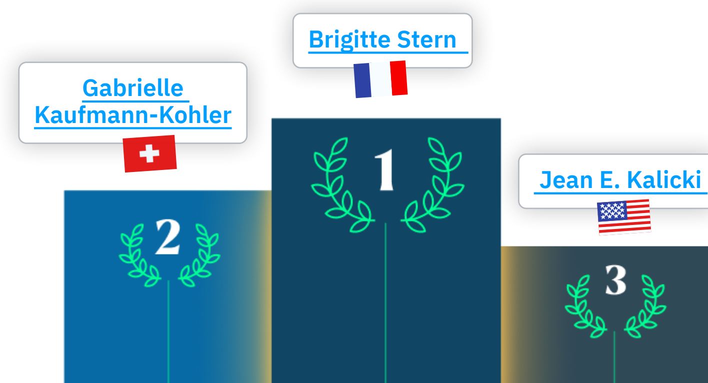
- according to our database as of September 2023 -

- The pursuit of gender equality and diversity in the field of arbitration has undoubtedly been a hot topic in recent years. While a multitude of initiatives have been introduced to drive transformation within the legal profession and the arbitral community, it is disheartening to note that most arbitral institutions continue to report a fairly unchanged number of female arbitrators appointed.

- In energy arbitration, the statistics remain strikingly imbalanced, with only 17% of appointed arbitrators being female. This gender disparity is equally pronounced in the sub-sectors of Oil & Gas and Electric Power.

The stereotype of "male, pale, and stale" arbitrators remains stubbornly ingrained, posing a formidable challenge to achieving true diversity and inclusivity within the field.

Efforts to rectify this gender imbalance and inject diversity into arbitration should persist as a matter of paramount importance. The arbitration community must remain committed to breaking down barriers and promoting the equitable inclusion of talented female arbitrators. The benefits of diversity in the field are manifold, leading to more robust, innovative, and balanced decision-making processes that reflect the complexities and diverse perspectives inherent in the resolution of global disputes.



Top 3 most appointed female arbitrators in Energy Arbitration

- according to our database as of September 2023 -

- A disconcerting pattern emerges wherein the selection of female arbitrators, when it does occur, tends to favor a limited pool of individuals.

In fact, the top 3 most appointed female arbitrators in energy arbitration also appear in the same ranking in mining and construction arbitration, according to our 2023 Industry Insights Reports.

- For instance, according to our data, Brigitte Stern is an extremely active arbitrator with a range of expertise:

- She is the most appointed arbitrator in energy arbitration, according to our data.
- She is also the fifth most active arbitrator in construction arbitration, according to our data.
- She is exclusively appointed in the construction sector for investor-State arbitrations, according to our data.
- She arbitrated more mining disputes than any other economic sector, according to our data, and was the most appointed arbitrator in our 2023 Mining Arbitration Report.
- The vast majority of her appointments came from States.

TOOLTIP

Showcase your entire case history, making it easier for people to hire or appoint you by adding cases to your **Jus Connect** profile now!

INSIGHTS FROM ARBITRAL INSTITUTIONS DATA

Arbitral institutions are emerging as trailblazers in addressing the gender imbalance within arbitration, consistently surpassing parties and co-arbitrators in the appointment of female arbitrators.

- Notably, in its 2022 Statistics, the Stockholm Chamber of Commerce (SCC) reported a significant milestone, with 54% of its appointments being female arbitrators. This achievement is a commendable testament to the institution's dedication to promoting diversity within the field. Unfortunately, this trend does not find an equivalent reflection in the appointments made by the parties, as only 27% of their designations were of female arbitrators.

- A parallel trend emerges from the 2022 Annual Casework Report of the London Court of International Arbitration (LCIA), which revealed that 45% of the institution's appointments were of female arbitrators, contrasting starkly with the mere 19% appointed by the parties.

- This growing emphasis on gender diversity is not confined to a single region, as evidenced by two major arbitral institutions in the Asia-Pacific (APAC) region, the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC).

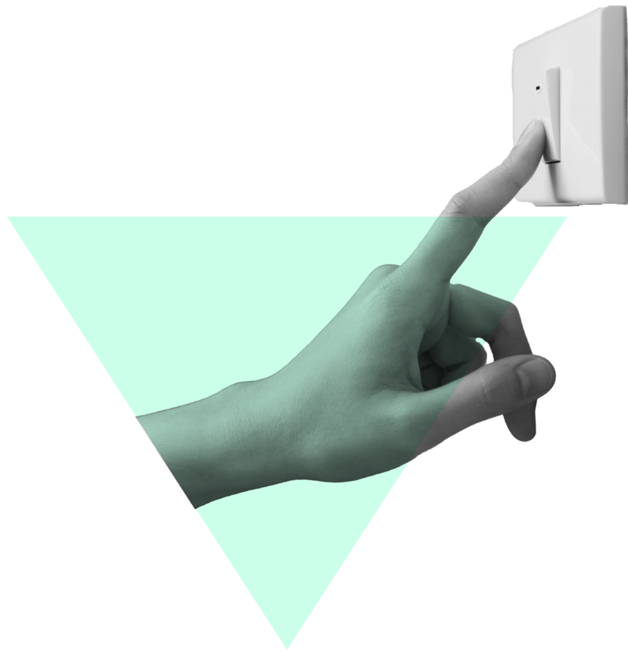
HKIAC, in particular, has made notable strides in enhancing the representation of women in arbitral tribunals. According to its 2022 Statistics, while in 2021, of the 142 appointments made by HKIAC, 31 (21.8%) were of female arbitrators; in 2022, of the 159 appointments made by HKIAC in 2022, 43 (27%) were of female arbitrators.

Additionally, parties increasingly appoint female arbitrators for their HKIAC arbitrations, indicating a positive shift in the mindset of those engaging in the arbitration process. In 2021, of the 118 designations made by parties and confirmed by HKIAC, 15 (12.7%) were of female arbitrators. In 2022, of the 90 designations made by parties and confirmed by HKIAC in 2022, 17 (18.9%) were of female arbitrators.

The number of female arbitrators appointed by co-arbitrators, however, has decreased between 2021 and 2022: 9 out of 46 designations in 2021 (19.6%) to 4 out of 35 designations in 2022 (11.4%).

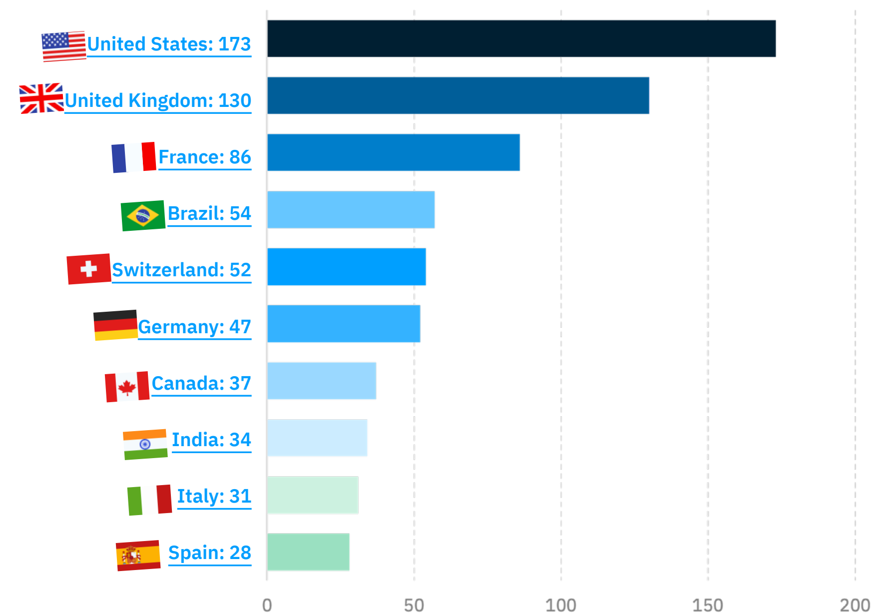
Meanwhile, SIAC came close to achieving gender parity in 2022, with 46.2% of its appointments being female arbitrators, marking a significant step towards fostering a more inclusive and balanced arbitration landscape. Of the 145 arbitrators appointed by SIAC, 67 were female (46.2%).

- These trends within arbitral institutions are indicative of a concerted effort to address the historical gender imbalance in arbitration and usher in a new era of diversity and inclusivity, which will undoubtedly strengthen the quality and fairness of the arbitration process.



Diversity in the Nationalities Represented by Arbitrators in Energy Arbitration

Diversity in arbitration also extends to the nationalities represented by arbitrators, which can significantly influence the global perspective and approaches taken in dispute resolution.



Top 10 nationalities most represented in arbitrators in Energy Arbitration

- according to our database as of September 2023 -

- ICSID's all-time statistics, spanning from 1966 to 2022, affirm that the most frequently appointed arbitrators are predominantly American, British, or French, as highlighted in its Caseload – Statistics, Issue 2023-1.

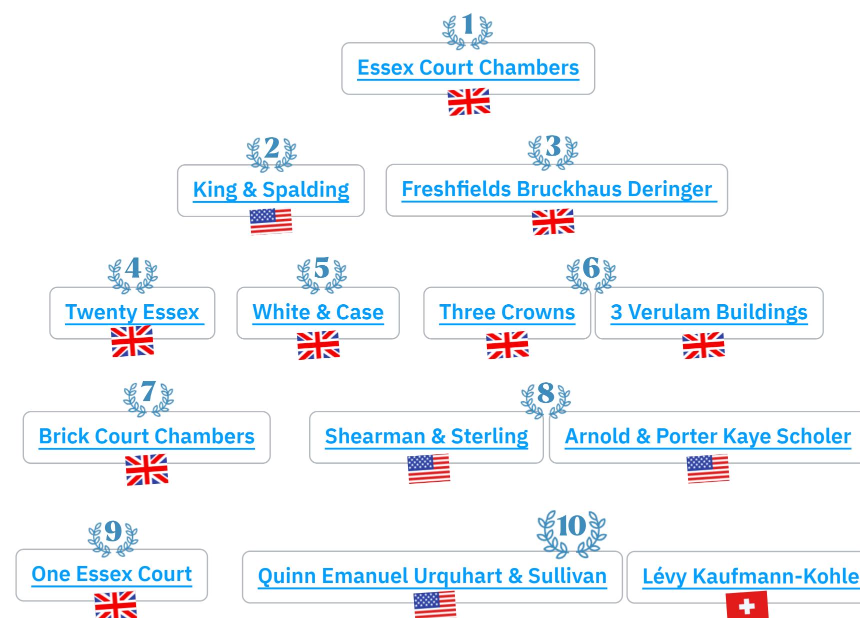
A similar trend is evident in the selection of arbitrators within the realm of energy arbitration, where the majority are Europeans and North Americans, with the noteworthy inclusion of two Latin American arbitrators.

- Brazilian arbitrators emerge as highly selected in the field, according to our data. Much like India, Brazil has cultivated a thriving domestic arbitration scene, marked by the enactment of the favorable Brazilian Arbitration Act (BAA) 26 years ago. As a result, commercial arbitration has become the preferred method for alternative dispute resolution in the country. However, the potential approval of Bill No. 3,923/21 by the Brazilian Congress, which aims to amend the BAA, poses a concerning prospect. The proposed changes are perceived by the Brazilian Arbitration Committee (CBAr), a key arbitration entity in Brazil, as potentially introducing legal uncertainty and undermining the country's arbitration system by permitting undue state interference in private arbitration proceedings.

Notably, Brazil and India, both of which have well-established domestic arbitration frameworks, are the sole nationalities among the top 10 most represented in arbitrators appointed in energy arbitrations that deviate from the typical European and North American tendency.

Most Active Arbitration Teams

As of September 2023, our data revealed ***1,708*** *active arbitration teams in energy arbitration, including law firms and chambers. Our data includes firms active in the post-award phase, e.g., in enforcement proceedings, challenged to awards.*



Top 10 most active Arbitration Practices in Energy Arbitration overall (inc. *ex aequo*)

- according to our database as of September 2023 -

Key Takeaways

- Out of the top 10 most active arbitration practices overall in energy arbitration, 5 are chambers:

1. Essex Court Chambers
2. Twenty Essex
3. 3 Verulam Buildings
4. Brick Court Chambers
5. One Essex Court

The top 3 most active arbitration practices in commercial Energy Arbitration are all chambers as well.

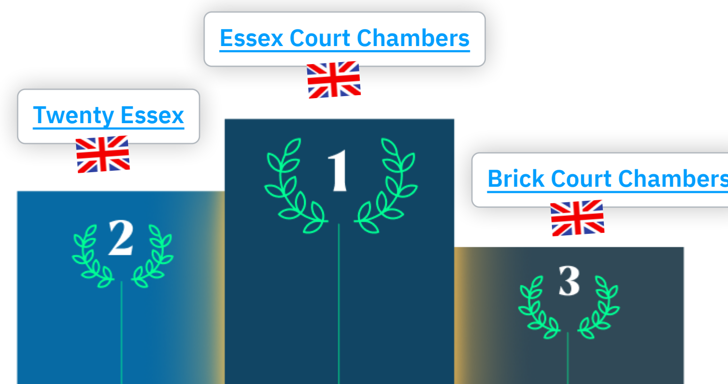
Chambers have established a strong presence in representing parties in energy arbitration over the years. Barristers tend to be highly specialized and possess extensive expertise in specific areas of law.

In addition, barristers are renowned for their advocacy skills, which are honed through years of courtroom and arbitration experience. Their ability to present a case persuasively and effectively is a critical asset in energy arbitration, where complex technical and legal issues require skilled representation.

Barristers are also heavily involved in enforcement proceedings, especially in the UK, which is one of the jurisdictions favored to enforce awards. London is also the second most popular seat in energy arbitration, which means recourse to barristers may be necessary to support the arbitration before local courts..

Barristers are usually complementary to arbitration lawyers and frequently collaborate with them. This synergy enhances the quality and depth of legal services provided to clients.

- Essex Court Chambers is the most active arbitration practice in energy arbitration overall and in the Oil & Gas sub-sector.



Top 3 most active Arbitration practices in Commercial Energy Arbitration

- according to our database as of September 2023 -

- Essex Court Chambers is also the most active in investor-State and commercial arbitration of energy disputes.

According to our data, in 2023 alone, barristers from Essex Court Chambers were involved in at least three cases in energy arbitration, all of which involved antisuit injunctions between German banks and the Russian company RusChemAlliance, an operator of the integrated complex for natural gas processing and LNG production near Ust-Luga in Russia. Gazprom is one of the owners of the company.

All three arbitration cases had similar modalities, according to our data:

- **Institution**: ICC (International Chamber of Commerce)
- **Seat of Arbitration**: Paris, France
- **Applicable law**: England and Wales

UNICREDIT V. RUSCHEMALLIANCE

This case was brought before the High Court of Justice of England and Wales which rendered a judgment ([2023] EWHC 2365) on September 22, 2023.

Stephen Houseman and Stuart Cribb from Essex Court Chambers worked alongside Latham & Watkins lawyers on this case.

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The case involves a dispute over an action for final anti-suit relief. The defendant challenged the jurisdiction of the court, arguing that the arbitration agreement is not governed by English law. The claimant disagreed, stating that it was indeed governed by English law and that England was the proper forum for their claim to an anti-suit injunction.

After considering both parties' arguments and referring to previous judgments such as Enka v Chubb [2020] WLR 4117, Sir Nigel Teare concluded that French substantive rules applicable to international arbitration govern the arbitration agreement due to France being chosen as the seat of arbitration.

Regarding whether England was the appropriate forum for this case, despite acknowledging that only in England could an anti-suit injunction be granted, he did not believe substantial justice couldn't be done in France where damages for breach of contract would likely be available if there were an arbitration. He also noted that while English courts have a juridical interest in ensuring contracts are upheld, so too would a Parisian tribunal seek to enforce parties' agreements.

In conclusion, Sir Nigel Teare dismissed the claim on grounds of lack of jurisdiction and deemed it unnecessary to consider whether relief sough would have been granted had there been jurisdiction.

COMMERZBANK V. RUSCHEMALLIANCE

This case was brought before the High Court of Justice of England and Wales, which rendered a judgment ([2023] EWHC 2510) on August 31, 2023.

Matthieu Gregoire and Paul J. McGrath from Essex Court Chambers worked alongside Allen & Overy lawyers on this case.

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Commerzbank, a German bank, sought an interim anti-suit injunction against RusChem, a Russian company, to prevent it from pursuing proceedings in the Arbitrazh Court of St. Petersburg and Leningrad Oblast. This was claimed to be in violation of an arbitration agreement within an On Demand Performance Bond issued by Commerzbank under English law and subject to ICC Arbitration in Paris. RusChem had demanded full payment under the bond but Commerzbank refused due to EU sanctions.

In response, RusChem initiated proceedings in Russia seeking orders for payment. RusChem acknowledged the arbitration agreement but argued it was unenforceable due to existing sanctions against Russia and doubts about fair resolution in France which also imposed sanctions on Russia.

Commerzbank contended that if not restrained from continuing these proceedings they would lose their contractual right to have dispute resolved per arbitration agreement and risk being subject to default judgment if forced into Russian jurisdiction.

The court found that there is a high degree of probability that the relevant agreement exists; it is governed by English law and includes clauses 11 and 12; it is subject to ICC Arbitration seated in Paris; and that proceedings commenced in the Arbitrazh Courts were likely a breach of this Agreement or Bond itself. The court granted an anti-suit injunction as no exceptional circumstances were identified against doing so despite having Paris as seat of arbitration based on expert evidence regarding French law. The application was brought promptly with no submission made by Commerzbank to the jurisdiction of the Arbitrazh Court.

DEUTSCHE BANK V. RUSCHEMALLIANCE

This case was brought before the Court of Appeal of England and Wales, which rendered a judgment ([2023] EWCA 1144) on October 11, 2023.

Paul Key from Essex Court Chambers worked alongside Baker McKenzie lawyers on this case.

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The dispute involves Deutsche Bank AG («DB») and RusChemAlliance LLC («RCA»), concerning an advance payment guarantee issued by DB to RCA. The guarantee, governed by English law, provided for arbitration in Paris under the ICC Rules of Arbitration. RCA initiated proceedings in Russia despite the arbitration agreement, leading DB to apply for an anti-suit injunction (ASI) against RCA's Russian proceedings at the Commercial Court. This was denied on grounds that England was not the proper forum.

On appeal, it was determined that there is a high degree of probability that the Guarantee existed; it contained clauses providing for governance by English law and ICC arbitration in Paris; Russian proceedings were likely breaching this agreement; agreements should be honoured; DB had acted promptly; and RCA would have access to justice via arbitration in Paris.

However, Bright J questioned whether it was appropriate to grant an injunction given that the seat of arbitration was outside his jurisdiction. After receiving evidence about French law which stated obtaining an ASI wouldn't be possible there, he dismissed DB's application based on his conclusion that granting such relief falls under s.37(1) Senior Courts Act 1981 rather than s.44 Arbitration Act 1996 as argued by DB.

Upon appeal with fresh evidence suggesting a French court will recognise an ASI granted by another court which can do so under its own rules provided it doesn't contradict international public policy, Ground 3 of DB's appeal is accepted and permission is granted for DB to serve their claim out-of-jurisdiction along with granting both requested injunctions.

- Although they do not appear in our top 10 most active arbitration practice overall in energy arbitration, Clifford Chance & Hogan Lovells are in our top 10 most active commercial arbitration teams in the energy sector.

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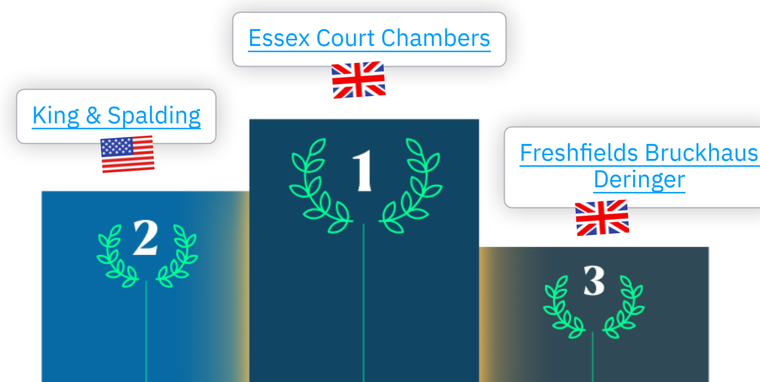

Top 3 most active arbitration practices in Energy Arbitration overall

- according to our database as of September 2023 -

- King & Spalding is the most active law firm in energy arbitration overall. It is also the most active arbitration practice in the Electric Power subsector (*ex aequo* with White & Case), according to our data.

As of late, its Paris, Washington D.C., and Houston offices represent the investor in an investor-State arbitration related to renewables and solar energies in Aderlyne v. Romania (ICSID Case No. ARB/22/13). The ICSID arbitral tribunal was constituted in April 2023.

Top 3 most active law firms in Commercial Energy Arbitration

- according to our database as of September 2023 -

- King & Spalding and Freshfields Bruckhaus Deringer, respectively 2nd and 3rd most active arbitration teams in energy arbitration overall, are also the most hired firms in commercial energy arbitration.

- In 2023, Freshfields Bruckhaus Deringer was hired by the claimant in two oil & gas ICC cases seated in London: Tullow v. Ghana Revenue Authority (II) and (III).

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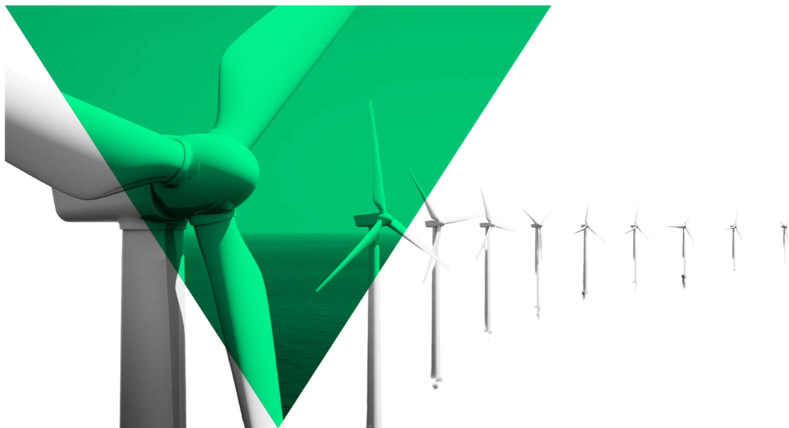
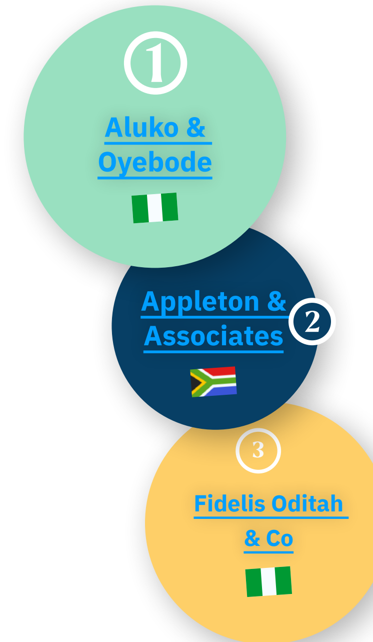
Select Regional Rankings of the Most Active Law Firms in Energy Arbitration

DISCLAIMER:

These regional rankings are based on the localization of the law firms' official headquarters. Please note that the headquarters of these firms have been automatically generated by Chat GPT, an AI language model, and may contain errors or omissions. While efforts have been made to ensure the accuracy and comprehensiveness of the information, the data provided should be treated as a general reference.



AFRICA

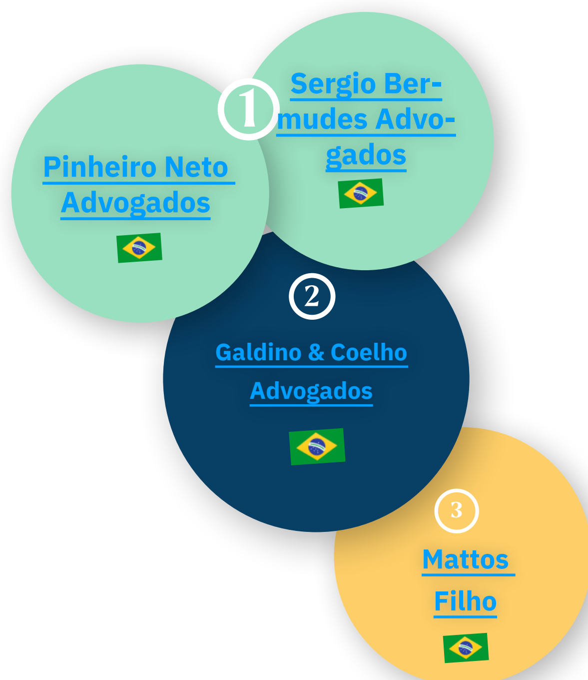


Top 3 most active law firms in Africa in Energy Arbitration

- according to our database as of September 2023 -

AMERICAS

BRAZIL

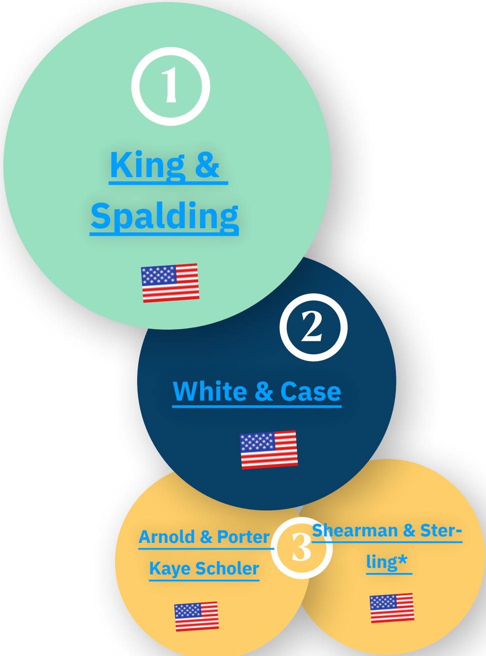


Top 3 most active law firms in Brazil in Energy Arbitration
- according to our database as of September 2023 -

LATIN AMERICA

Top 3 most active law firms in Latin America in Energy Arbitration
- according to our database as of September 2023 -

NORTH AMERICA

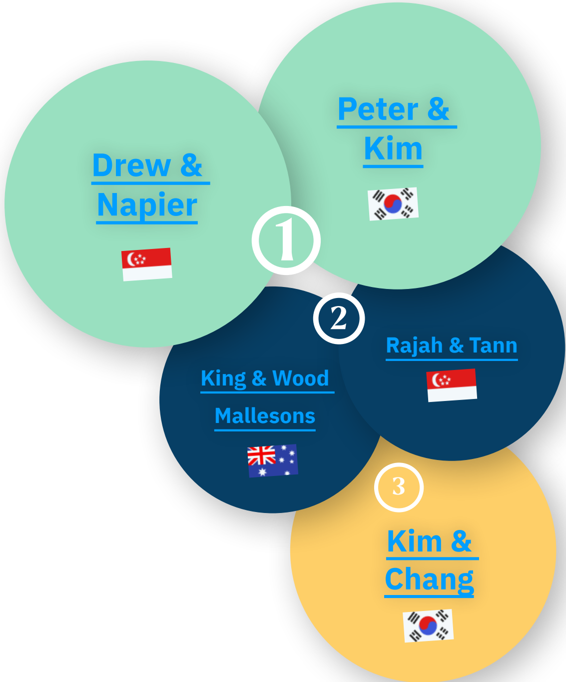


Top 3 most active law firms in North America in Energy Arbitration

- according to our database as of September 2023 -

** On October 13th, 2023, Allen & Overy and Shearman & Sterling announced that the partnerships of both firms have voted in favor of merging to create A&O Shearman. The data taken into account here only accounts for Shearman & Sterling caseload.*

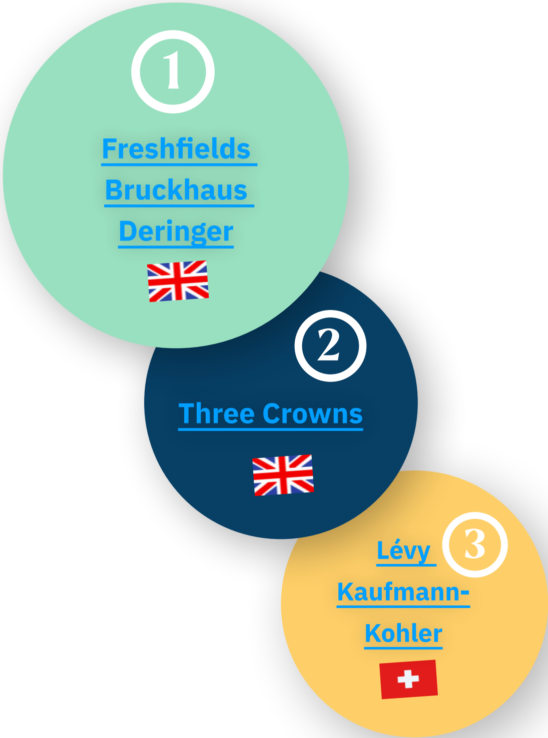
ASIA-PACIFIC



Top 3 most active law firms in Asia-Pacific in Energy Arbitration

- according to our database as of September 2023 -

EUROPE



Top 3 most active law firms in Europe in Energy Arbitration

- according to our database as of September 2023 -

MIDDLE-EAST & TURKEY

Top 3 most active law firms in Middle-East & Turkey in Energy Arbitration

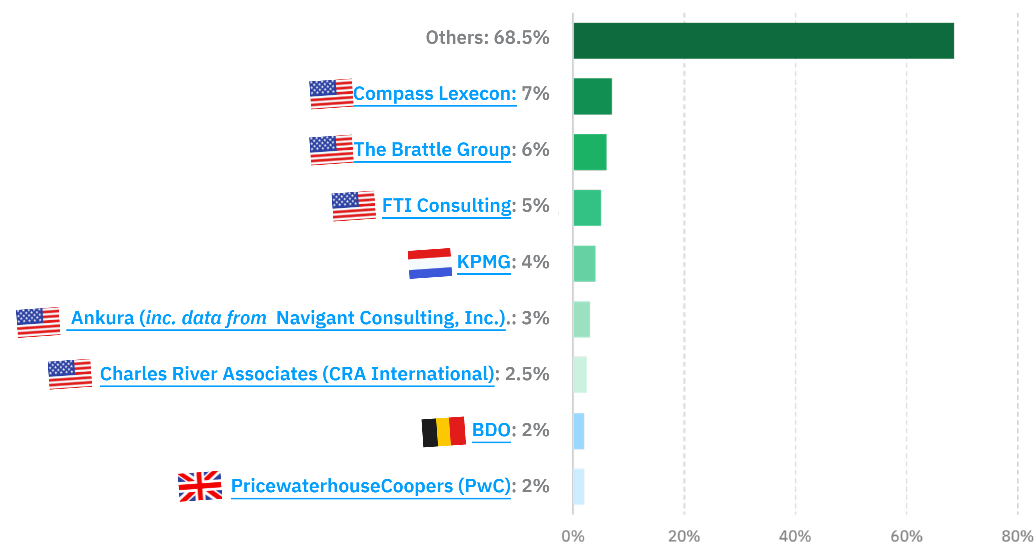
- according to our database as of September 2023 -

Most Active Expert Firms

In energy arbitration, parties and tribunals frequently turn to experts for assistance in addressing complex issues and evaluating damages. Expert evidence is paramount in energy arbitration cases due to the technical complexity of the sector, the need to quantify damages accurately, their knowledge of industry standards, their role in supporting legal arguments, their contribution to dispute resolution strategy, their help in evidentiary support, and their ability to enhance the credibility of your case. Without their expertise, it is challenging, to say the least, to navigate the intricacies of energy arbitration successful.

