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Current and emerging trends in Asia-Pacific energy disputes

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Current and emerging trends in Asia-Pacific energy disputes

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Summary

IN SUMMARY

Energy disputes represent some of the most complex and economically significant disputes in the Asia-Pacific region. This article identifies three current and emerging trends with exceptionally diverse origins, each of which holds practical lessons, including on how such disputes might be best managed and resolved.

DISCUSSION POINTS

- Scope for disputes widening due to energy transition
- Stakeholders should understand the changing regulatory and legal landscape to avoid disputes
- Race for critical minerals may transform international relations and legislation
- Mining and energy industries likely to remain connected
- Tailored arbitration clauses advised

REFERENCED IN THIS ARTICLE

- International Energy Agency's mineral requirements and critical mineral role summary
- World Bank guidance
- International Labour Organization's Indigenous and Tribal Peoples Convention 1989

RENEWABLE ENERGY: WITH GREAT OPPORTUNITY COMES GREAT RISK

In the bid to meet climate targets, the world is increasingly turning to electrification across all sectors and the use of renewable energy both to replace fossil fuel generation and to meet the increasing demand for electricity. The Asia-Pacific region faces a unique challenge in the energy transition as it is heavily reliant on fossil fuels.[1] The transition away from coal- and gas-fired power generation presents a key issue for Asia-Pacific countries, which has led to a need for exponential growth in renewables projects by 2050.

China has pledged to achieve carbon neutrality by 2060,[2] and South Korea and Japan have targets to reach net zero by 2050.[3] Investments in solar, wind and other renewable energy sources in the Asia-Pacific region are accelerating, which is occurring in parallel with a rise in demand for reliable energy. Taking Australia as an example, decarbonising the economy by 2050 will require the installation of:

- nine times the current large-scale wind and solar generation;
- 46 gigawatts of storage (equivalent to double the current coal-fired generation capacity); and
- 10,000 kilometres of transmission and distribution lines.

When this exponential global growth is viewed along with evolving regulatory landscapes, the adoption of new technologies, and the perennial challenge of managing time and cost on major projects, the scope for disputes between players in this industry has already proved

to be significant. Three types of issues, in particular, have featured prominently in those disputes, which we consider below.

Also, as more countries proceed with a reduced reliance on carbon-intensive power generation, we expect to see new disputes arising from an increased demand for the resources needed to generate renewable energy.

Disputes Over Licensing, Permission And Consent

Like most major projects, the development phase of any renewable energy project involves obtaining environmental approvals, planning consents, regulatory consents, land use agreements and permits to transport large pieces of equipment.

Renewable energy projects are typically located in remote, greenfield locations, often require a lot of space, and can have environmental impacts that may be uncertain or difficult to assess (wind farms being a prime example). They also often receive considerable public and political scrutiny, and affect large numbers of stakeholders, all of whom may have an opportunity to provide feedback for the approvals process (for example, think about how many landholders and community groups will be impacted by 10,000km of new electricity lines). These kinds of difficulties can lead to delays in obtaining approvals and consequent disputes along the contract chain as deadlines are not met.

To avoid disputes in this area, time should be invested upfront in understanding the relevant regulatory and legal landscape by assessing not only what permits will be required for a project, but also when they can expect to be received, what conditions might be imposed upon them and what can be done if permits are delayed, denied or later amended.

Supply Disputes

Given the global demand for new renewables projects, constraints on the supply of wind, solar and energy storage components represent a significant challenge for any new project. Accordingly, one source of disputes is equipment suppliers demanding increased prices on the back of alleged increases in the prices of raw materials, typically arising out of supply chain disruptions.

Some supply contracts may have price escalation or price review clauses that operate where input prices have increased. The operation of these clauses is usually straightforward and including them in a contract is one way to avoid surprises during the term of the contract (and avoid disputes). However, in the absence of these clauses, suppliers might attempt to pass on price increases by way of force majeure, hardship or change-in-law clauses in the supply contract. The validity of such claims will obviously depend on the reasons for the price increase and the relief available under the relevant clause. Another way for suppliers to claim escalation might be through the applicable sale of goods legislation that permits the price increase to be passed on.

