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RESOLVING ENERGY EFFICIENCY DISPUTES VIA ARBITRATION

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ABSTRACT

There has been a noticeable increase in the interdependence between the arbitration and energy industries in recent times. Arbitration has been necessary at some point for resolving energy disputes related to investment projects and/or energy purchase or supply agreements. Amidst the various advancements in the energy sector, there exists a vague and uncertain domain of the organization responsible for resolving these conflicts. Japan, China, and South Korea are the three countries that import the most liquefied natural gas (commonly known as "LNG") in the world. Asia is home to all three of these countries. It is one of the regions that is seeing the most rapid economic expansion, and the Asia-Pacific region, which is home to a significant portion of the world's economy, is one of the regions that is experiencing this growth. In addition to being one of the economies that is increasing at the quickest rate in the world, the Indian economy is also one of the most rapidly urbanizing economies in the world. By the year 2040, India will be responsible for around 25 percent of the total energy consumption that occurs throughout the world. In general, energy projects are lengthy, complicated, and require a substantial quantity of financial resources. Additionally, they require a significant amount of time. In addition, the industry is susceptible to a significant amount of sensitivity to things like geological occurrences, political shifts, and environmental legislation. Because of these circumstances, disagreements are rather prevalent in the energy industry. Arbitration has developed as the method of choice for resolving these differences, particularly on an international scale. This is especially true in the case of international disputes. The increasing demand for arbitration in energy disputes is the

topic of discussion in this research study. Additionally, the challenges that occur and the potential solutions to these issues are also discussed.

Key words: Energy, Disputes, Environment, Arbitration

INTRODUCTION

Increasingly, the concepts of "Energy" and "Arbitration" are becoming interconnected as a result of the worldwide nature of many energy projects and the successful resolution of energy conflicts through international arbitration. While the current developments in energy dispute resolution through neutral and independent international arbitration forums are promising, this essay argues that there may still be a requirement to establish a dedicated international arbitration court for energy disputes. Such a court would cater to the unique needs of the energy industry.

According to current statistics, the renewable energy industry in India is projected to receive an investment of $25 billion in 2023[1]. Additionally, its objective is to become a prominent manufacturer and distributor of environmentally friendly hydrogen on a global scale. While these investments may appear intriguing, they can give rise to various disagreements of varied magnitudes and forms. These disputes can occur for reasons such as energy shortages, disruptions in the supply chain, geopolitical instability, sanctions, and price fluctuations. According to recent reports from prominent arbitral institutions worldwide, the energy industry is responsible for a substantial number of conflicts and remains the primary focus of these institutions' caseloads[2]. Energy projects are often long, complex, and require a significant amount of financial resources. The industry is significantly influenced by political upheavals, environmental legislation, and geological occurrences. They grow in size and intricacy, need significant capital investment, extend over multiple years, involve multiple participants, and have a complex contractual framework and project financing. Energy issues can manifest in several ways. They can occur between two sovereign entities, two non-governmental entities, or a non-

[1] "Indulia, B. (2023, July 24). *The Growing Need for Arbitration in Energy Disputes | SCC Times*. SCC Times. https://www.scconline.com/blog/post/2023/01/14/the-growing-need-for-arbitration-in-energy-disputes/"

[2] "The ICC Dispute Resolution Statistics 2020 show that about 38% of all ICC cases are in the energy and construction sectors. Available at- https://www.scconline.com/blog/post/2023/01/14/the-growing-need-for-arbitration-in-energy-disputes/"

governmental entity and a sovereign entity. Arbitration has been the prevailing method for resolving disputes, particularly in the energy industry at an international scale.

Energy Sector:

- Regarding significant energy projects, various energy sources can be utilized. In general, these sources can be classified into two categories: "non-renewable" and "renewable" energy. Non-renewable energy refers to energy sources that are depleted once they have been utilized and cannot be replenished. The composition of this substance is predominantly comprised of the remains of ancient organisms, including both animal and plant species.[3] Oil and natural gas are examples of non-renewable energy sources. Renewable energy is sourced from geophysical and biological sources that are constantly renewed. This pertains to the utilization of solar, wind, and hydro energy.

- Companies operating in the energy sector are usually located either in the "upstream" or "downstream" segments of the supply chain. The process consists of four stages: discovery, production, refining, and distribution and selling. The energy sector mostly engages in these two sectors as its main activity. Companies classified as upstream in the non-renewable energy sector mostly focus on the extraction of raw materials. Currently, it is frequent to observe investors and states engaging in collaborative operating and drilling agreements. The downstream sector of the non-renewable energy business encompasses all activities that occur after the manufacturing phase and extend until the energy reaches the end-user. These operations encompass activities such as refining, processing, and distribution, among various others. Renewable energy companies involved in the early stages of production often prioritize research and development, whereas those involved in later stages focus mostly on selling and distributing to end-users. Renewable energy sector comprises upstream companies. Another potential interpretation of the term "midstream" is its application to the conveyance and retention of energy.

[3] "S. Vorburger and A. Petti, *Arbitrating Energy Disputes* in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2018), p. 1280"

RESOLVING DISPUTES IN ENERGY SECTOR

Disagreements in the energy sector are influenced by the following external factors:

- In the first place, because the energy contracts have been in place for decades, it is impossible to provide a specific price in the contract. As a result, the price review provision gives the parties the ability to periodically adjust the price of the contract to reflect the present conditions of the gas market. There are elements in the contracts that pertain to energy that mandate a price review[4]. These clauses may include indexation or references imbedded in the contracts to market pricing.

