

Kluwer Arbitration Blog

Energy Arbitration and Japanese Companies: Recent Experience and Emerging Trends

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The energy sector has long been one of the major users of international arbitration, and the field has always been a fertile ground for disputes, whether they be price reviews, construction claims, sale and delivery disagreements or disputes over the decommissioning of assets. This has certainly been the case in recent years, including for arbitrations involving Japanese companies. Against the backdrop of the continuing energy transition and increased energy insecurity globally, energy-related arbitrations show no sign of abating. In view of Japan's reliance on energy imports and recent updates in domestic renewables policy, as well as the involvement of Japanese companies in the energy sector, this trend can be expected to continue. In this article, we review the recent involvement of Japanese companies in energy-related arbitrations and specific areas where we expect such involvement will continue.

Recent Experience

The recently published [2022 Queen Mary University of London/Pinsent Masons Energy Arbitration Survey](#), discussed in a [recent blog](#), reported that the top four causes of international energy disputes in the last three years related to the construction of energy infrastructure; oil and gas; price volatility of raw materials and energy supply; and government policy change. The experience of Japanese companies has been consistent with these industry-wide trends.

A number of Japanese companies have been involved in arbitrations regarding the construction of upstream or downstream facilities. A clear example is found in the Ichthys LNG project based off the northwest coast of Australia. [Ichthys LNG](#) is a joint venture among Inpex, Japan's largest petroleum and exploration company, as the operator; its major partner TotalEnergies; and the Australian subsidiaries of CPC Corporation Taiwan, Tokyo Gas, Osaka Gas, Kansai Electric Power, JERA and Toho Gas. It is expected to supply approximately [10 percent of Japan's LNG requirements over the next four decades](#). Unsurprisingly for a project of its size, the Ichthys LNG project has also spawned several arbitrations.

In October 2021, Inpex settled a [US\\$600 million ICC arbitration](#) with Samsung Heavy Industries relating to delays in the construction of the floating offshore gas processing unit for the project. Also in October 2021, an Inpex affiliate settled [an ICC arbitration](#) with JKC Australia (a joint venture including Japanese engineering groups JGC and Chiyoda) in which the parties agreed to

withdraw all claims against each other. In April 2022, JKC Australia settled its [US\\$1.8 billion ICC arbitration](#) against the Australian-US consortium subcontracted to build a power plant for the Ichthys LNG project. Further, in August 2022, Inpex filed a [US\\$970 million arbitration claim](#) against Daewoo Shipbuilding & Marine Engineering over delays and defects in the commissioning of a storage facility.

There have been other sources of energy-related commercial arbitrations involving Japanese companies. In March 2021, Toyo Engineering and its subsidiary initiated an [ICC arbitration](#) against Thai company TTCL Public Company Limited over the alleged abandonment of engineering work at a refinery in Malaysia. Separately, in September 2021, Toyo Engineering [reported](#) it had largely defeated a US\$240 million claim brought by the operator of an oil sands project in Canada.

Japanese companies have also been active in investment arbitration, particularly in relation to policy changes in the Spanish renewable energy sector. Japanese company JGC Holdings, which has investments in concentrated solar power plants in Spain, brought an [Energy Charter Treaty arbitration](#) against Spain and secured an award of over €23.5 million in November 2021. Wind power developer Eurus Energy, a member of the Toyota Group, also reportedly won [€106.2 million in an Energy Charter Treaty award](#) against Spain (pending a [rectification request](#)), as recently discussed on the [Blog](#). At the date of writing, there are at least two other Japanese renewable energy investors ([Mitsui & Co](#) and [Itochu Corporation](#)) with proceedings pending against Spain.

Although only a small portion of publicly reported energy arbitrations, these cases nonetheless demonstrate the significant involvement of Japanese companies across the spectrum of energy disputes.

Emerging Trends

We consider that Japanese companies' involvement in energy disputes will continue to track industry-wide trends. Before turning to the reasons for this, it is necessary to first understand the underlying trends in the economy, policy, trade and investment.

