Kluwer Arbitration Blog

Australian Arbitration Week Recap: Hot Cakes & Hot Takes—Trends and Developments in Asia's Energy Sector

Benjamin Batten · Wednesday, October 16th, 2024 · ACICA

On 15 October 2024, Norton Rose Fulbright hosted a breakfast panel discussion on the topic of "Hot Cakes and Hot Takes: Trends and Developments in Asia's Energy Sector" in Brisbane as part of Australian Arbitration Week.

The panel was moderated by Dylan McKimmie, Head of Arbitration and Co-Head of Energy, Norton Rose Fulbright Australia and comprised:

- Matt Lee, Lawyer, Lindsay Francis & Mangan (formerly Principal, Burford Capital);
- Shanna Svensson, Team Lead, Global Litigation Asia Pacific, Shell;
- Katie Chung, Partner, Norton Rose Fulbright Singapore;
- Ananya Mitra, Senior Associate, Norton Rose Fulbright Australia

Seven key topics were explored by the panel as discussed below.

1. The Status of Conventional Energy Disputes

While the number of renewable energy disputes is increasing, the majority of disputes remain, and will continue to be, in the conventional energy space for some time. This is because there is still a need to supply conventional energy to ensure energy affordability, security, and sustainability of supply while the energy transition occurs.

However, the focus on delivering a conventional energy business in a value-focused way has led to more disputes due to finely balanced economics and resource shortages. For example, due to an increased focus on value with tighter margins, price disputes in LNG projects are becoming more likely and frequent. This contrasts with a more conciliatory approach leading to negotiated outcomes that had previously prevailed in Asia, as discussed further below. The economic climate has also contributed to an increase in other disputes, including in relation to production sharing and joint venture audits.

2. LNG Price Reviews in Asia Versus Australia

Historically, LNG price reviews in Asia were compromised and settled. However, since the first reported LNG price review arbitration arose out of Asia in 2018, there has been a growing number of instances of such price reviews proceeding to arbitration.

In comparing the price review clauses and processes between Asia and Australia, the panel noted four key differences:

1. There is a variety of different language used in price review clauses in Asia which creates a level of uncertainty and potential for disputes. By contrast, Australian clauses often include a last step of arbitration if a negotiated price cannot be agreed. To avoid uncertainty, if the intention is to allow for arbitration at the end of a price review process, that should be expressly stated in the price review clause.
2. In the Asian context, clauses often lack specific benchmarks for price reviews, whereas in the Australian context, clauses are very specific, such as defining what 'long term' and 'comparable' mean for the purpose of 'taking into account prices under other long term comparable contracts.' There are pros and cons to leaving the clause broad, with the advantage being increased scope in commercial negotiation.
3. For commercial arbitration in general, arbitration clauses in Asia tend to be institutional (e.g., ICC, SIAC). This gives a level of certainty to the procedure and a guardrail from the institution scrutinising an award. This contrasted with one panel member's experience of the practice in Australia tending toward *ad hoc*.
4. Finally, parties and experts in Asia rely on third-party aggregated data for price reviews. This contrasts with Australia, where parties can subpoena comparable contracts and can therefore gain more visibility on the terms and prices of other contracts. In both cases, however, there is a need for careful handling of confidential information including through the use of data rooms.

Furthermore, a key lesson from the Asian experience for parties in Australia is to get legal advice and expert input very early on in the process, even before starting price review negotiations. This allows parties to have full visibility of the potential downsides of the wording of the particular clause before engaging with the other side.

3. Diversification of Stakeholders in Energy Disputes

There has been a shift towards more multifaceted and multijurisdictional disputes, as the locations of joint-venture partners and the sources of capital have expanded.

The landscape does not just involve commercial claims or investment treaty claims, but there is also a regulatory and class action risk. This is the case particularly in an environment of rising interest rates, where there is a growing number of Australian companies who will likely need, or for strategic reasons choose, to access external funding to finance these disputes when they arise, as any legal disputes in this area are generally sizeable in nature.

