Arbitrating Energy Disputes: Hot Topics

International Arbitration, Energy and Environmental Commissions

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National Report of Sweden

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1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute? Do you see arbitration clauses in the agreements executed in the development of power plants? Do you normally include arbitration clauses in EPC and O&M Contracts? Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package? What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?[1]

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines 2014") states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that "The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

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[1] Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

1.5 "Price Review Clause" or Price Re-Opener Clauses"

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

1.5.2 What is the difference between a "Price Review Clause" or a "Price Re-Opener Clause" in contrast to a "loyalty"-or "hardship-clause"? In your jurisdiction: Is the "Price Review Clause" a provision specialis in contrast to a general hardship clause?

1.6 "Trigger events"/Significant Change of Circumstances

1.6.1 Please give examples of a simple[2] and of more complex[3] trigger mechanism.

1.6.2 Does any definition of the term "significantly" exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed[4]:

2 E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

3 E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

4 E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative completing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?

1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 ("**IBA Rules**") a party may rely on a "Party-Appointed Expert" or the arbitral tribunal may appoint an independent "Tribunal-Appointed Expert". What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?

1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the "translation" of a decision into a new price formula possible/desirable?

1.7 If the "Price Review Clause" or the "Price Re-Opener Clause" does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

1.8 Confidentiality

1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?

1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party's request to produce?

1.9 Scope of arbitral tribunal's mandate to revise the price formulae

1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal's power to change/revise the price formula be specifically mentioned in the contract? If not, can

arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks, but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary "tools" (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have "res judicata effect"?

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

Sweden has signed 69 BITs. 66 of these are in force.

2.2 What mechanisms of dispute resolution method does your country favor in its BITs? Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

In the vast majority of BITs entered into by Sweden, arbitration is available for investors as a dispute resolution mechanism against the host state. The most notable exception is the Swedish BIT with China.

Most of the Swedish BITs also provide for the possibility for the investor to sue the host state in the state courts. However, fork- in the road-provisions are very rare.

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

No.

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

Not applicable.

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

Yes.

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

In the vast majority of the BIT:s ratified by Sweden, there is a requirement to attempt to arrive at an amicable settlement before resorting to arbitration. The most commonly required period of time for negotiations is six months. However, it is not a requirement under any Swedish BITs that I have had access to for the drafting of this report, that investors resort to state courts prior to initiating arbitration proceedings.

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

The efficiency of the institute and its experience from handling investor-state disputes as well as time, are factors that are taken into account. As to the choice between ICSID on one hand and SCC/ICC/ad hoc on the other hand, the differences when it comes to state court involvement and enforcement are commonly considered, but seen as advantages and disadvantages depending on the investor and the case in question.

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

Yes, Sweden is a member of the ECT.

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL

Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

Swedish investors would probably have a preference for the SCC. It is the arbitral institution which is second only to ICSID in the number of investor-state disputes it handles and hence has a solid experience in handling such cases.. Also, as it is a Swedish arbitration institute it is generally very popular with Swedish companies, - they would probably have the same preferences for ISDS as in commercial disputes.

2.4.3 Has your country declared a reservation under Article 26(3)(b(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?]

Yes.

2.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

The key features for "investment" is in the vast majority of Swedish BITs are "any assets" or "every asset.." and a requirement that the investment has been made in accordance with the laws and regulations of the other contracting party.

Key features of "Investor" are generally only a) a natural person who is a national of a contracting party in accordance with its laws and b) a legal person having its seat in the territory of the other contracting party, or in a third country with a predominant interest of an investor of either contracting party.

Denial-of benefits clauses are found only in a very small number of BITs entered into by Sweden.

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

Not as of now, but Sweden has officially stated a willingness to do so, provided that all member states do the same, that it is done on a co-ordinated basis and provided that forseeability and protection for investors continues to be guaranteed.

Sweden does not share the EU commission's view that intra-EU BITs would be contrary to EU law but is nevertheless prepared to work with the EU and the Commission on terminating the BITs on the conditions stated above.

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

Not that I am aware of.

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

This uncertainty would be taken into account as one factor among others.

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

Not applicable – there are no such (known) awards.

2.9 To what extent have local courts been supportive of investment treaty arbitration?

Swedish courts are generally very supportive of arbitration and where Swedish courts have ruled on issues concerning investor-state arbitration, they have been generally been supportive of arbitration in that context as well.

3. ARBITRATING DISPUTES IN CONNECTION WITH RENEWABLE ENERGIES (WIND, SOLAR, WATER)

3.1 Legal Framework

3.1.1 What is the legal framework for renewable energies in your jurisdiction? Can investors take advantage of certain incentives such e.g. premium tariffs, very low taxes on power generators' revenues, subsidies for renewable energy producers etc?

3.1.2 Has such legal framework been amended recently? If so, has it been ameliorated for investors or deteriorated?

3.1.3 May different legal frameworks applicable to renewable energy facilities coexist within your jurisdiction? What is the criterion to benefit from one or other?

3.1.4 If your jurisdiction grants an incentive scheme for renewable energies: Has your country notified it to the European Commission under Article 108(3) TFEU so that it can be assessed under the State aid legislation?

3.1.5 If the answer is in the positive: Has the European Commission issued any decision on your current or former national incentive scheme? On what grounds was its ruling based?

3.2 Law-making process

3.2.1 By what means may the renewable sector exert an influence on the law-making process in your country? Does the renewable sector hold a fluent relation with the national energy authorities of your country? What about foreign investors?

3.2.2 Has any renewable subsector recently or in the past reached any sort of agreement(s) with your State on a particular issue concerning the applicable legal framework?

3.2.3 If the answer is affirmative: What are the agreed-upon terms of such agreement(s)? How is/are that/those agreement(s) regarded from a legal perspective (an administrative act, a bilateral contract, etc.)?

3.3 Development objectives

3.3.1 What policy instruments has your country implemented to meet the EU's binding 2020 renewable energy targets in the last few years (renewable action plans, incentive programs to increase installed capacity, etc.)? Will your country presumably comply with these objectives going forward?

3.3.2 What kind of initiatives have been taken by your national energy authorities in order to foster the proliferation of renewable energy within your country? In contrast, what kind of restrictions have been put in place to restrict the installed capacity within your country's borders?

3.4 Grandfathering policy

3.4.1 Is there any grandfathering regulation or clause included in your jurisdiction's legal framework for renewable energies that prevents existing investors from any retroactive changes in the regulatory paradigm in the future?

3.4.2 If a regulation or clause of this sort exists: How does national case law construe it? Is it applicable to every regulatory aspect or exclusively to particular ones?

3.4.3 Has your country ever undergone a profound change in the legal framework for renewable energies, recently or in the past?

3.4.4 If the answer is positive: What were the alleged reasons by the national authorities leading to those changes? Were acquired rights respected by the new regulatory legislation? What kind of transitional rules were enacted?

3.5 Dispute resolution

3.5.1 Are there any pending claims before either the state courts or arbitral tribunals for changes in the legal framework regarding investor incentives in the renewable energy sector?

3.5.2 Are there any final decisions of your state courts approving/disapproving of changes in the legal framework regarding investor incentives in the renewable energy sector?

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