Make sure to select the right experts who are not only knowledgeable but can communicate effectively, both in their reports and, if necessary, during hearings. Their contribution can make a substantial difference in the outcome of an energy arbitration case.

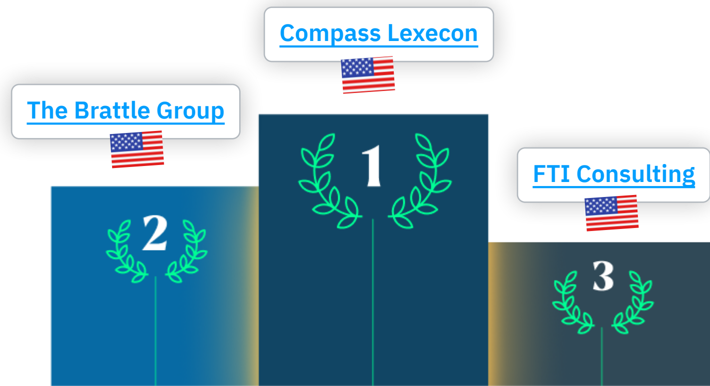
Our data shows that 226 expert firms were engaged in energy arbitrations.

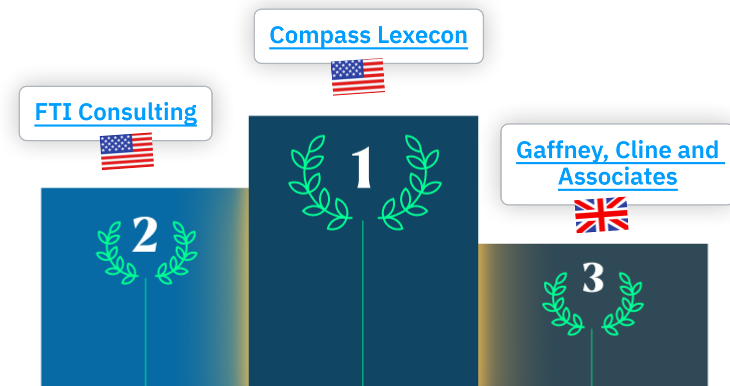


Proportion of expert firms' hires in Energy Arbitration

- according to our database as of September 2023 -

Key Takeaways





Top 3 most active experts firms in Energy Arbitration

- according to our database as of September 2023 -

- The top 3 most hired expert firms represent 18% of all hires in energy arbitration, according to our data.

- Compass Lexecon is indisputably the most hired expert firm in energy arbitration overall, according to our data.

The Brattle Group is the second most active in the Electric Power sub-sector, while FTI Consulting is the second most active in the Oil & Gas subsector.

In fact, FTI Consulting is also the most hired expert firm in mining and construction arbitration, according to our data.

Top 3 most active expert firms in commercial Energy Arbitration

- according to our database as of September 2023 -

In commercial arbitration, Gaffney, Cline and Associates enters the top 3 ranking. The consultancy specializes in the energy sector and is owned by Baker Hughes, one of the world's largest oil field services companies.

Experts and expert firms also have data-backed profiles on **Jus Connect**.

Fuel for Thought: Regional Perspectives in Energy Arbitration

AFRICA

NIGERIA

Accelerating Renewable Energy Projects in Africa: Addressing Supply Challenges with Arbitration 44

By Isaiah Bozimo, Daniel Ihueze, & Afolasade Banjo - Broderick Bozimo & Company

SENEGAL

Accelerating Renewable Energy Projects in Africa: Addressing Supply Challenges with Arbitration Overview of the energy market and disputes in Senegal 48

By Mouhamed Kebe, Aissatou Ndong, & Mahamat Atteib – Geni & Kebe LLP

AMERICA

BRAZIL

The Trivialization of Res Judicata and Its Effects 52

By Bernardo de Freitas Ramos & Livia de Souza Correia - Eneva

Enforcement of Arbitral Awards in Energy Arbitration in Brazil 55

By Elias Marques de Medeiros Neto, Lucas Britto Mejias , & Anna Paula Yazaki Sun - Tozzini Freire

The New CCEE Arbitration Convention: Better Than It Was, Not Quite What It Could Have Been. What to Expect from Arbitration in Brazilian's Electricity Market and a Brief Regional Comparison 59

By Rafael Villar Gagliardi, Julia Schulz Rotenberg, & Eduardo Guilherme Pahl - XGIVS

The Past, Present and Future of Energy Arbitration in Brazil 64

By Lauro Gama Jr. - Lauro Gama Advogados Associados - & João Vicente Pereira de Assis - Mattos Filho

LATIN AMERICA

Hot-Button Issues in The Latin American Energy Sector: Some Considerations on Hydrogen, Lithium, Renewables, and The Assessment of Damages in Early-Stage Disputes in These Industries 68
By Luiz Aboim - Mayer Brown -, Benjamin Roux - Compass Lexecon -, Antolín Fernández Antuña -Antuña & Partners -, José Ricardo Feris - Squire PattonBogs -, & Ruxandra Esanu (LATAP) – Dechert LLP

UNITED STATES

Sanctions and Disputes in the Energy Sector 72
By Diego Brian Gosis, Quinn Smith, & Ignacio Torterola – GST LLP

What is Fueling the Future of the ECT? 75
By Juliya Arbisman, Luis Fortuño, & Niyati Ahuja – Steptoe & Johnson LLP

HIGH VOLTAGE WISDOM: EXPERTS ADVICE

Helping Experts Assist the Tribunal: Energy Expert Witnesses Share Lessons Learned 79
By Ajey Chandra & Peter Bartlett - Baker & O'Brien

Reasonable Return Framework for RES in the Current Context 83
By Richard Caldwell & Fernando Bañez - The Brattle Group

ASIA PACIFIC

CHINA

Lighting the Way: The Arbitral Institution Illuminating Insights 86
Shifting Landscape: New Trends in Energy Disputes in China
By Leslie Zhang - United Energy Group Limited & Beijing Arbitration Commission

MALAYSIA

Fees and Tariffs in Europe's Renewable Energy Landscape: Lessons for Malaysia 89
By Harald Sippel & Vishnu Vijandran - Skrine

EUROPE

SWEDEN

Lighting the Way: The Arbitral Institution Illuminating Insights

Trends of Energy Disputes at The SCC Arbitration Institute Between 2020 and 2023 93
By Caroline Falconer & Gaurav Majumbar – SCC Arbitration Institute

UNITED KINGDOM

Sanctions and Energy Arbitration: a Practical Guide to Managing Supply Chain Issues 96
By Charlotte Murphy & Daniel Boon - Stephenson Harwood LLP

The Energy Transition and Climate Change-Related Disputes 99
By Ruth Keating - 39 Essex Chambers

The Impact of the Russia-Ukraine War on Energy-Related Arbitrations: A European Perspective 102
By Sandra Geahchan & Margaux Barhoum - Eversheds Sutherland

MIDDLE EAST & TURKEY

ISRAEL

Try to Keep Up - Issues in Arbitration of Energy Disputes in Israel 106
By Yuval Naim, Ran Sprinzak, & Uri Mandel - EBN

OMAN

Disputes Under Omani Exploration and Production Sharing Contracts 110
By Yanal Abul Failat & Chelsea Pollard - Al Tamimi & Company

TURKEY

Navigating the Storm: Potential Disputes Arising from Windfall Taxes and Revenue Caps 115
By Değer Boden & Ceren Saraçgil - Boden Law

UNITED ARAB EMIRATES

Wired for Success: The In-House Counsel Perspective 118
Guerilla Tactics in Arbitration: an Ethical Challenge
By Maria Scanlan - Crescent Petroleum

The Enforcement of Renewable Energy Investor State Awards Around the World: the State of the Art 120
By Ali Ismael Al Zarooni & Rodrigo Care – Horizons & Co

AFRICA

NIGERIA

Accelerating Renewable Energy Projects in Africa: Addressing Supply Challenges with Arbitration

Renewable energy projects in Africa represent a significant step towards sustainable development, harnessing the continent's rich natural resources to alleviate energy shortages. However, the unfolding narrative of renewable energy in this region brings several supply chain challenges to the forefront, which, if unaddressed, can impede progress and inflate project costs. The significance of resolving such challenges cannot be overstated, as they play a decisive role in shaping Africa's energy future.

This article sheds light on these challenges and presents arbitration as a viable solution. We will provide an overview of Africa's renewable energy landscape, explain the supply chain challenges encountered, assess the role and benefits of arbitration in dispute resolution, and outline practical strategies for project success. We aim to offer valuable insights and guidance for stakeholders involved in renewable energy projects across the continent.

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Daniel Ihueze
Senior Associate
Broderick Bozimo & Company

Afolasade Banjo
Associate
Broderick Bozimo & Company

Africa's Renewable Energy Landscape

Renewable energy projects in Africa are gaining momentum, reflecting a continued commitment to sustainable development and energy security. The continent boasts diverse renewable resources, including solar, wind, hydro, and geothermal energy, positioning it as a potential leader in clean energy generation. Solar projects, in particular, are on the rise, leveraging the abundant sunlight. Likewise, the development of hydro projects maximises the use of extensive river networks.

However, despite its vast, untapped potential, Africa's path to renewable energy is fraught with challenges. Addressing these challenges is crucial for enhancing energy access, reducing reliance on fossil fuels, and mitigating climate change impacts. Developers face obstacles ranging from infrastructural deficiencies, regulatory discrepancies, and limited access to finance, which must be overcome to fully unlock the potential of Africa's renewable energy sector.

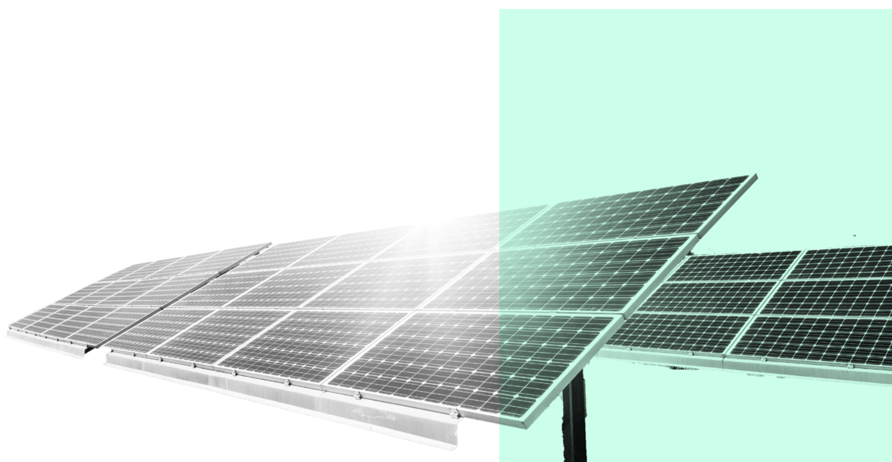
Addressing these issues necessitates innovative solutions and collaborative efforts from governments, private entities, and international organisations. By overcoming these barriers, stakeholders can harness Africa's renewable energy potential, contributing to a sustainable future and global climate objectives.

The Supply Chain Challenges

Supply chain challenges in the context of Africa's renewable energy projects are multifaceted, encompassing the management and movement of resources, goods, and services from source to end-user. These challenges significantly affect project progress, escalate costs, and can jeopardise the success of renewable initiatives across the continent.

A prevalent concern is the logistical constraints due to inadequate infrastructure, inducing delays and escalating operational costs. The scarcity of local manufacturing in the region compounds this issue, necessitating the import of vital components, thereby increasing costs, and making projects susceptible to international market variations. Divergent regulations among African countries and limited access to finance further impede the smooth execution of services and inhibit developers' ability to invest in mitigative solutions.

Addressing these challenges is imperative to prevent delays, cost overruns, and project abandonment. Developing and implementing effective strategies to overcome these obstacles is vital for unlocking Africa's renewable energy potential, advancing broader sustainability, and benefiting its communities and global climate goals.



Arbitration's Role in Supply Chain Disputes

Arbitration is an effective method of resolving supply chain disputes, proving pivotal in sustaining smooth operations and enduring partnerships. Noteworthy for its adaptability, this method offers bespoke solutions to diverse issues, reflecting the unique nature of each dispute within complex supply chains.

One of the primary advantages of arbitration is its ability to maintain confidentiality, a vital aspect in preserving business relationships and protecting sensitive information. The inherent flexibility in the process allows for a customised approach, ensuring each varied and complex dispute receives thorough consideration. The binding nature of the decisions imparts certainty and finality, which is essential in interconnected supply chains.

Moreover, the mechanism facilitates the appointment of arbitrators with specialised expertise in supply chain management. This focused approach enables informed and relevant decisions grounded in a detailed understanding of industry practices and addresses disputes requiring technical insight.

Identifying and Addressing Common Supply Chain Issues

Identifying and addressing supply chain challenges is crucial for maintaining seamless operations. Awareness of logistical constraints, regulatory inconsistencies, and limited access to finance is key to implementing effective solutions and avoiding operational disruptions. Vigilance and adaptability are essential, as emerging problems necessitate swift and thoughtful responses.

Employing technology and data analytics is instrumental in monitoring operations and detecting irregularities, enabling timely responses to potential disruptions. Addressing these identified challenges demands a strategic and thoughtful approach, where developing contingency plans, cultivating strong relationships with suppliers, and investing in capacity building are crucial.

Proactive risk management, entailing vulnerability assessments, immediate response protocols, and continuous process improvement, significantly addresses supply chain challenges. Additionally, fostering collaboration across sectors and borders enhances the sharing of best practices and the formulation of innovative solutions. Engaging in cross-industry partnerships and interactions with international organisations can contribute significantly to advancements in supply chain management, ensuring resilience and efficiency.

Utilising Arbitration to Address Supply Chain Disputes Effectively

Incorporating well-defined arbitration clauses into contracts is a strategic approach to managing potential supply chain disputes. These clauses create a structured resolution pathway, clarifying the procedures to be followed in disagreements. Precision and foresight are paramount in drafting these clauses to prevent ambiguities and ensure their enforceability.

Equally important is the development of a comprehensive arbitration agreement. This task necessitates delineating terms and conditions, specifying governing rules, and defining the scope of the arbitrator's authority. A neutral and suitable seat of arbitration is imperative, as it affects the applicable procedural laws and the enforceability of the award. Thoughtful consideration of the choice of law, the language of proceedings, and the qualifications of arbitrators are also critical components of an arbitration agreement.

Moreover, capitalising on local insights and sector-specific expertise can enhance the arbitration process. Appointing arbitrators with a profound understanding of the local business environment and the intricacy of the relevant industry ensures that decisions are well-informed and relevant. This expertise is invaluable for interpreting contractual terms, applying the appropriate laws, and assessing evidence, fostering fair and equitable resolutions.

Engaging with local stakeholders and institutions is also beneficial, keeping abreast of regulatory changes and market trends. Such engagement aligns arbitration strategies with the evolving business environment, yielding legally sound and commercially astute resolutions.

Maximising Project Success and Implementation Strategies

A focus on clear goals, stakeholder engagement, and adaptability is essential to maximise project success. Clearly defined objectives form the foundation for project planning and execution, ensuring alignment with overarching business goals. Engaging stakeholders at all levels fosters collaboration and facilitates effective communication, which is essential for managing expectations and mitigating risks. Adaptability allows for adjusting project plans in response to unforeseen challenges, thus maintaining project momentum and achieving desired outcomes.

Implementation strategies for arbitration awards require an equal measure of attentiveness and precision. A comprehensive understanding of both local and international legal frameworks is vital to enforce arbitration awards. Establishing diligent monitoring mechanisms and fostering connections with pertinent legal and regulatory entities are crucial strategies for ensuring adherence to decisions and addressing instances of non-compliance promptly. Communicating arbitration outcomes clearly and effectively to all relevant entities is indispensable, fostering a cooperative approach during the implementation phase.

Conclusion and Final Thoughts

This article underscores the critical nature of identifying and addressing supply chain challenges and strategically incorporating arbitration agreements for effective dispute resolution. Emphasising adaptability, clear communication, and stakeholder engagement are essential to maximising project success. Equally, a strategic approach to implementing arbitration decisions, with a deep understanding of the relevant legal frameworks, is indispensable. Organisations are encouraged to manage their operations and disputes proactively, recognising that adopting arbitration contributes to equitable settlements and cultivates an environment conducive to sustained business growth and continuity.

Frequently Asked Questions

HOW CAN ORGANISATIONS ENSURE THE ENFORCEABILITY OF ARBITRATION CLAUSES?

Prioritise precision when drafting and clearly defined procedures, ensuring alignment with applicable laws. A comprehensive arbitration agreement specifying governing rules and arbitrator authority is vital.

WHAT STRATEGIES MAXIMISE PROJECT SUCCESS?

Focusing on clear goals, fostering stakeholder engagement, and maintaining adaptability is key. Clearly defined objectives and effective communication mitigate risks and enable adjustments in response to challenges.

HOW CAN ARBITRATION DECISIONS BE EFFECTIVELY IMPLEMENTED?

A thorough understanding of relevant legal frameworks is essential. Establish diligent monitoring mechanisms, foster connections with pertinent entities, and communicate outcomes clearly to ensure adherence and address non-compliance.

ABOUT THE AUTHORS

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SENEGAL

Overview of the Energy Market and Disputes in Senegal

Overview of the Energy Market

The Senegalese energy market includes private companies producing electricity for rural zones according to the rural electrification policy in addition to companies producing electricity for the State-owned electricity company (Senelec) which is in charge of the distribution of electricity at the national level. At the regional level, Senegal is part of the West African Power Pool (WAPP), an institution set up under the auspices of the Economic Community of West African States (ECOWAS), to implement its energy policy in promoting and developing power generation and transmission infrastructures as well as coordinate power exchange among the ECOWAS member States.

The national market is so far characterized by the predominance of the State-owned electricity company (Senelec). Senelec handles production, transport, and distribution activities in Senegal. It has the exclusivity of bulk purchase of electricity and manages the transport and the electricity wholesale within the country until 2021.

The adoption of the new electricity Code in 2021 has in principle ended this exclusivity regime. Senelec should assign each of its activities to a separate entity. The transport should continue to be a State monopoly and will be managed by a Senelec subsidiary or a specific new entity with third parties' access to the grid and the liberalisation of bulk purchase of electricity. This reform engaged in 2021 should be effective by 2025.

In addition to Senelec and its users, the Senegalese market includes Independent Power Producers (IPP) and with the new Code, distribution operators. The energy produced derives from both fossil and renewable sources. The country opted for an energy mix which includes energy produced from coal, gas, hydro, solar and wind sources. The energy mix will

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be increased following the discovery of 17 trillion cubic feet of natural gas at the Grand Tortue Ahmeyim (GTA) gas field near the maritime border with Mauritania and the adoption by Senegal of the Strategy Policy called "Gas to Power" in 2018. Moreover, Senegal commonly holds hydroelectric energy resources with its neighbouring countries managed through specialised organisations including Gambia River Basin Development Organisation (OMVG) and the Senegal River Basin Development Authority (OMVS). Taiba Ndiaye Wind Park also contributes to the energy production in Senegal, as well as solar power plants.

The Senegalese national market is mainly regulated by the Energy Sector Regulation Council (CRSE) which covers downstream petroleum activities, midstream and downstream gas activities and renewables and other sources of energy while the regional market is under WAPP supervision.

Energy disputes in Senegal include a collection of electricity distribution

fees from users, breaching of Power Purchase Agreements (PPA), granting or revocation of licences as well as energy efficiency-related disputes. In addition to disputes opposing State to private companies, there are disputes between Senelec and its users as well as disputes between operators. The "gas to power" policy and the liberalization of purchase of electricity should increase the scope of disputes with competition-related disputes and involvement of oil and gas companies.

Energy disputes are subject to Senegalese Courts, International bodies including ECOWAS Community Court of Justice and ECOWAS Commission, CRSE Disputes settlement body (CRD) and arbitral tribunals. Disputes before CRD and arbitral tribunals will be analysed below given the importance of those forums in the energy market. Arbitration is generally the choice of foreign and private parties and the CRD is set up to meet the energy market needs and specificities.

Energy Disputes Before CRD

The CRD is an independent body within the CRSE (Energy Sector Regulation Commission) in charge of disputes settlement of energy-related disputes. The CRD is also entitled to pronounce sanctions in case of breach of rules applicable in the energy sector.

The CRD is composed of representatives of stakeholders of the energy market and dispute resolution system in Senegal and is chaired by a magistrate. Its members also include representatives of public administration, operators, users, and the Regulation Council. They are subject to confidentiality duties when acting in dispute settlement proceedings and should not receive any instruction from third parties including CRSE when exercising their attributions.

Energy disputes before CRD may involve relations between operators, i.e., Senelec, IPPs, the transport operators and distribution operators. CRD also has exclusive competence to address resources of candidates and bidders regarding disputes in relation to procedures of granting licences to exercise energy activities.

CRD can resolve disputes through conciliation or by exercising jurisdictional power. It is also entitled to take interim measures on disputes relating to granting titles to exercise energy activities.

Decisions rendered by CRD are considered as administrative acts. As such, they are subject to recourse before the administrative chamber of the Supreme Court in case of challenges based on legality grounds.

Dispute resolution proceedings conducted by the energy regulation bodies are labelled in some African countries, including Chad, as arbitration. However, this qualification could not be appropriate even if the proceedings are conducted independently. Such disqualification is mainly related to the fact that CRD decisions are qualified as administrative acts and are subject to annulment recourse before the Supreme Court. The disqualification is also in line with the common definition of arbitration including under OHADA Arbitration law as a private mechanism of dispute resolution.

Energy Cases Before Arbitral Tribunals

Despite the existence of a specialised settlement dispute body, the involvement of private and foreign companies in the Senegalese energy sector promotes the recourse to arbitration.

Energy arbitrations in Senegal involve both commercial and investment arbitral tribunals.

Commercial arbitration is more related to disputes between private parties in Senegal. Those disputes are generally based on the PPA agreements. The liberalisation market should extend the scope of commercial arbitration in the Senegalese market by involving competition disputes between operators and transport disputes between the transport operators and the third parties using the national interconnected grid.

Moreover, disputes between producers and funders of electricity projects are subject to commercial arbitration. Most IPPs in Senegal are financed by third parties including private investors and multilateral financial organisations including the International Monetary Fund and African Development Bank (AfDB). For instance, the dual-fuel combined cycle power plant in Malicounda is financed by AfDB while the Senergy Solar Power Plant is financed by the Dutch entrepreneurial Bank FMO.

Investment arbitration in the Senegalese market involves private companies and the State. This mainly occurs when States are facing investors' claims regarding their conduct toward their projects. It includes cases of downside changes in the law such as the adoption of new taxation against the energy companies as well as licence-related disputes, the turnaround in the situation which may be due, for example, to international commitments in environmental matters.

In practice, a commercial arbitration and an investment arbitration linked to the same economic operation could be conducted separately. This is the case when the State interferes in a project involving its own company acting in its commercial capacity. The State could then be subject to investment arbitration while a commercial arbitration could be initiated against its owned company for distinct legal grounds but on economically linked claims. This is the case when the State revokes a production licence from a private company and the State-owned company, the sole purchaser of energy produced, breaches its commitment under a PPA agreement.

Two recent pending cases relating to the Sendou coal plant project near Dakar in Senegal confirm this situation. An investment claim is introduced by Louis Claude Norland Suzor and SBEC Systems Limited against Senegal before an arbitral tribunal under the aegis of the International Centre for Settlement of Investment Disputes (ICSID Case No. ARB/22/1).

The case relates to the Sendou coal plant project in the South of Dakar operated by the Compagnie d'Electricité du Sénégal in which the claimants hold 50% of shares. While the exact origin of the dispute is not disclosed on the ICSID Website, it is reported in Senegalese press that Mr Louis Claude Norland Suzor, a shareholder of the Compagnie d'Electricité du Sénégal, was evicted from the project hence the ICSID arbitration.

At the same time, a commercial case was introduced before an arbitral tribunal under the aegis of the International Chamber of Commerce by the same claimant, i.e., Compagnie d'Electricité du Sénégal against Senelec (ICC Case No. 26162/DDA).

The arbitration is based on the PPA between the disputing parties dated 24 January 2008. The claimant argues that Senegal has breached its contractual agreement under the PPA including its payment obligation, the commitment to provide a letter of guarantee to the claimant and the connection of the company to the national grid.

Conclusion and Perspectives

For the time being, there are sporadic arbitration cases noticed and that might have been related to the limited liberalisation of the energy sector for now. With IPPs currently established in the country with Senelec as a unique "client", the power balance seems to be way too unequal to enable and facilitate the launch of arbitration proceedings from the investor side, as negotiations are privileged.

However, Law n°2021-31 of July 2021 establishing the Electricity Code, has put an end to Senelec's monopoly for the wholesale purchase of electricity and also enables the auto production of electricity.

One can expect that with those reforms and the implementation of the ECOWAS Energy Protocol which aims at more liberalising the energy sector in the Region within the coming years, and the launch of the ECOWAS arbitration rules, there will be a new dimension in the energy sector's dispute resolution environment.

Those measures could result in more disputes from PPA's (Power Purchase Agreements), for example, transportation, the management of the interconnected grid, and competition disputes.

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AMERICA

BRAZIL

The Trivialization of *Res Judicata* and Its Effects

Certainly, the most accurate definition of any legal concept is the one provided by the law. As a fundamental aspect of legal positivism, Brazilian laws not only describe typical facts and their legal consequences but also offer explicit definitions of certain expressions found in the normative text. In essence, when a legal concept is crucial to the legal system and its interpretation may raise uncertainties, the legislator can ensure that society has access to its intended definition.

This holds true for the term "***res judicata***" even though it is inherently clear. This clarity arises either due to its composition of common words familiar to Portuguese speakers (which translates to "judged thing" or "judged matter" in English), or because there are no semantic ambiguities, even for non-lawyers.

The Brazilian Civil Procedure Code (CPC) defines ***res judicata*** as the authority that renders a decision immutable and indisputable on its merits, with no possibility of appeal. This power finds its base in the Brazilian Constitution, specifically in the section on Fundamental Rights and Guarantees, where it is unequivocally stated that the law will not impact vested rights, legally valid acts, and ***res judicata*** (Article 5, Section XXXVI).

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If the law itself, the appropriate means to create, modify, and eliminate rights, duties, and obligations, cannot infringe upon ***res judicata***, it is unreasonable to expect a judicial decision to do so. In fact, ***res judicata*** also holds the same weight as the law, according to Article 503 of the CPC. This article states that any decision that fully or partially determines the merits of the case possesses the force of law within the explicitly stated scope of the main issue.

And it could not be otherwise. Without the authority of ***res judicata*** and the legal force derived from it, which presupposes the irreversible judgment of a previously contentious legal relationship[1], disputes would remain unsolved. Repetition of identical claims would become commonplace. Rights would become fluid, lacking defined limits or stability. This scenario would be disastrous for the foundation of the rule of law.

However, like any other right or guarantee, ***res judicata*** is not absolute and must be carefully balanced with other equally relevant constitutional principles. Meeting a few exceptional and restricted conditions, all of which are strictly provided for and regulated by law, is necessary. In the context of arbitration awards in Brazil, which hold the same legal weight

1 SILVA, De Placito e, Vocabulário Jurídico, 12ª ed., Rio de Janeiro, Editora Forense, 1997.

and nature as judgments rendered by the judiciary (as per Item VII of Article 515 of the CPC, in addition to Article 31 of Law No. 9.307/96), these exceptions are outlined in Article 32 of Law No. 9.307/96, which addresses the grounds for a Declaratory Action for Nullity.

An arbitral award can be declared null and void in Brazil if (1) the arbitration clause is null; (2) it is issued by someone who could not act as an arbitrator; (3) it does not meet the requirements of Article 26 of the same Law; (4) it is rendered outside the limits of the arbitration clause; (5) it does not resolve the entire dispute submitted to arbitration; (6) it is proven to have been rendered through prevarication, concussion or passive corruption; (7) it is rendered beyond the specified time limits, according to the provisions of Article 12, III of the Law; (8) the principles referred to in article 21, paragraph 2, of the same Law are disregarded.