In practice, however, we are seeing parties willing to take a pragmatic and amicable approach to resolving supply disputes arising out of supply chain disruptions, perhaps reflecting the repeat nature of business in this sector and the resulting need to preserve relationships. Whatever the scenario, early engagement and open discussion of these issues is encouraged.

Connection Delays And Performance Issues

Many renewable energy projects involve independent power producers (IPPs) supplying electricity to a national grid with sales to the market customers from grid owners or retailers (depending on the market). This necessarily involves a physical interface between the IPP's power generation infrastructure and the grid (via associated infrastructure such as switchyards, substations and transmission lines). As the grid is usually owned and operated by a separate (often state-owned) power utility, this also involves a legal and commercial interface between the IPP and the power utility or retailer, usually by way of a connection or power purchase agreement.

In many jurisdictions, achieving connection to the grid is a complex process and one of the biggest sources of delay in getting any project up and running. Attempts to connect are often beset by:

- delays in regulatory processes;
- difficulties in obtaining the modelling information necessary for design and connection;
- delays in the construction of connection infrastructure (often the responsibility of utilities);
- mandates by power utilities to modify or upgrade equipment; and
- consequent delays in commissioning processes.

The above delays are complicated by the ever-evolving landscape as stakeholders gain greater understanding of new technologies. Renewables projects often involve complex and relatively untested technology (or, at least, existing technology being put to use in a new, larger or more arduous operating environment, or by a party to whom it might not be completely familiar).

As more and more new renewables projects come onto the grid and start interacting with each other, demonstrating that a new project will do no harm to the grid can become challenging and the electricity rules and laws may be changed to improve grid stability. It is also relatively common in renewables projects for the new technology not to work as intended. This often produces disputes as to who bears the time and cost consequences of these events, particularly where risk allocation has not been specifically or clearly addressed in the construction contract or the power purchase agreement. This is particularly pronounced on projects where the designers, equipment suppliers, construction contractors, and operation and maintenance contractors are different parties and, predictably, seek to blame the other's contribution. The fact that such contractors are coming from an increasingly large and varied pool (in terms of size, experience and sophistication) only exacerbates this issue.

To avoid these issues, thorough due diligence must be done into the regulatory environment governing the connection. In addition, at the time of drafting the relevant design, supply, construction, connection, and operations and maintenance agreements, it is crucial to clearly define the roles and responsibilities in relation to these risks.

Increased Demand For Critical Minerals

Critical minerals such as copper, lithium and nickel are essential for renewable energy technologies, including batteries for electric vehicles and solar panels.[4] As an example, a typical internal combustion engine vehicle uses around 33kg of critical minerals, whereas an

electric vehicle uses more than 200kg.[5] The World Bank estimates that demand for these minerals could increase by 500 per cent by 2050.[6]

The energy sector has historically been heavily reliant on one sector of the mining industry – coal – and has not been a leading consumer of critical minerals. However, this dynamic is likely to change in the shift towards renewable energy and clean technologies. Equally, as electricity is fundamental to the safety and security of the economies of all nations, and as states have made commitments concerning greener energy (such as the ban of the sale of internal combustion engine vehicles in the 2030s), it is likely that governments, in addition to the private sector, will become active in the rush to obtain these minerals. This race for critical minerals has the potential to transform not only the energy sector but also international relations, economic policies and environmental regulations.

For instance, the surge in demand for critical minerals could lead to increased competition and tension between countries for access to and control over these resources. Nations may implement export controls, tariffs or other protectionist measures to secure their own supply chains. This heightened competition may increase geopolitical tensions and create resource-driven conflicts, including disputes arising under bilateral investment treaties.

The extraction and (in particular) the processing of critical minerals often comes with environmental impacts, such as water pollution. As demand for critical minerals grows, there is a risk that insufficient regulation and oversight could lead to unsustainable mining practices and environmental damage. This could result in disputes between countries over shared ecosystems, water resources or cross-border pollution, as well as conflicts with local communities and environmental organisations.