Several disruptions have emerged in recent years. *First*, a [recent review](#) of trends in energy disputes in the Asia Pacific highlighted the emergence of disputes associated with the shift to renewable energy. *See also* [2022 Queen Mary University of London/Pinsent Masons Energy Arbitration Survey](#) (identifying a similar trend). Energy transition carries unique risks for contractual performance. These include changes in the regulatory environment and teething issues with new technologies, alongside standard infrastructure construction issues. *Second*, it has been [reported](#) that large gas disputes are likely to remain and to be accompanied by an uptick in disputes related to the decommissioning of ageing offshore oil and gas assets. *Third*, the COVID-19 pandemic has caused supply chain and logistical issues that have impacted cross-border trade (*see a recent blog post* on this point). This was only exacerbated by Russian aggression in Ukraine, which has prompted many countries to seek alternate energy supply and various international sanctions regimes. It is reasonable to expect that these circumstances will impact contractual performance through unavailability of equipment, under-delivery in supply contracts, increased risk of insolvency of key contractors or claims for force majeure and frustration.

It is likely that many disputes arising from these situations will continue to have a Japanese connection. The reasons for this are manifold, one of which is Japan's position as a net energy importer. As recognised in a recent [Energy White Paper](#) produced by the Japanese Ministry for Economy, Trade and Industry (METI), "*Japan relies on imports for much of its energy resources and is heavily influenced by overseas conditions*". This reliance necessitates a large number of cross-border agreements to ensure energy supply and makes Japan particularly susceptible to the impact of the global events described above.

Perhaps one of the clearest examples is LNG supply. As of August 2022, Japan was the [world's largest LNG importer](#), with 10 percent of its supply from Russia. A number of Japanese companies are involved in large Russian LNG projects including [Sakhalin 2](#) and [Sakhalin 1](#), the latter being recently [reported](#) as the potential subject of arbitration. While Japan has remained involved in Russian projects to secure energy supply, many European countries have looked elsewhere. This may increase demand for supply from Asia and could conceivably impact Japanese companies involved in LNG projects throughout the region.

Another specific area of concern could be the significant [Japanese investment in LNG and other resources projects in Australia](#). These may yet spark further disputes under commercial contracts or investment treaties. The [Australian Government has faced public pressure to limit LNG exports](#) in the face of energy shortages and rising prices. Its [November 2022 intervention](#) in the energy market, temporarily pushing down gas and coal prices, has triggered speculation as to further sale restrictions, price caps or windfall profit taxes. The potential for arbitration is clear and some businesses have already [flagged](#) such measures as a possible breach of Australia's investment treaty obligations.

Meanwhile, the Government of Japan has indicated its aim to secure a stable energy supply, reverse its nuclear energy phaseout and increase the share of renewable energy supply. Recently, Prime Minister Kishida's advisory panel [approved a plan](#) to extend the life span of existing assets and build new reactors. A renewed focus on nuclear energy may also cause disputes, given the cost and complexity of the projects. The return to greater use of nuclear energy is motivated not only by concerns over energy supply, but also by the energy transition. In [Japan's Sixth Strategic Energy Plan](#), METI published its aims to increase the share of renewable energy to 36-38% by 2030 and to achieve carbon neutrality by 2050. The Plan also highlighted a number of specific renewable efforts, including the introduction and expansion of photovoltaic/onshore wind and promotion of technologies such as carbon dioxide capture use and storage (CCUS) and use of hydrogen.

Achieving these goals will require large projects, foreign expertise and cross-border contracts and is likely to be a key source of disputes of the kind outlined above. It is not just in Japan where disputes may arise given Japanese companies' heavy involvement in renewable projects globally, including as investors, EPC contractors and technology providers. For example, large Japanese companies are at the forefront of many clean energy initiatives, including [CCUS](#), [hydrogen](#) and [green ammonia](#).

As the energy transition continues, an increased focus on the decommissioning of traditional energy assets can also be expected. The significant involvement of Japanese companies in traditional energy projects around the world means decommissioning liability and obligations could be another key area for disputes.

As this brief article demonstrates, for as long as the world requires energy, we can count on energy

disputes. And for as long as Japanese companies remain heavily involved in this sector globally, we can also count on a continuing Japanese connection.


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