If none of those hypotheses materialize, the authority of ***res judicata***, revered by the law, ensures that the arbitration award is indisputable and immutable, backed by the force of law. Problems arise when the losing party refuses to accept the unfavorable outcome and attempts to challenge the arbitration award through clumsy methods, masking their mere non-compliance. This issue significantly impacts arbitral awards, given that they are typically final and unappealable decisions (though in rare cases, the arbitration clause and the terms of reference may allow an appeal to another arbitral tribunal or the judiciary after the award, although this is not customary or recommended).

Following a defeat in the case, the dissatisfied party may mistakenly believe (and be misguided) that they have the right to appeal to judicial courts. This belief persists even even there is no provision in the arbitration clause or the terms of reference that could authorize such an appeal phase, and without fulfilling any of the criteria for the arbitration award to be considered null and void, as outlined in Article 32 of Law 9.307/96. This action is, in most cases, motivated by a mere desire for revenge.

The support gained by the losing party's claim and its impact on the Judiciary is indeed concerning, as it can compromise the rationality of legal practitioners. Even in the absence of compliance with the requirements of Article 32 of Law no. 9.307/96, some judges take the risk of altering the non-negotiable content of the final and binding award, risking violation Article 5, Item XXXVI, of the Constitution of the Republic of Brazil.

A vivid illustration of this challenge occurred in a dispute involving a Power Purchase Agreement (PPA) between an energy trader and final costumer. Once the jurisdiction of the Arbitral Tribunal had ended and the ***res judicata*** had been established, the winning party initiated the enforcement of the award to demand payment of the historical amount of approximately 45 million BRL (equivalent to more than 110 million BRL in current values - this Information was extracted from case file nº 0011041-48.2022.8.19.0014, in progress at the 3rd Civil Court of Campos dos Goytacazes, in the state of Rio de Janeiro, Brazil).

The losing party, dissatisfied with the arbitration proceeding outcome, contested the validity of the award by claiming that the total amount awarded was excessive (i.e., essentially challenging the merits of a judgment already deemed immutable and indisputable). This challenge was made under Article 413 of the Brazilian Civil Code, a provision not included among the grounds for invalidating arbitration awards outlined in Article 32 of Law No. 9,307/96 as mentioned earlier.

In other words, the losing party is seeking a review of an issue that has already been thoroughly examined by arbitrators appointed by both parties – a matter falling under the exclusive jurisdiction of these arbitrators. This action is solely motivated by the party's disappointment with the arbitration's outcome.

It seems that challenging an arbitration award under the terms of Article 413 of the Brazilian Civil Code is not possible for several reasons, mainly because it is not one of the cases listed in Article 32 of Law 9.307/96. Furthermore, such a challenge requires the re-examination of contractual clauses and the rights of the parties on the already settled issued determined by the arbitration award, which is protected by ***res judicata***.

Surprisingly, in the mentioned case, the judge accepted the losing party's illegal claim and recognized their challenge to the award. This decision led to a reduction of the total sentence amount to 7 million BRL, ultimately diminishing the merit of the award by approximately 38 million BRL in historical values (equivalent to over 87 million BRL in current values), highlighting the absurdity of the situation.

Cases such as this one, arising solely from the losing party's nonconformity and revanchism, which are wrongly endorsed by some legal practitioners, undermine the credibility of the Brazilian legal system, institutions, and institutes. This situation can ultimately discourage both domestic and foreign entities from engaging in business in Brazil, in order to avoid the so-called "Brazil Risk", which leads to a lose-lose scenario.

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Enforcement of Arbitral Awards in Energy Arbitration in Brazil

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Brazil has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), which is in force within Brazilian territory since September 5, 2002, and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). The country is also a party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention), as well as the Geneva Protocol of 1923 on arbitration clauses. Finally, the confirmation of foreign arbitral awards rendered in Member States of Mercosur (Brazil, Argentina, Uruguay, and Paraguay) is regulated by the Protocol on Jurisdictional Assistance in Civil, Commercial, Labour, and Administrative Matters, also known as the Las Leñas Protocol.

Pursuant to the Brazilian Arbitration Act (Federal Law nº 9.307/1996), a foreign arbitral award is the arbitral award rendered outside Brazilian territory (Sole paragraph, Article 34 of the Brazilian Arbitration Act) and must be recognized by the Superior Court of Justice (Brazilian's Federal Court with jurisdiction to uphold federal legislation and treaties) in order to be enforceable in Brazil (Article 961 of the Brazilian Civil Procedure Code). Once recognized by the Superior Court of Justice, the foreign arbitral award may be enforced in the national territory before a Federal Court. Interim measures might be granted to protect the enforcement of a foreign award.

Currently, the recognition procedure of foreign arbitral award is regulated by Articles 15 and 17 of the Federal Introductory Law on Brazilian Rules (Lei de Introdução às Normas do Direito Brasileiro); by Articles 960 to 965 of the Brazilian Civil Procedure Code; by Articles 216-C, 216-D and 216-F of the Internal Regimental Rules of the Superior Court of Justice (Superior Tribunal de Justiça); and by Articles 38 and 39 of the Brazilian Arbitration Act (Superior Court of Justice. Interim Appeal filed in the Recognition Proceedings nº 6347 / EX. Reporting Judge Benedito Gonçalves).

According to such provisions, the recognition proceedings shall be instructed with copies of the foreign award and related exhibits (including copies of the arbitration agreement), all duly translated to Portuguese by an official sworn translator and ratified by the Brazilian Consulate – ratification is not mandatory depending on the country in which the award was rendered and the existence of correlated treaties between Brazil and said country.

The plaintiff must also provide evidence that (i) the foreign award was rendered by arbitrators with jurisdiction to decide on the matters pro-

vided for in the award; (ii) the Respondents of the arbitration were duly summoned and/or the default judgment was rendered under applicable law; (iii) the arbitral award is final and binding; and (iv) the award does not violate any norms regarding Brazilian sovereignty and public order.

Certain criteria have already been set by the Superior Court of Justice to determine whether a foreign arbitral award has incurred in a violation of the Brazilian “public order” - and therefore shall not be recognized in Brazilian territory -, such as (i) the absence of evidence of summoning of the Respondent in the arbitration (Superior Court of Justice. Foreign Award Proceedings nº 14.385 / EX. Reporting Judge Nancy Andrighi); (ii) the lack of an express consent with the arbitration agreement (Superior Court of Justice. Foreign Award Proceedings nº 978 / GB. Reporting Judge Hamilton Carvalhido; Superior Court of Justice. Foreign Award Proceedings nº 866 / GB. Reporting Judge Felix Fischer; and Superior Court of Justice. Foreign Award Proceedings nº 967 / GB. Reporting Judge José Delgado); and (iii) the partiality of the arbitrator (Superior Court of Justice. Foreign Award Proceedings nº 9412 / EX. Reporting Judge Felix Fischer).

The opposing party will be served to submit a defense and violation of the Brazilian public order can be raised as a defense argument against the recognition of the award.

When deciding on whether such an award shall be recognized in Brazilian territory, the Superior Court of Justice is not entitled to proceed with the reassessment of the merits of the arbitral award (Superior Court of Justice, Recognition Proceedings nº 7488 / EX. Reporting Judge OG Fernandes). As a matter of fact, the Superior Court of Justice must abide by the analysis of the formal requirements of the arbitral award, especially regarding the validity of the service of summons and that the award does not violate any norms towards Brazilian public order. Such criteria have been followed by the Superior Court of Justice regarding foreign arbitral awards related to energy arbitration (Superior Court of Justice. Recognition Proceedings nº 6896 / EX. Reporting Judge Maria Thereza de Assis Moura).

As such, in the Alstom vs. Mitsui case (Superior Court of Justice. Recognition Proceedings nº 14930/EX. Reporting Judge OG Fernandes), the Superior Court of Justice issued a decision recognizing a foreign arbitral award, setting aside claims of violation of the public order.

In 2015, Alstom Power Inc. and Alstom Brasil Energia e Transporte Ltda. filed a recognition request before the Superior Court of Justice related to an arbitral award rendered against Mitsui Sumitomo Seguros S/A. The arbitral award was rendered in New York, United States of America, in relation to a Supply Agreement of a certain steam generation system executed by and between Alunorte-Alumina do Norte do Brasil S/A and Alstom. Mitsui was Alunorte's insurer company and had indemnified Alunorte for property damages related to incidents that occurred with the steam generators' object of the Supply Agreement. Mitsui then commenced a court procedure against Alstom, to recover the indemnity paid.

According to Alstom, Mitsui had been subrogated into the rights, obligations, and actions of Alunorte, including the arbitration agreement provided for in the Supply Agreement. Mitsui, on the other hand, claimed that it was not bound to the arbitration agreement. The arbitral award decided that the Arbitral Tribunal had jurisdiction over the issues and disputes and that Mitsui was bound, as Alunorte's subrogee, by the termination and full release issued under the Supply Agreement. In this context, Alstom was entitled to a declaration that Mitsui could not bring its claims to the Brazilian courts.

Alstom then requested the recognition of the arbitral award before the Superior Court of Justice. Mitsui's defense was that the subrogation declared by the Arbitral Tribunal was invalid, claiming that the arbitral award could not be recognized due to a violation of Brazilian public order. The Superior Court of Justice set aside Mitsui's reasoning, deciding that the Court should not assess the merits of the dispute and rejecting Mitsui's claims of violating the public order.

In the same context, the Superior Court of Justice has also rejected claims of violation to the public order in the Vestas vs. Copabo case

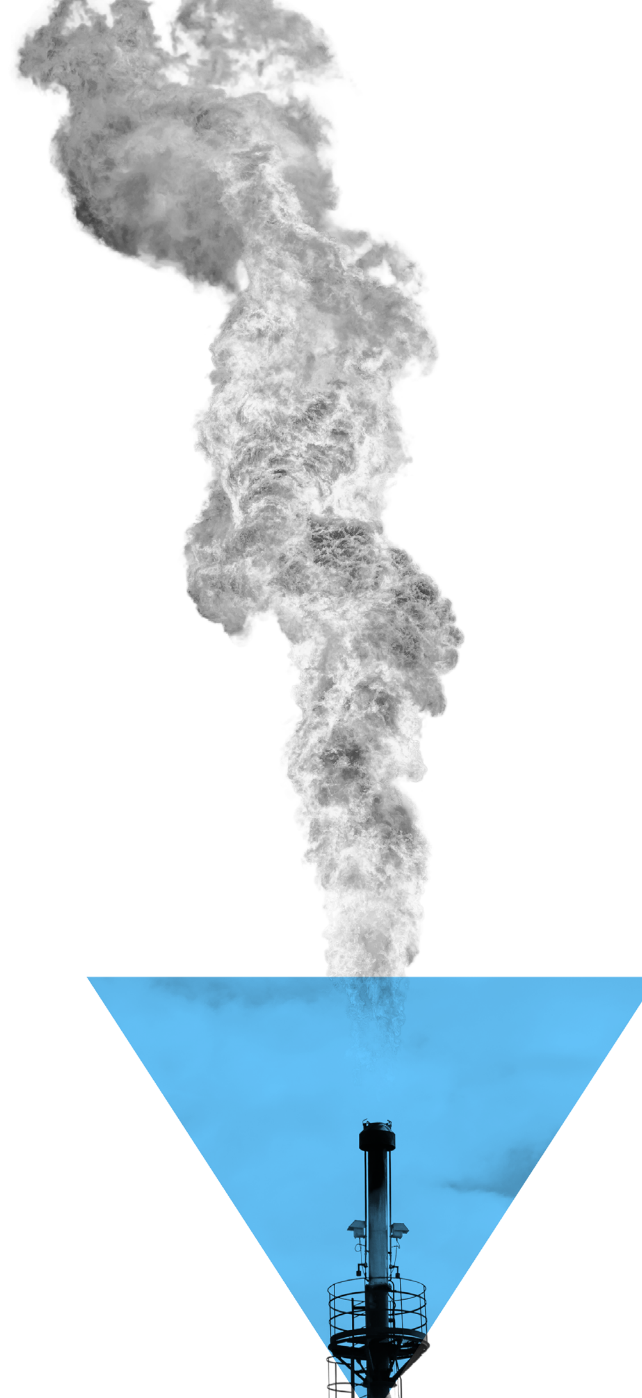
(Superior Court of Justice. Foreign Award Proceedings nº 12.115 / ES. Reporting Judge Luis Felipe Salomão). The arbitral award in dispute was rendered in Madrid, Spain, related to a representation agreement concerning the sales of aerogenerators executed by and between Vestas do Brasil Energia Eólica Ltda. and Copabo Consultoria e Negócios Ltda. According to Copabo, the arbitral award should not be recognized as it had been ruled out of the scope of the arbitration request.

The Superior Court of Justice rejected Copabo's claims against the recognition of the arbitral award, reasoning that Copabo's claims of violation of the public order are actually arguments related to the merits of the dispute and therefore cannot be submitted to the recognition proceedings.

The same reasoning was applied by the Superior Court of Justice in 2021, when deciding on the Gemini vs. State Grid Brazil case (Superior Court of Justice. Interim appeal in the Recognition Proceedings nº 4201/EX. Reporting Judge Paulo de Tarso Sanseverino). Gemini Energy S.A. and State Grid Brazil Holding S.A. executed a Quota Purchase Agreement related to the acquisition of certain Brazilian energy transmission companies. The arbitration was commenced by State Grid in Paris and Gemini was ordered to proceed with payment of certain amounts related to the QPA.

State Grid requested the recognition proceedings and Gemini filed a defense claiming that the arbitral award violated the Brazilian public order due to the lack of reasoning and because the award rejected the production of the evidence requested by Gemini. The Superior Court of Justice ruled that there was no evidence of violation of the public order, reasoning that Gemini was, in fact, aiming the reassessment of the merits of the dispute, which is not allowed under Brazilian law, in the context of recognition proceedings.

In conclusion, the Superior Court of Justice has consistently abided to the assessment of formal requirements of the arbitral award, in the context of recognition of foreign arbitral awards, and including those related to energy arbitration.



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The New CCEE Arbitration Convention: Better Than It Was, Not Quite What It Could Have Been. What to Expect from Arbitration in Brazilian's Electricity Market and a Brief Regional Comparison

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Introduction

The Brazilian National Electric Energy Agency ("ANEEL") recently approved a new Arbitration Convention ("New CCEE Convention") for all the agents that trade energy in the Electricity Trading Chamber (CCEE). This is a relevant development for the energy market, especially given both the intense use of arbitration in such segment of the economy and the expected increase in the number of consumers expected to migrate to the free market, thus entering the CCEE trading environment. This paper addresses the main changes of the New Convention and offers points of comparison with other countries in Latin America.

Brief Notes on the Brazilian Electricity Market and the Use of Arbitration

Brazil has the world's 6th largest installed capacity of generation, with 191,257MW, mostly (83.79%) from renewable sources (56.14% hydro, 5.31% solar, 13.80% wind and 8.55% biomass). According to the Energy Research Company (EPE), there are more than 90.5 million consumers, with an annual consumption of 58.95 GW, out of which 23.38 GW are dedicated to the 31,071 consumer units in the free energy market.

Despite its size, Brazil currently occupies the 47th position out of 56 countries in the Electric Energy Freedom ranking released by the Brazilian Association of Energy Traders ("ABRACEEL"), based on annual data from the International Energy Agency (IEA).

While it gained 8 positions since 2019 due to recent regulatory advances, Brazil is still outranked by countries such as Colombia (41), Peru (44), Uruguay (45) and Argentina (46), that underwent similar processes of privatization and de-verticalization in the early 90s.

Currently, only units connected at medium or high voltage (above 2.3kV) that meet the contracted demand requirement of at least 500 kW are eligible for accessing the free trade market (*Ambiente de Comercialização Livre* or "ACL"). This demand can also be met by the sum of units from the same company or by companies in neighboring properties. However, in such cases, consumers can only purchase energy from incentivized sources. The remaining consumers are part of the regulated market (*Ambiente de Contratação Regulada* or "ACR") and must purchase energy from the local utility.

The number of free consumers is expected to grow three-fold in the near future, following the loosening of access restrictions approved by the Ministry of Mines and Energy ("MME"). At least 72,000 new units are ex-pected to migrate to the free trade market and further favoring access to

the ACL is widely considered to be an irreversible trend. Regulation under discussion by the MME provides for banning all restrictions by January 2028.

On the other hand, the Brazilian electricity market is known for adopting arbitration as the preferred dispute resolution mechanism. It is, in fact, mandatory for applicants to enter the CCEE trading system to accept and execute the CCEE Arbitration Convention. As per Federal Act 10,848/2004, disputes between agents taking part of the CCEE ("CCEE Agents") and between CCEE Agents and CCEE itself must be resolved through arbitration.

In parallel, over the years, several pieces of legislation were enacted to provide for the use of arbitration, even by State entities. In 2015, the Brazilian Arbitration Law ("BAL") was adjusted to expressly encompass such a possibility, thus reducing the opposition faced in some sectors of the Government.

Despite the legal provisions, arbitration was not used specifically by ANEEL until a recent decision by its Board of Directors, in September 2021. At that juncture, ANEEL decided to agree to arbitrate a claim for financial rebalance of a concession contract to arbitration. Besides, the General Attorney's Office recently enacted Regulation 15/2022, establishing the Specialized National Team for Arbitration.

With an eye on the market opening and modernization of the sector, ANEEL approved the New CCEE Convention on February 14, 2023. The New Convention had already been approved by the CCEE Agents on October 19, 2021.

The New CCEE Convention

The first relevant change brought by the New CCEE Convention was allowing other arbitral institutions to administer cases to which it applies ("Convention Cases"). In doing so, it ended a monopoly held by the FGV Mediation and Arbitration Center ("FGV"). CCEE Agents are now free to choose among arbitral institutions approved by CCEE. The goal is to foster competition, flexibility, and efficiency.

Institutions applying to be registered by the CCEE are required to undertake the obligation to conduct mediation prior to the arbitration procedure. They must also agree to maintain a public database of Convention Cases awards on their websites, to create a reliable source of research and to foster consistency in the outcome of similar cases. Clearly, a consolidated database would be much more efficient and reliable for practitioners.

Furthermore, while it still provides for additional circumstances regarding the impartiality and independence of arbitrators, the New Convention states that all such cases are no longer of impediment (non-waivable), but merely of suspicion (waivable). Also, it narrowed down such additional cases and reduced the quarantine time for former contractors, service providers or consultants. The aim is to increase the number of eligible arbitrators with experience in the market. That said, an opportunity was missed to simply remove the additional cases of waivable cases of partiality/lack of independence, given that there is no real gain in comparison to the content of the Brazilian Arbitration Act.

The New CCEE Convention also clarifies to which conflicts it does not apply (and, conversely, those to which it applies). It states that it does not apply to bilateral conflicts that do not affect third parties' rights and, consequently, do not have repercussions on CCEE's operations. This is relevant to give more security to the parties in case they decide to submit a bilateral conflict to a different mechanism of dispute resolution that does not necessarily observe the parameters provided for in the New Arbitration Convention.

Further to that, the New CCEE Convention clarifies that it does not apply to disputes between ANEEL and signatories and ratifies that collection of amounts owed by CCEE Agents must be carried out before Brazilian Courts.

Aiming to protect the market and ensure that the financial effects of decisions arising from bilateral conflicts are restricted to the parties involved, the New CCEE Convention affords the CCEE discretion to liaise with the Arbitral Tribunal and request it to require suitable guarantees from the interested party in cases in which the operationalization of a decision may impact third parties. While the idea is laudable, certain cases were not dealt with, such as what the consequences of the Tribunal not granting the request for guarantee or if the CCEE is a party to the arbitration.

The New CCEE Convention maintained the preexisting rules regarding the applicable law (Brazilian Law) or the language of the procedure (Portuguese). Moreover, it still provides for the requirement that arbitrators appointed shall reside in Brazil, which may prove an unnecessary restriction to the appointment of good arbitrators residing abroad, either Brazilian or foreigner.

As for the seat of the arbitration, the New CCEE Convention provides that it shall be indicated by the parties and, failing such agreement, determined by the Tribunal within the Brazilian territory. In cases in which the CCEE is a party, the seat will be in São Paulo.

All awards of Convention Cases will thus be domestic awards, regardless of other elements of internationality, given that Brazil is a monistic country and it abides by the territorial criterion to define whether the award is domestic or foreign (Arbitration Act, article 34, sole paragraph).

Looking Beyond the Brazilian Borders: the Experience of Neighboring Countries

Several countries in Latin America have gradually developed a more friendly environment for arbitration. Solid arbitral institutions have emerged, and national legal frameworks have been enhanced to support arbitration in the region.

Specifically with regards to energy projects, some experiences can be pointed out in connection with the dispute resolution mechanism applied by some of our neighbors.

In Colombia, the State does not enter energy projects and private agents can undertake these contracts within the open market and parties are free to agree to arbitrate their disputes as they see fit for the specific project.

National and international arbitration are regulated by the same arbitration act. Despite the legal possibility, choice of forum and choice of law rules are usually introduced in international arbitration proceedings (articles 93 and 101 of Law No. 1563 of July 12, 2012) and not in contracts that are to be adjudicated by national courts, due to a discussion on whether parties can modify domestic rules of conflict by means of introducing a choice of law clause.

For the purposes of promoting projects for nonconventional sources, the Colombian State has organized public tenders for the sale of energy contracts. Under these contracts, arbitration is provided as the final mechanism for dispute resolution, after a direct arrangement between the parties and an attempt of an amicable settlement. As to the arbitration, the contracts provide for specific provisions concerning the seat of arbitration (Bogota), applicable chamber (Arbitration and Conciliation Center of the Bogotá D.C. Chamber of Commerce), and language (Spanish), among others.

In Peru, private investors are mainly responsible for developing electricity projects and this is done through concession contracts with the State (represented by the Ministry of Energy and Mines). The regulation in force promotes settling disputes by domestic or international arbitration, depending on the amount of the dispute. Similarly to Colombia, the Peruvian Arbitration Law (D.L 1071/08) also regulates both national and international arbitration.

PPAs, construction contracts, interconnection contracts, and easement contracts executed by power generators customarily contain arbitration clauses. Finally, as per Law 28832, of 2006, and the bylaws of the COES (that roughly performs the role of the Brazilian CCEE), decisions issued by the Board of Directors and the Assembly may be challenged through ad hoc arbitration.

As to Chile, much like in Brazil, the applicable framework is two-fold, comprising the free and the regulated markets. In relation to the free market, there is no State intervention. Parties are free to agree on the dispute resolution mechanism and customarily chose arbitration for the relevant contracts. The Arbitration and Mediation Centre of the Santiago Chamber of Commerce (CAM Santiago) is extensively used. Med-Arb clauses are also popular and promoted by the arbitral institution itself.

Within the regulated market, there is intense State regulation. Chilean law provides that utilities must have supply contracts resulting from public tender processes, designed, coordinated, and managed by the National Energy Commission, the Chilean electricity regulator.

These contracts set forth a similar dispute resolution mechanism as to one found in Colombia, *i.e.*, Med-Arb clauses. However, in practice, arbitration cases are few and far between, given the intense presence of the State and the exclusion of the Governmental Authority from the scope of the arbitration agreement.

On a separate note, it is worth noting that in recent years, there has been an increase in the number of ICSID cases involving Latin American countries. Colombia, Peru, and Chile are signatories of the ICSID Convention, alongside several other Latin American countries. Notably, Argentina has withdrawn from the 1965 Washington Convention, but was involved in several high-profile cases against foreign investors. Brazil, on the other hand, is not a party to the ICSID Convention. It is therefore not part of the ICSID system.

Although each energy market has particularities, it is possible to identify a general trend as dispute resolution methods in connection with energy contracts.

With regards to the free market, parties generally have more freedom to customize the dispute resolution mechanism, although they should pay attention to possible obstacles that might face upon the enforcement of an award depending on each legal system. It is even possible to note an attempt to implement a framework that actually embraces international arbitration.

As to the contracts with States, State-owned companies or public entities, the use of arbitration is also being continuously disseminated. There are still additional particularities to be considered depending on each system, but several Latin American countries seem to be endeavoring efforts to attract investment by institutionalizing a more friendly environment and predictable mechanism for dispute resolution related to capital-intensive projects, even by means of investment arbitration.

Concluding Remarks

The Brazilian electricity-free market is growing exponentially, and this is a trend expected to continue, as access barriers are gradually being removed. One of the implications of this trend is the increasing number of CCEE Agents and the growth of commercial relations that will contain arbitration agreements (or the disputes of which shall be resolved by arbitration under the New CCEE Convention).

That alone is reason enough to justify the review of the previous CCEE Arbitration Convention, enacted in 2007 to reflect the evolution of the market. While the makeover was not as complete as one should expect, it addressed relevant points that concerned market players, thus representing a step forward.

This is even more important considering the expected changes resulting from the ongoing worldwide efforts to carry out a complete energy transition aimed at achieving climate and sustainable development goals. This transition tends to present opportunities and challenges and, as such, room for growth of energy-related disputes in a market already quite litigious.

Legal frameworks friendly to arbitration are crucial to attracting foreign investors, especially in the energy sector, considering the relevance of technical decisions and efficient procedures in disputes arising from the significant and long-term contracts executed.

While it felt short of embracing all the possible tools and mechanisms to benefit efficiency, the New CCEE Convention represents an important step to strengthen energy-related arbitration. Still, there is room for improvement and Brazil may learn greatly from the positive experiences of its neighbors.

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Introduction

Brazil stands as one of the world's foremost energy producers and possesses one of the most diversified energy matrices globally. This achievement is the result of a historical process that gained considerable momentum after World War II. The significant increase in industrialization and the rapid expansion of urban areas demanded a substantial development of the nation's energy generation capacity to meet flourishing demand.

Today, the Brazilian energy matrix exhibits remarkable diversity, encompassing not only oil, gas, and nuclear energy, but also many renewable energy sources such as hydropower, biofuels, wind, and solar.

The expansion of energy generation has required substantial investments and prompted a succession of disputes involving governmental entities, infrastructure corporations, and regulatory agencies. These disputes persist to this day and are poised to continue emerging within the Brazilian landscape.

However, in contrast to previous disputes, which were frequently submitted to State courts, there has been a noticeable increase in the use of arbitration to address this type of dispute. From the mid-2000's onwards, arbitration has gained wide recognition and reliability in Brazil.

In this context, we examine below some landmark cases that represent the past, present, and future of energy dispute arbitrations in Brazil.

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Past

The following cases have set important precedents concerning arbitrations regarding energy disputes in Brazil or Brazilian parties:

BRASOIL CASE (ICC, 1995)

The Brasoil case was one of the first oil and gas arbitrations involving Brazilian entities. In summary, Brasoil had signed a contract with the GMRA, an entity within the Government of Libya to drill a number of wells in that country. Brasoil started an ICC arbitration seated in Paris after the GMRA terminated the contract.

In 1995, the Arbitral Tribunal rendered a partial award declaring that malfunctions detected in the wells were attributable to Brasoil. Afterwards, GMRA submitted certain documents, which Brasoil considered to have been fraudulently omitted and that should have been presented before the partial award was rendered.

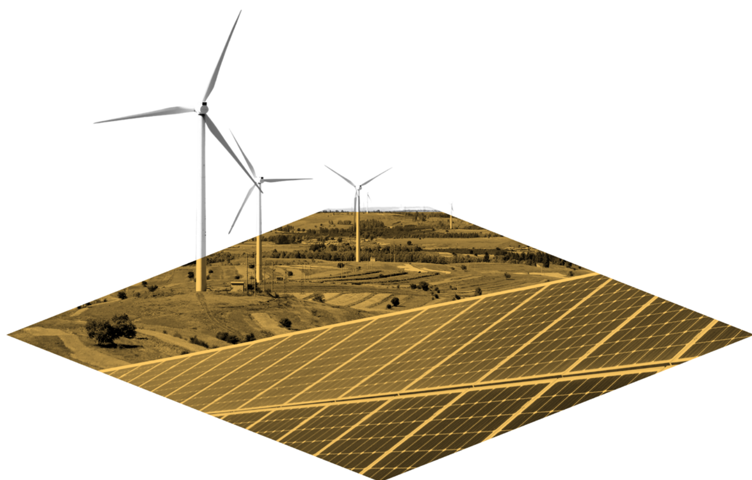
Consequently, Brasoil requested the Arbitral Tribunal to review the partial award. The Arbitral Tribunal rendered an "order" rejecting Claimant 's request. Brasoil attacked the "order" before the French courts. In 1998,

the Paris Court of Appeal found that (1) the appeal was admissible; (2) the “order” was, in fact, an award; and (3) annulled it.

COPEL CASE (ICC, 2004)

COPEL – a hydroelectric energy producer based in Paraná, signed with UEGA a contract for the operation and maintenance of a combined cycle gas turbine power plant. A dispute arose between the parties and UEGA started an ICC arbitration in 2003. COPEL then raised the non-arbitrability of the dispute before the ICC Court, which ordered the continuation of the proceedings. Shortly thereafter, the Curitiba Treasury Court declared the arbitration clause to be null and void and granted COPEL an interim measure of protection. UEGA filed, without success, an appeal before the State of Paraná Court of Appeal.

In 2004, a hearing on the jurisdictional issue took place. COPEL argued that the arbitral tribunal lacked jurisdiction since public companies under state control required express legislative authorization to arbitrate their disputes, which was not the case at hand. The arbitral tribunal found that it had jurisdiction over the dispute since the case was an international dispute and, under Brazilian law, State-controlled public companies should be treated in the same manner as private ones.



AES URUGUAIANA CASE (STJ, 2005)

The case involved a contract for the sale of electrical energy between CEEE, a company owned by the State of Rio Grande do Sul, and AES Uruguaiana, a private company operating a natural gas power plant in the same state.

After a dispute arose between the parties, CEEE filed a lawsuit against AES Uruguaiana before a court of the State of Rio Grande do Sul, despite a pre-existing arbitration clause.

The State court invalidated the arbitration clause, based on the understanding that State-owned companies form part of the public administration and, as such, required prior legal authorization to submit disputes to arbitration.

