

# Kluwer Arbitration Blog

## From Vancouver with Love: The Future of Energy is Paved with Disputes – Insights from the Joint ICCA and VanIAC Conference

Özge Yazar (Miller Titerle + Company) · Friday, June 30th, 2023

On an exceptionally sunny day in Vancouver, Canada, Vancouver International Arbitration Centre (VanIAC) and International Council for Commercial Arbitration (ICCA) hosted a joint conference entitled “Energy Infrastructure Disputes and Arbitration: Today and Tomorrow”. The one-day conference kicked off with a traditional welcome by Wilson Williams (Sxwíxwtn) of the Squamish Nation on June 2, 2023. After opening remarks from Craig Chiasson (Borden Ladner Gervais) and Lucy Reed (Arbitration Chambers / ICCA), and the official launch of the ICCA Award Series, the first panel was underway.

### Clean Energy Construction Disputes

In the morning session moderated by Laura Cundari (Blakes), speakers Dr. Patricia Galloway (Galloway Arbitration, Inc.), Dr. Ezra Jampole (Exponent), Doug Jones AO (Atkin Chambers), and Miguel López Forastier (Covington & Burlington) touched upon the main features of disputes arising out of energy projects, discussed the effects of new regulations, new technologies and climate change in energy construction disputes, and addressed related trends in investor-state disputes.

Clean energy projects are often distinct from traditional construction projects. First, they are characterized by higher value (typically over \$1 billion), longer duration (more than 4 years) and the involvement of multiple multi-national stakeholders. They arise in highly regulated environments, appear over multiple jurisdictions, and attract the communities’ attention. Complex engineering facilities and components are regularly featured. Needless to say, potential for delay and scope changes are inherent to clean energy projects. To complicate things, it can take up to 25 years for energy produced from green sources to be integrated into the main grid, which does not always occur to developers, financiers, or governments, and can become ripe for disputes. Though everyone in the construction industry is familiar with ripple effects, mega energy projects oftentimes exhibit ricochet effects. Notably, it is virtually impossible to introduce one change in an element of work without causing unintended effects elsewhere.

While exploring the issues that arise in this area, the speakers discussed some of the unique fact patterns they have encountered. Some of these were largely due to the proliferation of new

technologies. For example, the increased use of solar panels, which are prone to “snail trails”, i.e. discoloration or cracks, or leaky salt chambers, has given rise to disputes concerning the effects of such defects on the amount of energy generated or the unintended consequences of light reflection from a solar panel field into nearby buildings. Others are prompted by the changing conditions in which projects exist. For instance, one issue encountered in relation to nuclear energy is earthquake engineering. A whole generation of nuclear plants requires that earthquake engineering aspects be reconsidered in light of contemporary research.

The panelists had impressive collective experience with disputes arising from new and changing industry standards in energy projects. For example, Doug Jones AO recounted a case that reached the UK Supreme Court, *MT Højgaard A/S v. E.On Climate & Renewables UK Robin Rigg East Limited and another*, and the parallel arbitration concerning the same parties. The main issue in that case was whether a contractor for offshore wind turbines was liable for defective components built in accordance with international standards, which, over the years, turned out to be wrong. The contractor argued that it had exercised reasonable skill and care and had complied with all contractual requirements, but the Supreme Court of England and Wales found it liable for defective works. Underscoring the effect of climate change on industry standards, Dr. Jampole recalled a case of a zinc mine in the Arctic Circle, wherein the roof collapsed because its design did not account for unprecedented amounts of snow that the area started getting as a result of climate change. Weather-related events are another area where the panelists have seen an increasing number of disputes. Two recent examples were referenced: the case concerning the 2020 California fires and a case from Texas concerning the sale of natural gas. In the former, a California utility company *PG&E* pleaded guilty to 84 counts of involuntary manslaughter stemming from its insufficient maintenance of a power line, which ignited in a forested area known for strong winds. In the latter, *Mieco LLC v. Pioneer Nat. Res. U.S.*, the US District Court for the Northern District of Texas addressed the application of a force majeure provision in an industry-standard contract for the purchase and sale of natural gas. During Winter Storm Uri in February 2021, Pioneer failed to deliver the full amount of gas owed to Mieco. In its decision, the Court considered whether a seller losing its preferred gas supply is sufficient to excuse the seller due to force majeure, even if other gas supply was available. The Court ruled that Pioneer was excused.

When it comes to recent investor-state disputes, the panelists agreed that such disputes generally arose from states failing to treat projects as promised at the design stage. These disputes typically involve either the removal of the incentive (e.g. taxation of the project in a way that had not been envisaged previously), the provision of preferential treatment to some actors to the detriment of others, or the phasing out of certain types of energy. Among the probably most-known incentives are the so-called “feed-in-tariffs” (“FIT”) which presuppose a system by which a sovereign guarantees a price for energy generated by the project, typically above market rate, and that price decreases with time. In the case of Spain, for example, the adopted governmental policy was so effective that a mere few years after its implementation the country surpassed or achieved capacity that was supposed to be installed by the policy. This led to Spain owing more than \$4 billion to providers, causing the system to become unsustainable. The Government’s withdrawal of the FIT triggered a flurry of cases against the State. Apart from Spain, Mexico, Japan and the Czech Republic were discussed as examples of states that continue to face disputes resulting from a shift in their renewable energy strategies. Notable cases in this area include *Mathias Kruck and others v. Spain* (ICSID Case No. ARB/15/23) and *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic* (PCA Case No. 2014-01).

## Predicting the Future

The theme of the second panel, which was moderated by [Raëd Fathallah \(Bredin Prat\)](#), was “Predicting the Future of Energy Arbitration”.

