

Kluwer Arbitration Blog

Berlin Dispute Resolution Days 2022: Disputes in an Age of Uncertainty – Managing the Energy Transition

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The [DIS 2022 Autumn Conference](#) took place on 15 September 2022, following the traditional Gala Dinner at the spectacular Palace Charlottenburg the evening before. The Autumn Conference is one of two of the DIS' main annual conferences, traditionally held in English gathering arbitration practitioners from all over the world to exchange ideas and initiate thought-provoking discussions. The overarching theme of the Conference this year was “*Disputes in an Age of Uncertainty – Managing the Energy Transition*”, with attendees and panelists discussing the intersections of international arbitration, Environmental Social Governance (ESG) and the energy transition.

Keynote Speech: The Energy Transition – Operating in an Age of Uncertainty

The conference began with a keynote speech delivered by [Mathias Wolkewitz](#) (Wintershall Holding GmbH) from the perspective of a market participant, focusing on the challenges for energy companies operating in the challenging times of the transition. Mr. Wolkewitz enlightened the audience with regard to the combination of technical, regulatory, economic and commercial uncertainties associated with the energy transition. Further, Mr. Wolkewitz explained how market participants were having to adjust on the go to the effects of the war and the related sanctions, which have had a heavy impact on the energy sector.

The keynote speech set the stage for the discussion panels on: (1) covering for uncertainty through contractual best practices, (2) managing uncertainty through procedural best practices, (3) the pros and cons of discovery/document production, (4) assessing uncertainty in quantum calculations, and (5) resolving uncertainty through arbitration (or other means) in a way that accelerates the energy transition.

Covering for Uncertainty in Energy-related Transactions – Contractual Best Practices

The first panel was moderated by [Florian Cahn](#) (Framatome) and addressed uncertainty in energy-related transactions. The panelists were [Elena Busson](#) (BonelliErede), [Nikolas Hübschen](#) (RWE), [Bregje Korthals Altes](#) (Ysquare), and [Sebastian Schneider](#) (Hengeler Mueller).

The speakers agreed that, while the energy market had remained relatively unscathed during the COVID-19 pandemic, the current energy situation is cause for concern and having an impact on the M&A and transactional market. Echoing the sentiment expressed during the keynote speech, the speakers agreed that there was great uncertainty regarding the regulation of the industry. It was further discussed how judicial precedent arising out of environmental litigation may make some jurisdictions more or less attractive for deals and structuring.

There was also an insightful discussion surrounding the drafting of agreements for the transaction, which perked the ears of the dispute practitioners in the room who might need to interpret these agreements *ex post*. The speakers discussed the concept of uncertainties when drafting agreements, such as what can and cannot be foreseen and the perceived success of *force majeure* clauses, as well as the appropriate use of risk-sharing language to avoid future disputes.

Managing Uncertainty – Procedural Best Practices

The second panel was moderated by [Maxi Scherer](#) (Wilmer Hale), with [Antje Baumann](#) (BAUMANN Resolving Disputes), [Christian Borris](#) (Borris Hennecke Kneisel), [James Boykin](#) (Hughes Hubbard & Reed) and [Anja Ipp](#) (Climate Change Counsel) speaking, primarily from the perspective of the arbitral tribunal, about the procedural challenges arising in energy-related arbitrations and whether any best practices existed in this regard.

Given the complex nature of energy-related disputes, it can be challenging for arbitral tribunals to maintain procedural efficiency in these arbitrations. The speakers agreed in this regard that case management conferences, as foreseen by Article 27 of [DIS Rules of Arbitration](#), are an effective tool to safeguard the efficiency of the proceedings. In particular, it was discussed that it is often useful to hold several such conferences to deal with the different stages of the proceeding in a collaborative manner. This is consistent with one of the key selling points of arbitration as a forum for dispute resolution allowing a flexible process tailored by the parties.

The importance of procedural flexibility in arbitration was also highlighted in the panel's discussion surrounding tribunal-appointed experts. The speakers agreed that expert testimony is often indispensable in energy-related disputes, and that there may be situations in which the appointment of a tribunal-appointed expert could be warranted. It was also recognized, however, that parties are often reluctant to refrain from obtaining a party-appointed expert and the parties' extensive knowledge of the facts of the case allows party-appointed experts to work in great detail, which is of benefit to the tribunal. Thus, the panel concluded that a tribunal-appointed expert in lieu of, or in addition to, party-appointed experts may not always be of benefit to the conduct of proceedings and should be considered on a case-by-case basis.