However, the Superior Court of Justice (STJ) overturned this decision, establishing a significant precedent for energy arbitrations. The STJ ruled that disputes regarding contracts with state-controlled companies, specifically those related to strict economic activities like industrial public services, the production of goods and their trading, with the purpose of generating profits, could submit disputes to arbitration regardless of previous legislative authorization, due to their commercial nature. As a result, the parties were ordered to commence the agreed arbitration procedure.

COMPAGÁS CASE (STJ, 2011)

This dispute involved a natural gas distribution contract between Compagás, a company controlled by the State of Paraná, and the Carioca-Passareli Consortium, a construction joint venture.

After the tender process and the formalization of the construction agreement, disputes arose between the parties concerning the economic and financial balance of the contract.

Despite the absence of an arbitration agreement in the contract or in the bidding request for proposals, the parties agreed to submit their dispute to arbitration.

Following the production of evidence during the arbitral proceedings, Compagás then initiated a lawsuit in Paraná to invalidate the arbitration on the grounds of the absence of explicit arbitration provisions in the contract or in the tender documents.

The case reached the STJ, which established another crucial precedent in energy disputes. The STJ validated the arbitration agreement, emphasizing that both parties had voluntarily chosen arbitration instead of state courts. Therefore, it determined that arbitration proceedings involving state entities can validly take place based on an arbitration agreement, even without specific provisions on arbitration in the tender documents or in the contract.

Present

Over the past few decades, the wave of globalization intensified the quest for legal harmonization worldwide. The energy sector has become global and incorporated legal models and institutions previously foreign to Brazilian practice.

The case below illustrates the situation where three Brazilian-based oil & gas companies have regulated their dealings based on an international contract model of a joint operating agreement, which contained a forfeiture clause until then not discussed before arbitral tribunals or state courts.

DOMMO ENERGIA V. ENAUTA ENERGIA AND BARRA ENERGIA (LCIA, 2018)

These companies obtained a concession from the Brazilian National Petroleum Agency (ANP) and, as a result, entered into a consortium and, subsequently, a joint operating agreement (JOA) to explore oil reserves in the region.

The JOA included a forfeiture clause, allowing a non-defaulting party to request the withdrawal of a party in default with its financial obligations. In the case at hand, Dommo defaulted on some cash calls and, subsequently, received a withdrawal notice from Barra, which obliged the former to leave the JOA without compensation.

Dommo initiated an LCIA arbitration in Paris against Barra and Enauta seeking, among other claims, the invalidation of the forfeiture clause governed by Brazilian law. In Brazil, the principle of party autonomy and freedom to enter into contracts are central in contract law. These principles stand out in the petroleum industry where contracts are long-term, relational, and capital-intensive.

The 2002 Brazilian civil code, in line with international norms and practices, values the sanctity of contracts freely agreed upon by the parties. Especially where the parties are experienced and well-informed. For this reason, the arbitral tribunal, constituted of French, Brazilian and English nationals, found that, despite not being expressly provided for in Brazilian law, the forfeiture clause was valid. Subsequently, the ANP enforced the forfeiture and other JOA clauses in administrative proceedings that aimed at transferring the participating interests of Dommo to the non-defaulting parties.

Future

In recent years, Brazil has emerged as a prime destination for energy investments, driven by a combination that includes the discovery of significant oil and gas reserves (at the pre-salt layer and in the mouth of the Amazon River basin), as well as its vast potential for sustainable and renewable sources and stronger commitments to ESG principles.

This transformative shift will inevitably usher in a new wave of arbitrations involving the supply of crucial equipment, including wind turbines and solar panels, further amplifying the complexity and significance of these cases in the Brazilian energy arena. Also, there will be disputes dealing with new and previously uncharted issues not encountered in

prior proceedings, including ESG matters, which are currently being dealt with in an ongoing arbitration involving Petra and the ANP.

PETRA V. ANP (ICC, 2021)

The dispute between Petra and the ANP involves the use of fracking in the São Francisco River Basin. Petra sought authorization from ANP to employ fracking in its natural gas exploration activities. ANP denied the request due to environmental concerns and regulatory restrictions. Notwithstanding, ANP continued to request Petra to comply with the obligations set forth by the concession agreement and eventually terminated the concession agreement due to non-compliance with such obligations.

In early 2021, Petra initiated an ICC arbitration based on the concession agreement, seeking a declaration that ANP's refusal to authorize fracking rendered the concession agreement unworkable and equivalent to indirect expropriation, as well as compensation for associated damages.

A similar issue was dealt with in two other recently concluded CBMA arbitrations initiated by Petra, Copel, Bayar and Tucuman against ANP. In these cases, the respective arbitral tribunals granted claimants' requests to terminate the concession agreements after federal courts ruled against the use of fracking in two class actions. The claimants argued that such prohibition rendered the performance of the concession agreements impossible.

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LATIN AMERICA

Hot-Button Issues in The Latin American Energy Sector:

Some Considerations on Hydrogen, Lithium, Renewables, and The Assessment of Damages in Early-Stage Disputes in These Industries

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As of September 2023, Latin America is home to over 8.28% of the world's population and represents 6% of the global energy demand. The region is still powered mostly by fossil fuel, with the share of oil in energy production amounting to 43.8% in 2020, the share of natural gas to 18.6%, while hydro, biofuels, wind, solar and other renewable sources of energy jointly amounting to 31.3% (IEA Sustainable Development Goal 7). However, the share of fossil fuels decreased between 2016 and 2020, while the share of renewables has increased steadily. Latin America has attracted and continues to attract significant investment in the energy sector (for instance, energy sector investments grew by 50% between 2018 and 2019). This, in turn, means that there is potential for disputes to arise, from contractual arrangements pursuant to which such investment is made, from State regulations and intervention etc. In this context, the Energy Disputes panel of the first annual Latin American Arbitration Practitioners EU (LATAP EU) conference looked at four hot-button issues in the energy sector.

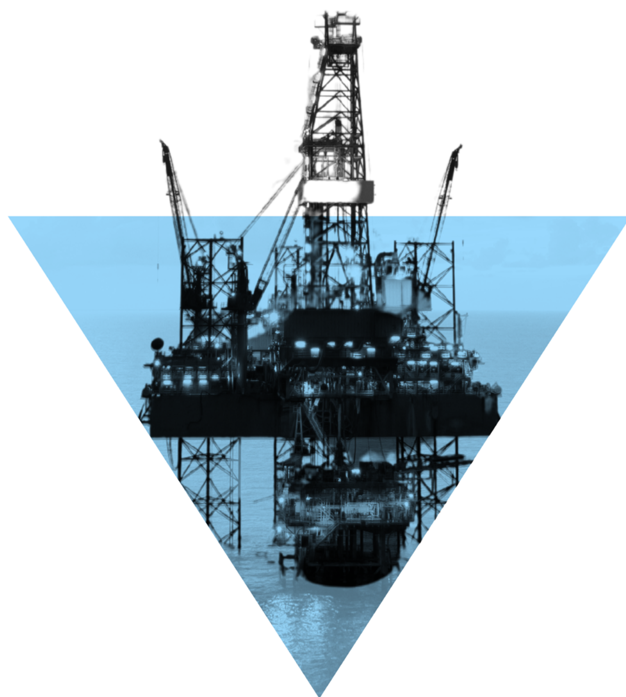
First, José Ricardo Feris discussed the potential for lithium-related disputes, taking into consideration, in particular, recent political changes in the region. A notable example is Mexican President López Obrador's nationalization of the lithium industry in early 2023, after declaring lithium a mineral of public utility the previous year. The President's indication that all lithium mining concessions granted prior to the reform would be scrutinized has borne practical results: the concession over Mexico's largest lithium deposit was revoked in August. Other concessions may also come under the spotlight (*e.g.*, for failure to comply with minimum investment levels, carry out consultations with the indigenous population, where applicable, etc.). This review process is not the only aspect worth following closely in the future; the evolution of Mexico's own LitioMx, which is taking charge of developing the lithium industry following nationalization, may also prove interesting.

Second, Antolín Fernández Antuña discussed some takeaways that could be drawn from the Spanish renewables saga, a string of over 50 investor-State arbitrations that started in 2011, after the State had to adapt the incentives provided to renewable energies. With more than 30 final awards rendered already, a diversity of outcomes and approaches can be found in the case law. Bearing in mind that every case is different in its facts, circumstances, and submissions, several cases were brought up. Amongst other cases, as an example of how some tribunals have decided on the matter, the *PV Investors v. Spain* final award, after stating that "*the analysis shows that the regulatory framework [...] did not provide for a stabilization guarantee*," concluded that "*[i]n the Tribunal's view, the principle of reasonable return serves as the limit of ECT-compliant regulatory changes. [...] the Claimants are only entitled to compensation under Article 10(1) of the ECT if they establish that the new regime violates the guarantee of reasonable rate of return. This approach strikes the right balance between, on the one hand, the protection of investors [...] and, on the other hand, Spain's right to regulate and adapt its framework to changed circumstances*" (PV Investors v. Spain). Other tribunals have followed different approaches.

Another point of particular interest is that multiple economic, financial, and taxation variables can be decisive for the outcome of the arbitration process. For instance, again in *PV Investors*, the Tribunal observed that "*[t]he guarantee provided [...] is economic in nature. This being so, the Tribunal cannot verify whether or not such guarantee was observed without considering the economic impact of the Disputed Measures on the Claimants' investment. Only once it has ascertained such impact will the Tribunal be able to determine whether or not there is a breach of the Treaty [...] in this particular case the quantification of the harm, if any, informs the finding on liability*," i.e., the quantum not only determines damages, but can also define liability (PV Investors v. Spain).

Third, Luiz Aboim considered the potential for disputes in green hydrogen projects in Latin America, one of the world's regions with the largest potential for the production of renewable hydrogen. The abundance of clean water, land, wind, and sun exposure, and access to the sea places the region as a net exporter of green hydrogen. While the region has a track record in the production of fossil-fuel-based hydrogen, in particular in Trinidad and Tobago, small green hydrogen projects are already operating in Chile, Colombia, and Costa Rica. Separately, two dozen large-scale projects have been announced across Brazil, Mexico, Paraguay, Uruguay, and other jurisdictions. The significant long-term investments needed to bring these new projects to financial investment decisions require a combination of adequate regulatory and legal frameworks in the host countries, as well as foreign investment in the form of equity and financing. Given the absence of a global hydrogen market, a uniform taxonomy and global regulations on green hydrogen, different stakeholders will need to address technological, commercial, and project risks in their contractual documentation, and consider treaty protection against certain risks, such as regulatory risk. This includes ensuring that appropriate dispute resolution mechanisms are in place to address hydrogen-specific potential disputes, such as price reopeners, or host State measures affecting the investment in green hydrogen, such as the change in subsidies seen in the Spanish solar cases. International commercial and investment arbitration in their current form are natural candidates for any dispute resolution design strategy. Finally, investors in green hydrogen projects should also be prepared for challenges regarding the quantification of damages in commercial and investment arbitrations, as green hydrogen is a nascent market with little track record, where forecasts and data will be limited or non-existent.

Fourth, Benjamin Roux addressed some of the challenges posed by the valuation of early-stage energy projects at the quantum stage of international arbitration. Such projects may include a broad range of assets (some having been in operation for a short time, others not operational at all), in industries where markets are sometimes not fully developed and comparable transactions may be scarce. Their valuation is challenging, as such projects usually have no track records of operations. This poses the age-old question of the appropriateness of forward-looking income approaches (such as a discounted cash flow or DCF valuation) and market-based approaches. It also opens the door to the use of asset-or cost-based approaches to remove the additional uncertainty related to assets which are not yet operational. In this context, parties and tribunals may be tempted to consider new applications of the so-called "modern DCF" method, used for example by the tribunal in the Tethyan v. Pakistan case. While the "traditional" DCF valuation is based on expected cash flows discounted at a risk-adjusted discount rate, the "modern" DCF involves computing risk-adjusted cash flows (through the use, for instance, of decision trees or probabilistic scenarios), which are then discounted at the risk-free rate. The "modern DCF" method, in effect, factors in the risks of the project in the cash flows rather than in the discount rate (as is the case in the "traditional" DCF approach).



Another relevant consideration relates to the date of valuation and the type of assumptions used. There are, in that respect, three main approaches commonly used when valuing early-stage projects, each of those having pros and cons: i) *ex ante* valuations assess damages at the date of the breach and disregard the information between that date and the date of the award, ii) *ex post* valuations provide an assessment at the date of the award and factor in all available information at that date, including those subsequent to the breach, or iii) *hybrid* approaches which account for hindsight but value the claimed damage at the date of the breach. *Ex ante* and hybrid approaches may have an additional layer of complexity in that if there are multiple breaches, there might be multiple dates of valuation. Overall, the specifics of each case should guide the valuer. There is no one-size-fits-all approach both in terms of methodology, date of valuation and type of assumption used when valuing early-stage projects.

The panel's discussion concluded that it is worth following closely the development of the Latin American energy sector in the coming years. The "coming of age" of nascent industries (like green hydrogen) and the evolution of existing industries (like lithium) and regulatory measures affecting them may give rise to new disputes, both at the contractual and at the investor-State level. In that context, the Spanish renewables saga may provide valuable takeaways for counsel and tribunals alike, in terms of liability and quantum. In any event, it appears clear that such future disputes will pose particular challenges at the quantification stage, given the difficulties posed by accurately valuing early-stage projects.

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Latin American Arbitration Practitioners EU *(*LATAP EU*) is an association aiming at building a network of practitioners focused on international arbitration and with strong ties to, or experience in, Latin America and based in Europe.*

UNITED STATES

Sanctions and Disputes in the Energy Sector

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Although not a new development or a recent trend, the latest waves of international sanctions affecting exports to and imports from certain jurisdictions have created a vast network of restrictions that significantly impact the energy sector, with foreseeable consequences in international commercial and investment disputes.

Over the last 50 years, but increasingly over the last decade, countries and international organizations have imposed sanctions on a number of countries that play preponderant roles in the energy sector, from Iran to Venezuela and Russia, to name a few. We will strive in this paper to reflect on the impact that those sanctions carry on the practice of international arbitration, rather than on the legal appropriateness or the effectiveness of those sanctions for their purported purposes.

One should distinguish between the disputes involving the sanctioning State or organization and challenging the sanctions themselves – which we will call “first-level” disputes – and those dealing with second or third-level corollaries of the sanctions – which we will call “second-level” and “third-level” disputes, respectively.

“First-level” disputes may include public international law disputes between sanctioned States or organizations on the one part, and sanctioned parties on the other, but also investment disputes by foreign investors against a sanctioning State – or, more rarely, against a sanctioning international organization – which argue that the sanctions imposed wrongfully affect their protected investment in the territory of that sanctioning State or a territory subject to the rules of that international organization. They could also include some limited form of contract dispute, where the sanctions are argued as a ground for the sanctioning State or international organization not to abide by the terms of a preexisting contract.

For practitioners in these disputes, the merits might become easier to prove—after all, sanctions often result in some kind of non-payment that gives rise to liability. But a new set of defenses might arise. Depending on the scope of the sanctions and the parties involved, the sanctioned State may have arguments of *force majeure* under international law, although this is difficult to prove. This is especially true since sanctions often contain a “wind-down” period or the possibility to obtain a license. And with the narrow nature of contractual defenses, it is challenging for a State-owned entity, even in a first-level dispute, to escape payment, as was shown by the US Court of Appeal decision that recently ordered PDVSA - the Venezuelan sanctioned State-owned oil company – to pay its defaulted notes in spite of the sanctions. The primary challenge will be one of enforcement.

The countries imposing sanctions often contain links to the banking sector such that any funds subject to enforcement will be blocked. A State that has blocked the funds has no obligation to convey them to an inves-

tor that has prevailed against a State. Indeed, the blocked funds are often spent in ways that award creditors may not expect, such as compensating victims of terrorism –as was the case with certain Afghan funds frozen and then released by the US for this limited purpose–or fulfilling other policy prerogatives. And this does not take into account the impact of global sanctions. Sanctioned States often see overseas revenues drop and move their business to countries that may not respect an international arbitration award. These hurdles are often too much for small and medium-sized businesses, that cannot afford the years of creative litigation needed to recoup their losses. Needless to say, sanctions in this context often make disputes longer and more difficult to resolve.

Examples of "second-level" corollaries would be disputes over measures adopted by a non-sanctioning State in furtherance of international or foreign sanctions. Disputes of this sort may arise where the challenging party is the target of the sanctions or their contractual counterparty. Such would be the case, *e.g.*, where a sanctioned State or State-owned company attempts to deliver oil and collect the purchase price from a purchaser in a non-sanctioning State under a pre-existing contract, but the non-sanctioning State prevents delivery from or payments to the seller. As the measures at stake were adopted by a non-sanctioning State, it is unlikely that the reasons for the sanctions or their adequacy to the policy purposes of the countries or international organizations issuing the sanctions will or can fully be debated in the context of this first level of disputes. It is conceivable that the discussion may extend to whether any conduct by the target of the sanctions allegedly leading to the sanctions can act as a bar to the arguments by such sanctioned party. Most foreseeable types of disputes falling in this category will be matters of contract law between that seller and purchaser, with the most likely debates focusing on whether performance by one or both parties is affected by an "act of God", *force majeure*, or hardship, and the consequences of such finding.

These disputes pose unique challenges and opportunities. In some cases, a non-sanctioning State may use the pressure created by sanctions to take actions on their own, as was the case with measures adopted by the Jamaican government further to US sanctions against Venezuela and its State-owned oil company or a company in a non-sanctioning State may have international banking relationships that complicate payment. Sometimes, alternative structures arise to facilitate such transactions, such as the Kimberley Process, which has been used to alleviate concerns related to "blood" or "conflict" diamonds and the sanctioned entities that trade in them. After the recent round of sanctions against Russia, some imports have started paying different currencies, which can help reduce the existence of a dispute or ease enforcement. These disputes also feature fewer defenses. It is more difficult for a buyer to allege impossibility or *force majeure* in a contract when alternative means of payment exist or sanctions are not technically applicable.

Meanwhile, there will also be "third-level" disputes more indirectly related to the sanctions, which might consist of corollaries of the sanctions arising in legal relations that involve neither the sanctioning State or organization nor the targets of those sanctions, but instead unrelated parties who relied on products, assets or services affected by the sanctions to discharge their obligations under contracts with other unrelated parties. Here, again, the most likely causes of action will be contractual in nature, and the debate will probably involve discussions resounding on theories of "act of God", *force majeure* or hardship, and their respective consequences.

Third-level disputes can be the most challenging to resolve because they often involve smaller amounts of money and small to medium-sized businesses that lack the financial wherewithal to litigate the matter. For example, if sanctions prohibit Shell, a seasoned oil company, from receiving payments from PDVSA, it is unlikely that Shell's subcontractors will have contractual recourse against Shell, and if they do, they may feel constrained by a lack of desire to sue a major client or the practical challenges of bringing the claim. Recent reporting indicates that Chevron received a limited license to, in part, pay third-party invoices and salaries in spite of the sanctions imposed against Venezuela, where those invoices and salaries had accrued. It is difficult to know the underlying claims that may exist, but this could have likely gone to pay awards or judgments, especially those where Chevron may have wanted to avoid any collection efforts.

ABOUT THE AUTHORS

Diego Brian Gosis *is a Partner at GST LLP and has participated as counsel, conciliator, sole arbitrator or chair in more than 100 high value and high stakes disputes. He has represented sovereigns and private parties in international arbitration and annulment proceedings in the Americas, Europe, Africa and Asia. He has extensive transactional experience, including mergers and acquisitions, technology, real estate, arranging and counseling participants at public and private tenders, arranging estate and tax planning structures and advising clients on matters of commercial, administrative and international law.*

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What is Fueling the Future of the ECT?

Recent years have seen a political re-evaluation of the Energy Charter Treaty (ECT). The ECT is a multi-national legal instrument originally designed to liberalize energy trade after the fall of the Soviet Union in the 1990s. Investors with qualified investments can enforce the ECT's protections through international arbitration. To date, over 150 such cases have been launched. Many led to historically consequential compensation decisions.

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Whether the ECT's utility has become outmoded is a matter of perspective. Undoubtedly, the existence of safeguards against expropriation, unfair treatment, and discrimination (amongst others), along with the provision for international arbitration instead of domestic court systems, serves as an incentive for foreign investments of any nature. In this respect, the ECT substantively protects existing and new energy projects. Given recent geopolitical events, including the war in Ukraine and its effect on the global fuel market, and greater awareness about the repercussions of climate change, energy investments have attracted greater scrutiny. In particular, the ECT's historic protection of fossil fuel investments has been criticized as incongruent with rigorous decarbonization regulation and the promotion of alternative energy sources. Various economic and political factors at national and EU levels, have added further pressures for reforms, with some contracting parties advocating for reforms or the complete withdrawal from the ECT.

ECT Modernization

The Intergovernmental Panel on Climate Change (IPCC) reflects scientific consensus on global carbon dioxide (CO2) emissions caused by human activity. It estimates that the energy sector contributes to approximately three-quarters of global greenhouse gas emissions. Although the ECT's reach does not cover all projects – only those of the contracting parties – this necessarily implicates the role of the ECT.

In 2022, after nearly five years of consultations by the ECT contracting parties, a proposed framework for modernization was announced. It includes a carve-out for new fossil fuel projects and a ten-year sunset of protections for existing projects. It specifically extends protection for decarbonization technologies. The framework expressly reserves environmentally-related public policy aims within the scope of the sovereign right to regulate.

However, efforts to implement the framework were stifled when certain EU parties decided to explore withdrawal from the ECT. Although no legal withdrawal from the ECT has occurred to date, the EU and Euratom are currently pursuing a coordinated departure by its membership, from which specific Member States of the ECT's 66 signatories are likely to take cues (in addition to the 66 State signatories, the EU and Euratom are also signatories).

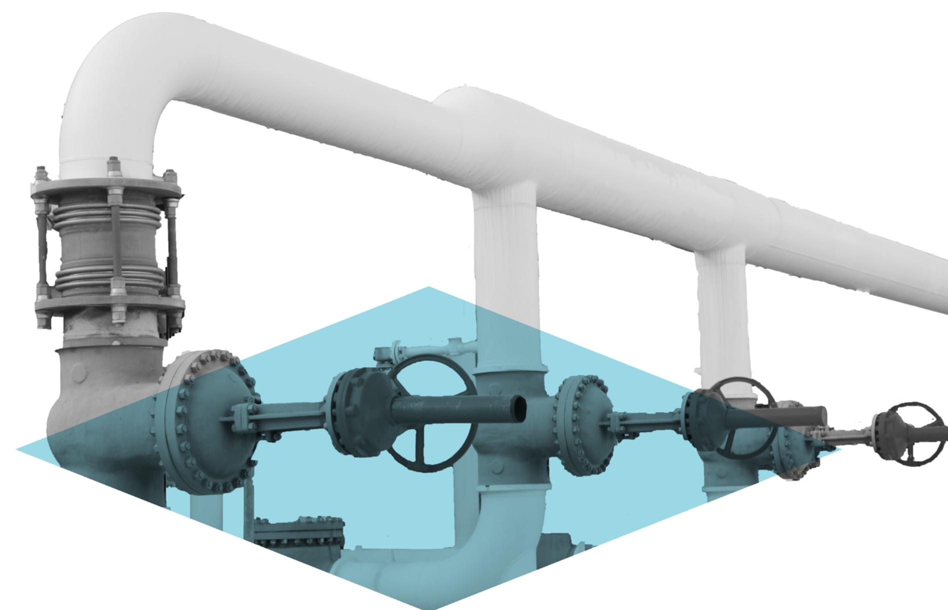
Certain contracting parties also proposed excluding the application of the sunset clause as part of the reforms. This would suggest any updated ECT text would depart from its current stance of energy-source neutrality. In essence, the modernized version of the treaty would distinguish between investments in carbon-intensive energy sources, which ought to receive less favorable treatment and eventually be phased out, and investments in low-carbon energy sources, which would be promoted and better protected.

In another development, the United Kingdom has utilized the ECT's denial of benefits provision, attempting to revoke protection for specific Russian investors, including those commonly referred to as "mailbox" investors and those who are subject to the UK sanctions regime.

Government Policies and Energy Investment

The primary political call for ECT reform addresses members' desire to achieve fossil fuel project phase-out without incurring liability and significant compensation for failure to comply with the ECT's obligations. Several high-profile cases that concern environmental and carbon emission reduction schemes demonstrate this tension. Critics frequently express reservations about the ECT's investment protections, arguing they are not tailored to specific energy sources and undermine climate targets. This concern was illustrated in Rockhopper v Italy, which concerned Italy's decision to reintroduce a ban on oil and gas exploration and production activities within a 12-mile zone along the Italian coastline. The tribunal ultimately ruled that Italy had committed an unlawful expropriation of Rockhopper's investment under the ECT's protections as a result of this regulation.

On the other hand, investors have worries regarding the abrupt enforcement of policies and regulations of fossil fuel projects, which can lead to devaluation or total loss of value of their investments. Coal phase-out deadlines often result in the premature closure of fossil fuel facilities before they have reached their intended economic lifespan achieved equilibrium with investedcosts. The State's failure to provide adequate time and resources for a smooth transition gave rise to the recent case of RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands. The German utility company RWE initiated arbitration against the Netherlands, arguing a breach of the ECT in response to a 2019 law prohibiting coal for electricity generation. RWE committed a substantial EUR 3.2 billion investment in the construction of its latest plant, a decision which was claimed to be in response to a specific request from the Netherlands. According to RWE, it would be economically impractical to achieve profitability for these plants by switching to an alternative fuel source in the contemplated five-year timespan. While the decision is as yet unissued,, the case demonstrates the complexity of balancing the fossil fuel phase-out ambition and the protection of investor's legitimate expectations.



The Renewables Conundrum

Governments have defended quick and rigorous regulation for phasing out fossil fuel projects by invoking their responsibilities under the Paris Agreement. Specifically, they argue that the ECT is incompatible with EU law.

Since 2012, almost 70% of ECT arbitrations concerned reforms impacting the renewable energy sector. A careful analysis suggests that the disputes did not concern fossil fuel projects but rather the regulatory measures that target renewables. In particular, after the 2008 global economic crisis, many States reduced renewable energy sector subsidies. Several instances of tax levies in the Spanish industry spurred numerous investors to commence arbitration proceedings under the ECT. Furthermore, the removal of incentives for photovoltaic generators had a similar impact in Italy, while a State-imposed levy on solar energy led to investor claims in the Czech Republic.

The arbitral award issued in Charanne v. Spain was the first decision in a series of arbitrations commenced under ECT against Spain regarding amendments to its renewable energy regulations. In this arbitration, the Tribunal held that Spain's legislative changes were reasonable, proportionate, and in the public interest.

The *Charanne* case demonstrates the political parameters informing the intersection of renewable energy policies, investment protection, and regulatory sovereignty. The interaction of these issues is expected to remain a hot topic.For instance, the IEA Government Energy Spending Tracker reported that USD 1.34 trillion was allocated by governments for clean energy investment support since 2020. Government spending has played a central role in the rapid growth of clean energy investment since 2020, which rose nearly 25% from 2021 to 2023, outpacing growth in fossil fuels in the same period. Governments need to explore mechanisms that provide fair compensation to investors in cases where regulatory changes impact their investments, while also ensuring that the overarching goals of climate action and environmental protection are fulfilled.

Looking Ahead

The modernization of ECT poses complex challenges involving commercial, legal, and geopolitical dimensions. Yet, climate goals and investment protection are not mutually exclusive. A potential outcome can be achieved if investors have confidence that their rights and investments remain protected re and States can retain the ability to enact and enforce environmental protection laws to drive their policy objectives.

States can manage any apparent tension by engaging in constructive consultation with stakeholders on investment treaties, taking proactive mediation and alternative dispute resolution before a dispute manifests, and devising fair compensation structures that consider the broader context of climate action. Enhancement of policy certainty by providing clear, long-term roadmaps for climate action, and the featured role of private investment is also key in assisting investors to make informed – if qualified –decisions and reduce the uncertainty often associated with rapid policy changes. After all, the impact of investment has many reverberating benefits for the development of human capital and research, the advancement of technology and the establishment of a competitive market – the very features which make climate change goals actualizable.

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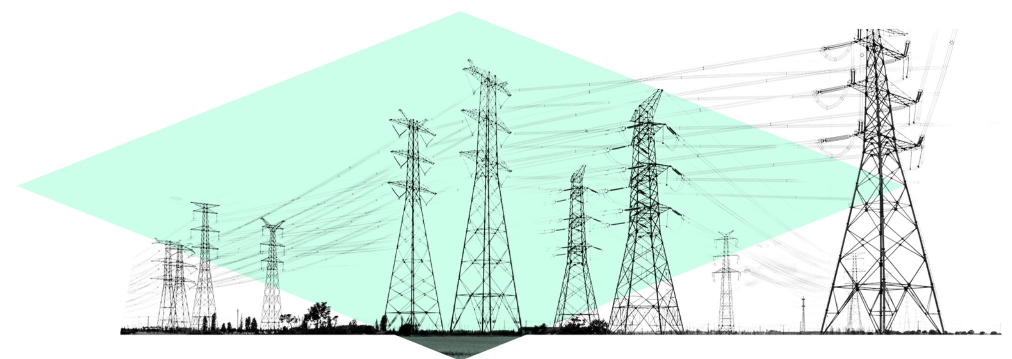
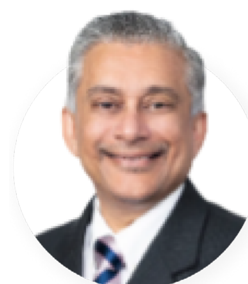


HIGH VOLTAGE WISDOM: EXPERTS ADVICE

Helping Experts Assist the Tribunal: Energy Expert Witnesses Share Lessons Learned

Can We Adopt a Best Practice from the Energy Industry To Improve Our Performance in Arbitration?



Ajey Chandra
Executive Vice President
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Peter Bartlett
Managing Director, London
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"If you simply take up the attitude of defending a mistake, there will be no hope of improvement."

