

# Kluwer Arbitration Blog

## Hong Kong Arbitration Week Recap: Renewables in a Rapidly Changing World

Ing Loong Yang (Latham & Watkins LLP) · Wednesday, October 27th, 2021

On day one of the Hong Kong Arbitration Week 2021, Latham & Watkins LLP (“Latham & Watkins”) hosted a virtual workshop to explore the role of renewables in a rapidly changing world and how this growth will impact disputes in renewables and other energy markets.

**Ing Loong Yang**, Partner at Latham & Watkins (Hong Kong), opened the workshop with Nick Sims, Tactical Opportunities Managing Director at Latham & Watkins (London), with a brief discussion of the growth in investment in renewables during the pandemic and investors’ commitment to raising capital to boost this thriving sector.

### Impact of Government Policies on Disputes in the Renewable Sector

The first panel discussion addressed how changes in government policies have played a role in triggering disputes in the renewables sector. The discussion was moderated by Sebastian Seelmann-Eggebert, Partner at Latham & Watkins (Hamburg). Panelists were:

- Christopher Tan, Senior Counsel at Chevron Singapore;
- Henri Baguenier, Chairman of Novenergia II Energy & Environment; and
- Fernando Mantilla-Serrano, Partner at Latham & Watkins (Paris).

One panelist indicated that although European economic policies are underpinned by free market fundamentals, state action is required for combatting climate change and will vary from sector to sector.

Another highlighted the coal industry as a key area in which a number of states are taking action. Certain states have actively pledged to reduce their coal consumption, but this reduction will require modifications to legal frameworks such as negotiating phasing out of contracts or renegotiating current contracts with coal energy producers. For example, the German Bundestag adopted legislation to phase out the use of coal in Germany whilst simultaneously negotiating with coal producers, to mitigate the risk of potential disputes. By contrast, the Netherlands instigated an end to coal production without offering compensation for coal producers. This approach triggered claims by German investors against the Netherlands where proceedings are still in their early stages.

The panel considered renewables in the context of the oil and gas industry, with one panelist noting that carbon pricing likely will remain a long-term policy to reduce greenhouse gas emissions in a number of jurisdictions in the Asian Pacific region. The effect of carbon tax on long-term supply contracts will likely raise contentious discussions about which party should bear this tax; a consequence that was unforeseen when these contracts were entered into. In the face of such disputes, parties have attempted to implement different measures such as price review mechanisms, change of law, and force majeure clauses. The panelists considered that carbon pricing will become a long-term feature of the renewables space, noting that in contracts in which commercial relationships are important, parties should determine whether there is an amicable way to negotiate fair and equitable sharing of the tax burden, rather than focusing on the short-term effects and passing on the immediate tax.

Finally, the panelists discussed how the position and popularity of nuclear energy has decreased in the energy market in the last 20 years, whilst the cost of producing nuclear energy has increased. It was also noted that disputes could arise from policy changes that aim to decommission nuclear plants. Panelists pointed to a change of regulation on market tools as the key to success in the renewables industry and emphasized that the sector requires a clear and stable legal framework.

### **Renewables — The Next Frontier in Commercial Disputes?**

The second panel was divided into two sections, the first section was moderated by Philip Clifford QC, Partner at Latham & Watkins (London), speaking with:

- Paul Davies, Partner at Latham & Watkins (London); and
- Stephen Markscheid, Chairman of Still Waters Green Technology.

The second section was moderated by Sophie Lamb QC, Partner at Latham & Watkins (London) speaking with:

- Kai-Uwe Karl, Senior Counsel at General Electric; and
- Lara Nicholls, Senior Legal Counsel at Shell.

The first section discussed the types of disputes likely to arise out of the transition to, and rapid expansion of, renewables in Asia. It was noted that commercial disputes are a likely consequence of changes in government policies, shifts in technology, as well as other traditional forms of disputes. The panel discussed contractual clauses, which can protect against supply shortages and pose the challenge of addressing every possible contingency during negotiations.

One panelist noted that, whilst identifying the most common areas of dispute is challenging, change in governmental policies is often at the heart of commercial disputes in the renewables space. They highlighted the value in looking at jurisdictions that are trying to amend regulatory regimes in an effort to increase investment in renewables. For example, Japan's efforts to reduce previously favourable tariffs for renewable sector investors prompted an investor based in Hong Kong to bring the [first known investment treaty claim against Japan](#) in relation to renewables, which, if successful, could lead to further claims against Japan by other investors. It was also noted that similar disputes arising out of the renewables sector in Europe, particularly in Spain, largely consist of claims under the Energy Charter Treaty.

The panelists in the second section explored the role of mediation in the renewables industry. Panelists highlighted how mediation has been a feature of the industry for many years, though it has not played a significant role in resolving disputes. However, the panel considered that mediation could provide an efficient and useful mechanism if parties wish to resolve disputes swiftly. Swifter resolution of renewables-related disputes (via mediation) is potentially significant, as delivering these projects at pace may be key to ensuring an effective energy transition. This approach would require parties to look at the weaknesses of their own cases, the relationship between the parties, and other alternative solutions that can be brought into the settlement.

One panelist offered insight into the [Campaign for Greener Arbitration](#), which aims to reduce the environmental impact of arbitrations. They emphasized the need for such an initiative, noting that a medium-sized arbitration carries a substantial carbon footprint and would require 20,000 trees to be planted in order to offset the negative impact of carbon emissions. The discussion highlighted a series of protocols that have been launched to target different stakeholders in an arbitration, which provide general guidelines to help parties to arbitrations decarbonize and promote sustainability in arbitration proceedings. In addition, the panel outlined some of the practical ways in which these protocols are being delivered, including holding remote hearings to avoid unnecessary travel and using electronic bundles during hearings.

*More coverage from Hong Kong Arbitration Week is available [here](#).*

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