

# Kluwer Arbitration Blog

## LIDW 2022: Back to the Future: A Look at the Future of Energy Disputes in a Post-Covid World

Andres Mazuera (Queen Mary University) · Saturday, May 21st, 2022

On the last day of the [#LIDW22](#), Herbert Smith Freehills, Linklaters, Norton Rose Fulbright, Twenty Essex, Vinson & Elkins, and Clyde & Co hosted a session on “The future of energy disputes in a post-covid world”.

The speakers – [Michael Ashcroft QC](#) (Twenty Essex), [Rebecca James](#) (Linklaters), [Colin Johnson](#) (HKA), [Richard Power](#) (Clyde & Co), [James Robson](#) (Herbert Smith Freehills), [Holly Stebbing](#) (NRF), [Louise Woods](#) (Vinson & Elkins), and [Rachel Lidgate](#) (Herbert Smith Freehills) – shared their perspectives on how the energy disputes landscape will look in the years to come.

### An Increase in Price Reviews and Force Majeure Claims

The session kicked off with one panellist reflecting on contractual disputes amid volatility in energy prices. The last couple of years has put a lot of uncertainty in the energy markets. The post-covid recovery has not been steady, and there are still disruptions in both the demand and supply. On top of that, the war in Ukraine has added an extra layer of pressure on energy prices.

The panellist anticipated an increase in the number of disputes regarding price reviews, hardship clauses, contractual flexibility, and force majeure. In particular, one recent case before the Commercial Court, [MUR Shipping BV v RTI LTD](#), highlights the effects of force majeure clauses in international sanctions disputes.

### Trends in Climate Change and Environmental Disputes

In line with this year’s [#LIDW22](#) focus on sustainability and awareness of climate change issues, the panel also addressed current developments in climate change litigation. Two panellists expressed their views on climate change disputes, and particularly on how strategic climate litigation, shareholder activism, and government pressure are shaping the future of the energy sector.

They explained that climate change litigation is often pursued for strategic reasons, with claimants seeking to change States’ regulations and individual companies’ corporate policies. There are examples in the recent wave of claims seen against governments in relation to climate change, as

well as significant cases brought against multinationals in relation to climate change impacts and climate change transition plans, some of which have succeeded. This increase reflects that claimants are being increasingly creative in pleading their cases and is a trend which is set to continue; it also underscores that the climate disputes landscape is rapidly evolving on a global scale.

The panellists then analysed three trends to watch:

1. Consumer behaviour is increasingly shaped by concerns for the environment, leading to so-called “greenwashing” when companies are trying to advertise themselves as eco-friendly and use [misleading environmental representations](#). Both regulators and the public may inquire about the accuracy and evidence supporting claimed sustainability commitments.
2. More claims against States in response to climate actions are expected. Claimants will rely on bilateral investment treaties and contract-based stabilisation clauses to obtain redress for amendments to the regulatory framework affecting investments. The [RWE v The Netherlands](#) case is one example, though many such cases are expected to follow. Whether these cases will be successful is yet to be seen. However, as some have argued before, they might serve a strategic purpose aiming at having “chilling” effects.
3. Amid corporate environmental commitments, there is room for conventional contract claims for breaching specific climate obligations in an agreement. For example, a company may require that its suppliers meet specific climate commitments. A breach of environmental obligations could give rise to the right to terminate the contract or obtain liquidated damages.

Ultimately, they encouraged the conference attendees to “become climate lawyers” by staying informed about new developments in the field and understanding climate litigation hotspots.

### **Issues Arising from Incomplete or Inaccurate Information and Assumptions**

Another panellist referred to the issues arising from incomplete or inaccurate information and assumptions in contracts for offshore decommissioning. The analysis was based on the LOGIC General Conditions (2018) and its Guidance Notes. The panellist argued that in these standard conditions, numerous indications suggest that a gap in the information provided to the contractor may justify a variation under the agreement.

### **Impact of Climate Change on Valuation and Risk**

The next panellist emphasised that, in general terms, climate change is not factored into the valuation of companies. The panellist predicted a shift in this trend, as environmental risks become more evident. In fact, disclosure obligations are stricter than they were a few years ago, and companies will soon be compelled to disclose the impact of climate change on their business. Be that as it may, there is no clear way to factor climate change risks into business valuations. The audience was left with a thought-provoking statement regarding valuations: will we eventually see a premium for climate change risks equivalent to the premium we have for country risks?

## Low Carbon Hydrogen Projects

The panel then focused on the industry of [low carbon hydrogen projects](#). In one panellist's view, there will be disputes in three main areas. First, this industry will require substantial infrastructure investments in order to be viable in the future. And since it is a relatively new sector, not many experienced contractors are suitable to undertake these types of construction projects. As a result, this is an area with significant risks of construction disputes. Second, similar to other energy industries, [joint venture agreements to develop hydrogen projects](#) will be a source of potential conflicts. Third, the lack of regulation poses a risk to ongoing projects. The enactment of new regulations may negatively impact existing facilities, including by leading to delay, disruption, and devaluation of certain projects.

## Decarbonisation, Decentralisation, and Digitisation

Finally, the panel shared some views on dispute resolution in decentralised and digitised networks. The energy transition requires three “Ds”: decarbonisation, decentralisation, and digitisation. It is not only about producing green energy. Transmission and distribution are also issues, as there will be enormous pressure placed on the transmission and distribution network.

A panellist described a scenario where part of the demand for energy in a particular area could be satisfied by locally producing and distributing energy, effectively decentralising the process in microgrids. Buildings could produce small amounts of renewable energy (i.e., solar energy) and sell the excess to other consumers or energy aggregators.

As for digitisation, the panellist argued that it would play a key role in the development of microgrids. “Prosumers” (producers and consumers) do not have the time or ability to track and record all the small-scale energy sales between each other. This process must happen automatically. Therefore, self-executing smart contracts will be central to operations. In this context, digitisation could have a potentially dramatic effect on the future of energy disputes. They will be driven by an increasing number of small players with low-value claims, which may be challenging to litigate cost-effectively. Additionally, many of these disputes will be related to the operation of smart contracts.

## Conclusion

In conclusion, this session offered an insightful overview of the recent developments in energy disputes. Whilst there are relevant issues in more traditional energy industries, renewable energies and climate change concerns are shaping the future of energy disputes and, in consequence, litigation and arbitration practices.

*More coverage from LIDW is available [here](#).*

---

*To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).*

### **Profile Navigator and Relationship Indicator**

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

This entry was posted on Saturday, May 21st, 2022 at 8:32 am and is filed under [Energy](#), [LIDW2022](#), [Sustainability](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.