Kluwer Arbitration Blog

2023 PAW Recap – Day 3: Arbitrating Renewable Energy Disputes in the CEE Region

Ioana Knoll-Tudor (Jeantet) · Tuesday, April 4th, 2023

In the course of the 2023 Paris Arbitration Week, Jeantet organized a round table on "**Arbitrating Renewable Energy Disputes, with a Special Focus on the CEE Region**". The panel was composed of **Caroline Falconer** (Secretary General of the SCC Arbitration Institute), **Jurriaan Kien**, (Legal Director New Energies & Services, SBM Offshore), **Edoardo Marcenaro**, (Head of Legal & Corporate Affairs, Enel Grids srl), **Luminita Popa** (Managing Partner, Suciu Popa), **Prof. Dr. Maxi Scherer** (Special Counsel, WilmerHale and Professor at the Queen Mary University of London), and was moderated by **Dr. Ioana Knoll-Tudor** (Partner, Jeantet).

Current State of Affairs

Edoardo Marcenaro opened the discussion by highlighting the scale of the transition that the energy market is currently undergoing, as the development of renewable energies over the past 25 years has deeply altered the energy industry: it changed its actors, the type of power plants and modified the concerns around the distribution and storage of energy since renewable energy requires new structures and grids to be adapted to this new type of energy.

Taking the example of off-shore wind energy, **Jurriaan Kien** referred to the Paris Agreement goals and the need to produce 30% of European electricity from off-shore wind (first source of European Electricity) by 2050 and underlined that this goal already proves challenging for European countries. The generation of electricity, which started with on-shore wind projects before moving (shallow water) off-shore, will also inevitably find limits and likely require to move to (deeper water) floating wind projects, where new technical challenges await.

Focus on Eastern Europe

Luminita Popa then went on to emphasize that although Central Eastern European States have been adopting or amending their legislations in order to sustain the progress of renewables, their implementation still requires improvement. Romania, for example, is targeting 32% of renewables by 2030, yet last year's share was only 17%, meaning the country will have to double its production in the next eight years to reach that goal.

Among the examples of legislation taken by the CEE countries, Luminita mentioned:

- Romania – where a piece of legislation accorded priority connection to the grid for renewable energy projects, while another one shortened the time for obtaining permits for renewable energy project to two years.
- Poland and Romania – where specific legislations were adopted (Poland) or in the process of being adopted (Romania) to promote offshore wind projects.

Although the implementation of such legislation will certainly have to be improved, positive signs are seen. For example, the largest solar photovoltaic plant in Europe is currently being built in the city of Arad (western Romania), with the full project scheduled to be completed by 2026 and set to offer a total power of 1,044 megawatts.

Investment Arbitration

Turning to investment arbitration, **Prof. Dr. Maxi Scherer** first looked at the legal sources most frequently used by claimants when initiating a renewable energy claim and then, at the common factual questions tribunals have to consider when deciding on such a claim.

Starting with the sources, although BITs are often relied on by investors, matters have become complicated in the European context due to some EU Member States terminating their BITs and the many questions marks surrounding the Energy Charter Treaty ("ECT"), following the recent withdrawals of several Contracting States (France's, Germany's and Poland's notifications of withdrawal will take effect 8th, 21st and 29th of December this year, respectively) as well as unresolved reforms. Besides, and even if the ECT 20-year sunset clause protects investments already made prior to withdrawal, there are also talks among European Contracting States to terminate these sunset clauses, at least between them. Finally, and pursuant to the European Court of Justice's *Komstroy* judgment, inter-EU arbitration clauses are now deemed invalid as a matter of EU law. Against this background, investors are therefore now turning back to relying on contractual mechanisms and investment agreements, and to negotiating stabilization clauses to ensure extra levels of protection for their investments.

From a tribunal's perspective, **Prof. Maxi Scherer** pointed out that arbitrators, when examining investors' renewable energy claims, might consider the following elements: (i) whether the State has adopted laws to incentivize parties to invest in green energy, and whether this legal framework was later altered and adversely affected the investor; (ii) whether the State gave any specific insurance, or whether the investor may base its legitimate expectations on the provisions of the law in general; (iii) the time the investment was made, and whether the investor could have reasonably relied on the laws in force at that time or whether some indication of changes already existed; and (iv) the effect of these changes in the law, and whether it only affected the profitability of the investment or destroyed its value.

Commercial Arbitration

Despite an important number of investment arbitration cases, most renewable energy disputes

remain contractual. As the panel pointed out, their nature very much depends on the phases of the project:

- development phase: delay in obtaining permits, lack of permits, shortage of equipment and natural material (the supply of silicious and lithium, for example, is not inexhaustible), etc.;
- construction phase: delay and defect claims, cost overruns, interface between multiple contactors, *force majeure* / hardship issues, etc.;
- operation & maintenance phase: quality issues, questions of liability, problems related to the plant's long-term performance, etc.

Jurriaan Kien further pointed out that nowadays projects have turned from domestic to international. Unlike decades ago where contracts, suppliers and constructions used to be done locally or with neighboring States, renewables projects now involve worldwide actors and interactions, which can thus impact the success of the project depending on the situation in those countries.

