# Kluwer Arbitration Blog

## Paris Arbitration Week Recap: Renewable Energies and Arbitration

Marie-Provence Brue, Shaparak Saleh (Three Crowns) · Saturday, April 16th, 2022

As part of the 2022 Paris Arbitration Week, Three Crowns held on 31 March 2022 a conference on "*Renewable Energy and Arbitration*". The panel was comprised of Marc Péresse (*Head of Legal Offshore Wind at EDF Renewables*), Fabien Roques (*Executive Vice President with Compass Lexecon and Associate Professor in Economics at Paris Dauphine and at the European University Institute*), and Kathryn Khamsi (*Partner at Three Crowns*). Shaparak Saleh (*Partner at Three Crowns*) acted as moderator. This post discusses the special features of renewable energy projects today, and how they are likely to give rise to arbitration proceedings in the future, from the perspective of an arbitration lawyer, an expert and an in-house counsel.

**Connecting Renewable Energy to Arbitration**

Shaparak Saleh acknowledged in her introductory speech that renewable energy is both a timely and growing area of focus for the arbitration community. The transition to renewable energies is not a recent concern. The ongoing energy crisis, which is manifest in the increase in the price of fossil energies, and climate change concerns, predates Russia's invasion of Ukraine and has prompted many governments to increase their ambitions to develop renewable energy capabilities. Undoubtedly, the conflict in Ukraine now further highlights Europe's energy vulnerability.

Shaparak emphasised that investments in renewables have increased considerably over the last two decades. In 2004, investments in renewable energy systems amounted to 37 billion US dollars. We are now looking at a 300 billion US dollars figure. Shaparak also emphasised that currently, roughly a quarter of total electricity generated worldwide comes from renewable resources. Renewable energies – in particular wind and solar – are the fastest growing sources of energy globally. In 2020, a net capacity of 278 gigawatts of renewable energy was added worldwide. This represents an increase of nearly 45 % in comparison to the capacity additions of the previous year.

Given this investment activity, and if any lessons are to be drawn from the previous wave of investment arbitrations, particularly in Spain, it is very likely that the number of renewable energy arbitrations will significantly rise in the future.

The panellists focused on three main topics and their relationship to arbitration: financing and construction; offtake arrangements and economic fundamentals; as well as regulation by the State.

**Financing and Construction**

Marc Péresse highlighted that arbitration has an increasing role to play regarding renewable energy projects as they become bigger and more complex. Such projects by their nature imply international or transnational aspects: they take place in various places in the world; involve contractors from diverse jurisdictions; construction is complex, with multiple contractors; and the projects are project-financed. Arbitration constitutes the natural forum for disputes concerning these projects, given their complex and transnational structure.

Fabien Roques noted that the industry is relatively young, and that technologies are all fixed-cost, heavy on capex and low on opex. This has several implications. For example, regarding financing, it is critical to have a set of contracts that ensure the investment will be repaid over time.

It is worth noting that all three panellists highlighted what is a unique feature of renewable energy projects: the extent to which they are third-party financed. More particularly, *Kathryn Khamsi* discussed the issue of the timing of securing financing and sequencing of the contracts. She highlighted the multiplicity of contracts into which project companies enter (license or contract with the government, EPC contract, O&M contract, input arrangements, output contracts, financing arrangements). This begs the question of what happens when project contracts are concluded before securing financing, and financing is not secured thereafter. Contract drafting can assist in such cases.

**Offtake Arrangements and Economic Fundamentals**

Marc Péresse and Fabien Roques highlighted the main changes in the industry since its inception. They recalled that, up to a few years ago, renewables were more costly than their alternatives, prompting States to provide support in the form of feed-in-tariffs, which were the main drive in the industry. This has changed fundamentally, and renewables are now becoming competitive in many jurisdictions without the need for State subsidies. The example of the Spanish cases shows that any change in the regulatory framework, by which States would go back on these subsidies, is likely to give rise to arbitration.

As a consequence, the nature of the agreements is changing and there is more exposure to market price, as well as volume and counterparty risks. For example, more and more tenders are now awarded to zero bid offers, with total or partial exposure to market price for the awardees. To mitigate price and volume risks, renewable energy producers and developers can secure offtake arrangements with large industrial offtakers, which are called green corporate power purchase agreements. These agreements ensure that a certain amount of megawatts of renewable energy produced is bought at a set price for a certain period of time. Another option is to aggregate a large number of users to buy energy from suppliers who themselves contract with renewables producers.

There is also increasingly indexation or references embedded in contracts to market prices, with corresponding clauses to renegotiate contracts. Events affecting the market, such as the current increase in electricity prices, could lead to reopening the contracts, to disputes and to arbitration.

Kathryn Khamsi elaborated on the different types of risks and risk allocation clauses. For example, there are market risks, which can be dealt with by clauses that trigger adaptation or renegotiation in case of market change; regulatory risks, which can be addressed through change in law clauses; and construction and operation risks, which can be catered for with various types of clauses. Specifically in relation to change in law clauses, Kathryn mentioned considerations relevant to identifying (i) the change that triggers the remedy, and (ii) the specific remedy. She also

noted that all parties have an interest in clarity of the contract; and parties to multiple contracts should ensure that the chosen remedy in one contract has its back-to-back equivalents in the other project contracts.

**Regulation by the State**

Marc Péresse and Fabien Roques identified the types of regulatory changes that can impact renewable energy projects: unilateral change of tariffs and/or contractual arrangements by the State, changes relating to the offtake contract in the context of corporate power purchase agreements, to the range of conditions for licensing the project, to connecting the project to the network, fiscal changes, changes affecting the balancing or profiling risks, or environmental constraints. Such changes may give rise to arbitration. In particular, investors are likely to argue that such changes violate their legitimate expectations.

Fabien Roques stressed that the role of economic or regulatory experts in renewable energy cases is not necessarily limited to quantum: they can also help to analyse the specificities of the regulatory framework and establish the legitimate expectations of the investor.

He noted that a lot of renewables cases are fundamentally about establishing what the underlying principles of the regulation in economic terms were and how that was embedded into the commitments that were taken by the State and the private party, in order to demonstrate that there has been a fundamental change in the rules of the game.

Kathryn Khamsi noted that there is a new wave of incentivisation of renewable energy projects, and drew certain lessons from the Spanish cases in that regard.

In conclusion, renewable energy projects, which have already given rise to a vast number of arbitrations in the past, are likely to result in even more arbitrations in the future. Indeed, renewable energy projects become bigger and more complex, they are capital intensive, span years, involve multiple actors, a complex contractual structure and project finance, they are affected by market changes, and take place in changing regulatory environments. As such, they provide fertile ground for disputes. Nevertheless, as the panelists pointed out, there are ways for actors in the renewable energy sector to mitigate the risks associated with those disputes. This includes, in particular, contract drafting.

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