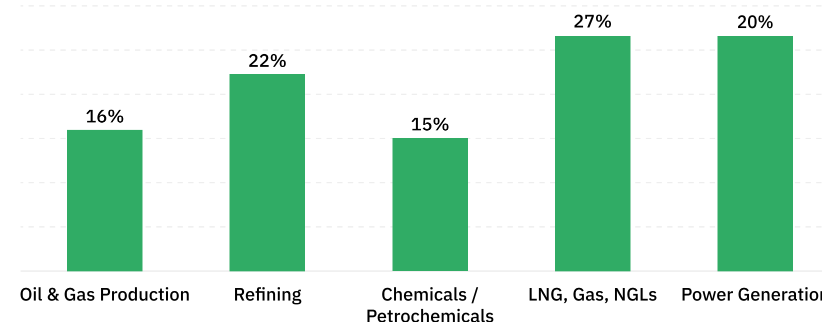
(Winston Churchill)

At Baker & O'Brien, most of us are engineers with extensive energy industry experience, including developing and implementing major projects. An industry best practice is to evaluate a completed project retrospectively to develop "lessons learned" on what went well and what could have been done better. We apply this practice in our consulting work, learning from our arbitration expert witness experiences. In this article, we share a few insights that we hope will serve as catalysts for continued discussion and improvement.

Our Experience in Energy Arbitrations

Let us set the stage with a brief description of our experience so that readers can gauge how our insights apply to their cases.

Clients engage us as independent experts to assist in arbitrations across the energy value chain. Our engagements span oil and gas production through transportation and processing (refining, petrochemicals, liquefied natural gas (LNG), and power generation) to industrial energy consumers. Our expert assignments typically fall into two general categories: (1) liability and root cause; and (2) damages/quantum analysis. Our engagements involve a wide range of economic damages in dispute – from relatively modest amounts (<US$10 million) to high-stakes claims involving billions.



Industry Segment Experience Percent of Billable Hours

In the Liability and Root Cause category, we determine what went wrong and who was at fault. In engineering, procurement, and construction (EPC) execution-related disputes, the issues often concern the adequacy of the front-end engineering and design (FEED). Other common execution issues in dispute include delayed or defective work, performance of modular subcontracts, long-lead procurement items, and change order validity and management (or mismanagement). Once the EPC project transitions from construction to commissioning, disputes often develop over the contractor versus owner roles and responsibilities for preparing the plant for startup, testing, and operation.

In matters requiring Damages/Quantum expertise, the focus shifts from liability to economic valuation – putting a price tag on the alleged financial harm and moving from "who" to "how much." Generally, these disputes pertain to: (1) commercial terms (e.g., supply or offtake, force majeure); (2) business or asset valuation; and (3) insurance claims for business interruption and property damage.

Opposing experts often disagree on fundamentals, such as the calculation methodology and the appropriate baseline. Further points of disagreement include forecasting commodity prices and profit margins and the appropriate discount rate to apply to future cash flows for determining a present value. What common lessons have we learned assisting with energy arbitrations?

Learnings and Perspectives

The following five categories capture the high-level focus areas and some of the nuanced perspectives.

TIMING OF THE EXPERT ENGAGEMENT

The timing of an expert engagement impacts the cost of services, the breadth and depth of assistance, and ultimately the quality of the work. Our advice is to engage the experts earlier than you think necessary.

When engaged early in the process, we can facilitate independent investigation, understand better the underlying issues, and provide a more perceptive and quantitative analysis. For example, we may draw on our industry experience to identify key issues and questions not yet identified by the legal team. Engaging an expert in advance of receiving opposing expert reports is highly recommended so that suitable upfront analysis on expected key issues can be performed, and a suitable reply report submitted.

Engage the expert early to benefit from an enhanced analysis.

EXPERT TEAM

When appointing an expert, a counsel may face a trade-off between an expert with deep subject matter expertise versus one with more extensive testifying experience. A thoroughly prepared expert with an exceptional grasp of the core issues and the ability to explain them in a simple manner can best assist the tribunal. In matters with multiple testifying experts, delineating each expert's opinion area is essential to control the risk of overlap and conflict. Thus, a key point to learn is the importance of regularly challenging the size and experience of the expert team.

Seek subject matter experts who quickly grasp the key issues and can explain them simply.

EXPERT INSTRUCTION

Expert instructions require careful attention. Relevant, clear, and specific instructions or questions enhance the clarity and focus of expert reports. Instructions should be delivered from a single source, as multiple sources have the potential to result in conflicting directions. We have experienced subtle differences when instructions were given by multiple counsels, for example, in client joint venture situations. The involvement of barristers provides a fresh perspective; however, their input on instructions, especially when late in the process, can create confusion and late-stage redrafting.

Single-point delivery of unambiguous instructions leads to a more defined and efficient expert engagement.

JOINT EXPERT CONFERRALS

It is common for tribunals to instruct the experts to hold joint conferrals to identify the areas of agreement, allowing experts and tribunals to focus on the major disputed issues. Baker & O'Brien has been involved in very effective joint expert conferrals; however, we have experienced occasions where the process became an arduous war of attrition. The process is most effective when the experts collaborate on a joint report that focuses on the main issues to assist the tribunal.

Instruct conferring experts to focus on preparing a report focused on maximizing its value to the tribunal

REPORT WRITING

Preparation is the key to success in expert testimony. And preparation is founded on a solid report, reflecting an intimate understanding of facts. The secret to a well-written and credible expert report is to begin an early draft to move towards a defined structure. This is the surest way of establishing the critical issues and identifying the gaps in documentation and evidence. Experts should lay out their logic and methodology, explain how they have applied their experience and draw their opinions from the underlying evidence. Critically, reports should be easy to read. Finding the right balance between technical detail and readability is critical for articulating credible opinions.

Reports must be clear, concise, accurate,
and well-organized – and easy for the tribunal to read.

Conclusion

Expert assignments for energy-related arbitrations have many common issues that cut across engagement types. We strive to learn from them to provide credible and perceptive opinions that assist the tribunal.

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Reasonable Return Framework for RES in the Current Context

In the last 10 years, many investor-State arbitrations have involved renewable energy sources (RES) – including claims brought under the Energy Charter Treaty (ECT) and various bilateral investment treaties related to regulatory changes in countries such as Spain, Italy, the Czech Republic, Romania, Japan, and Bulgaria. These arbitrations typically concern reductions in the financial incentives provided to promote RES investments that would otherwise not have been viable, raising issues around a sovereign State's right to regulate. The at-issue regulatory measures commonly commenced in the early 2010s, in the aftermath of the 2008 Financial Crisis and Great Recession.

This series of RES arbitrations has seen a variety of outcomes, including substantial financial awards to investors. For example, between 2018 and 2020, three different ICSID tribunals awarded more than €290 million in damages to Nextera Energy, €112 to Antin, and €77 million to Watkins Holdings S.à.r.l. and others.

Several awards have found particular regulatory changes to be incompatible with the ECT (*e.g.*, Antin v. Kingdom of Spain award; the Watkins Holdings Sarl and others v Kingdom of Spain award; or the Masdar Solar & Win Cooperatief UA v Kingdom of Spain award). Others have permitted sovereign states to alter financial support to RES as long as investors were able to earn a reasonable return (*e.g.*, Nextera Energy Global Holdings BV and Nextera Energy Spain Holdings BV v Kingdom of Spain award; the RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain award – "RREEF Award"; or the PV Investors v. The Kingdom of Spain award – "PV Investors Award").

Richard Caldwell
Principal & Practice Leader: International Arbitration
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Dr. Fernando Bañez
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Energy markets have once again seen regulatory measures, raising the related concerns about the ability of RES investors to earn reasonable returns. We identify four recent market developments:

- A steep decline in the costs of certain RES technologies. For example, the levelised costs per MWh of the most widely deployed RES technologies (aside from hydropower), solar PV and onshore wind, have declined by about 90% and 70%, respectively (see, IRENA (2022), "Renewable power generation costs in 2022", International Renewable Energy Agency, Abu Dhabi, Figure S.4.). Many new RES projects are now viable without financial support from States.
    - Policy commitments to progress towards net zero emissions, involving ambitious expansion of RES targets.

- Increased short-term volatility of energy and electricity prices, with a general upward price trend (see the electricity markets report for Q4-2022, the "EC 2022-Q4 Report", Figure 11 and Figure 29). Price volatility has been particularly extreme since the Russian invasion of Ukraine.
- Growing pressure on consumer bills ("EC 2022-Q4 Report", Figure 67) through both increased energy prices and the general cost of living crisis. The resulting affordability concerns have prompted several European states to shield consumers from the direct impact of rising prices. Since mid-2021, European countries have allocated €651 billion to this aim.

Several recent regulatory measures explicitly aim to reduce consumer bills while maintaining a "reasonable return" for investors. For example, the EU electricity price cap "intends to minimise the impact [of] marginal sources like coal or gas [...] on the final price of electricity while still ensuring a reasonable return on investment for the technologies covered", such as RES and nuclear. However, the application of a reasonable return framework can involve significant interpretative issues, which introduce uncertainty to RES investments.

First, some applications will involve no clear *ex ante* definition of "reasonable return." Does a reasonable return refer to the return that a particular investor or industry would have considered reasonable at the time investments are sunk, or is it a return that could be considered "reasonable" at the time of a regulatory change? Does reasonable return refer to a particular financial measure such as the "internal rate of return," the "cost of capital," or an accounting measure of profitability? Does it refer to a specific percentage number or a given range?

Second, upon what investment is the supposed reasonable return being earned? Since many regulatory changes have affected existing plants, several answers are possible. One answer could be a planned or actual investment amount incurred in the past; another could be a hypothetical industry-standard investment consistent with an efficiency benchmark.

Many energy investments are long-lived, involving significant upfront capital investment and extended cost recovery through their operating lifetime. Should a reasonable return consider amounts earned by long-term producing assets before a regulatory change? Should it consider differences in investment between countries or regions?

Different answers to these questions may have materially different economic consequences.

Unfortunately, existing RES arbitral awards are unable to provide further clarity since they have employed different interpretations. For example, the RREEF Award estimated an updated measure of reasonable return and applied it to the historical investment costs of a particular installation, while the PV Investors Award applied an *ex ante* measure of the reasonable return to industry standard investment costs. The lack of a clear *ex ante* definition, together with the diversity of arbitral practice, could leave the meaning of reasonable return hotly contested in future arbitrations.

Another issue is that a reasonable return framework entails a shift in risk allocation, potentially increasing the costs of future investments. As noted before, certain RES technologies can now compete in the market without financial support from sovereign states. This represents a significant development from earlier generations of RES that required financial support to motivate any investment. The application of a reasonable return framework to the latest generations of RES risks limiting their ability to enjoy upside market price outcomes while exposing them to downside outcomes. Investors might come to expect that future regulatory measures will be introduced to limit upsides but that they will retain full exposure to downsides. The resulting asymmetry would raise uncertainty and increase the financing costs of new investments,[2] to the detriment of consumers and sovereign states.

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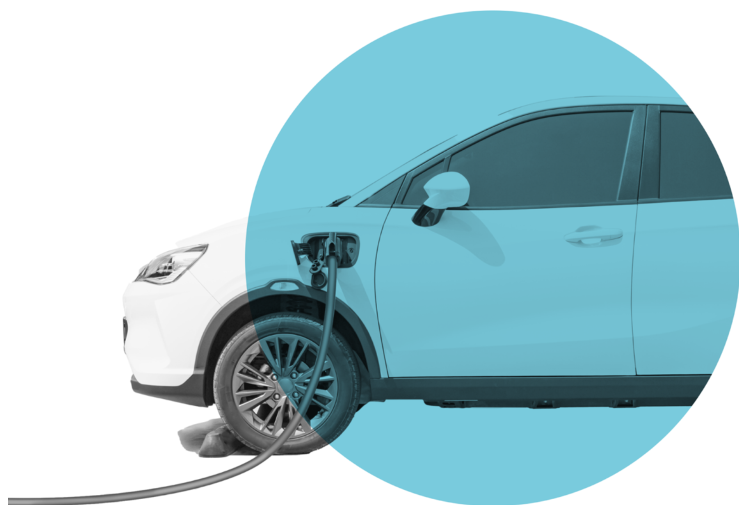
2 A reasonable return framework could also create implementation challenges under existing power purchase agreements. For instance, the introduction of an electricity price cap could be inconsistent with contractually defined reference prices.

Similarly, a particular investor might seek to use innovation and effective management to drive down costs, increase production, or extend project lifetimes. This improved project efficiency would, in turn, enhance profitability and investment returns. A subsequent regulatory limitation of returns to a more "reasonable" level could inadvertently eliminate these potential efficiency benefits, undermining investors' incentives to innovate and manage efficiently, again to the detriment of consumers and sovereign states.

The costs of RES have fallen over the past 10 years, due in part to the financial support from sovereign states to earlier generations of RES projects, allowing for technology innovation and mass production. Substantial RES and grid investments are needed in the next decade to achieve the desired energy transition. Minimising investment uncertainty and maintaining efficient incentives would help contribute to this critical endeavour.



ABOUT THE AUTHORS

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ASIA PACIFIC

CHINA

Lighting the Way: The Arbitral Insitution Illuminating Insights
Shifting Landscape: New Trends in Energy Disputes in China

In recent years, led by the United Nations and various other international organizations, countries around the globe have embarked on ambitious campaigns to develop renewable energy and fight climate change. Meanwhile, a succession of major black swan events, first the Covid-19 pandemic and then the Russia-Ukraine Conflict, have sent shockwaves through the global energy market and led to a severe energy crisis. These profound changes have far-reaching impact on energy-related disputes in China. With the steady progress of energy transition, an increasing number of disputes have arisen from the new energy sector. Additionally, amidst the chaos due to the Covid-19 pandemic and the Russia-Ukraine Conflict, and the tightened regulations aiming at achieving both "energy security" and an "orderly transition" to a low-carbon energy system, certain interesting new trends or causes of disputes have also begun to unfold.

Leslie Zhang
General Counsel & Vice President Strategic Growth and Business Development
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Rise of Disputes from the New Energy Sector

With the expansion of renewable energy in China, disputes from the new energy sector have been on the rise, and the new energy sector seems to be poised to overtake its conventional counterpart as the predominant source for energy disputes.

According to its casework statistics, Beijing Arbitration Commission, a major arbitral institution of China, has consistently dealt with more cases from the new energy sector than the conventional energy sector in the past 5 years, and more recently, the total amount of disputes from the new energy sector disputes has also surpassed those from the conventional energy sector.

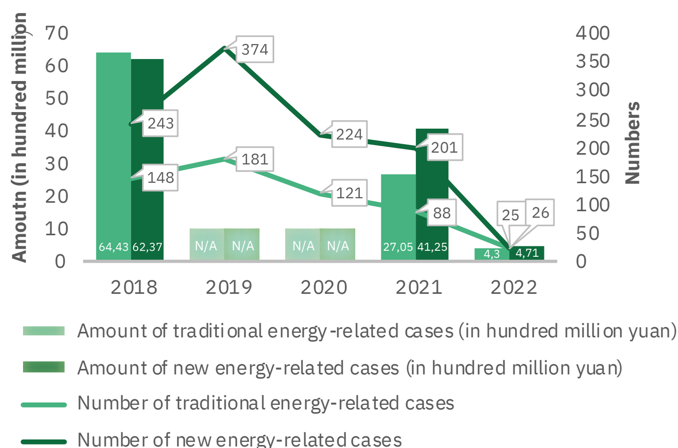

Chart: Comparison of the quantity and aggregate disputed amount of cases from the conventional energy and new energy sectors from 2018 to 2022

(the total disputed amount for cases in 2019 and 2020 are unavailable)

Notably, the rapid rise of disputes from the new energy sector is to some degree disproportionate to the relatively small share of the new energy sector in the energy market of China. This excessive increase in disputes reflects the robust growth prospect of the new energy sector of China and is partially attributable to the fact that the new energy sector has traditionally been more market-oriented, with more participation from private businesses that appear willing to submit disputes to arbitrations, in contrast to the conventional energy sector, where the Stated-owned enterprises' dominance remains unequivocal.

With the data available now, we cannot make conclusive predictions on the prospect of disputes from the new energy sector. However, the upward trend seems clear. With the further implementation of China's grand energy transition plans, we may yet see more cases arising from the new energy sector.

New Trends or Causes for Energy Disputes

DISPUTES ARISING FROM DISLOCATION OF THE ENERGY MARKET.

Since 2019, the Covid-19 pandemic and the Russia-Ukraine Conflict have significantly destabilized the global energy market. As an integrated part of the global market, China is not immune to the sweeping impact of such events, and the unforeseen and dramatic fluctuations in energy prices have predictably led to various disputes, especially in long-term oil and gas supply contracts. For example, in a recent case adjudicated by a Chinese court, an LNG seller sought exemption from obligations under a sales contract on the ground that the surge in LNG prices following the Russia-Ukraine Conflict constitutes a *force majeure*. The court denied the seller's request, noting that the seller was a veteran LNG supplier familiar with the market, and that LNG prices had been steadily rising before the parties signed the LNG sales contract, which indicated the subsequent increases in LNG prices were a commercial risk the seller had assumed, rather than *force majeure*. Similar cases have been raised during the Covid-19 pandemic as well. In such cases, contracting parties usually cite *force majeure* or the changed circumstances doctrine to request for exemption from obligations that have become onerous. As of now, the prospect of the Russia-Ukraine Conflict is uncertain, with no clear end in sight, and the global energy market remains volatile and fragile. We may see more disputes caused by the fluctuations in the energy market in the near future.

DISPUTES FROM M&A TRANSACTIONS.

M&A transactions in the energy sector typically involve significant financial stake and complex deal structures. In recent years, increased market risk has led Chinese companies to become increasingly proactive in wielding litigation or arbitration as leverage for their business objectives,

especially in cross-border energy M&A transactions. Also, given the uncertainty of energy prices, earnout payments have become more popular in energy M&A transactions, especially in the oil and gas industry, where the parties tie payments for target assets to oil or gas prices, reserves or the assets production or performance following the completion of the transactions. As the earnout mechanism essentially converts the M&A transactions into an ongoing concern, instead of a clean-off one-time deal, its growing popularity may lead to more disputes.

DISPUTES RELATING TO CARBON EMISSION.

To achieve a carbon emission peak by 2030 and carbon neutrality by 2060, the Chinese government has introduced numerous new legislations and policies, including a comprehensive carbon emission quotas system. New disputes relating to carbon emissions have surged in recent years. Pursuant to the report from the Supreme People's Court of China ("Supreme Court"), courts across the nation have adjudicated more than one million carbon emission cases since China joined the *Paris Accord*. In a recent exemplary case published by the Supreme Court, the court confirms that carbon emission quotas are a property of value, similar to deposits, cash, motor vehicles and real estate. With the recognition of the legal status and value of carbon emission quotas, disputes concerning carbon emissions are very likely to become a material subject for commercial disputes.

DISPUTES CONCERNING INTELLECTUAL PROPERTY RIGHTS.

The new energy sector relies heavily on technological innovations, and its expansion has given rise to a significant number of intellectual property disputes. As noted in the Supreme Court's annual reports on intellectual property disputes in 2020 and 2021, the new energy sector has become one of the main sources of intellectual property infringement claims in China. The further development of the new energy sector requires extensive research and innovations, which may bring forth even more intellectual property disputes.

Conclusion

In light of the prevailing consensus on climate change, and the persisting energy crisis, the energy sector of China will continue to be affected by the profound changes that have already partially shifted the landscape of the industry. In the next years, the volatile energy market, carbon emissions goals, and ESG liabilities are likely to cause more energy disputes. While courts in China are likely to play a significant role in resolving such disputes, we expect an increase in conflicts that will end up in arbitrations. Chinese arbitral institutions would have to ramp up their arsenal for handling energy disputes, by increasing the number of arbitrators with expertise in domestic and international energy practices and accumulating experience administering energy disputes, in order to play a more meaningful role in the resolution of energy disputes.

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Mr. Zhang *currently holds the position of General Counsel and Vice President of Strategic Growth and Business Development at United Energy Group Limited (UEG). Prior to joining UEG, he served as a Director in the Project Management Division of the Legal Department at China National Offshore Oil Corporation. He has played an integral role in numerous groundbreaking transactions in the oil and gas sector globally, possessing a comprehensive grasp of energy disputes in both theory and practice. Furthermore, Leslie Zhang is a visiting professor at several esteemed universities and sits on the board of directors for a public company. He is also on the list of arbitrators registered with the Beijing Arbitration Commission/Beijing International Arbitration Centre (BAC/BIAC).*

MALAYSIA

Fees and Tariffs in Europe's Renewable Energy Landscape: Lessons for Malaysia

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Introduction

In recent years, the world has witnessed a significant shift towards renewable energy sources as nations strive to combat climate change and reduce their dependence on fossil fuels. Europe has been at the forefront of this transition, with ambitious renewable energy targets and policies designed to promote both clean energy consumption and generation. One of the key aspects of renewable energy policy in Europe was the establishment of fees and tariffs to incentivise renewable energy production and ensure a fair and sustainable energy transition. Unfortunately, these have also been the source of multiple investor-State and other arbitrations in Europe.

Renewable energy is also a key concern in Malaysia, with the government aiming to install 70% renewable capacity and to phase out coal power plants completely by 2050, among other objectives, under the National Energy Transition Roadmap, published by the Malaysian Ministry of Economy in August 2023.

Malaysia too has adopted a feed-in tariff (FiT) system, among other policies to increase the proliferation of renewable energy sources and increase uptake of the same. This essay explores the intricacies of fees and tariffs for renewable energy in Europe and highlights key lessons Malaysia can take away to increase the robustness of its own system and ideally avoid disputes.

The European Model of Fees and Tariffs for Renewable Energy

Europe's approach to fees and tariffs for renewable energy is rooted in its commitment to achieving climate goals outlined in the Paris Agreement and the European Green Deal. This has led to the development of a multifaceted system that supports the growth of renewable energy sources, such as wind energy, solar energy, and biomass energy, to name a few. The European model encompasses several key components, as follows:

FEED-IN TARIFFS (FITS)

Feed-in tariffs have historically been a cornerstone of European renewable energy policies[3]. They guarantee fixed, above-market rates for the electricity produced from renewable sources, ensuring a steady income for renewable energy producers. FiTs have been instrumental in kick-starting the renewable energy sector in many European countries.

AUCTION MECHANISMS

In recent years, many European countries have transitioned from FiTs to competitive auction mechanisms. Through these auctions, renewable energy projects compete for subsidies, with the lowest bid securing the support. Auctions are designed to reduce the cost of renewable energy generation and increase market competitiveness.

GREEN CERTIFICATES AND GUARANTEES OF ORIGIN

To encourage renewable energy consumption, Europe has implemented systems of green certificates or guarantees of origin. These instruments certify the origin and environmental attributes of renewable energy, allowing consumers to make informed choices about the source of their electricity.

NET METERING AND FEED-IN PREMIUMS

Some European countries have adopted net metering policies, enabling small-scale renewable energy generators to offset their consumption with excess production. Feed-in premiums provide additional incentives by offering a supplementary payment on top of market prices.

CROSS-BORDER ELECTRICITY TRADE

Europe has established interconnected electricity grids and cross-border trading mechanisms to facilitate the exchange of renewable energy across countries. This promotes renewable energy integration and supports regions with varying renewable energy potential.

INVESTOR-STATE DISPUTES IN EUROPE PERTAINING TO RENEWABLE ENERGY

The achievements in Europe over the last years in the proliferation of renewable energy are remarkable. As such, Denmark made it to the news in 2017 when it managed to run the country 100% on win energy, albeit for only 24 hours.

All the while, numerous disputes arose between foreign investors and European nations. At large, this was the result of an over-incentivization of solar energy. Several countries suffered from a renewable energy boom by far exceeding anticipations and thus costs for governments.

Spain clearly stands out, with the incentives offered for the solar industry leading to such proliferation that it became unsustainable for the Spanish government to continue with its FiT. Spain then pulled the plug in 2012 when it retrospectively curtailed the FiT advantages provided to investors. Since then, many investors have initiated investor-state arbitrations against Spain and other countries, with the investors often prevailing with (at least a portion of) their claims.

3 Andri Pyrgou, Angeliki Kylili and Paris A Fokaides, 'The Future of the Feed-in Tariff (FiT) Scheme in Europe: The Case of Photovoltaics' (2016) 95 Energy Policy 94, 2.

Lessons from Europe's FiT Experience for Malaysia

As Malaysia further develops its integration of a FiT system for renewable energy, there are several critical lessons that can be drawn from Europe's extensive experience in the field of renewable energy:

STABLE, PREDICTABLE AND ROBUST POLICIES

Europe's success with FiTs is underpinned by the stability and predictability of its policies. Malaysia should aim to establish a long-term policy framework that provides certainty to investors and developers, fostering a conducive environment for renewable energy growth. Indeed, a current issue with the Malaysian renewable energy landscape is the lack of robust policies, leaving key industry players with a lack of understanding of their rights and obligations.

TECHNOLOGY-SPECIFIC RATES

Tailoring FiT rates to specific renewable energy technologies based on their characteristics and costs can promote the balanced development of various technologies, optimizing the energy mix and leading to greater diversification of renewable energy technologies.[4] Indeed, differentiating FiTs for specific technologies also a greater adaption of support to the costs of varied technologies; this in turn reduces the costs of support and the likelihood that "*...the cheapest technologies will receive windfall profits*".[5]

REGULAR TARIFF ADJUSTMENTS

Regularly reviewing and adjusting FiT rates to reflect technological advancements and cost reductions is vital to ensure that tariffs remain equitable and fair over time. The Malaysian Government ought to ensure that the rates for any implemented tariffs are reviewed at regular periods (e.g., annually or semi-annually) so that Malaysia does not run into the same problems that several European nations were facing when they needed to cut back on attractive tariffs.

GRID INTEGRATION PLANNING & MONITORING AND TRANSPARENCY

Adequate grid planning and investment are essential to accommodate increasing renewable energy capacity, minimize curtailment, and ensure grid stability. With the increase in renewable energy uptake that has no doubt accompanied the feed-in tariff system in Malaysia (which shall no doubt be enhanced under the Malaysian Renewable Energy Roadmap), Malaysia must ensure that it designs and implements a robust and comprehensive grid integration strategy. Such a plan ought to include sub-strategies for forecasting, balancing area coordination and expansion and increasing flexibility, among others.[6]

Furthermore, Malaysia must implement a transparent and robust monitoring and evaluation system to help track the effectiveness of the FiT scheme and make data-driven adjustments to the policy as needed. Also, clear monitoring and transparency would also provide clear information to investors, which would provide a lead-in for the market to aid in and support this transition into renewable energy, as it did in Europe.

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4 Pablo del Río, 'The Dynamic Efficiency of Feed-in Tariffs: The Impact of Different Design Elements' (2012) 41 Energy Policy 139, 144.
5 Ibid., 147.

6 Sarah L Cox and Kaifeng Xu, 'Integration of Large-Scale Renewable Energy in the Bulk Power System: Lessons from International Experiences' (National Renewable Energy Lab (NREL), Golden, CO (United States) 2020) NREL/TP-6A20-74445 <https://www.osti.gov/biblio/1604617> accessed 1 October 2023.

AVOIDING DISPUTES WITH INVESTORS

One key aspect in driving Malaysia's energy transition will be managing investors' expectations. The experience in Europe should both serve as encouragement – attractive investment opportunities will proliferate the shift to renewable energy – and a warning sign: unexpected changes in policy will lead to investor-State disputes.

Malaysia is far from being a shining example for providing clear, stable, and transparent regulations. The country has seen five different Prime Ministers since 2018, with each of them seemingly driving his own "agenda." If there were plenty of attractive opportunities for foreign investors in the field of renewable energy, frequent policy changes would be a potential powder keg for Malaysia.

Conclusion

The transition to renewable energy is a global imperative, driven by the need to address climate change and ensure a sustainable energy future. Europe has been a pioneer in developing and implementing policies related to fees and tariffs for renewable energy, offering valuable lessons and insights for countries like Malaysia.

As Malaysia takes steps towards a greener energy landscape, it has the opportunity to not only reduce its environmental footprint but also stimulate economic growth, create jobs, and enhance energy security. By learning from the experiences of Europe – including how to not end up in numerous legal disputes – and leveraging its own unique strengths and resources, Malaysia can make significant progress in the global transition to renewable energy. It is hoped that this progress will be conflict-free.

ABOUT THE AUTHORS

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EUROPE

SWEDEN

Lighting the Way: The Arbitral Institution Illuminating Insights

Trends of Energy Disputes at The SCC Arbitration Institute Between 2020 and 2023

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SCC Arbitration Institute

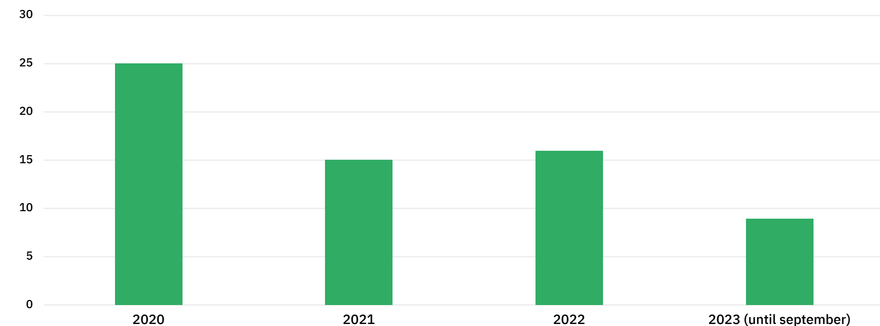
Gaurav Majumdar
Intern
SCC Arbitration Institute

The present article analyzes the inflow of energy arbitrations administered by the SCC Arbitration Institute ("SCC") between 2020 and September 2023. "Energy arbitration" is for this report defined as any dispute arising out of contracts between parties conducting their businesses in the energy sector including but not limited to gas, electricity, oil, renewable energy, waste management and similar other disputes which can be included in the broad framework of the energy sector.

Since 1917, the SCC provides a neutral, independent, and impartial venue for dispute resolution in commercial business around the world. The Institute operates entirely without commercial or political interests as a non-profit and independent entity within the Stockholm Chamber of Commerce. Every year, the SCC resolves around 150 to 200 disputes between parties from more than 40 countries. In 2022, the total value of the disputes amounted to more than EUR 1.6 billion.