The growing demand for critical minerals will likely have far-reaching implications for international relations, investment into mining and energy projects, and environmental regulation. To navigate the challenges, governments, businesses and other stakeholders will need to collaborate. However, even if this collaboration takes place, experiences to date have shown that the rapid introduction of renewable energy is unlikely to be a smooth journey.

RESOURCE SPOTLIGHT: LITHIUM

One of the key critical minerals emerging from decarbonisation efforts is lithium. Lithium production is predicted to reach over 1.5 million tonnes, tripling from 2019 production levels.-[7] Lithium is used in a wide range of industries such as air treatment, ceramic and glass production, metallurgy, pharmaceuticals, and polymer production.[8] However, the boom in demand has been primarily driven by the use of lithium in rechargeable lithium-ion batteries and the use of these batteries in electric and hybrid vehicles.[9]

The growth in demand for lithium highlights that the decarbonisation of energy supply does not herald the end of the relationship between the mining and energy industries. Critical minerals such as lithium are essential to the renewable energy transition and, as a result, mining will continue to remain inextricably linked with energy production.

Lithium can be extracted from arid sedimentary basin brine, hard rock, clays, geothermal brine, oilfield brine and zeolites.[10] However, the limitations of current technology mean that the only economically feasible production of lithium is from hard rock (spodumene), which is primarily located in Australia, and arid sedimentary basin brines, which are primarily located in South America (particularly Chile and Argentina).[11]

There are three common categories of disputes arising in respect of lithium: licensing and mining rights disputes, environmental disputes, and joint venture and construction of infrastructure disputes. Examples of such disputes are discussed further below.

Until lithium production technology improves such that lithium can be economically and efficiently exploited to its full potential, it can be expected there will be a proliferation of these types of disputes.

Licensing And Mining Rights Disputes

As indicated above, technology limitations for extracting lithium and the scarcity of the mineral in the face of increasing demand is already proving to be a significant source of disputes as companies fight over who has the right to mine it.

One such example is the Manono lithium deposit located 500km north of Lubumbashi in the Democratic Republic of the Congo. The deposit, which has been described as one of the largest and highest-grade undeveloped hard-rock lithium deposits in the world,[12] has already given rise to more than four International Chamber of Commerce (ICC) arbitrations and ancillary disputes between entities claiming the right to mine it.

In 2017, MMCS Strategic 1 of Mauritius commenced an ICC arbitration against DRC-owned Cominière over the 2016 revocation of a mining permit held through a joint venture between the two entities and the issuance of a new permit to a separate joint venture led by Australia-based lithium explorer AVZ Minerals Limited.[13] A hearing on the merits in that proceeding concluded in January 2023.[14]

Around May 2022, Jin Cheng Mining Company, a subsidiary of Chinese miner Zijin Mining Group Company Limited, also filed a claim with the ICC against AVZ Minerals Limited to confirm its purported acquisition from Cominière of a 15 per cent interest of Dathcom, another joint venture formed to mine the Manono project.[15] AVZ has maintained that this purported acquisition is a material breach of the pre-emptive rights of its subsidiary, AVZ International Pty Ltd, and is invalid and of no force or effect.[16] Those proceedings are ongoing.

Shortly thereafter, in December 2022, AVZ International also lodged two claims with the ICC against Dathomir Mining SARL to affirm its alleged acquisition of a 15 per cent share in Dathcom.[17] AVZ's disclosure on 22 March 2023 gave an update to these proceedings and indicated that it is unlikely an award will be made before September 2024.[18]

In addition, an alleged failure by AVZ to disclose matters that were the subject of these proceedings to its shareholders led to a potential class action against AVZ. Australian litigation funder, Omni Bridgeway, has agreed to fund that class action.[19]

Environmental Disputes

While many might have seen the energy transition as a move away from environmentally harmful technologies to procure energy, the reliance on lithium to power this transition means that, unless and until production techniques improve, the energy supply chain will continue to pose environmental risks.

