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New Frontiers of Energy Disputes in the Era of Low Carbon Transition and Geopolitical Turbulence: The Focus of the 12th ITA-IEL-ICC Joint Conference on International Energy Arbitration

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This year's ITA-IEL-ICC Joint Conference on International Energy Arbitration (the "Conference"), co-organised by the Institute for Transnational Arbitration was a whistle-stop tour of the new frontiers facing arbitration practitioners focused on the energy sector. There were, however, two themes that emerged as particularly significant: (i) the transition towards lower carbon economies; and (ii) the effects of geopolitical tensions, further discussed below.

(i) The Low Carbon Transition

The concept, the "Low Carbon Transition", refers to a shift from economies heavily dependent on fossil fuels to sustainable, low carbon economies. As the "Adapting to New Energy Contracts: How Will Energy Transition Change Arbitration Practice?" panel explained, the International Energy Agency estimates "peak oil" demand by 2030 due to an increased electric vehicle ("EV") usage, renewable energy and industrial electrification. It was further noted that at the recent 28th Conference of the Parties ("COP28") Global Stocktake from 30 November to 12 December 2023, nations agreed on a roadmap for transitioning away from fossil fuels — a first for a UN climate conference — and called on parties to take actions towards achieving, at a global scale, a tripling of renewable energy capacity. Acceleration towards new technology solutions has, moreover, already begun — perhaps most notably in the form of hydrogen and carbon capture storage. The energy sector is thus a sector that is seeing, and will continue to see, huge change.

What does this mean for arbitration practitioners? In short, that there will be a wide spectrum of disputes — some familiar, some less familiar. As one panellist put it "our world as energy lawyers is going to get a lot bigger!" A few of the types of disputes that we can expect to see are mentioned below — pulled together from a number of the panels throughout the Conference.

First, we look at renewable energy sector disputes. As with conventional energy projects, there are and will continue to be offtake disputes, construction disputes and joint venture disputes affecting renewables projects. There will also be disputes arising out of delays to regulatory and planning

approvals, as well as inflation and the rising cost of capital — all making contractual disputes more likely.

More specific to renewable projects, however, are disputes arising from supply chain issues. Most notably, rare earth minerals are essential to renewable technologies (such as wind turbines and solar panels). The rapid rise of renewables (as well as EV, which is also reliant on such minerals) has put massive pressure on mineral supplies, exposing projects to sharp price increases and delays. Minerals are, moreover, available in and controlled by just a few countries, and produced by a small number of companies. This greatly increases the risk of supply chain disruption, and also the risk of political instability, as discussed later. Additionally, there is design uncertainty. Whilst onshore wind and solar are now well-established technologies, other newer technologies being brought to market are not, leading to construction and operational delays. The result is a backdrop ripe for disputes—and, notably, as various panellists highlighted, arbitration clauses are commonplace in the project documentation.

Further, there is significant regulatory activity in this space to incentivise investment — the United States' Inflation Reduction Act of 2022 being a recent example. Where investors invest with an expectation that those incentives will continue, and the incentives are subsequently changed, disputes may arise — both in the form of investor-State arbitration proceedings and arbitrations between commercial parties. Concerning the former, as the "Political Risks in Big Energy Projects: If Not Investment Treaties, Then What?" panel explained, investors' options to pursue claims under investment treaties are becoming ever more limited and other options must therefore be considered where there is regulatory risk (such as contractual mechanisms and political risk insurance).

Second, disputes relating to hydrogen — a new form of technology that is attracting a great deal of attention. (Though, as one panellist observed, a relatively small percentage of projects have achieved final investment decision). Over time, we can expect a new value chain to develop and "usual" disputes to arise (such as offtake, construction and JV disputes that arbitration practitioners are used to seeing). But there will be more novel disputes too — for example, in relation to quality specification. Those are, contractual disputes arising over whether the hydrogen purchased is green or blue, and whether the emissions profile of the hydrogen is correct.

Third, there is likely to be a significant rise in decommissioning disputes (the North Sea being one geographical area seeing significant decommissioning activity). As was discussed, standard form contracts have been developed for managing decommissioning such as "DISMANTLECON", developed by industry in the UK and published for international use. This includes a tiered dispute resolution clause — the final stage of which is arbitration.

Fourth, there are a huge number of nuclear energy projects in the pipeline, driven by increased awareness of the impact of carbon emissions and renewed apprehensions around energy security. Again, nuclear projects will experience similar issues giving rise to disputes as seen in the conventional and renewables sectors — but there will also be more nuclear-specific dynamics at play, linked to the particularly lengthy project schedules, complex systems (including safety systems) and heavy regulatory burdens (which are present at every stage of a nuclear project).

The key takeaway from the Conference is that, as governments around the world face mounting pressure to decarbonise, we can expect to see a global increase in the number of disputes in new sub-sectors. That said, it was also noted by a number of panellists that major demand for oil and

natural gas will continue, with the OPEC estimating that fossil fuel use will increase by 16% by 2030 due to economic growth in Least Developed Countries as well as less robust EV use, and countries not meeting net zero goals. Thus, all the conventional energy disputes will continue to exist in the short to mid-term.

(ii) Geopolitical Disruption

The keynote address — titled "An Overview of the Impact of Recent Geopolitical Disruption on International Business" — summarised the many on-going geopolitical issues impacting the energy industry. These include the conflict between Russia and Ukraine (which continues to have ramifications on the global energy market); disruption to commercial shipping in the Red Sea (impacting regional and global supply chains and prompting increases in oil prices); the assertion by Venezuela of territorial claims in Guyana (potentially affecting the safety of local oilfields); and tensions in the South China Sea (potentially affecting energy transportation in those waters). All of these events currently, or may in future, impact the disputes landscape — such as through causing delays or resulting in force majeure events in contracts, or leading to rising costs in projects.

The keynote address also highlighted periodic outbreaks of violence in Africa in areas where rare earth minerals are mined. This can lead to arbitration or litigation between private companies which are parties to supply contracts — and, as noted above, the renewable energy sector is particularly exposed. It may, in certain circumstances, also lead to investor-State claims.

Disputes arising as a result of cyberattacks — increasingly targeted at energy infrastructure — may be more common too. A cyberattack could constitute a force majeure event under contractual arrangements, where there is also recourse to arbitration.

In turbulent geopolitical times, sanctions are often imposed — such as those issued by the European Union, the United States, the United Kingdom, Switzerland and others against Russian individuals, companies and organisations. As the "The Impact of Wartime and Related Sanctions on Arbitration Proceedings and the Enforcement of Awards" panel discussed, sanctions can make contractual performance unsustainable, impossible or even illegal, leading to disputes (again, such as whether the sanctions constitute a force majeure event). Acting for or against sanctioned parties brings with it complex issues, however — sanctions may, for example, impact the payment and receipt of funds in connection with the arbitration (including arbitrator fees, arbitral institution fees and so on).

Concluding Remarks

To conclude, the energy sector is facing challenges on a number of fronts, leading to an environment ripe for disputes — disputes that will, as mentioned, be both familiar and unfamiliar for arbitration practitioners. It will be interesting to take stock of where we are in just one year's time: in 2024, more voters than ever in history will be voting in the elections of at least 64 countries (plus the European Union parliament), representing around 49% of people globally. The results of these elections will unquestionably impact the energy sector in myriad of ways, including the low carbon transition and geopolitical tensions.

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