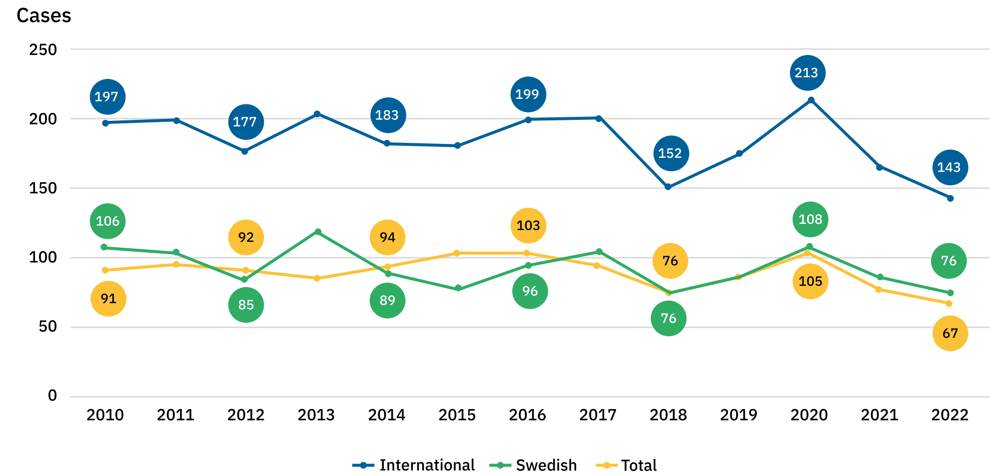
SCC's role in energy arbitrations is twofold. First, it administers, each year, energy arbitrations as a result of the parties' agreements. Second, the Institute is one of the international arbitration institutes that is active in the public debate in relation to energy arbitrations and disputes in the energy sector.

Between 2020 and September 2023, 65 energy arbitrations were commenced at the SCC.



Number of Energy Arbutrations commenced at the SCC

These numbers can be compared to the SCC's total caseload:



In 2020, disputes within the gas industry formed a major part of the Institute's energy arbitrations, counting for 44% of the energy arbitrations commenced at the SCC that year. This was followed by disputes related to the electricity sector and the renewables sector. The remaining disputes for the year 2020 were in relation to oil and waste management.

However, in 2021, the SCC saw a rise in the number of disputes related to the electricity sector and the renewables sector wherein 60% of the energy arbitrations received by the Institute in 2021 came from those two sectors (within and outside of Sweden). Other energy arbitrations that year related to the oil and gas industry.

In 2022, disputes related to the gas sector stood for 43% of the SCC energy arbitrations. Also, this year, disputes from the electricity sector and the renewables sector formed a large part of the energy arbitrations under its purview, holding 38%.

A majority of the SCC energy arbitrations relate to breach of supply contracts and payments arising out of it as their main cause of action.

Further, a clear trend in 2022 and 2023 (up until September) has been that the SCC has received several requests for arbitration in disputes which have directly or indirectly resulted from the Russian invasion of Ukraine.

Following the invasion of Ukraine in 2022, the SCC witnessed a majority of cases where the underlying cause of action in these energy disputes is rooted in the unfulfillment of contractual obligations due to the invasion (including *force majeure* as a defense). For instance, in 2023, 4 out of the 9 disputes filed by entities in the energy sector had their roots in the aftermath of the conflict. In one of the disputes involving the delivery of electricity, the parties agreed to use the SCC Expedited Rules instead of the SCC Arbitration Rules referred to in the contract for a faster resolution of the dispute. Under the SCC Expedited Rules, the deadlines are shorter and there is a limit to the number of petitions that a party can submit which result in a faster and more cost-efficient way of resolving disputes between the parties.

Offering quick and cost-efficient methods for resolving disputes lies at the heart of the SCC, being the birthplace for expedited arbitration, emergency arbitration, and the SCC Express. At the Institute, we know that these faster services are essential for the ever-growing energy sector.

A number of energy arbitrations at the SCC has been a result of disputes under investment treaties. The SCC is one of the preferred international forums for the resolution of investment treaty disputes. For example, under Article 26 of the Energy Charter Treaty ("ECT"), investors can choose to submit disputes to the SCC and the SCC has administered more than 30 disputes arising out of the ECT.

Much has been previously said about the Achmea and the Komstroy decision of the Court of Justice of the European Union ("CJEU"). These cases have had a direct impact on arbitration proceedings within the EU. After these decisions were rendered, energy arbitrations arising out of Intra EU Bilateral Investment Treaties and out of the ECT have been on a decline at the SCC.

ABOUT THE AUTHORS

Caroline Falconer *is the Secretary General of* **SCC Arbitration Institute***. She holds a Swedish LL.M. degree from Stockholm University as well as a LL.M. degree in international dispute resolution from King's College, London University. She was Senior Legal Counsel at a major European energy company between 2015 and 2022 and has spent almost 10 years at three different Swedish law firms specializing in dispute resolution and has worked at the Stockholm District Court. Caroline is co-founder of SWAN (Swedish Women in Arbitration Network) and a member of the jury for the Swedish prize "The Company Lawyer of the Year".*

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UNITED KINGDOM

Sanctions and Energy Arbitration: A Practical Guide to Managing Supply Chain Issues

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The Ukraine – Russia conflict has renewed focus on the impact of economic and trade sanctions on the global energy industry, particularly the impact of sanctions on the entirety of the oil and gas supply chain. The Oxford Institute for Energy Studies aptly describes the long-reach of sanctions: "Looking forward the market focus should not only be on whether the oil sector will be directly targeted by sanctions, but also the crescendo effect of self-sanctioning along the oil supply chain all the way from marketing to financing to shipping."

Noticeably, it is not uncommon for the sanctioned State to impose countersanctions. For example, Columbia University's Center on Global Energy Policy pointed out that, following the USA, UK, and EU's imposition of sanctions in 2022, Russia introduced countersanctions, including the sanctions on Gazprom's former European subsidiaries and halting gas exports to Finland.

Unsurprisingly, a number of disputes and issues have arisen as a result of sanctions, particularly in relation to the Russian sanctions targeting the energy sector and their knock-on effects on global energy supply chains. For example, Shell announced in February 2022 that it intends to exit its equity partnerships held with Gazprom and related entities.

We summarise below some key issues that arise in relation to the imposition of sanctions in the energy sector, along with some practical suggestions on managing these issues in an attempt to resolve any disputes efficiently or avoid them arising in the first place.

BACK-TO-BACK CONTRACTS

Oil and gas contracts are commonly part of a longer chain of supply, e.g., the buyer purchases LNG from the producer (usually from a facility in which the seller has an interest). The buyer then has contracts to supply the purchased LNG to downstream customers, whether for private consumption or public use. In the event that one entity (save for the end user) in the chain is sanctioned, it is likely that the end user will face some disruptions and bring a claim against its supplier. Such claims could then be "passed up the chain" causing severe disruptions to all involved and, subject to the terms of the respective contract, leaving some parties out of pocket if their downstream damages cannot be fully recovered. It is, therefore, helpful to have sufficient protection built into the contract to cover any loss arising from the downstream contract and, to the extent possible, ensure that the terms are "back-to-back". This is particularly important with regard to arbitration clauses to ensure that any disputes in the chain can possibly be resolved in consolidated or concurrent arbitrations.

FORCE MAJEURE

A key area of dispute in relation to sanctions and their impact on the supply chain is whether a party affected by sanctions is permitted to rely on force majeure to suspend its obligations under the contract. This depends on the provision of the force majeure clause. However, it is common for the clause to provide that "acts, rules or regulations of a governmental authority" amount to an act of force majeure.

Often the force majeure clause requires the party relying on it to take further action. For instance, the clause may require the party affected by the force majeure event to take "reasonable endeavours" to overcome the event. The English Commercial Court in *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) clarified that this obligation only requires the party relying on the clause to take action envisaged by the contract. However, this was later overturned on appeal, and it was held that an event could be "overcome" if its adverse consequences were completely avoided and the underlying purpose of the parties' contractual obligations was achieved, even if the contract was not performed strictly in accordance with its terms (here, by making payment in Euros instead of US dollars). However, this position may change further as permission to appeal to the Supreme Court has been granted.

This highlights the need to carefully consider the wording when drafting force majeure clauses and make clear if they are intended to include sanctions. Ensuring that any other requirements in the force majeure clause are properly satisfied should also be taken into account before seeking to rely on it.

REPRESENTATIONS AND WARRANTIES

These are also useful tools to protect against the potential negative impact of sanctions. Strong and wide-reaching representations and warranties to prevent sanctions breaches will also assist in flushing out any potential issues in the negotiation phase. For example, if there is a concern regarding the identities of any other parties in the chain, or the ultimate destination/source of cargo.

LIMITATION OF LIABILITY

In a commercial dispute, two aspects of loss need to be considered. The first is the loss suffered by the counterparty if a sanctioned party fails to comply with its contractual obligations due to the impact of sanctions, and a replacement cargo needs to be sourced. In the example cited above, Finland claimed that there would be no disruptions to Finnish consumers despite Russia's suspension of gas supplies. If Finland achieved this by purchasing gas from alternative suppliers through last-minute contracts, the costs of doing so may be significant. Ordinarily, subject to the usual principles of causation and mitigation being satisfied, Finland could seek to recover this cost from Russia. However, if the contract stipulates (as is common in LNG supply contracts) that amounts recoverable due to the failure to supply are capped at a percentage of the cargo value, established by reference to the contract price, it is not inconceivable that this amount is insufficient to make whole the loss suffered, especially if market prices are high due to the global circumstance. One option is for parties to be aware of the commercial realities of the agreed cap on the recoverable amounts when the contract is negotiated.

Second, as established above, if a party in the supply chain is unable to comply with its contractual provisions due to the impact of sanctions, it is likely that various claims will be brought in the supply chain. The key question is the extent to which any loss suffered by the innocent party due to claims by its customers, resulting from the sanctioned party's failure to comply with its contractual obligations, can be passed on to the sanctioned party. Ultimately, this depends on whether the contract excludes the sanctioned party's liability for such loss and warrants a close reading of the relevant contractual terms.

SANCTIONS CHECKS ON ALL PARTIES IN THE SUPPLY CHAIN

Prior to entering into the contract, a sanction check against the known parties and their significant shareholders should be taken to flag any potential issues so that appropriate protection can be included in the contract. Such a check can usually be done for a relatively low cost. As part of this due diligence, it is important to consider the potential jurisdictions involved and the origin and destination of the cargoes (and included in the representations and warranties discussed above).

FUTURE-PROOFING

While the development of the global sanctions regime can be hard to predict and may change rapidly, it is useful for companies operating in the energy sector to carry out period horizon scanning to try to mitigate the effects of future potential sanctions. It is not uncommon for sanctions regimes to target the energy sector (including oil & gas and renewable energy) due its global importance, and it is therefore sensible for advance contractual and operational preparations to be taken where possible. For example, a "sanctions playbook" can be put in place for important transactions, which could include a protocol for operational strategies (such as identifying alternative supply sources) and communication procedures in the event that new sanctions are imposed.

This is particularly relevant for companies that are focused on the renewable energy push, as the raw materials and technology required for the energy transition are often sourced from higher-risk jurisdictions. In particular, if the tensions between the USA and China continue to escalate, it would not be inconceivable that the countries impose sanctions prohibiting the importation of materials (as they did in 2021 when the USA banned the importation of polysilicon from China due to human rights concerns) or the exportation of technologies (as China proposed to do in February 2023 when it considered introducing export sanctions on a large number of technologies related to the renewable energy transition, including those which are crucial for the manufacture of photo voltaic cells for solar panels). In general, it is advisable to build flexibility into contracts at an early stage, to try to provide protection against future events.

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The Energy Transition and Climate Change-Related Disputes

Globally there is a shift underway to transition to greener forms of energy. As a result of that energy transition, there is a corresponding rise in related disputes and climate change-related disputes. Disputes addressing issues of climate change – climate litigation or climate arbitration – are used as tools against governments and companies to accelerate the energy transition. These disputes are complex and challenging – they occur in a landscape where the regulatory, legislative, and contractual regimes are unclear and often developing. In addition, by virtue of the very nature of these types of disputes they involve multiple parties and jurisdictions.

Accordingly, international arbitration is a well-suited forum for resolving many of these disputes, given the flexibility and expertise that can be offered. For those interested in this area, the ICC Arbitration and ADR Commission Report on Resolving Climate Change Related Disputes through Arbitration and ADR is useful reading. However, much has changed since 2019, both in terms of the subject matter of these disputes but also the number of disputes being brought.

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This article will discuss some of the key types of energy transition and climate change-related disputes that are likely to arise in the coming years.

Types of Energy Transition and Climate Change-Related Disputes

Defining 'climate change litigation' or 'climate change arbitration' is an area of discussion. However, for the purposes of this article the scope given to it by the Grantham Institute – Climate Change and Environment (pg 6) is used, namely disputes involving *"material issues of climate change science, policy, or law"*. Particularly the latter two aspects – climate change policy and law – are likely to give rise to increasing disputes in the area of energy transition.

There is a wide range of disputes prompted by the energy transition and driven by concerns surrounding climate change. Two common types of disputes to focus on are those that arise in the contractual arena and those in the arena of Investor-State:

CONTRACTUAL DISPUTES

These disputes can arise from a variety of contractual relationships, such as power purchase agreements, joint development agreements, and of course construction contracts. As just one example, by way of illustration, a dispute can arise between two companies over the construction of a carbon capture and storage facility. An increasing issue that can arise in the context of contractual disputes is around the expertise of contractors.

Generating power from renewables is of course one part of the energy transition. However, disputes can arise in many different ways as that project makes its way to realisation. There are related issues such as mass electric transportation infrastructure, energy storage, and technologies to improve energy efficiency. All of these projects demand expertise and, in some cases, new engineering solutions to be realised. In turn this increases the risk that disputes will arise. Equally, parties may increasingly use 'carbon penalties and incentives' under contracts – to encourage a reduction in carbon output. Keeping the Grantham Institute's definition of climate change disputes in mind, particularly *"material issues of climate change...policy...or law"* one can appreciate the potential for disputes as parties come to terms with what these newly developed contractual clauses and mechanisms.

INVESTOR-STATE DISPUTES

Since the signing of the Paris Agreement, governments around the world have taken action through various means to curb the effect of climate change. These actions have included phase-out timelines of fossil fuels, along with introducing policies to incentivise the development of renewable forms of energy. As such, these disputes arise not only in the context of those seeking to transition to greener energy but also by parties that have been negatively affected by the transition to green energy. For example, an investor could claim that its investment has been damaged by a government decision to phase out oil and gas exploration. See, *e.g.* Lone Pine Resources Inc. v. Canada, ICSID Case No. ARB(AF)/13/2. Equally there have been several claims against host states to date pursuant to the Energy Charter Treaty. For example, investors have filed claims against foreign governments as a result of the repeal or reduction of feed-in tariffs that were promised to investors who invested in the renewable energy sector. There are many such examples, see *e.g.* Eiser Infrastructure Ltd. and Anor v. Spain, ICSID Case No. ARB/13/36; Greentech Energy Systems and Anor v. Italy, SCC Case No. 095/2015; and AES Solar Ampere Equity Fund and Ors v. Spain, UNCITRAL 2012-14. As governments seek to meet their obligations under the Paris Agreement and other international obligations, such disputes are only set to increase.

In addition to these specific types of disputes, there is also potential for more general conflicts to arise in the context of the energy transition and climate change. For example, there could be disputes over the allocation of costs and benefits associated with the transition, or over the distribution of liability for climate change-related damages.

Recommendations for Lawyers Working in International Arbitration

Lawyers working in international arbitration should be aware of the following trends and developments in the area of energy transition and climate change-related disputes:

The number and complexity of these disputes is increasing as the global energy transition accelerates.

There is a growing trend of investors using investor-State arbitration to challenge government policies related to the energy transition and climate change.

Arbitral tribunals are becoming more familiar with the technical and legal aspects of energy transition and climate change disputes. That trend must continue and increasing expertise must be developed.

Conclusion

The energy transition is not a new phenomenon, but it has gained increasing importance. The energy sector is a key contributor to climate change and so the energy transition is a key component in the fight against climate change.

For that reason, disputes will continue to rise in this rapidly changing and important landscape.

ABOUT THE AUTHOR

Ruth Keating *is a Barrister at* 39 Essex Chambers *who has a broad practice across all areas of chambers' specialisms, with a particular interest in energy disputes and environmental law. Ruth has worked on a wide variety of different of disputes, both litigation and arbitration – acting as both sole counsel and junior counsel in a larger team. She is an editor of the Environmental Law Bulletin (published by Sweet & Maxwell) and also regularly records a podcast with Camilla ter Haar on the construction industry and climate change issues. They are joined by industry guests to discuss the big topics facing the sector in reaching net zero.*

The Impact of The Russia-Ukraine War on Energy-Related Arbitrations: A European Perspective

Russia's invasion of Ukraine in February 2022 has raised significant alarm among European leaders and prompted a firm response towards Russia.

It notably triggered the adoption of several new sanctions packages against the Russian Federation, adding to the existing economic sanctions imposed on Russia since 2014 in the wake of its annexation of Crimea.

The strong stance taken by European States in support of Ukraine following the Russian invasion has not been without consequences on the European energy sector, especially as the EU has been heavily dependent on Russia for its supply of energy.

Over the course of the past two years, Russia has, in turn, substantially decreased the volume of its gas deliveries to Europe and enacted a series of presidential decrees that have affected energy-related contracts with European companies as well as European assets in Russia.

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Russia's Imposition of New Contractual Conditions

In response to Western sanctions, on 31 March 2022, Russia's president issued a decree ordering companies affiliated with "unfriendly States" to pay for Russian gas in Roubles. European companies were directed to make payments through designated accounts at Gazprombank, the affiliate bank of Gazprom, the majority State-owned Russian gas company. This move was perceived as an attempt by Russia to bolster the depreciating Russian Rouble.

The enactment by Russia of the so-called "Rouble Decree" compelled European buyers to either comply, with a risk of violating EU sanctions or see their supply of gas halted by Gazprom. Russia's threats were serious: Bulgaria's refusal to comply, for instance, was met with a suspension by Gazprom of its deliveries.

Since gas supply agreements typically specify the currency of payment, it is natural that contract negotiations and disputes would follow Russia's unilateral decision to impose payments in Roubles. As an example, this gave rise to a dispute between Gasum, a Finnish State-owned energy

company, and Gazprom. An award was reportedly issued by an ad hoc Stockholm-seated arbitral tribunal, resulting in conflicting statements from the parties. Gasum claimed the tribunal held that they were not obligated to pay in Roubles, while Gazprom stated the tribunal recognised the Rouble Decree as a force majeure event, ordering Gasum to pay over EUR 300 million in gas supply payments. It was further noted that both parties were advised to continue negotiations to resolve the situation regarding future gas supplies.

Even compliance with the Rouble Decree did not, however, shield European companies from adverse consequences. Notably, Italian energy company Eni had initially agreed to Moscow's demands to transition to a payment arrangement in Roubles, a provision not stipulated in their long-term contracts. Eni disclosed that Gazprom's gas supplies nevertheless fell below the minimal contractual daily average as of June 2022.

Eni is one of many European companies that have seen their Russian gas deliveries dwindle, sparking a surge of arbitrations against Gazprom.

Disputes Relating to The Suspension of Gas Deliveries

Indeed, a series of disputes have stemmed from Gazprom's failure to comply with its obligation to supply minimum quantities of gas under gas supply agreements concluded with European companies.

Gazprom's suspension of gas deliveries has forced some European companies to secure replacement volumes at much higher prices on the spot market to comply with their own delivery obligations. It has also exacerbated the volatility of gas prices in Europe, which could lead to further instability in the regional energy market.

A number of European companies have initiated arbitration proceedings with the hope of obtaining compensation, some of them requesting that Gazprom be ordered to cover the extra costs they claimed to have incurred to mitigate the consequences of the Russian company's non-performance. For instance, the partially state-owned Czech energy group CEZ has initiated arbitration proceedings against Gazprom, seeking around CZK 1 billion (approximately USD 45 million) in damages for alleged non-delivery of natural gas by Gazprom Export in 2022. Other arbitrations arising from or contemplated in relation to Russian gas supply shortages involve major players like Germany's Uniper and RWE, Bulgaria's Bulgargaz EAD, Slovenia's Petrol d.d, France's Engie, and Italy's Eni.

Gazprom has relied on force majeure to justify some of its failures to supply gas in compliance with its contractual obligations.

Sanctions-Related Disputes

The Russian invasion of Ukraine has also triggered disputes that relate to the enforcement of the European sanction regime vis-à-vis Russia.

To comply with these sanctions, some European companies opted to terminate their contracts with Russian companies, with the latter disputing the validity of the termination. For instance, Danish wind turbine manufacturer Vesta Wind Systems A/S terminated contracts for the construction of wind parks in Russia it had entered into with WEDF, a Russian subsidiary of the Finnish majority State-owned company Fortum. Vesta claimed that sanctions-specific contractual clauses allowed it to validly terminate the contracts, which is contested by WEDF. Fortum's Irish subsidiary, Fortum Finance DAC, has filed ICC arbitration proceedings seated in Stockholm.

Furthermore, some European companies stopped performing their obligations under energy-related contracts in order to avoid breaching the EU sanctions regime. Following the enactment of EU sanctions, German industrial gas company Linde suspended work under an EPC contract signed in 2021 for the construction of a gas processing facility in Russia. The other party, RuChemAlliance (RCA), a joint venture between Gazprom and Rus GazDobycha, decided to terminate the contract. RCA has taken legal action to claim repayment of the advance it allegedly paid to Linde and sought an order to seize Linde's Russian assets. Linde has initiated arbitration proceedings.

Investment Disputes

Investment disputes have also happened and are likely to continue to arise between European companies and Russia, as well as between Russian companies and European countries. European investors, specifically those that are affiliated with States viewed as "unfriendly" by Russia, have been facing significant impediments in relation to their Russian operations. These issues include a risk of expropriation of their assets and difficulties in withdrawing from Russia. Investors might seek remedies through BITs or the Energy Charter Treaty (ECT). European States may also face arbitrations arising from measures taken by European authorities against Russian companies. Some Russian companies have seen their assets being frozen, and the corporate structure of some Russian energy company subsidiaries has been placed under administration in Europe.

Foreign Investors v Russia

On 25 April 2023, Vladimir Putin signed a decree allowing the temporary administration of movable and immovable property belonging to foreign individuals associated with "unfriendly States". This includes significant stakes in Russian energy companies such as Unipro and PAO Fortum.

Fortum, a Finnish energy company, has sent two Notices of Dispute to Russia under the Netherlands and Sweden BITs with Russia. This is the result of Russia's temporary administration of Fortum's stakes in the Russian company PAO Fortum on the basis of the above-mentioned presidential decree. Fortum plans to seek compensation of several billion Euros for the seizure of its assets in Russia.

Similarly, Russia has placed assets of the German company Uniper under temporary administration. While Uniper enjoys protection under the Germany-Russia BIT, it is still unclear whether it will commence investment arbitration proceedings.

Russian Investors v European Countries

A German law firm representing the Russian oil company Rosneft has revealed preparations for initiating an arbitration claim against Germany. This came as a response to Germany's decision to place Rosneft's German assets under trusteeship following Russia's invasion of Ukraine. Germany put forward Russia's use of crude oil supply as a political lever and the necessity of the trusteeship to ensure Rosneft's ability to fulfill its obligations. As Germany has recently decided to deny Russia the enjoyment of the protections of the ECT, Rosneft may be contemplating arbitration under the Germany-Russia BIT, which provides for ad hoc arbitration under the treaty.

Looking Forward

Europe has been actively working to reduce its dependency on Russian oil, natural gas, and coal, as it represents a serious threat to energy security in Europe.

Europe has made significant progress in that respect since the invasion of Ukraine, with gas storage facilities at a record-breaking 90% capacity by the end of the 2023 summer. One strategy involves increasing gas imports through LNG non-Russian sources. Norway's pipelines have stepped in as Europe's largest source of gas, while the US has also benefitted from the energy crisis, with LNG imports from the US increasing.

However, a reduction in gas supplies in the global market means that the market is still prone to disruptions, and prices are still volatile. The crisis has not only exposed Europe's dependence on Russian fossil fuels but also highlighted its vulnerability in relying on fossil fuels in general.

As a result, Europe is also exploring alternative energy sources and turning to clean energy sources, in alignment with the European Commission's call to accelerate the transition to clean energy and a shift towards more sustainable and environmentally-friendly energy solutions.

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ISRAEL

Try to Keep Up
Issues in Arbitration of Energy Disputes in Israel

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In the past decade, Israel has seen a significant increase in the volume and quality of energy projects. This increase correlates with various factors, such as the discovery of rich natural gas reserves, the development of technologies allowing efficient harnessing of solar, wind, and biogas to generate renewable energy, and other factors. Consequently, we have also seen a rise in energy-related disputes in recent years.

In this article, we will review and discuss various issues concerning energy disputes in Israel: the general structure and tensions of Israeli energy projects, circumstances that affect arbitration as the appropriate method to resolve such disputes, and common issues in energy arbitration in Israel.

The Inherent Israeli–Foreign Tension

Generally, energy generation projects in Israel follow the typical structure comprising a developer (or "owner") who engages with financiers for the project, an engineering procurement and construction contractor (EPC), which undertakes the design, construction, and commissioning of the project on a fixed-price, turnkey basis; and an operation and maintenance contractor (O&M). In certain projects, the owner would also engage in Long Term Service Agreements (LTSAs) for the provision of parts and services, for instance, with respect to gas turbines. The owner normally enters into a power purchase agreement (PPA) with Noga, the system operator (a government-owned company) or with large energy consumers and possibly also with private electricity suppliers, pursuant to regulations recently established by the Israeli Electricity Authority. This structure also reflects the contractual relationships that are endemic to energy projects, as well as any disputes arising in this context.

In Israeli energy projects, the owner, the financiers (usually local banks and institutional investors), and the regulatory agencies are Israeli. The contractors for the construction and operation of the project, including suppliers of materials and products (e.g., solar panels, wind turbines, etc.), are, in many cases, foreign corporations. The respective contractual relationships between the Israeli owner and the foreign parties are typically governed by an agreement to resolve disputes by international arbitration.

Arbitration or Court

Parties to energy disputes tend to agree that international arbitration is the appropriate and efficient method to resolve the dispute between them. This is especially so when the contractual relationship is planned to extend for many years. For example, as energy projects in Israel may extend to 20 to 25 years, a relationship between an owner of a project and an O&M contractor potentially lasts a significant period of time. In such circumstances, the parties would be interested in resolving the dispute as quickly as possible to allow the continuation of the normal course of operation of the project. In addition, Israeli courts are generally averse to setting aside arbitral awards and also tend to recognize and enforce awards in foreign-seated arbitration, thereby increasing reliability and certainty with respect to the resolution of disputes by arbitration. In addition, with respect to Israeli-seated arbitrations, Israel is in the process of legislating the International Commercial Arbitration Law, which is based on the UNCITRAL Model Law on International Commercial Arbitration, another significant step in Israel's pro-arbitration direction.

However, to the extent that exceptional public interest may be attributed to the energy project and to the issues in dispute, Israeli case law includes an exception to arbitration, which should be taken into account by the parties. In LCA 1817/08 *Teva Pharmaceutical Industries Ltd. v. Pronauron Biotechnologies Inc.* (11 October 2009), the Israel Supreme Court refused to stay court proceedings, notwithstanding an express arbitration agreement between the parties to resolve disputes in London by arbitration pursuant to the LCIA Rules. The Court's basis for refusal to give force to the arbitration agreement in that case was premised on public policy considerations – specifically, public interest in the matter of the dispute (the dispute in question raised issues of public health regarding a clinical trial on human beings). In view of the magnitude of certain energy projects and their potential importance in a relatively small country such as Israel, especially considering that public resources might be involved – it could not be ruled out that Israeli courts might view the resolution of certain energy disputes in arbitration proceedings as inappropriate (for example, if the dispute concerns the integrity of the electricity system and the reliability of electricity supply to consumers), and refrain from referring the parties to arbitration, even in cases in which the exceptions of Article II.3 of the New York Convention do not apply.

Common Issues in Israeli Energy Arbitration

In addition to the issues that may arise in energy disputes regardless of the geographical region (delay in construction, contractual disagreements, etc.), there are specific issues that arise when dealing with such disputes in the Israeli context.

REPEAT-PLAYER EFFECT REGARDING GLOBAL ENERGY CONGLOMERATES

An issue that commonly surfaces in the initial stage of the arbitration proceeding, specifically in the nomination and appointment of the arbitral tribunal, is the matter of arbitrator impartiality due to repeat-player effect. More often than not, the foreign corporations – which may be the EPC contractors, O&M providers, and suppliers of the materials and parts – are major global energy conglomerates. As such, they are repeat players in the international arbitration arena of energy-related disputes. It may be challenging to identify impartial arbitrators with experience in energy disputes, without any links to such energy corporations, to serve on the arbitral tribunal. In addition, even when an arbitrator may seem impartial, a concern still remains with Israeli parties throughout the dispute, that the arbitrator might be prone (even subconsciously) to decide in favor of the non-Israeli global corporation, in the hope of securing future appointments.

