Kluwer Arbitration Blog

Istanbul Arbitration Week 2022 Recap: Energy-Related Panels

Ece Day?o?lu (Day?o?lu Law Firm) · Saturday, December 17th, 2022

As part of the 2022 Istanbul Arbitration Week (ISTAW) organized from 10 to 14 October 2022, the Energy Disputes Arbitration Center (EDAC), which is the only energy sector-based arbitration center with its own rules, hosted several panels in relation to energy arbitration at historical Sait Halim Pasha Mansion by the Bosphorus. This post provides a succinct coverage for three of these panels.

Panel 1: Arbitration as an ADR Mechanism for Administrative Disputes in Respect of the Energy Sector in light of International Approaches

A first panel was held on "Arbitration as an Alternative Dispute Resolution Mechanism for Administrative Disputes in respect of the Energy Sector in light of International Approaches". Moderated by Ye?im Bezen, the panel was composed of Aykut Bak?rc?, Sophia Von Dewall and Assoc. Prof. Nilay Arat. Discussions focused on a controversial topic, *i.e.* whether arbitration, as opposed to a full remedy action before Turkish domestic courts, is a suitable mechanism for the resolution of administrative disputes in the energy sector.

Aykut Bak?rc? first mentioned the 1999 Turkish constitutional amendment regulating which of the services carried out by the public legal entity can be made through private law contract. Turkish Law (Law No. 4501) allows for disputes arising from concession agreements to be resolved by arbitration. Provided that there is an element of extraneity, international arbitration can come into play.

Although it is well settled that only Turkish administrative courts can rule on the annulment of an administrative act, the relevant question is whether compensation is possible through arbitration if an administrative act directly has an impact on an investment. Assoc. Prof Nilay Arat examined these issues, including full remedy actions under Turkish administrative law. She first drew a distinction between the "administrative actions", *i.e.* conducts that do not change any legal status, and the "administrative acts", which are non-regulatory actions taken by administrative authorities. The distinction is important because only administrative acts can be annulled. For the investor, be it foreign or Turkish, full remedy action is designed to provide compensation. But the question – where other alternative paths of relief are available, including through arbitration – is whether the amount of the remedy awarded through the domestic court action genuinely constitutes a full remedy.

Sophia Von Dewall raised the question in connection with the parameters to be applied to the quantification of loss during full remedy action before Turkish administrative courts. She noted that the "compensation issue" has not fully developed under Turkish law yet, as the courts' judgments do not articulate the approach to valuation in depth. However, in any case, there should be an actual and existing account for any loss of profits.

Sophia Von Dewall also touched on the advantages of resorting to arbitration for the compensation of loss of profit as opposed to a full remedy action before domestic court. She noted that under international law, the standard is for full reparation of the breach. In arbitration proceedings, parties' quantum experts provide reports to support use of the discounted cash flow (DCF) method to calculate the loss of profit for energy disputes.

Panel 2: Arbitration in the Midst of the Global Energy Crisis

A second energy-related panel was held on "Arbitration in the Midst of the Global Energy Crisis". The panelists Cihat Kö?ger, Prof. Kamalia Mehtiyeva, Dr. Rahmi Kopar, Prateek Bagaria and Roy Schondorf were joined by moderator Berceste Elif Duranay.

As background, Prateek Bagaria described the impacts of the global energy crisis on the European energy market, including Russia's cuts to energy supply .

Cihat Kö?ger elaborated on possible energy arbitration disputes involving Russia and Russia related parties, noting that not only is there a gas supply crisis but also an oil supply crisis. The set aside of the Russian oil (constituting ten percent of global supply) eventually leads to an increase of the oil price. Although the Russian oil seems to be cheaper, it comes with an additional cost which consists of insurance and transportation which affects the global inflation. Some of the refineries in Eastern Europe desperately use the Russian crude oil for structural and technical reasons. For instance, Turkish refineries get fifty percent of their oil from Russia. There are other options such as Basra oil.

