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VI. Top tips in resolving renewables disputes through arbitration

So how is it that the unique flexibility of international arbitration can be used most advantageously in renewables disputes? We set out below the key areas for consideration, based upon our experience of advising and acting for clients in this area.

1. Use of experts

Arbitration gives parties wide discretion to appoint expert witnesses to give technical evidence in support of any aspect of their case. The technical nature of renewables arbitrations means that the use of party-appointed experts to submit an independent opinion on technical, environmental or economic issues is frequently of fundamental importance in an environment where much of the technology remains immature.

Party-appointed experts are required to be independent and to provide impartial evidence to assist the tribunal, rather than to support the party that appointed them as a 'hired gun'. Most arbitral rules contain certain minimum provisions regarding the use of experts but it is advisable for the parties to supplement these by agreeing that the arbitral tribunal should be guided by more detailed rules such as the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (IBA Rules), which set out the 'best practice' for admission of evidence in international arbitration.[131] It is preferable

for parties to appoint experts with whom either they or their counsel have prior experience or at least for whom independent recommendations can be obtained. This is especially the case in sectors such as renewables where there have been relatively few large disputes and so experts may have little experience of testifying and undergoing cross-examination.

In addition to preparing a report for use in arbitration proceedings, parties may helpfully make use of experts to assist behind the scenes as advisers to the parties in developing case strategy, conducting a preliminary assessment of a party's claim, assisting with identifying categories of relevant documents for production, drafting pleadings, assisting in preparation for the hearing including questions for cross-examination of an opposing party's experts, and in the preparation of closing submissions. However, to the extent that any expert or team of analysts is assisting the main expert (ie, the expert who is on the record on the proceedings) with her or his report, caution should be exercised – the expert who is called for cross-examination needs to be able fully to explain his or her conclusions and the data underlying them, and so needs complete control over and awareness of any work done by others to assist in the preparation of their report.

The manner in which experts are deployed can also differ between civil and common law jurisdictions. This is something worth bearing in mind where the counterparty or the tribunal comes from a different legal background – they may have different practices and expectations that need to be taken into account.

1.1 Identification of remedies and quantification of losses

Two particular areas in which expert evidence may be required in renewables disputes are: (1) the identification of an appropriate remedy; and (2) the quantification of losses.

In certain disputes, particularly technical disputes involving malfunctioning equipment or processes, the remedy to be sought may not be entirely clear, especially at the outset of a dispute. In claims involving, for example, defective equipment, where the contract is silent or unclear, it may not be apparent whether the appropriate remedy is an order for the complete replacement of that equipment, or for specific repairs to be conducted. It may also not be clear whether the party responsible for the manufacture or installation of the equipment should implement the remedy, or whether an award of damages would be more appropriate to allow the injured party itself to implement a remedial solution. An expert can assist in the determination of the appropriate remedy by, for example, opining on the works required to rectify a defect.

"While oil and gas projects have a long history of reference to draw on in order to assess and estimate future losses, the same is not true for renewables projects, and the lack of comparable historical precedent makes the assessment of future damages a difficult and uncertain exercise."

The quantification of losses can be a lengthy and complicated process in the context of a renewables project, the aim of which is often to determine the 'fair market' value of a project as at a particular 'valuation date'.[132] There are a number of valuation methods that are employed to assess compensation due, which are broadly separated into 'asset-based',[133] 'market-based'[134] or 'income-based'[135] approaches. There can be significant doubt over this exercise, and at least one and possibly multiple experts are likely to be required: both quantum and industry experts. For example, assessing the quantum of damages using the 'discounted cash flow' method, widely used in energy arbitrations, requires a forecast of the anticipated future cash flows of a project, and identification of an appropriate discount rate. While oil and gas projects have a long history of reference to draw on in order to assess and estimate future losses, the same is not true for renewables projects, and the lack of comparable historical precedent makes the assessment of future damages a difficult and uncertain exercise. Further, most renewables projects are long term and so an appropriate discount rate might need to take into account the risk of regulatory changes, which can be hard to predict and which might require expert evidence on, for example, likely future tariffs based on the approach adopted in other comparable countries.

1.2 The importance of early engagement

It is important for parties to identify and engage technical experts early on, in order that the technical problems in the dispute, and how they will shape the proceedings, can be understood. Early engagement is also important given the relatively small field of available experts who have demonstrable and relevant experience of the new and emerging technologies used in the renewables sector. The already small pool of experts with direct experience of the newer technologies is further limited when consideration is given to those experts that also have experience of presenting oral evidence at a contested hearing, and the experts that are available and have experience might in any event be conflicted from acting. It may, therefore, be necessary to engage experts who have a broader area of expertise, or who have experience with the same technology used in other applications, or outside the renewables context. For example, in the context of a dispute concerning defective welding at an onshore wind farm, it may be appropriate to engage an expert who has extensive welding experience, despite having no experience of onshore wind farms. In this respect, it is key to engage counsel who can recognise where parallels can be drawn with an expert's experience, and where there is a genuine gap in knowledge or experience that can affect an expert's credibility. This is critical, not only in respect of a party's own experts, but also in respect of experts appointed by a counterparty, in order that areas of vulnerability can be explored and exploited.

"In certain circumstances, the arbitral tribunal might appoint its own expert to provide assistance on discrete issues."

In every engagement with experts, it will be important that confidentiality and requirements of legal privilege in communications are met. Great caution should be exercised in communications directly between parties and experts, which may well not meet the test for legal privilege and thus be vulnerable to having to be produced when it comes to the document production stage of an arbitration.