INTRICACIES OF ISRAELI LAW

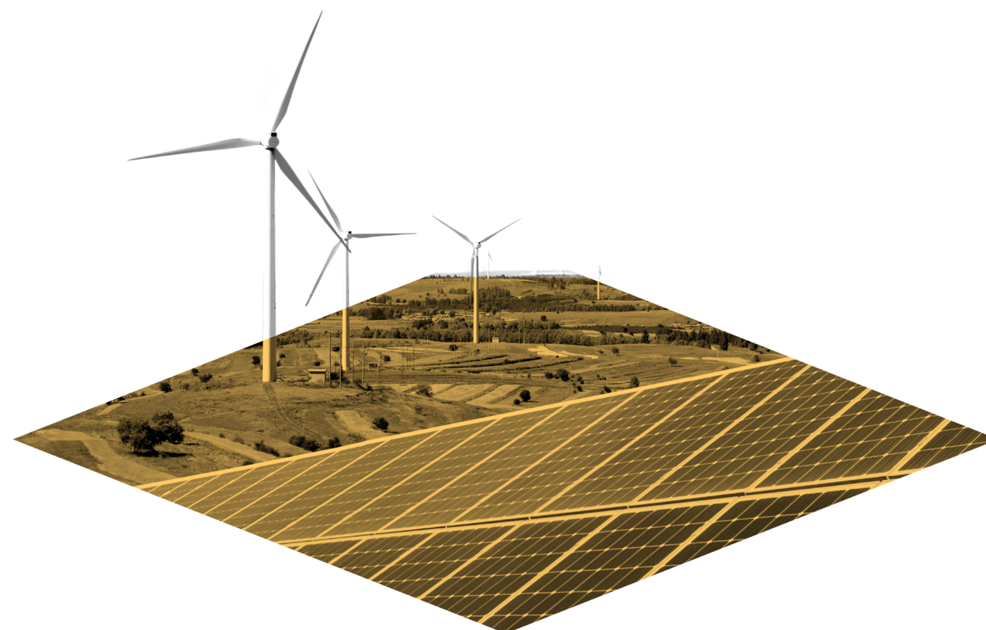
Typical substantive issues that arise in Israeli energy disputes include claims relating to the fulfillment (or lack thereof) of Israeli regulatory requirements. Any energy project in Israel must meet the applicable Israeli regulatory provisions and the “Grid Code” of the Israel Electric Corporation. When disputes arise, it becomes evident that this is not only a matter of technical expertise but also of contract interpretation regarding the appropriate allocation of liability in case of a failure to meet said requirements. The inherent involvement of Israeli law in the arbitration proceedings may affect the formation of the arbitration agreement ahead of time, causing the parties to choose, from the get-go, Israeli law as the substantive applicable law governing any dispute between them. Other issues involving Israeli legal idiosyncrasies might relate to the interpretation of force majeure clauses, material adverse effect (MAE) clauses, change in law provisions, etc.

LOST IN TRANSLATION

The various contractual agreements relating to a specific project are supposed to ensure meeting Israeli regulatory requirements, and as such, these agreements are all intertwined with respect to such issues and are supposed to be in sync. However, sometimes, some of these agreements may be in Hebrew, and the difference in language may lead to discrepancies. For example, an O&M Agreement (between the owner and the O&M) may be in English, while the PPA (between the owner and Noga, the Israeli government-owned entity) would be in Hebrew. This characteristic may also come into play in arbitration – the choice of whether to have the PPA translated to English as an appendix to the O&M Agreement or whether to keep it in the original Hebrew language may determine which party would bear the responsibility for any discrepancies due to translation issues.

Conclusion

The complexities of certain issues in Israeli energy disputes are, sometimes, sui generis relating to the specific energy market. As there are increasingly more opportunities in Israel for energy projects, these issues receive more focus and are discussed in practice more often. Such discussions lead counsel to better address these issues in agreements, which leads to resolution of disputes regarding new issues, and round and round it goes. This characteristic is innate to the rapidly evolving nature of the Israeli energy market, requiring parties and counsel to work hard to keep up.



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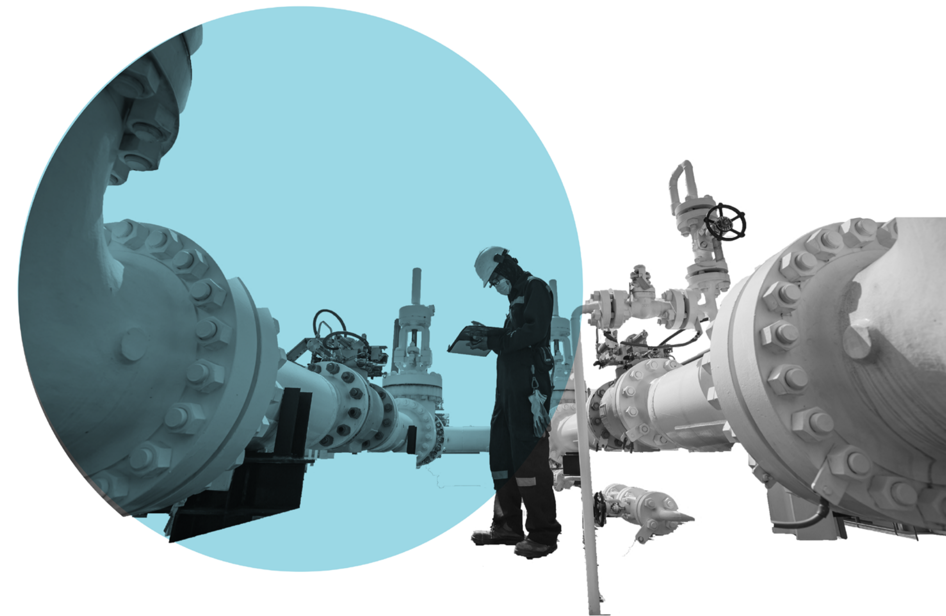

OMAN

Disputes Under Omani Exploration and Production Sharing Contracts

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The foundational legal framework for oil and gas exploration and production in Oman is the Oil and Gas Law, which was issued by Royal Decree No. 8/2011 ("Petroleum Law"), which regulates the activities related to surveying, exploring, developing, and exploiting petroleum resources in Oman and defines the rights and obligations of the Government of the Sultanate of Oman ("Government") and exploration and production oil and gas companies. The Petroleum Law requires a concession agreement, typically in the form of an exploration and production sharing agreement ("EPSA"), to be concluded between the Government and the concessionaire(s) ("Contractor") for carrying out these activities. The EPSA grants the Contractor the exclusive right to explore and produce oil and gas in a specified area, subject to certain terms and conditions.

An EPSA is the chief title document to an upstream project in Oman and can become a source for disputes between the Contractor and the Government. They are long-term and complex agreements involving technical issues and numerous regulatory frameworks. As such, they may give rise to various types of disputes, which can be resolved through different methods, depending on the terms of the specific ESPA and Omani law. This article will provide an overview of the main types of disputes under EPSAs in Oman. This article explores the predominant kinds of EPSA disputes that may emerge in this intricate domain of the Omani oil and gas sector and how they are resolved.

Exploration and Production Sharing Agreements

Within the framework of EPSAs, the Government retains the title to the petroleum but bestows upon the Contractor the exclusive privilege to explore, produce, and partake in the resulting profits. Initially, EPSAs are typically awarded for a short exploration period, often spanning three years. Should the Contractor meet their minimum work obligations, they can extend the exploration term by three additional years. Moreover, the

term can be extended once the Contractor declares commerciality; at this point, the production phase kicks in, usually lasting for 15 years, with the right to extend for a further five years if petroleum production continues after the production phase.

The EPSA lays down definite work obligations and chronologies for the Contractor. A notable instance would be the stipulated period within which a declaration of commerciality should be made post-exploration. Similarly, the Government and the Contractor harmonise their understanding of the EPSA regarding the mechanisms to share profits, striving for an equitable division of revenues. This often encompasses formulas addressing cost recovery and the distribution of profits. Furthermore, the EPSA delineates the government take, encompassing royalties, taxes, and other fiscal responsibilities.

The Dispute Landscape

One type of dispute that may arise under EPSAs in Oman is related to the Contractor's operations in the exploration and production areas. These disputes may involve allegations of environmental damage, disputes over project assets, or issues regarding abandonment and decommissioning. For example, the Government may claim that the Contractor has caused pollution or failed to protect the environment and seek compensation or termination of the EPSA. Alternatively, the Contractor may dispute the condition or maintenance of the assets they have to transfer to the Government at the end of the EPSA or their liability for future abandonment or decommissioning costs. These disputes may require evidence of the existence or non-existence of environmental damage, the condition and maintenance of the assets, or the proper abandonment of the existing wells.

Similarly, another source of disputes under EPSAs is compliance with the minimum work obligations and the HSE requirements. These obligations and requirements are imposed on a Contractor to ensure that it conducts the exploration and production activities in accordance with the best international industry practices and Omani laws and regulations. Disputes may arise over the performance and measurement of the minimum work obligations, such as the drilling of wells, the acquisition of seismic data, and the implementation of Enhanced Oil Recovery ("EOR") techniques. Conflicts may also arise over compliance with the HSE standards, such as the prevention and mitigation of environmental damage, the use of materials, equipment, and techniques, and the protection of the workforce.

Another type of dispute that may arise under EPSAs in Oman is related to the cost recovery mechanism. Under this mechanism, the Contractor is entitled to recover its exploration and production costs from a portion of the petroleum produced before sharing the remaining production with the Government. However, conflicts may arise over which costs are recoverable, out of which production, and when. For example, the Government may conduct audits and reverse some of the costs the Contractor has already recovered, or the Contractor may challenge the Government's interpretation of the EPSA terms on cost recovery. These disputes may affect the amount of profit production that each of the Government and the Contractor parties can take and sell, and it may lead to overlifting disputes, where one party claims that the other has lifted more than its entitlement. These disputes may involve issues of burden of proof, limitation periods, and contractual interpretation.

A fourth type of dispute that may arise under EPSAs in Oman is related to the rights and obligations of the parties under the EPSA and Omani law. These disputes may involve allegations of breaches of the EPSA obligations by either party, disputes over the approval requirements for assignments or transfers of rights, or disputes over the regulatory decisions of the Ministry of Energy and Minerals ("MEM"). For example, the Government may accuse the Contractor of selling or importing prohibited materials or equipment, not meeting the Omanisation and training requirements, or violating land-related easements. Alternatively, the Contractor may challenge the Government's enforcement actions, approval of transfers or assignments, or other regulatory decisions by the MEM.

These disputes may involve the application of the Omani laws and regulations, as well as the EPSA terms, to the facts of the case.

Enforcing Assignment Rights

Finally, amid the dynamics of joint operating agreements ("JOAs") entered into between Contractor parties and EPSAs, disputes between the Contractor and the Government may revolve around the enforcement of reassignment rights under JOAs. When assigned, the Contractor's rights under the EPSA are formalised in the JOA. Failing to obtain the Government's indispensable approvals could render the Contractor in breach of both the JOA and the EPSA. In scenarios where disagreements arise under a JOA between the Contractor parties, a Contractor party might seek reassignment through mechanisms such as forfeiture or buy-out-related pathways. However, to execute this, the Contractor must meticulously adhere to the EPSA's assignment protocols. This becomes particularly complex given the contentious space between the Government and the Contractor. Assigning interests in an oil or gas block is under strict regulation in Oman. Any reassignment necessitates an initial endorsement from the MEM and obtaining a No Objection Certificate ("NOC"). Although the MEM requires submissions such as due diligence and evidence of financial soundness, the Government might have heightened scrutiny or additional demands in a dispute backdrop. Further complications ensue when reassignment rights under the JOA become a matter of contention with the Government. The enforceability of an arbitral award stemming from such a dispute becomes paramount. The focal point is often whether the reassignment remedies associated with a specific block are recognised and enforceable. While JOAs traditionally provide for forfeiture or buy-out-related reassignments, their application in an Omani context remains largely untested. The MEM's position on such contentious assignments is also nebulous. The crux of enforcing reassignment rights, especially amid Government-Contractor disputes, rests on securing a NOC from the MEM, ensuring it acknowledges the assignment, and simultaneously waives any right to an assignment bonus under the EPSA, if applicable.

Other issues that may arise concerning enforcing this right relate to whether the defaulting party must provide consent, whether the Government's assignment bonus will be applicable, and the documentation required. Most JOAs will include a provision whereby the defaulting party grants the non-defaulting party a power of attorney to act on its behalf in the event of default; however, under Omani law, a power of attorney is generally limited to representation in courts and a resolution of the shareholders, partners, or board of directors is required where the assignment of assets is concerned. For example, under the Commercial Companies Law, issued under Royal Decree No. 9/2018, and its regulations (Ministry of Commerce, Industry, and Investment Promotion Decision No. 146/2021 and Capital Markets Authority Decision No. 27/2021), a written resolution is required for the assignment of assets, unless the constitutional documents of the company stipulate otherwise.

Forum for Dispute Resolution

The resolution of disputes under EPSAs in Oman may depend on the provisions of the EPSA and the applicable law. EPSAs typically provide for arbitration as the primary method of dispute resolution under the rules of the International Chamber of Commerce (ICC) or the Oman Arbitration Centre (OAC), established under Royal Decree No. 26/2018. There has been a trending preference in Oman for the MEM to encourage oil and gas companies to adopt the OAC's arbitration rules ("OAC Rules"). The current version of the OAC Rules was issued under OAC Decision No. 8/2020 and is currently undergoing revision with the appointment of the Rules Revision Committee appointed in August 2023.

Irrespective of the arbitral institution selected, the seat of arbitration is often Oman. However, some EPSAs may also allow for sole expert determination as an alternative to arbitration, a waterfall dispute clause allowing the parties first to explore mediation, or for appealing arbitration awards to the Omani courts. These provisions may raise issues of enforceability, finality, and waiver of appeal rights. For example, based on current jurisprudence and the absence of reference to expert determination in the Oman Arbitration Act, issued under Royal Decree No. 47/1997, it is unlikely the Omani courts would enforce a decision of an expert. Similarly, there are current concerns with respect to the enforcement of mediation agreements in Oman, where the mediation takes place outside of the court-ordered system. One alternative to these issues is to adopt a med-arb approach whereby the mediator executes the final mediation agreement, turned arbitrator, as a consent award, making it an enforceable arbitral award. Whether the same approach can be translated into expert determination has yet to be tested in the Omani courts.

In addition to arbitration, litigation in Oman may also be possible in some cases, especially if the dispute involves the Government or a government entity. The Administrative Court has jurisdiction over disputes with government entities, and the Civil Code, Royal Decree No. 29/2013, and other laws provide the basis for civil claims against a Contractor. Criminal liability may also arise under the Penal Code, Royal Decree No. 7/2018, for certain EPSA or Petroleum Law violations. However, litigation in Oman may have disadvantages, similar to what happens in other jurisdictions, such as the lack of specialised courts, the requirement of translating all documents into Arabic, which may be burdensome, and the prolonged process resulting from the appealability of court judgements.

Finally, alternative dispute resolution (ADR) methods, such as negotiation and mediation, as discussed above, may also be used to resolve disputes under EPSAs in Oman before or during formal proceedings. Some EPSAs may require the parties to negotiate for a certain period before commencing arbitration. Where the pre-conditions to arbitration have not been fulfilled, this may lead to preliminary challenges at the commencement stage. While such arguments have been relatively untested, the Omani courts will likely treat it as an admissibility issue instead of a jurisdictional one. Nevertheless, while negotiation and mediation may help the parties reach an amicable settlement, which is encouraged under the principles of the Civil Code, any pre-conditions in the dispute resolution clause should be strictly adhered to, and the resulting settlement agreement should be comprehensive, final, and properly documented to avoid further disputes.

Enforceability of Arbitral Awards

The enforceability of arbitral awards arising from disputes under EPSAs is a pivotal aspect of the dispute resolution process. As a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified under Royal Decree No. 36 of 1998, Oman recognises the validity of foreign arbitral awards. Domestic and foreign arbitral awards are enforceable in Oman under the Oman Arbitration Act and the Civil Procedure Law, Royal Decree No. 29 of 2002, respectively. Similar to other New York Convention signatory jurisdictions, the grounds for non-recognition of foreign arbitral awards and annulment of domes-

tic arbitral awards are limited, and the Omani courts take a pro-arbitral stance when enforcing arbitral awards.

Final Remarks

EPSAs form the backbone of the Omani oil and gas sector, reflecting the nation's commitment to sustainable and mutually beneficial exploration and production activities. As with any complex contractual framework, the dynamics of EPSAs are susceptible to disagreements, often pivoting on nuanced technical, regulatory, and financial matters. The expansive range of potential disputes - from operational issues and compliance requirements to cost recovery mechanisms and assignment rights - showcases the intricacies inherent in such long-term, strategic agreements.

Oman's legislative environment, encompassing the Petroleum Law and various associated decrees, underscores a commitment to clarity, fairness, and a balanced approach to dispute resolution. While arbitration stands out as the predominant method of resolving EPSA-related conflicts, the legal landscape in Oman, complemented by its adherence to international conventions like the New York Convention, ensures that both domestic and foreign arbitral awards are enforced judiciously.

The challenges highlighted in this article signify the need for thorough, well-informed legal counsel and proactive risk management. With the rapidly evolving global energy landscape and increasing pressures on hydrocarbon-based economies, a meticulous understanding of EPSAs and a robust legal infrastructure are essential to navigate the potential pitfalls and capitalise on opportunities in Oman's oil and gas sector.

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TURKEY

Navigating the Storm: Potential Disputes Arising from Windfall Taxes and Revenue Caps

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In the energy industry, a recurring trend emerges where increases in energy prices often lead to government actions aimed at gathering unexpected excess profits and then redistributing these gains to support vulnerable households, energy-intensive companies, and high-cost energy companies. Many countries that are significant energy producers, such as Australia, Nigeria, and Brazil, have tax systems that incorporate mechanisms ensuring that the government benefits when prices experience an upswing. Governments in Europe and in many other countries have taken some measures to quickly try to curb the rising energy prices. Windfall tax and revenue caps are finance measures used in high energy prices.

Windfall taxes are imposed on excessive profits earned by energy companies during a period of significant energy price increases on an energy crisis. The tax is introduced by governments as a way to capture some of the unexpected and unusually high profits made by energy companies when energy prices surge due to supply disruptions, market manipulation, or other factors. The idea behind a windfall tax is to prevent energy companies from profiting excessively from a situation where consumers are facing soaring energy costs.

Several European nations such as Spain, Greece, Italy, Belgium, and Austria have already enacted such measures until the end of 2022, and Germany on early 2023. They have put in place "windfall profit taxes" targeting companies that have unexpectedly reaped substantial profits, especially as a result of rising energy prices. In parallel, the UK has introduced a levy on energy profits for oil and gas enterprises.

Several European States including Spain also provided price caps for electricity producers, utilizing what are referred to as "inframarginal technologies". These technologies encompass renewables, nuclear, and lignite. These operators have experienced unexpectedly high financial gains lately, despite their operational costs remaining stable. This is primarily due to the influence of coal and gas as dominant sources, which currently drive up the final electricity price.

Turkey's Inframarginal Price Cap

In Turkey, due to the increases in electricity prices and cost disparities related to electricity generation, with the aim of ensuring supply security and protecting the consumers, a price cap was introduced for generation companies utilizing what are referred to as "inframarginal technologies" such as renewable energy generators. Such ceiling is called the "Maximum Settlement Price" and any profit between the such Maximum Settlement Price and the Market Clearing Price ("MCP") will be distributed to high-cost generators. The difference between such a price cap and the market clearing price is defined as the Turkish Electricity Market as the Support Fee on the Basis of Source ("Support Fee").

As expected, it resulted in many administrative lawsuits against the regulatory authority in order to annul the regulation. For instance, the Board of Directors of the Association of Electricity Producers filed a lawsuit on May 16, 2022, for the annulment of the regulation imposing the Support Fee. After the introduction of the Support Fee, fixed-price contracts were initially considered exempt from this scope with an amendment in the regulation. However, a second subsequent amendment was made to the regulation, specifying that in order for fixed-price contracts to qualify for the exemption, they must be conducted "up to the end-user" at fixed prices. This second amendment was applied retroactively so that many exemptions were annulled retroactively on the ground that their fixed price was not retained until the end-user. This situation also resulted in numerous administrative lawsuits.

Generation companies not only engaged in administrative lawsuits but also attempted to pass on the burden of the Support Fee, which was imposed on them, to their counterparties in bilateral agreements. They did this by either claiming hardship or seeking adaptation through arbitration or litigation proceedings. Many of the companies cited the inframarginal price cap as a reason to break their contractual commitments and take advantage of the high market prices.

Is it Unforeseeable?

The formulation and legality of these price intervention and tax policies can be complex and may give rise to many disputes. These governmental interventions may trigger investment treaty violation claims on *inter alia* expropriation or fair and equitable treatment, as it was the case in the past (See Murphy Exploration & Production Company International v. Republic of Ecuador, PCA Case No. 2012-16; Perenco Ecuador Limited v Republic of Ecuador, ICSID Case No. ARB/08/6; and Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5). Broadly, investment arbitration tribunals acknowledge that tax laws do not typically amount to an indirect expropriation. However, there are specific instances where they may do so, such as when a tax is deemed confiscatory, meaning it severely impairs the continued economic feasibility of the investment (Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability).

The prevailing legal precedent underscores that if an investor has not secured a commitment regarding tax stabilization, it would be unreasonable for them to anticipate that the State's tax regulations will remain unchanged in the future. In such cases, it is generally accepted that it is the investor who assumes the risk associated with potential alterations and therefore it is less likely to constitute a breach of legitimate expectations. Indeed, in the context of the current legal framework concerning windfall taxes in the resources sector, arbitral tribunals have frequently emphasized that when there are "substantial unexpected surges in commodity prices," investors should be prepared for the potential scenario where a host State aims to increase taxes within that specific sector. That is why it is less likely for a windfall tax to constitute a breach of the Fair and Equitable Treatment (FET) standard.

It may raise claims against European Union ("EU"). For instance, in its claim against the EU, ExxonMobil argues that the EU exceeded its legal jurisdiction by imposing a windfall tax on oil companies, marking a substantial response from the industry. This legal action questions the viability of the tax and was initiated by Exxon's German and Dutch subsidiaries. It also contests the EU Council's ability to enforce the recent tax, a capability traditionally held by sovereign nations, as well as its utilization of emergency measures to obtain member States' consent for the policy.

It may also give rise to constitutional claims. For instance, in Germany, introducing a new sector-specific windfall profit tax faces a significant challenge due to the German constitution's comprehensive list of permissible tax forms that legislators can enact. Creating an entirely novel form of taxation or combining multiple tax types into a new hybrid tax system is prohibited. This stringent framework is in place to prevent uncertainties related to legislative and administrative authorities or the allocation of

tax revenues among different levels of government in Germany. Any new windfall profit tax would need to adhere to these principles. Past efforts to circumvent these rules, such as the nuclear fuel tax, which was deemed unconstitutional, demonstrate that introducing new sector-specific systems for additional profit taxation can lead to substantial issues in this regard.

Electricity prices can be influenced by a range of factors, including geopolitical events, shifts in macroeconomic conditions like pandemics, economic sanctions, and financial crises, as well as alterations in global energy supply routes. The energy market is exposed to inherited risks stemming from global and local energy policies and regulatory changes. While government interventions can lead to disputes, it's important to acknowledge that the energy industry inherently carries these risks. As commonly recognized by arbitral tribunals in investment arbitration cases, in cases of significant unexpected spikes in commodity prices, investors should be prepared for the possibility that a host State may seek to raise taxes or intervene in the prices within that particular sector.

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UNITED ARAB EMIRATES

Wired for Success: The In-House Counsel Perspective
Guerilla Tactics in Arbitration: an Ethical Challenge

Maria Scanlan
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The term "guerilla tactics" has been used to describe a wide range of procedural tactics whose prime objective is to obstruct, derail or even sabotage arbitration proceedings in favour of one party. Whilst guerilla tactics are not a new phenomenon, there is evidence that they are being increasingly deployed in arbitration. In a 2012 survey conducted by Edna Sussman and Solomon Ebere (in 'All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration', The American Review of International Arbitration, Vol. 22, No. 4, 2011), 68% of the respondents (both counsel and arbitrators) reported that they had been subjected to or had witnessed guerrilla tactics in arbitrations in which they were involved.

Guerilla tactics range from unethical (but "legal") conduct, through to criminal behaviour. They include repeated delay tactics, raising frivolous challenges in bad faith, intimidation of arbitrators and witnesses, use of surveillance methods, bribery, fraud, forgery of documents, and abuse of state authority. A common (and paradoxical) feature of guerilla tactics is that they usually involve abusing the same rules that are intended to protect the integrity of the arbitral process. Unsurprisingly, this has led to the erosion of trust in the arbitration process as an effective and ethical dispute resolution mechanism.

A key topic of debate has become how best to regulate guerilla tactics. The closest instrument to a universal ethical code of conduct can be found in the IBA Guidelines on Party Representation in International Arbitration (2013). However, these guidelines are not binding and are only applicable upon the agreement of the parties and the tribunal.

Some arbitral institutions have also sought to incorporate into their rules sufficiently wide powers to sanction unethical conduct, e.g. Article 14 of the 2020 LCIA Rules which allows the arbitral tribunal to take any "appropriate measures in order to preserve the fairness and integrity of the proceeding". It is up to the arbitral tribunal to act as the "first line of defence" against guerilla tactics, but regrettably some arbitrators are reluctant to actively rely on arbitral institutional rules to uphold ethical standards, for fear of being (albeit unjustly) accused by recalcitrant parties of "procedural unfairness".

Nevertheless, there are many examples of arbitral tribunals and local courts taking the reins of the proceedings and preventing the use of guerilla tactics. To illustrate, in Hrvatska Electro Privreda D.D. v. Republic of Slovenia (ICSID Case No. ARB/05/24),the ICSID tribunal ordered the removal of a newly appointed counsel in the middle of arbitration proceedings, as his appointment was found to be a tactical move by one of the parties to bring into question the independence of one of the arbitra-

tors. Similarly, in Docket No. 34 SchH 13-16, the Higher Regional Court of Munich considered a case involving around a dozen challenges to the impartiality of the arbitral tribunal and a challenge to the judges hearing the challenge application. The Court rejected the challenge as "abusive" and the objection as inadmissible, concluding that "[t]he guarantee of judicial protection against alleged infringements of rights does not provide unlimited recourse to the courts."

It is high time for all arbitral tribunals and local courts to move towards a "zero tolerance" approach to the use of guerilla tactics. This could be done by sanctioning recalcitrant parties through cost penalties, or using disciplinary or criminal proceedings against unethical counsel. Ultimately, it is the responsibility of all stakeholders (including arbitral institutions, local courts, arbitral tribunals, counsel and party representatives) to take an active approach towards curbing these abusive practices.

ABOUT THE AUTHORS

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The Enforcement of Renewable Energy Investor State Awards Around the World: the State of the Art

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In the aftermath of the Achmea and Komstroy judgments of the Court of Justice of the European Union ("CJEU"), the enforceability of arbitral awards based on intra-EU Bilateral Investment Treaties, or The Energy Charter Treaty ("ECT"), has become uncertain. Consequently, investors seeking to enforce these awards have increasingly turned to jurisdictions outside the EU to collect on their awards. There are a number of reasons behind this strategic choice.

First, under the secluded mechanism enshrined in Art. 54(1) of the ICSID Convention, the court seized with the enforcement action "*shall treat the award as if it were a final judgment of the courts of a constituent state.*"

Second, even where the award at issue is not an ICSID award (for example, an SCC or UNCITRAL award), the Achmea ruling does not represent a binding precedent for non-EU courts, and Respondent States will have to invoke the limited avenues set in the New York Convention to deny recognition and enforcement of a foreign arbitral award.

Jurisdictions where claimants have attempted to enforce ECT and intra-EU bilateral treaty awards outside the EU include the United States, Switzerland, the United Kingdom, and Australia.

In the U.S., The United States District Court for the District of Colombia ("DDC") has been frequently seized with such actions, also thanks to domestic legislation that designates it as the default venue for actions against foreign sovereigns (28 U.S.C. § 1391(f) of the FSIA). However, in a decision date 29 March 2023 concerning the enforcement of the PV Investors award, the DDC rejected the investor's request to enforce the award holding that under EU law Spain lacked the legal capacity to extend an offer to arbitrate to the EU investors, and therefore no valid arbitration agreement existed. The investor appealed and it is understood that the matter will be heard by the DC Court of Appeal together with the NextEra and 9REN matters.

Investors have also started resorting to the **Swiss courts** to enforce intra-EU awards, likely building on the positive experience of investors in the Swiss chapter of the Yukos saga. However, in a decision dated 17 March 2023 the Swiss Federal Supreme Court rejected a request to attach assets belonging to Spain on the ground that the matter had no "*sufficient connection*" with the country.

In the United Kingdom, seized with the enforcement of the Antin v. Spain award, the Commercial Court of England and Wales rendered on 24 May 2023 an important decision rejecting all EU law and State immunity defenses. Notably, the English court determined that the intra-EU objection was "*a purely EU law issue*" and, relying on Schreuer's Commentary to Article 54 on the ICSID Convention (as the UK Supreme Court did in Micula), concluded that the decisions of the EU top court do not have primacy over the application of the Convention.

Another positive decision regarding the Antin award was obtained recently in Australia, where Spain again argued sovereign immunity. On 12 April 2023, the High Court of Australia rejected that argument, concluding that Spain's agreement to Arts 53-55 of the ICSID Convention amounted to a waiver of foreign State immunity from the jurisdiction of the courts of Australia to recognise and enforce ICSID awards.

One cannot escape noticing that extra-EU enforcement actions against Spain (or other European Respondents) have focused on the above-listed jurisdictions so far. While Switzerland is geographically and culturally closer to the EU, and more likely to host EU States' assets, there is no clear link with the other jurisdictions.