The panel observed that we are also seeing a rise in investor-State arbitration cases, with increasing corporate demand for these services, particularly from Australian mining companies expanding operations overseas. The potential for further investment arbitration to arise from changing political dynamics and the ramping-up of government efforts to meet Paris Agreement targets was also flagged.

4. Increase in Referrals to Arbitration

The panel noted that there has been an increase in energy disputes being referred to arbitration in the Asia-Pacific in three key areas:

1. **Disputes related to renewable projects**, including solar and offshore wind projects, where disputes arise from the construction itself, the provision of equipment, and the repair and maintenance of equipment. These are exacerbated by set time periods in which construction needs to be completed.
2. **Gas price review disputes**, as the volatility of LNG prices and deliberate breaches of long-term contracts have led to disputes, with parties beginning to realise a negotiated outcome may not be the best way forward.
3. **Upstream oil and gas activities and decommissioning disputes** are expected to rise as part of the energy transition to greener energy, with governments wanting to impose more financial obligations on the concessionaire/licensee.

5. Environmental and Cultural Issues

The panel highlighted the global prominence of environmental and cultural protection disputes, with Australia earning a reputation as a leader in the litigation space with respect to some of these ESG issues. Against this backdrop, a company's social licence to operate is critical for delivering business strategy and avoiding disputes that delay projects or impact reputation.

By virtue of the disputes playing out in very public forums which can affect a company's social licence, there is a need for business to focus on proactive measures, and to work with governments to get the right policies in place in order to mitigate litigation risk. The panel also stressed the importance of delivering on environmental and cultural commitments in order to build positive relationships and avoid disputes.

As obtaining new capital for LNG and other projects becomes increasingly competitive, the panel re-affirmed that there is now a need for companies to demonstrate a business case that takes account of these ESG-related risks when proposing new projects.

6. Mitigating the Risk of Disputes

There is an increasing trend of dispute lawyers working more closely with transactional lawyers in full-service law firms to make corporate clients aware of the types of structuring and approaches necessary to protect against possible future disputes.

Additionally, rising interest rates, and an increasingly political environment over the last decade (both domestically and internationally) makes it more important to consider jurisdictional risks in long-term investments where different sets of rules can be imposed upon a company at different time-horizons.

Finally, the use of legal finance as an insurance policy to protect against adverse cost exposure is becoming more normalised. Just as arbitration has developed a reputation of being 'business friendly,' companies in Singapore and Hong Kong are increasingly seeing litigation funding in the same light. The emergence of legal finance in arbitration in these jurisdictions is particularly interesting, given they are not allowed in the domestic court setting.

7. Future Trends and Hubs for Energy Dispute Resolution

The panel predicted an increase in energy disputes and arbitration, stemming from the need for more renewable energy sources in the Asia-Pacific region. From this logic, there should be an increase in disputes related to offshore wind, solar, and hydroelectric power projects in the construction stage, or relating to provision of equipment. The panel also predicted an increase in gas price review disputes as more LNG is used in power stations, which inevitably creates disputes concerning price. The panel also noted the continued positive perception of arbitration within the energy sector, as reported in Queen Mary University of London's 2022 Energy Arbitration Survey.

Regarding hubs for dispute resolution, the panel considered Singapore to be a top hub for international arbitrations in this area, with Perth and Brisbane also being important locations, owing to the concentration of energy resources that come from these parts of Australia. Australia will continue to be a major supplier to the Asia-Pacific region, and also accounts for a lot of the developments in LNG infrastructure. With many projects in the region, this will likely influence the location of dispute settlement, as the bargaining power may rest with the project owner or project developer who will want to dictate the seat of arbitration. In response to an audience question, the panel noted that extensive energy projects under construction in the Pacific Islands could contribute to Brisbane being a popular location for the resolution of disputes from this region.

Conclusion

As the panel discussion showed, Asia's energy sector relies on effective dispute resolution procedures to operate efficiently. With the progress of the energy transition, and conventional energy disputes set to continue in the region, there is a significant opportunity for Australia to emerge as a growing hub for facilitating such disputes.

More coverage from Australian Arbitration Week is available here.

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