1.3 Tribunal-appointed experts

In certain circumstances, the arbitral tribunal might appoint its own expert to provide assistance on discrete issues. This is expressly allowed in many arbitration rules.[136] The role of a tribunal-appointed expert is flexible – but they might usefully prepare for the tribunal a summary of the issues in dispute where they are particularly complex.

2. Joinder and consolidation

As explained in Chapter III, it is possible that disputes arising in renewables projects will span multiple contracts and affect multiple parties. It is important to consider not only the relevant agreement under which the dispute arises, but also the surrounding contractual framework and the extent to which it is necessary for third parties to be involved in the proceedings and bound by any decisions rendered. This is particularly relevant where disputes arise between members of a consortium. A party contracting with a consortium should give early consideration to the nationality and relative strengths of each member of the consortium, including where each might hold assets and relevant documents, in order to inform any decision about where and how they might pursue relief in the event of a dispute, and in which jurisdiction an award could usefully be enforced.

As a consensual process, the jurisdiction of an arbitral tribunal arises only from the parties' agreement to arbitrate. Save where joinder or consolidation is possible, the tribunal will not have jurisdiction over any potentially interested or affected third parties. Early engagement with counsel is crucial where multiple contracts or parties are at issue. There may be a need to consider the possibility of:

- commencing a single arbitration in respect of multiple related disputes;
- consolidating multiple separate arbitrations;
- joining third parties to proceedings that have been commenced; or
- coordinating separate parallel arbitrations.

While most arbitral rules provide for joinder and consolidation in some form, there are differences in respective procedures. For example, it is our experience that, under certain rules, joinder applications will be granted almost automatically where there is an arbitration agreement

that binds the third party, without any real review of the merits of joining such a third party being undertaken. This may be used to a party's benefit, but could also come as a surprise to those proceeding without proper legal advice.

To the extent that joinder or consolidation is likely to be a consideration, provision should be made for this in the parties' arbitration agreement. We explain the type of wording that might be included in Chapter V.

3. Document production

In common law litigation, a comprehensive disclosure (or 'discovery') exercise is often required. This is the process whereby parties have to disclose to the other side relevant documents, including confidential material. It has been roundly criticised by many commentators as disproportionately expensive for the benefits it produces. Arbitration, however, offers an advantage over litigation because it allows the parties to agree on the extent of document production. Parties can agree to the production of limited categories of documents only, or indeed to dispense entirely with the process if, for example, documents would likely not resolve disputed factual issues, or if all relevant documents are attached to the pleadings. The document production stage of an arbitration has the potential to be an onerous, lengthy and expensive process given the potentially large number of relevant documents, which may span a long period of time. The potential for multiple parties to be involved on each side of the dispute can give rise to complex considerations when it comes to document production. If, for example, a 'shell' company is used as the project company, then, unless the stakeholders in the project company are also party to the proceedings, there may not be scope for the tribunal to order the production of relevant and material documents (because it would not necessarily have jurisdiction over those stakeholders).

Parties are best advised to seek early legal advice on the scope of document production, and to consider at the outset the likely extent of the exercise required. A key consideration will be who holds the relevant documents, whether such entities or individuals are party to the proceedings, and where they are based. Searches might in turn give rise to swathes of duplicates being produced, which can make the process of reviewing a party's document production time-consuming and, if inadequate time has been set aside for such a task, impossible. Making provision for how the document production process will be conducted at the outset of the proceedings (in the first procedural order) is key to avoiding complications.

In that regard, parties might seek to adopt protocols to guide the document production phase. It is common for parties to adopt the IBA

Rules, which can be particularly helpful in disputes involving parties and lawyers from mixed legal and cultural backgrounds, who traditionally take different approaches to document production. In common law systems, document 'disclosure' or 'discovery' is an extensive process, and often requires parties to produce all documents relevant to an issue in dispute, whether or not they are helpful to the party's case. In civil law jurisdictions, each party generally is only required to produce documents upon which it will rely. The IBA Rules represent a compromise between the civil and common law systems of evidence. The IBA Rules anticipate both voluntary production in response to requests for categories of relevant and material documents, and tribunal-ordered production. They provide that parties must produce the documents upon which they rely,[137] but may also request a specific document or a "narrow and specific" category of documents which is "relevant to the case and material to its outcome".[138]

Where significant electronic document production is envisaged, it is our experience that the Chartered Institute of Arbitrators (CIArb) Protocol for E-Disclosure in International Arbitration can be especially beneficial.[139] That protocol is intended to "encourage early consideration of disclosure of documents in electronic form", and

"Where significant electronic document production is envisaged, it is our experience that the Chartered Institute of Arbitrators (CIArb) Protocol for E-Disclosure in International Arbitration can be especially beneficial."

to "focus the parties and the Tribunal on e-disclosure issues",[140] and provides that the tribunal shall bring questions of e-disclosure to the parties' attention "at the earliest opportunity and in any event no later than the first management conference".[141] The protocol encourages parties to consider what tools and techniques might be deployed to reduce the cost and burden of e-disclosure, including the use of agreed search terms.[142] Engaging with such protocols from the outset, and making proper provision in the procedural timetable for the process of agreeing on search terms, is crucial if unnecessary delay is to be avoided during the document production process.

*This is an extract from the chapter 'Top tips in resolving renewables disputes through arbitration' by Emma Johnson, Lucy McKenzie and Matthew Saunders in the Special Report '*International Arbitration of Renewable Energy Disputes*', published by Globe Law and Business.*