Edoardo Marcenaro also highlighted how the global transition to digitalization can affect the nature of disputes in the energy sector. With projects turning more and more digital, technological issues indeed increasingly tend to arise, thus triggering an entirely different field of risks, expertise and applicable law but also disputes.

Building on the specificities of this new type of business, **Jurriaan Kien** noted the lack of standardized contracts for offshore wind projects. While FIDIC standard contracts (specially the Yellow Book) are often used as a base for offshore wind EPC(I) contracting (with various elements taken from Oil & Gas LOGIC suite of contracts), those standards are often not suited for offshore wind projects without substantial redrafting. The questions of liability and adequate risk allocation also constitute intricate issues. The global reach of renewables projects but also their increased use of new technologies indeed often constitute an unknown factor for which the allocation of liabilities and risks must be carefully structured. As a consequence, the role of lawyers in drafting and negotiating renewable energy projects contracts is even more important.

ADR and Adjudication Method

As the panel however stressed, the recourse to arbitration for renewable energy disputes is not always the best solution. Alternative dispute resolution and adjudication are important tools at the hands of parties in resolving their disputes during the life of their renewable energy projects. Parties to many construction projects indeed do not wish to go to arbitration but, rather, to maintain a good working relationship in order to pursue and complete their project.

A novelty in that sense, presented by **Caroline Falconer**, is the SCC Express Dispute Assessment (the "SCC Express"), whereby the parties can refer their dispute to the SCC (through either a special clause in their contract or a direct request) who will appoint a neutral legal expert to give an opinion on the merits of the case within three weeks and for a set fee. Parties can turn this decision into an award and have it enforced, or can choose to make it a non-binding or contractually binding decision. Launched in May 2021, the SCC Express has already been integrated in various contracts (especially construction, long-delivery and joint-venture agreements) and first experts' opinions are expected to be rendered in the next weeks.

Procedural Specificities of Renewable Energy Disputes

Renewable energy disputes, once referred to arbitration, distinguish themselves from other arbitral proceedings by a set of specific features. As noted **Luminita Popa**, the particularly complex technical issues often at stake result in a lack of high-level experts (which can also be said of counsels or even arbitrators). Similarly, the multiplicity of actors (technology providers, turbine suppliers, installation vessels, concrete construction companies, etc.) and contracts very often leads to the joinder and consolidation of claims. Additional difficulties also emerge when parallel proceedings are initiated in relation to disputes that are not always arbitrable (e.g., public authorization, issuances of permits). To avoid or minimize those risks, parties can therefore adapt their contracts by incorporating de-escalation clauses or clauses providing for pre-arbitral procedures, or consider aligning as much as possible the arbitration agreements of various connected contracts.

Luminita Popa also stressed that the scale of renewable energy projects can often jeopardize the evidentiary process. Off-shore facilities and global supply chain indeed means potential witness, experts and evidence scattered all over the globe. This also puts at risk the proper and timely collection of documentation and, more generally, the collection of data to build a party's case.

From a more general perspective, the new SCC Green Technology Disputes report further reveals that, in 2022, the renewable energy sector was the most common sector identified in Green Technology Commercial Disputes, with 56% of the parties pursuing their main business in this sector. As **Caroline Falconer** explained, those types of disputes notably arise during the construction phase where the need for a quick solution is essential (thus justifying the increasing number of requests for emergency arbitrators).

Quantification of Damages

Prof. Maxi Scherer finally discussed the importance of experts when it comes to the determination of damages in renewable energy disputes, and addressed two types of criticism arbitral tribunals often face.

First, the preconceived idea that arbitrators tend to "split the baby" is not confirmed by practice: as already highlighted by a 2001 study, in the majority of cases (66%), claimants are awarded either nothing or almost all of their damages. Subsequent studies confirm this result. Second, case law analysis validates the preconception that some arbitrators tend to "cut corners" and not reason their awards sufficiently when it comes to quantification: according to data collected over the last 20 years and processed by **Prof. Maxi Scherer**, the average percentage of the reasoning of an award dedicated to quantum allocation is 25%. Her further study results will be discussed in a future Kluwer Blog.

Conclusion

The transition of the energy industry to renewables carries various impacts, including for the future

of arbitration itself. There is little doubt that, in order for States to achieve the various goals of the Paris Agreement, the forthcoming years and decades will see a continuous increase of renewables projects and, as a result, an increase of renewable energy disputes. It is also certain that arbitration constitutes a viable forum to resolve those disputes, which has the means to manage the specificities inherent to this new type of business. There will, however, certainly be future evolutions (e.g., standardized contracts for off-shore wind projects) and, as a consequence, new procedures related to new areas (such as intellectual property). As finally observed by **Edoardo Marcenaro**, the dual environmental and social dimension of those disputes will also inevitably require arbitration to adapt in order to meet those new challenges. Arbitration can nonetheless prove incredibly flexible, as shown many times, so it is certainly up to the task.

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