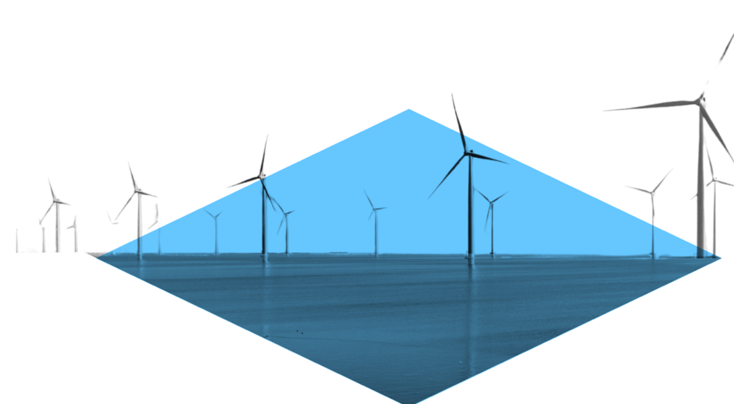
Indeed, in the Swiss judgment, it emerged that the investors had located assets for (only) CHF 33 million, represented by patents, trademarks, real estate, bank accounts and safety boxes. On the other hand, the English judgment resulted in a further order, dated 2 August 2023, where the High Court issued an interim charging order allowing the award creditor to seize (one) property Spain owns at 317 Portobello Road in London; and it is not known whether the investor has identified any Spanish assets in Australia. Thus, the amount of assets identified in the relevant jurisdictions is unlikely to be the determinant reason for investors choosing these jurisdictions, as it is quite plausible that respondent States possess at least as many assets in other countries.

However, it cannot be ignored that, with the exception of Switzerland, all that these jurisdictions have in common is that they are common law jurisdictions. It is therefore submitted that the preference of intra-EU award creditors for enforcing their awards for these jurisdictions is, at least in part, dictated by the familiarity of their legal representatives (often US or UK-headquartered law firms) with the legal framework of these jurisdictions.

The countries of **the Gulf Cooperation Council,** on the other hand, are at least as likely to host assets of sovereigns, and particularly the assets of those who are active in the oil & gas industry and may have invested in the region directly, or through state-owned companies.

The GCC countries include in their legal systems special free zones with common law courts. However, these have never been used to enforce ICSID awards or non-ICSID awards based on investment treaties.

The Courts of the Dubai International Financial Centre (DIFC Courts), in particular, have already shown a willingness to enforce (commercial) arbitral awards against sovereigns. In Pearl Petroleum v. Kurdistan, the DIFC Courts rejected all claims of sovereign immunity, reasoning that the fact that the Kurdistan Regional Governmetn of Iraq had waived such immunity when it entered in the arbitration agreement providing for LCIA Arbitration in London. Another award against Kurdistan was enforced in Lahela v. Lameez. In Fal Oil Company v Sharjah Electricity And Water Authority, the DIFC Courts enforced a court judgment against a UAE sovereign.



DIFC Courts judgments benefit from a simplified enforcement mechanism in the UAE through local statutes, and in the rest of the GCC thanks to the Riyadh Arab Convention for Judicial Co-operation and the GCC Judgements Convention.

The Abu Dhabi Global Market ("ADGM") Courts benefit from a similar framework, within the UAE and the rest of the GCC. Finally, the Qatar Financial Centre ("QFC") Court is based in Doha, and foreign arbitral awards can be enforced within the QFC jurisdiction under the QFC Arbitration Regulations. Such regulations, much like their equivalent in the DIFC and ADGM, are based on the UNCITRAL Model Law on International Commercial Arbitration.

ABOUT THE AUTHORS

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Rodrigo Carè *is an Associate at* Horizons & Co.*, admitted to practice in New York, Italy, and before the Courts of the Dubai International Financial Centre. His practice covers all levels of the energy industry, in particular price reviews under long-term natural gas and LNG agreements under a variety of seats including Paris, London, and Stockholm. Rodrigo's expertise includes investor-State arbitration, having served as a Judicial Fellow for Charles N. Brower, and represented investors as well as States in treaty arbitrations under the ICSID, UNCITRAL, and SCC Rules*

Annex 1

2022-2023 Energy Arbitration Cases Available on Jus Mundi

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Civicon v. Fuji Electric	Data not available	Commercial Arbitration	Data not available	2023-08-15	Energy - Electric Power
Mashad v. Belarus	Data not available	Investor-State	Data not available	2023-07-26	Energy - Electric Power
Larsen & Toubro v. NTPC (II)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-07-18	Energy - Electric Power
Baker Hughes v. Joshi Technologies	Arbitration and Mediation Centre of the Ecuadorian-American Chamber of Commerce	Commercial Arbitration	Quito	2023-07-13	Energy - Oil & Gas
PCL-Intertech Lenhydro Consortium v. THDC India	Ad hoc Arbitration	Commercial Arbitration	Delhi	2023-07-12	Energy - Electric Power
Savannah Energy v. Chad (II)	International Chamber of Commerce	Commercial Arbitration	Paris	2023-07-12	Energy - Oil & Gas
EGS v. RiTE Ugljevik	Ad hoc Arbitration	Commercial Arbitration	Belgrade	2023-07-03	Energy - Electric Power
Engie v. FDR	Data not available	Commercial Arbitration	Data not available	2023-06-29	Energy - Electric Power

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Lansdowne v. Ireland	Data not available	Investor-State	Data not available	2023-06-28	Energy - Oil & Gas
Jiangsu v. We Brazil Energy	China International Economic and Trade Arbitration Commission	Commercial Arbitration	Data not available	2023-06-12	Energy - Electric Power
MP Gulf v. Total E&P	American Arbitration Association	Commercial Arbitration	Houston	2023-06-09	Energy - Oil & Gas
Orion v. Engie	Data not available	Commercial Arbitration	Data not available	2023-06-06	Energy - Electric Power
Elixon, Azoria and Glorina v. Hanwha	Singapore International Arbitration Centre	Commercial Arbitration	Data not available	2023-05-29	Energy - Oil & Gas
Jaiprakash Associates v. NHPC	Data not available	Commercial Arbitration	New Delhi	2023-05-26	Energy - Electric Power
GSE v. PSG	American Arbitration Association	Commercial Arbitration	Data not available	2023-05-26	Energy - Electric Power
Sinopec and Jinggong v. Petrobas	Data not available	Commercial Arbitration	Data not available	2023-05-25	Energy - Oil & Gas
Phoenix Petroleum v. Albania and Albpetrol	Data not available	Commercial Arbitration	Data not available	2023-05-20	Energy - Oil & Gas
Petrol Group v. Gazprom	Data not available	Commercial Arbitration	Data not available	2023-05-16	Energy - Oil & Gas
EDP São Paulo v. IDC Telecom	FGV Chamber of Mediation & Arbitration	Commercial Arbitration	Data not available	2023-05-15	Energy - Electric Power

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Europol Gaz v. Gazprom	Stockholm Chamber of Commerce	Commercial Arbitration	Data not available	2023-05-09	Energy - Oil & Gas
Edison v. Venture Global LNG	London Court of International Arbitration	Commercial Arbitration	Data not available	2023-05-01	Energy - Oil & Gas
Pristec Refining Technologies USA and others v. Pristec America and others	American Arbitration Association	Commercial Arbitration	Data not available	2023-04-28	Energy - Oil & Gas
Suntech Power v. Italy	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2023-04-27	Energy - Electric Power
Petrobras v. EDB	Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada	Commercial Arbitration	Data not available	2023-04-25	Energy - Electric Power
2 W Energia v. Energify	Data not available	Commercial Arbitration	Data not available	2023-04-24	Energy - Electric Power
Energoatom v. Russia (II)	Data not available	Investor-State	Data not available	2023-04-14	Energy - Electric Power
EDF v. Spain	Permanent Court of Arbitration	Investor-State	Data not available	2023-04-01	Energy - Electric Power
National Unity Government of Myanmar v. PTT	Data not available	Commercial Arbitration	Data not available	2023-03-20	Energy - Oil & Gas
Torres v. Univen	International Chamber of Commerce	Commercial Arbitration	Data not available	2023-03-07	Energy - Oil & Gas
Linde v. RusChemAlliance	Hong Kong International Arbitration Centre	Commercial Arbitration	Stockholm	2023-03-04	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Oceancare Corporation v. Hibiscus Oil & Gas	Data not available	Commercial Arbitration	Singapore	2023-03-02	Energy - Oil & Gas
Pan American v. Camuzzi	International Chamber of Commerce	Commercial Arbitration	Data not available	2023-02-16	Energy - Oil & Gas
Orteng and Oengenharia v. Arcadis	Câmara de Mediação e Arbitragem Empresarial	Commercial Arbitration	Data not available	2023-02-13	Energy - Electric Power
CEZ v. Gazprom	International Chamber of Commerce	Commercial Arbitration	Geneva	2023-02-08	Energy - Oil & Gas
PowerChina and China Railway 18th Bureau v. Vietnam (II)	International Centre for Settle-ment of Investment Disputes	Investor-State	Data not available	2023-02-01	Energy - Electric Power
3G v. Ecom	Data not available	Commercial Arbitration	Data not available	2023-01-24	Energy - Electric Power
ENGIE v. TotalEnergies	Data not available	Commercial Arbitration	Data not available	2023-01-03	Energy - Oil & Gas
Todwick v. Shell	London Court of International Arbitration	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
Patriot v. ExxonMobil	Data not available	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
BP v. Venture Global LNG	London Court of International Arbitration	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
Shell v. Venture Global LNG	London Court of International Arbitration	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
OMV Petrom v. NAMR and Romgaz	International Chamber of Commerce	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
GAIL v. Gazprom	Data not available	Commercial Arbitration	London	2023-01-01	Energy - Oil & Gas
NET4GAS v. Gazprom	Data not available	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
Fortum v. Vestas	International Chamber of Commerce	Commercial Arbitration	Stockholm	2023-01-01	Energy - Electric Power
Kazakhstan and KazMunayGas and v. Shell and Eni	Data not available	Commercial Arbitration	Geneva	2023-01-01	Energy - Oil & Gas
Kazakhstan and KazMunayGas and v. Shell, Exxon, Eni and Total	Data not available	Commercial Arbitration	Stockholm	2023-01-01	Energy - Oil & Gas
ENAP v. Cabinda	Data not available	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
Refineria di Korsou v. PDVSA	Data not available	Commercial Arbitration	Data not available	2023-01-01	Energy - Oil & Gas
AlJomaih and National Industries Group v. Pakistan	Data not available	Investor-State	Data not available	2023-01-01	Energy - Electric Power
New Stratus v. Ecuador	Permanent Court of Arbitration	Commercial Arbitration	Santiago	2022-12-05	Energy - Oil & Gas
Investors in Nagorno-Karabakh v. Azerbaijan	Data not available	Investor-State	Data not available	2022-12-05	Energy - Electric Power

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Astroenergy Solar v. Bulgaria	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2022-12-02	Energy - Electric Power
Ternium Brasil v. Air Liquide Brasil and others	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-11-30	Energy - Oil & Gas
Exyte Energy v. SSA Solar and others	Dispute Prevention and Resolution, Inc.	Commercial Arbitration	Data not available	2022-11-18	Energy - Electric Power
Berkeley v. Spain	Data not available	Investor-State	Data not available	2022-11-18	Energy - Electric Power
G.S. Express v. NTPC	Delhi International Arbitration Centre	Commercial Arbitration	Data not available	2022-11-15	Energy - Electric Power
Ershova and Jeršov v. Bulgaria	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2022-11-11	Energy - Oil & Gas
Petronas and others v. Cameroon	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2022-11-11	Energy - Oil & Gas
RWE v. Gazprom (III)	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-11-01	Energy - Oil & Gas
RWE v. Gazprom (II)	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-11-01	Energy - Oil & Gas
KEPCO and KHNP v. Westinghouse	Korean Commercial Arbitration Board	Commercial Arbitration	Seoul	2022-10-25	Energy - Electric Power
Claimant v. Respondents	Data not available	Commercial Arbitration	Data not available	2022-10-21	Energy - Electric Power

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
HG Power v. PGCB	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-10-17	Energy - Electric Power
Ascent Slovenia v. Geoenergo	Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia	Commercial Arbitration	Data not available	2022-10-06	Energy - Oil & Gas
MOL v. Croatia (II)	Permanent Court of Arbitration	Commercial Arbitration	Data not available	2022-10-04	Energy - Oil & Gas
Star Hydro v. NTDC Pakistan (III)	London Court of International Arbitration	Commercial Arbitration	Data not available	2022-09-30	Energy - Electric Power
HVF and HWG v. EGF	Ad hoc Arbitration	Commercial Arbitration	London	2022-09-16	Energy - Electric Power
Naftogaz v. Gazprom (III)	International Chamber of Commerce	Commercial Arbitration	Zurich	2022-09-09	Energy - Oil & Gas
Eni v. GasTerra	Ad hoc Arbitration	Commercial Arbitration	The Hague	2022-09-09	Energy - Oil & Gas
ENGIE v. Gazprom	Stockholm Chamber of Com- merce	Commercial Arbitration	Data not available	2022-09-01	Energy - Oil & Gas
Vitol v. Copape	Ad hoc Arbitration	Commercial Arbitration	New York City	2022-08-24	Energy - Oil & Gas
Bacilio Amorrortu v. Peru (II)	Permanent Court of Arbitration	Investor-State	New York City	2022-08-22	Energy - Oil & Gas
Ascent v. Slovenia	International Centre for Settle- ment of Investment Disputes	Investor-State	Washington D.C.	2022-08-15	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Titan 2 IC İçtaş v. Akkuyu Nükleer (II)	London Court of International Arbitration	Commercial Arbitration	Geneva	2022-08-01	Energy - Electric Power
Titan 2 IC İçtaş v. Akkuyu Nükleer (I)	London Court of International Arbitration	Commercial Arbitration	Geneva	2022-08-01	Energy - Electric Power
Upland Oil and Gas v. PeruPetro	International Centre for Settle-ment of Investment Disputes	Investor-State	Washington D.C.	2022-07-13	Energy - Oil & Gas
USIMINAS v. CCEE (I)	FGV Chamber of Mediation & Arbitration	Commercial Arbitration	Rio de Janeiro	2022-06-21	Energy - Electric Power
Steelman Telecom v. PGCIL	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-06-16	Energy - Electric Power
Cobra Instalaciones y Servicios and Shyam Indus Power Solution v. HVPNL (II)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-05-06	Energy - Electric Power
Cobra Instalaciones y Servicios a nd Shyam Indus Power Solution v. HVPNL (I)	Ad hoc Arbitration	Commercial Arbitration	Delhi	2022-05-06	Energy - Electric Power
STX Offshore and Shipbuilding v. Mellitah Oil & Gas (II)	International Chamber of Com-merce	Commercial Arbitration	Paris	2022-05-03	Energy - Oil & Gas
Aderlyne v. Romania	International Centre for Settle-ment of Investment Disputes	Investor-State	Washington D.C.	2022-05-03	Energy - Electric Power
Gasum v. Gazprom Export	Ad hoc Arbitration	Commercial Arbitration	Stockholm	2022-05-01	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
ENGIE v. Antamina	Center of National and International Conciliation and Arbitration of the Lima Chamber of Commerce	Commercial Arbitration	Data not available	2022-04-26	Energy - Oil & Gas
CB&I v. Colombia	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2022-04-05	Energy - Oil & Gas
BSOG v. Romania	International Chamber of Commerce	Investor-State	Data not available	2022-04-01	Energy - Oil & Gas
Clara Petroleum v. Romania	International Centre for Settlement of Investment Disputes	Investor-State	Washington D.C.	2022-04-01	Energy - Oil & Gas
Medco v. Libyan National Oil Company	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-03-15	Energy - Oil & Gas
Claimant v. Respondent	Arbitration Center of Mexico	Commercial Arbitration	Data not available	2022-03-09	Energy - Oil & Gas
Eltel v. Georgian State Electrosystem	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-02-28	Energy - Electric Power
Monterra Energy v. Mexico	Data not available	Investor-State	Data not available	2022-02-22	Energy - Oil & Gas
Janaúba v. Trina Solar	International Chamber of Commerce	Commercial Arbitration	New York City	2022-02-15	Energy - Electric Power
HiTec v. Tullow	Data not available	Commercial Arbitration	Data not available	2022-02-15	Energy - Oil & Gas
IBV Brasil v. PetroRio	Data not available	Commercial Arbitration	Data not available	2022-02-14	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
IL&FS v. Amity University	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-02-09	Energy - Electric Power
NAM v. Netherlands (II)	Netherlands Arbitration Institute	Commercial Arbitration	Data not available	2022-01-31	Energy - Oil & Gas
NAM v. Netherlands (I)	Netherlands Arbitration Institute	Commercial Arbitration	Data not available	2022-01-31	Energy - Oil & Gas
Haïti and BMPAD v. Preble-Rish	Ad hoc Arbitration	Commercial Arbitration	New York City	2022-01-31	Energy - Oil & Gas
KrisEnergy v. Bangladesh and Petrobangla	International Centre for Settle-ment of Investment Disputes	Investor-State	Washington D.C.	2022-01-26	Energy - Oil & Gas
GIWEL v. Siemens Gamesa	Data not available	Commercial Arbitration	Data not available	2022-01-01	Energy - Electric Power
CNI22 and CNI 22 (Thai) v. Nusasiri	China International Economic and Trade Arbitration Commission	Commercial Arbitration	Data not available	2022-01-01	Energy - Electric Power
Claimant v. Chinese State-Owned EPC Contractor	Dubai International Arbitration Centre	Commercial Arbitration	Data not available	2022-01-01	Energy - Electric Power
Savannah Energy v. Chad (I)	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-01-01	Energy - Oil & Gas
Geoplin v. Italian Respondent	International Chamber of Commerce	Commercial Arbitration	Data not available	2022-01-01	Energy - Oil & Gas
Eni v. Gazprom	Data not available	Commercial Arbitration	Data not available	2022-01-01	Energy - Oil & Gas

Case	Institution	Type of Case	Seat of Arbitration	Date	Economic Sector
Claimant v. Vietnam	Data not available	Investor-State	Data not available	2022-01-01	Energy - Oil & Gas
Oando v. Nigerian Agip Oil	Ad hoc Arbitration	Commercial Arbitration	Data not available	2022-01-01	Energy - Oil & Gas
Genel Energy v. Kurdistan Regional Government	London Court of International Arbitration	Commercial Arbitration	London	2022-01-01	Energy - Oil & Gas

Annex 2

2023 Shortlist of Arbitral Institutions with an energy caseload by region

DISCLAIMER:

The following table presenting a shortlist of worldwide arbitral institutions and their headquarters is solely intended for informational purposes. The list is organized by region and does not signify any hierarchical ranking. The inclusion or exclusion of any particular institution does not imply superiority or inferiority compared to others. The information provided in the table is based on data available on Jus Connect's Arbitral Institutions Profiles up until August 2023, and is subject to change

Arbitral Institution	Country of HQ	Region of HQ
AFRICA		
Cairo Regional Center for International Commercial Arbitration	Egypt	Africa
Cairo International Arbitration Center	Egypt	Africa
AMERICAS		
Centro Brasileiro de Mediação e Arbitragem	Brazil	LATAM
Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada	Brazil	LATAM
Câmara de Arbitragem do Mercado	Brazil	LATAM

Arbitral Institution	Country of HQ	Region of HQ
Center for Arbitration and Conciliation of the Chamber of Commerce of Bogotá	Colombia	LATAM
FGV Chamber of Mediation & Arbitration	Brazil	LATAM
Arbitration and Mediation Centre of the Ecuadorian-American Chamber of Commerce	Ecuador	LATAM
Arbitration and Mediation Centre of the Santiago Chamber of Commerce	Chile	LATAM
Câmara de Mediação e Arbitragem Empresarial	Brazil	LATAM
Center for Arbitration, Conciliation and Amicable Composition of the Chamber of Commerce of Cartagena	Colombia	LATAM
Center of National and International Conciliation and Arbitration of the Lima Chamber of Commerce	Peru	LATAM
International Centre for Settlement of Investment Disputes	USA	North America
American Arbitration Association - International Centre for Dispute Resolution	USA	North America
American Arbitration Association	USA	North America
Judicial Arbitration and Mediation Services	USA	North America

Arbitral Institution	Country of HQ	Region of HQ
Dispute Prevention and Resolution, Inc.	USA	North America
Financial Industry Regulatory Authority Office of Dispute Resolution, formerly NASD	USA	North America
Judicial Arbiter Group	USA	North America
The International Institute for Conflict Prevention and Resolution	USA	North America
ASIA - PACIFIC		
China International Economic and Trade Arbitration Commission	China	APAC
Singapore International Arbitration Centre	Singapore	APAC
Delhi International Arbitration Centre	India	APAC
Hong Kong International Arbitration Centre	Hong Kong SAR China	APAC
Asian International Arbitration Centre	Malaysia	APAC
China Changchun Arbitration Commission	China	APAC
Korean Commercial Arbitration Board	South Korea	APAC
Shanghai International Arbitration Center	China	APAC

Arbitral Institution	Country of HQ	Region of HQ
EUROPE		
International Chamber of Commerce	France	Europe
Permanent Court of Arbitration	The Netherlands	Europe
London Court of International Arbitration	UK	Europe
Stockholm Chamber of Commerce	Sweden	Europe
Netherlands Arbitration Institute	Netherlands	Europe
International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation	Russia	Europe
Arbitration Court attached to the Hungarian Chamber of Commerce and Industry	Hungary	Europe
Swiss Arbitration Centre formerly SCAI	Switzerland	Europe
Court of Arbitration at the Polish Chamber of Commerce in Warsaw	Poland	Europe
Malta Arbitration Centre	Malta	Europe
Vienna International Arbitral Centre	Austria	Europe
Zurich Chamber of Commerce	Switzerland	Europe

Arbitral Institution	Country of HQ	Region of HQ
Arbitration Board for the Construction Industry	Netherlands	Europe
Association Française d'Arbitrage	France	Europe
Chamber of Commerce, Industry and Services of Geneva	Switzerland	Europe
German Arbitration Institute	Germany	Europe
Iran-US Claims Tribunal	Netherlands	Europe
Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia	Slovenia	Europe
Madrid Civil and Commercial Arbitration Court	Spain	Europe
Milan Chamber of Arbitration	Italy	Europe
Riga International Commercial Arbitration Court	Latvia	Europe
Russian Arbitration Center	Russia	Europe
MIDDLE EAST		
Dubai International Arbitration Centre	United Arab Emirates	MENA

Annex 3

2023 Shortlist of Top Energy Companies in alphabetical order

DISCLAIMER:

The following table presenting a shortlist of top energy companies worldwide and their known in-house counsel is solely intended for informational purposes. The list is organized alphabetically and does not signify any hierarchical ranking. The inclusion or exclusion of any particular company does not imply superiority or inferiority compared to others. The information provided in the table is based on publicly available data up until August 2023, and is subject to change.

Name of the Company	Region	Country	Leading Counsel	Position
ADNOC	MENA	UAE	Danielle Brownrigg	Senior Vice President & General Counsel, Group Legal Commercial & Operations
American Electric Power	North America	US	David M. Feinberg	Executive Vice President, General Counsel and Secretary
Baker Hughes	North America	US	Noura Benfarhat	Vice President & General Counsel - Corporate
Bharat Petroleum Crop	APAC	India	Navin Kumar Singh	Deputy General Manager - Legal
BP	UK	UK	Eric Nitcher	EVP Legal
Canadian Natural Resources	North America	Canada	Brenda G. Balog	Vice-President, Legal and General Counsel
Centrica	UK	UK	Raj Roy	Group General Counsel & Company Secretary

Name of the Company	Region	Country	Leading Counsel	Position
CGN Power Co	APAC	China		
Chevron	North America	US	R. Hewitt Pate	Vice President and General Counsel
China Coal Energy	APAC	China	Data not available	Data not available
China Shenhua Energy Co	APAC	China	Data not available	Data not available
China Yangtze Power Co	APAC	China	Ping Yuan Zhan	Chief Financial Officer & General Counsel
CNOOC	APAC	China	Xu Yugao	Chief Compliance Officer, General Counsel, Joint Company Secretary, Secretary To the Board and Domestic Representative
CNOOC International	APAC	China	Alan O'Brien	SVP General Counsel and Company Secretary
Coal India	APAC	India	Pushpendra Agrawal	Head of Legal
ConocoPhilips	North America	US	Kelly Rose	Senior Vice President, Legal and General Counsel
Crescent Petroleum	MENA	UAE	Drazen Petkovich	General Counsel & Executive Director
IIDA Group Holdings	APAC	Japan		
Devon Energy	North America	US	Dennis Cameron	Executive Vice President and General Counsel
Duke Energy	North America	US	Kodwo Ghartey-Tagoe	EVP & Chief Legal Officer

Name of the Company	Region	Country	Leading Counsel	Position
E.on	Europe	Germany	Christoph Radke	General Counsel & Chief Compliance Officer & Human Rights Officer
EDF	Europe	France	Sabine Le Gac	Directrice Juridique Groupe
Edison	Europe	Italy	Pier Giuseppe Biandrino	General Counsel
Electrobras	Brazil	Brazil	Marcelo de Siqueira Freitas	Legal Vice PResidency
Empresas Copec	LATAM	Chile	José Tomás Guzmán Rencoret	Corporate Counsel and Secretary of the Board of Directors
Enagas Renovable	Europe	Spain	Alicia Juristo	General Counsel
Enagas	Europe	Spain	Diego Trillo Ruiz	Legal Services and Corporate Affairs General Manager
Enbridge	North America	Canada	Robert R. Rooney	Executive Vice President and Chief Legal Officer
EnBW	Europe	Germany	Dr. Bernd-Michael Zinow	Head of Legal Services, Compliance and Regulation - General Counsel
Enel	Europe	Italy	Francesco Puntillo	Head of Legal and Corporates Affairs
ENEOS Holding	APAC	Japan	Anthony (Tony) Durkan	General Counsel
ENGIE	Europe	Francce	François Graux	General Counsel and Corporate Secretary

Name of the Company	Region	Country	Leading Counsel	Position
ENI	Europe	Italy	Christian Johnson	General Counsel and Corporate Secretary
ENN Energy Holdings	APAC	China	Data not available	Data not available
Enterprise Products	North America	US	Harry P. Weitzel	Director and Executive VP, General Counsel and Secretary
Equinor	Europe	Norway	Helen Rygh Torstensen	Executive Vice President, Legal & Compliance
Exelon	North America	US	Gayle E. Littleton	Executive Vice President, Chief Legal Officer
ExxonMobil	North America	US	Craig S. Morford	VP General Counsel
Fortum Corp	Europe	Finland	Nora Steiner-Forsberg	Executive VP Legal General Counsel
GAIL	APAC	India	Data not available	Data not available
Gazprom	Europe	Russia	Maxim Losik	Chief Legal Officer
GE Renewable Energy	North America	US	Rachel Gonzalez	General Counsel
Halliburton	North America	US	Van Beckwith	Executive Vice President, Secretary, and Chief Legal Officer
Iberdrola	Europe	Spain	Gerardo Codes Calatrava	Director de los Servicios Jurídicos de Iberdrola
Idemitsu Kosan	APAC	Japan	Kan Hoshino	Senior Executive Officer - General Affairs & Legal
Indian Oil Corp	India	India	Jaivardhan Singh	Head Legal & Chief Law Manager

Name of the Company	Region	Country	Leading Counsel	Position
Korea Electric Power	APAC	South Korea	Byeong Ik (Ben) Kim	General Legal Counsel
Lukoil	Europe	Russia	Alexander Osipov	Deputy CEO - General Counsel
Marubeni	APAC	Japan	Koichi Ariizumi	General Manager, Legal Dept.
MOL Hungarian Oil&Gas Co	Europe	Hungary	Gergely Szutrely	Group Legal Vice President
National Grid	UK	UK	Justine Campbell	Group General Counsel & Company Secretary
Neste Oyj	Europe	Finland	Ilmi Korhonen	Vice President, Legal
NRG Energy	North America	US	Brian Curci	Executive Vice President and General Counsel
NTPC	India	India	Mridul Kumar Shukla	Head Of Law
OMV	Europe	Austria	Marion Kaisinger	Chief Legal Counsel
Orsted	Europe	Norway	Jesper Mikkelsen	Vice President - Head of Legal
Petrobras	Brazil	Brazil	Affonso Motta	Legal Section Manager
PetroChina	APAC	China	Jingxia Wu	General Counsel & Secretary
PGNiG	Europe	Poland	Łukasz Dumin	Deputy Director of Legal Department
Phillips66	North America	US	Michael Voutsinas	Senior Director, Head of Legal Operations

Name of the Company	Region	Country	Leading Counsel	Position
PKN Orlen	Europe	Poland	Jacek Kosuniak	Deputy General Counsel
Power Grid Corp of India	APAC	India	Swapnil Verma	Manager (Law)
PTT Exploration and Production	APAC	Thailande	Peangpanor Boonklum	Group General Counsel
Reliance	APAC	India	Rajagopal Venkatakri-shnan	Senior Vice President Legal
Repsol	Europe	Spain	Pablo Blanco Pérez	Legal Affairs Secretary
Rosneft	Europe	Russia	Roman Maslovich	Head of Legal Department
RWE	Europe	Germany	Christian Ring	General Counsel, Head of Legal & Compliance
Saudi Aramco	MENA	Saudi Arabia	Nabeel A. Al Mansour	Executive Vice President, General Counsel & Corporate Secretary
Saudi Electricity	MENA	Saudi Arabia	Abdulaziz Albilali	Senior Vice President, Legal Affairs& Secretary of the Board Directors
Shaanxi Coal and Chemical Industry	APAC	China	Data not available	Data not available
Shell	Europe	Netherlands	Philippa Bounds	Group Legal Director
Siemens Energy	Europe	Germany	Simone Davina	VP General Counsel Europe & Africa Siemens Energy

Name of the Company	Region	Country	Leading Counsel	Position
Sinopec	APAC	China	Sebastien van Roosmalen	Senior Vice President - Legal
SK Innovation	APAC	South Korea	Valeria Caparó Oyola	Legal Chief
SSE	UK	UK	Liz Tanner	Group General Counsel
State Grid Corporation China	APAC	China	Data not available	Data not available
Suncor Energy	North America	US	Curtis Serra	Vice President Legal Operations
TAQA	MENA	UAE	Mohammad Sharafi	Chief Legal Officer
TotalEnergies	Europe	France	Aurélien Hamelle	Group General Counsel
Uniper	Europe	Germany	Marc Merrill	General Counsel & Chief Compliance Officer
Valero Energy Corp	North America	US	Rich Walsh	Senior VP, General Counsel and Secretary
Helleniq Petroleum	Europe	Greece	John Apsouris	Group General Counsel

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