In particular, current methods of extracting lithium brine pose significant environmental risks due to the sizeable volume of salt and fresh water required.[20] These risks are front and centre in the dispute arising from the mining of the Salar de Atacama within the Atacama Desert in Chile. Local and indigenous groups have alleged that lithium mining activities have

impacted fresh water accessibility and led to the desiccation of salt water lagoons that are habitats for species such as flamingos.[21]

In particular, the dispute involves allegations that lithium miners have drawn too much underground brine, in excess of the limits imposed by the Chilean Superintendence of the Environment, depleted fresh water aquifer supplies and failed to protect native carob trees (which rely on deep roots to extract water from aquifers), which they were required to monitor and protect.[22]

To avoid sanctioning by the Superintendence, SQM (partially owned by Chinese firm Tianqi Lithium Corporation) was required to implement a plan to compensate for the damage caused by its activities in January 2019.[23] This included an investment of US$25 million in improving monitoring and undertaking further environmental studies.[24]

Due to the naturally occurring location of lithium brine, potential environmental harms are particularly likely to be felt by indigenous and tribal peoples, as seen in the case of Salar de Atacama. Argentina, Bolivia and Chile, the countries where the majority of the world's identified lithium brine reserves are located, have all ratified the International Labour Organization's Indigenous and Tribal Peoples Convention 1989.[25] Articles 4 and 7 of the Convention impose obligations on signatory governments to safeguard, protect and preserve the environments of indigenous and tribal peoples.[26] Article 6 requires consultation with indigenous and tribal peoples who may be affected by legislative or administrative measures, which would likely include granting rights to exploit lithium that is geographically proximate to indigenous and tribal peoples.[27] Non-compliance by governments with their obligations under the Convention poses risks to lithium projects throughout their life cycle.

Until lithium extraction technology improves such that it can address the environmental risks posed by lithium mining, it is reasonable to expect an increase in lithium-related environmental disputes as lithium production continues to expand to meet demand.

Joint Venture And Construction Of Infrastructure Disputes

In addition to licensing and environmental disputes, the construction and operation of lithium mining and processing facilities has proven to be fertile ground for joint venture and construction disputes.

For example, the Greenbushes lithium mine, which is the world's largest hard rock lithium mine located just south of Perth in Australia,[28] was the subject of a dispute between owner (Talison Lithium) and operator (Global Advanced Metals). Although ultimately settling on commercial terms, proceedings were commenced when Talison proposed to expand lithium operations to supply downstream lithium hydroxide plants being constructed by its shareholders Tianqi Lithium and Albemarle Corporation as part of a planned vertically integrated lithium value chain.[29] Global Advanced Metals was concerned that this development would negatively impact its tantalum production.

The construction of one of these downstream lithium hydroxide processing plants was also the subject of proceedings. The Kwinana lithium hydroxide plant is Australia's first battery-grade lithium hydroxide producing facility.[30] However, a dispute arose between Tianqi Lithium Energy Australia (which is owned by Tianqi Lithium and IGO Limited) and the lead contractor for the construction of the project, MSP Engineering, in relation to payment of certified progress claims.[31]

The dispute provides a useful illustration of the importance of tailored arbitration clauses in project agreements. MSP commenced proceedings and sought summary judgment in the Supreme Court of Western Australia in respect of unpaid claims. Tianqi Australia subsequently issued notices of dispute under the contracts and sought to force MSP into arbitration, relying on the dispute resolution procedure contained in the contracts. However, the Western Australia Court of Appeal held that a carve-out in the arbitration clause enabling parties to institute proceedings to 'enforce payment due under the Contract' was sufficient to prevent the matter from being stayed and determined in an arbitration.[32] The parties ultimately settled the dispute.[33]

RESOURCE SPOTLIGHT: LIQUEFIED NATURAL GAS

Notwithstanding the global shift away from fossil fuels, across the Asia-Pacific region, gas continues to play a key role in the energy transition as countries seek to balance affordability, security and emissions considerations. In particular, gas is supporting a shift away from coal in markets (particularly in developing economies) where renewables have not grown sufficiently quickly to replace coal.

Buyers in this region have for some time accounted for a significant percentage of the global demand for liquefied natural gas (LNG), typically purchased under long-term LNG sale and purchase agreements (SPAs). However, the region has not seen the same flood of price reviews and associated arbitrations that Europe has experienced in recent decades. This is starting to change.