First up were forecasts on the types of disputes. [Jessica Crow \(Arbitra\)](#) predicted two broad categories of carbon pricing disputes: emissions trading and carbon taxes. [Maria Chedid \(Arnold & Porter\)](#) anticipated an increasing number of joint venture formations for the development of new technologies, as well as risk and revenue sharing arrangements once the new technologies are deployed.

Mr. Fathallah then questioned whether arbitration users would start seeking increasingly tech-savvy arbitrators. [Michelle MacPhee \(BP International Disputes Team\)](#) explained that while technical skills may be more relevant in energy disputes, her team will not necessarily be looking at a wholly new set of factors when appointing arbitrators, as arbitrators will learn relevant skills through expert evidence. [Constantine Partasides KC \(Three Crowns\)](#) added that despite new technologies and regulations, the key issues in arbitrations are likely to remain linked to revenue sharing, joint ventures, or the interpretation of contracts, such that adjudicative experience and judgment will remain of paramount importance.

While traditional energy disputes will not disappear anytime soon, the panel was convinced that the world would see more examples of bespoke arrangements promoting sustainable business like the Dutch government’s [International Responsible Business Conduct \(IRBC\) Agreements](#). These agreements may become an advantage for parties applying for government contracts, and often have multi-tiered dispute resolution mechanisms that end in arbitration, which may become relevant for arbitration practitioners.

The panel agreed that energy disputes will likely make use of procedural innovations in arbitration. While Ms. Chedid predicted increased use of witness conferencing in the face of expert intensive disputes, Mr. Partasides expressed an expectation that many disputes, due to their time sensitive nature, will call for early disposition and summary judgment. As pertinently pointed out by an audience member, the [2022 VanIAC International Commercial Arbitration Rules](#) (previously discussed [here](#)) contain a provision on early disposition, as do the rules of some other institutions.

## How Critical are “Critical Minerals”?

Perhaps the most entertaining part of the day was when [Mark A. Luz \(Global Affairs Canada\)](#) and [Jim Morrison \(Peter & Kim\)](#) debated whether “we should fuel our future through the extraction of critical minerals”, showcasing abundant data, futuristic design concepts, and photos of [politicians holding coal](#).

When the audience members heard the arguments in favour of the motion, they were optimistic that critical mineral mining can fuel the green energy transformation in a sustainable manner. It was compelling to hear that switching to green energy will offset the amount of carbon dioxide emissions from critical mineral mining, and that there are enough critical mineral reserves in the world to facilitate the green energy transformation.

Optimism in the room was somewhat dispersed after hearing that the critical mineral reserves in

the world are not sufficient to get us to net zero. The speaker against the motion urged the audience to accept the difficulty and awkwardness of transition: just like going through our teens. He argued that governments cannot be relied on to make consistent regulations, and that resource geography can lead to international block formation and trade wars.

Even though [Alison FitzGerald \(Norton Rose Fulbright Canada\)](#) pushed the debaters further on equity concerns with respect to developing nations, the audience remained divided on whether they are for or against the use of critical minerals.

## **Role of Third Parties**

The last panel of the conference, moderated by [Vasuda Sinha \(Freshfields\)](#), pondered over what third party interests deserve to be represented in arbitration, whether the subject matter of the dispute is relevant, and how to choose between two willing representatives who both claim to represent the third party's interest?

Panelists agreed that there is a role for non-party representatives in energy infrastructure projects but were sceptical of their role in arbitrations. While modern businesses know the cost of ignoring third party interests, according to [Abby Cohen Smutny \(White & Case\)](#), the design stage is the best time for these voices to be heard. [Dr. Elizabeth Whitsitt \(University of Calgary\)](#) pointed out that in certain jurisdictions, regulated industries already require third party intervention, or commercial parties voluntarily enter into benefit sharing agreements with stakeholders such as indigenous groups. However, both speakers stressed that third party intervention cannot be forced on commercial parties, as it would jeopardize the finality, confidentiality, efficiency, and consent-based nature of arbitration, hence challenging the legitimacy and preference of arbitration.

Involvement of state parties required a different way to consider consent in the discussion. Dr. Whitsitt suggested that it might be easier to imagine third party intervention where a state's (in)action is directly challenged in an investor-state arbitration. [Gabriela Alvarez-Avila \(DLA Piper\)](#) pointed out that environmental, social and corporate governance may in some jurisdictions be considered public policy, thus raising questions about arbitrability and becoming relevant in set-aside or enforceability proceedings.

If third parties are to be represented, who is their voice? In *Milieudefensie et al. v. Royal Dutch Shell plc*, the District Court of Hague confirmed the standing of NGOs, including Milieudefensie, representing the Dutch public interest, but found that another NGO, ActionAid, did not sufficiently promote the interests of Dutch residents, as its operations were geared towards developing countries, not the Netherlands. The panel also considered whether the personhood of nature, defensible by any person in Ecuador, or by appointed guardians in New Zealand, may have an application in arbitration practice. Considering the risks to the legitimacy of arbitration, the answer was "no".

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The VanIAC-ICCA Conference came to an end with closing remarks by [Tina Cicchetti \(Vancouver Arbitration Chambers/ Arbitration Place\)](#) and [Joe McArthur KC \(Blakes\)](#). Hosting such a distinguished delegation from around the world that gathered for the Conference, as well as two other events that were explored in the blog published yesterday, was an absolute delight.

Vancouverites hope that the arbitration community will consider using VanIAC's new rules and seating their arbitrations in this picturesque city.


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