The sanctions made it harder to supply oil. As a result, refineries faced the risk of shutdowns. This means that refineries may not be able to restart. Following the pandemic, the focus moved towards force majeure. Interpretation of force majeure clauses is expected for disputes arising out of gas supply contracts. Gas supply crisis led to shutdowns in Europe and has domino effect on the disputes in numerous sectors.

Roy Schondorf commented on the disruption of economic activity due to the energy crisis and its connection to possible arbitration claims. He noted, in particular, that during times of economic pressure, particularly in reacting quicky to urgent circumstances, businesses may try to resolve their disputes in different ways. They might, for instance, seek to settle claims or not pursue a dispute at all.

Prof. Dr. Kamalia Mehtiyeva described the impacts of changes in landscape and geopolitics in the region and in the rest of the world. For instance, in order to help the European Union ("EU") diversify the energy supply, some countries such as Israel, Egypt, Canada and Azerbaijan came into play. The legal nature of the agreements concluded between the EU and these countries was questioned and the panel agreed that these were bilateral memoranda of understanding (MoU) which, under public international law, might have binding effect depending on their wording. The

panel agreed such agreements definitely fell in a grey zone insofar as the commitments under them were concerned.

Dr. Rahmi Kopar looked at indirect disputes that may arise out of these MoUs. Canada, for example, needs to build infrastructure. By the time the facilities are constructed the EU's demand may fade away. If the prices go back to previous levels, this might create problems including "stranded" investments. This may give rise to investment disputes. Gas price review arbitrations may also increase in the future.

Finally, Prateek Bagaria also mentioned that these disputes may lead to new regulations and policy responses which, in turn, may themselves generate new disputes. In order to manage this potential caseload, it is better to prepare and to plan in advance. Mr. Bagaria advised that litigation finance may be of huge importance. As cash flow from business will be limited, financing and monetizing these disputes will be of essence.

Panel 3: The Energy Transition – A Smorgasbord of New Disputes?

Moderated by Paul Stothard, a third energy-related panel discussed "The Energy Transition – a smorgasbord of new disputes?". The panelists were James Rogers, Dr. Esra Bekta? and Ergin Mizrahi.

Paul Stothard stated that the energy transition refers to political and market driven change from fossil fuels to renewables and non-carbon intensive forms of fuel including but not limited to nuclear, bio fuels, solar and wind to mitigate the ongoing climate change. Climate change disputes are broader than energy transition disputes.

Dr. Esra Bekta? analysed how the Paris Agreement on Climate Change contributes to sustainability. The signatory countries submit their Nationally Determined Contributions ("NDCs") in order to show how they will contribute to the energy transition phase. For instance, Turkey promised to make a contribution in sectors such as energy, infrastructure, transport, agriculture and waste management. Corporate social responsibility and ESG principles have become hot topics regarding corporate duties toward employees, environment and consumers.

James Rogers then focused on the tension between States and investors, noting that investors care their business whereas States are becoming more socially and environmentally aware. And the population is deemed as the third party. Competing needs give rise to regulations from the States' end.

Finally, Ergin Mizrahi explored the hurdles of the enforcement procedure in Turkey. Some national courts' decisions declared arbitration clauses invalid for not being drafted in Turkish. However, even if the arbitration clause is deemed invalid, given the fact that Parties signed Terms of Reference ("TOR") until the stage of enforcement, the implied intention to arbitrate should be enforced. The practice in Turkey now involves two-columned arbitration clauses both in English and Turkish while the rest of the documents may be in Turkish only.

Ergin Mizrahi also noted that, in Turkey, public policy defenses are explained in a vague way. In energy disputes there may be public implications such as electricity cuts. According to the European Court of Human Rights, if a court refuses to enforce an award based on non-

proportionable consideration of public policy over parties' interest, it may constitute a treaty violation on the part of the country of enforcement.

Conclusion

ISTAW 2022 offered its participants an unforgettable arbitration week with panels, keynote speeches, Bosphorus tour, breakfast and closing cocktail. Organised with the contributions of sponsors and supporters consisted of leading international law firms, arbitration centers, arbitration organisations and media institutions, ISTAW 2022 welcomed arbitrators, lawyers, academics and arbitration experts from all over the world in this unprecedented event. And ISTAW 2023 is on its way – stay tuned!

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