This section addresses the marked spike in price review activity (both structured negotiations and, where no agreement is reached, arbitrations) we have observed in the region.

What Is Driving This New Approach?

This increase in price review activity and willingness to arbitrate may, in part, reflect a cultural shift by buyers away from traditional, non-adversarial attitudes to formal price review processes. That said, there is also an evident proximate cause in the volatility present in LNG markets. Subject always to the particular wording of the price review clause concerned, buyers may find support in pushing for price reductions by alleging a long-term downward trend in prices prior to 2021. Meanwhile, sellers may find support for their pricing positions by asserting a change in market conditions from 2021, driven by a post-covid-19 rebound in economic activity (and a consequent increase in LNG demand) followed by the supply impact of Russia's 2022 invasion of Ukraine.

What Characterises Asia-Pacific LNG Price Reviews?

In our experience, LNG price review disputes in this region are characterised by a number of recurring themes.

The first is the relative uncertainty as to the process for their ultimate resolution. While many LNG SPAs in the region provide a clear trigger for price reviews (often by way of notice after a set number of years) and a clear process for negotiations of new prices (usually for a defined period of at least six months), many such SPAs (in particular, older contracts) do not provide an express mechanism, such as arbitration, for resolving negotiation deadlocks. In the absence of such a mechanism, parties are finding themselves embroiled in preliminary disputes about where, if anywhere, the dispute about price should be resolved upon a failure of negotiation. Attempts to refer such disputes to arbitration are met with challenges to the

tribunal's jurisdiction on the basis that there is no dispute for the purposes of the arbitration clause, merely a failure to reach an agreement or, in other words, that the parties agreed to resolve the new price themselves through negotiation, not arbitration. While the merit of these challenges will always turn on the precise wording of the price review and arbitration clauses, they are in all cases increasing the time and monetary costs of disputes that are already inherently time-consuming and costly.

The second associated theme is that many price review provisions require the relevant negotiations to be conducted in good faith. Given the inherently subjective nature of the phrase 'good faith' and questions as to the enforceability of good faith obligations (particularly under English law, which we often see selected as the governing law of LNG SPAs in the Asia-Pacific region), these provisions can generate considerable uncertainty as to the scope of the parties' respective obligations and whether a breach of such obligations provides a basis for claim in the event of deadlocked negotiations.

Finally, we are seeing hard-fought battles over how any new price is to be determined (noting, of course, that this is not a dynamic unique to price reviews for sales into this region). Many price review provisions adopt a benchmarking process seeking to align the price under the SPA with the wholesale market more generally, rather than maintaining the parties' original bargain in light of altered economic circumstances (as is common in the European context). The challenge is how such benchmarking and alignment is achieved, particularly where the clause provides simply that the price should be aligned with 'like' or 'comparable' LNG SPAs, or similar, without any greater detail as to what these phrases mean. This lack of specificity is driving widely divergent positions, which often scuppers negotiations and prolongs arbitrations.

How Can These Price Reviews Be Better Managed?

What is most apparent from the trends noted above is that an efficient, cost-effective and successful price review process must start with a well-drafted price review clause. In our view, this entails at minimum a clear time limit for price review negotiations and the inclusion of an express mechanism (such as arbitration) for breaking the deadlock if the parties cannot agree on a new price.

It can also be helpful to clearly define which types of reference contracts ought to be included in the data set for the benchmarking process, as opposed to relying on vague and subjective terminology such as 'comparable contracts'. While this is a necessarily complex exercise that must be approached on a case-by-case basis, the reference contracts may be defined by reference to factors such as their term and quantity, geographical markets, price structures, delivery basis, when they were agreed or revised, their delivery time frame, and whether they are conditional or binding.

At the same time, care must be taken to ensure that the reference contracts are not defined in an overly restrictive manner that may result in a set of reference contracts that is not representative of the broader market, or even no set of reference contracts at all. This is a particular concern in the current climate where, in some markets, there is considerable uncertainty as to future levels of LNG demand. This is making it difficult for buyers in affected markets to commit to the type of long-term SPA that typically might be used as a reference point in a price review clause.

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