Coffee House Debate: Discovering Certainty without Discovery? Did Discovery/Document Production ever Lead to the Truth?

The third panel was conducted in a coffee house debate format. [Nils Schmidt-Ahrendts](#) (Hanefeld) moderated a panel consisting of [Courtney Lotfi](#) (Jones Day), [Mino Han](#) (Peter & Kim), [Johannes Koepp](#) (Baker Botts) and [Simon Manner](#) (Manner Spangenberg).

For the sake of the debate, Ms. Lotfi and Mr. Manner advanced the proposition that there should be no automatic discovery and/or document production because of its many shortcomings, while Messrs. Koeppe and Han argued that it is an important procedural tool that must remain intact.

For their proposition, Ms. Lotfi and Mr. Manner cited particularly the time and costs concerns, in addition to the risk that the entire exercise turns into a fishing expedition. In addition, it was questioned whether one can reasonably rely on the procedural integrity of the opposing party. In sum, in the speakers' view, document production constitutes much ado for nothing, as in their experience no smoking gun is likely to be revealed in document production.

In contrast, Messrs. Koeppe and Han argued that document production is an essential element of justice, enabling both parties to access the same case-relevant materials. Furthermore, both pre-arbitration and post-arbitration, parties are aware that documents may come to light which could possibly damage their case. Therefore, they went on, although document production is criticized at times, it is nonetheless regularly employed by arbitrators and counsel alike. This speaks volumes as to its desirability as a procedural tool.

Interestingly, the latter view was confirmed by a spontaneous survey of the audience, with significantly more attendees raising their hand in favor of maintaining document production.

Assessing and Valuing Uncertainty: Old School vs. Modern Approaches

The fourth panel looked into issues of quantum, and was moderated by [Alexander Demuth](#) (Alvarez & Marsal). The panelists included [Johanna Reichenbach](#) (Frontier Economics), [Stuart Dekker](#) (Secretariat Advisors), and [Dan Harris](#) (Brattle Group), investigating methods to assess and value the uncertainty inherent to long-term energy investments and contracts, and in this context comparing old-school approaches to more modern ones.

The panel noted the great difficulties inherent to predicting and assessing drastic policy shifts and the ensuing consequences. Traditional methods such as the Discounted Cash Flow Method (DCF) are calculated with the most likely point estimates as input, and then spell out the most likely expected value of a certain asset. However, this method does not fully take into account essential information relating to the risk and uncertainty borne by long-term energy investments. The panelists thus elaborated on the Monte Carlo simulation, which incorporates risks elements into the traditional DCF valuation. That way, the application of Monte Carlo can reveal critical information to the arbitrators about the value of an asset at a certain point in time.

Resolving Uncertainty: Arbitration to Accelerate the Energy Transition?

The fifth and final panel examined ways to resolve uncertainty, and whether arbitration can be a suitable tool to accelerate the energy transition. [Markus Köhler](#) (Oppenländer) moderated a panel of [Manfred Dittmer](#) (Parkwind), [Carlo Ottaviano](#) (TenneT) and [Roya Sangi](#) (Redeker Sellner Dahs).

The panel explained the multi-layered complexity, both technical and legal, of large offshore wind projects, which creates a large demand for tailored dispute resolution services. In other words,

there is a need for disputes arising in this specific industry to be resolved expediently and by competent individuals with industry knowledge. The panel also spoke in detail about a new initiative by the organization World Forum Offshore Wind (**WFO**), establishing an [Offshore Dispute Resolution Committee](#) which aims to meet this demand for specialized dispute resolution services in the industry.

The final mark of the conference was fittingly provided by Ms. Sangi, who confirmed that – in the future – arbitration could be a viable option to resolve disputes concerning offshore grid connection costs (rather than default litigation). This would enable arbitration to cover yet another highly specialized and complex disputes sphere, and thereby contribute to accelerating the energy transition.

Conclusion

In sum, the DIS Autumn Conference showed that, in the energy sector, *winter is coming*. And this upcoming winter will be crucial in managing the energy transition as adequately as possible both from a procedural and substantive standpoint. The DIS Autumn Conference provided numerous useful ideas on how the law generally, and arbitration more specifically, can play their part to that end.

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