- Clauses allow for contract renegotiation. Even a small change in petrol prices can affect earnings by hundreds of millions of dollars. This is because long-term gas contracts provide massive volumes. Second, energy contracts are usually longer. Since time has passed, the government constantly changes its policies. New obligations for the parties result from this alteration, which alters the agreement. Energy contracts offer a fertile ground for disputes.

- Additionally, the re-energized market as a whole is impacted by international politics. For instance, the ongoing conflict between Russia and Ukraine has an effect on prices around the world. The country of Russia possesses an abundance of natural resources, mainly oil and gas. As a consequence of this, disagreements of this kind not only have an impact on the regional market, but they also have the potential to have an impact on the global market, which can serve as a catalyst for other energy-related conflicts.

- The fourth point is that energy contracts include the installation of pipelines, the establishment of grids, and other similar projects, which can span thousands of kilometers

[4] "The Evolution of Natural Gas Price Review Arbitrations. (n.d.) Retrieved 13-9-2022, from https://globalarbitrationreview.com/guide/the-guide-energy-arbitrations/fifth-edition/article/the-evolution-of-natural-gas-price-review-arbitrations"

and encompass a variety of geographical terrains. Due to the fact that these terrains present their own unique challenges, they provide an ideal environment for the germination of disputes. The reopening of contracts, disputes, and arbitration are all outcomes that can be attributed to external variables that have an impact on the market. Some examples of these causes include global politics and a spike in the cost of power.

There are, however, two groups that are frequently encountered: disputes between private parties and private states (including state institutions), and disputes between private parties against private parties.

1. **Disputes between investors and states**

   Historically speaking, the energy industry has been subject to a great deal of regulation. State governments and enterprises owned by the state held a monopoly on the extraction and distribution of energy for a considerable amount of time. The states continue to maintain a substantial degree of involvement in energy projects, despite the fact that privatization programs have resulted in the creation of potential new opportunities. The tight relationship that exists between the public sector and the private sector frequently results in disagreements, particularly in nations that are major importers of capital.

   Disputes of this nature can have a variety of legal foundations, as will be shown below:

   - Private energy firms often form deals with either the state or state-owned/corporate-controlled entities. This could potentially result in contractual disputes. For example, oil and gas contracts are commonly made with a state or national oil corporation (NOC) that is involved in the exploration, production, and distribution of oil and gas. Arbitration clauses are frequently incorporated into these agreements, stipulating that any future disputes will be settled by arbitration.

   - Conflicts that are based on treaties: “these treaties may take the form of bilateral or multilateral investment treaties, and they provide for a unilateral offer from the

sovereign states to arbitrate in the event that certain types of conflicts arise". After submitting a request for arbitration, the investor chooses to accept the offer made by the state. In the case of "*Venezuela Holdings, B.V. v. Venezuela* (ICSID Case No. ARB/07/27),[5] for example, the claimants filed an arbitration under the Netherlands-Venezuela Bilateral Investment Treaty (BIT) for expropriation and violation of fair and equitable treatment". This was in response to the implementation of measures that had an impact on the production and export of two energy projects. These include the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA), both of which have since been terminated. In recent decades, a number of European nations have been subjected to a multitude of claims under the ECT. The country of Spain, for example, has been involved in the greatest number of ECT arbitrations in the field of renewable energy. "A group of investors in the photovoltaic industry filed claims against Spain, seeking compensation for indirect expropriation resulting from a series of regulatory measures. These claims include cases such as *Isolux Netherlands, B.V. v. Kingdom of Spain*[6] , *Charanne, B.V. et al. v. Spain*[7], *Eiser Infrastructure Ltd et al. v. Kingdom of Spain*[8] , and *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* [9]".

- Claims in the energy sector can also be founded on domestic investment law, which provides additional legal basis for disputes arising from the legislation of the host governments. Domestic statutes and ordinances aimed at promoting and motivating foreign investments can incorporate clauses that grant the host state the authority to unilaterally accede to arbitration. However, investors can usually grant their authorization by submitting a written letter to the state or by filing a

[5] "The Netherlands-Venezuela BIT was officially terminated on 1 November 2008, see International Investment Agreements Navigator – UNCTAD Investment Policy Hub".
[6] SCC Case V2013/153
[7] SCC Case No. V 062/2012
[8] ICSID Case No. ARB/13/36
[9] ICSID Case No. ARB/14/1

request for arbitration. Unlike disputes based on treaties, the option to arbitrate in domestic laws is not usually contingent on the requirement of nationality.

ARBITATION IN ENERGY SECTOR: NATURAL FORUM

When compared to litigation, arbitration is frequently referred to as the opposite of litigation. In accordance with the Arbitration method, the issue between the parties in contention is resolved through the utilization of a neutral third party or board of impartial third parties known as Arbitrator(s). This is a process that takes place outside of the judicial system. Arbitrators are responsible for listening to the reasons that are presented by the disputing parties and then coming to a decision that is impartial and favorable to both parties alike[10].

Because it is less expensive, quicker, more dependable, and offers the parties with more confidentiality, arbitration is typically preferred over litigation. This is because arbitration is more reliable. Moreover, among the several benefits that arbitration offers over litigation, the most prominent advantage is the fact that it is more efficient in terms of both time and money. As a method of conflict resolution, arbitration is selected by a significant number of business owners and manufacturing sector firms. This is mostly due to the positive reputation and goodwill that they enjoy in the market. Because the parties involved in an international dispute are unable to reach a consensus on the proper jurisdiction, arbitration is frequently utilized in these situations. Additionally, it is preferable in circumstances in which either one or both of the parties want a verdict that is definitive and there is no possibility of further appeal. However, there are certain situations in which arbitration should not be utilized as a method of settling a dispute.

[10] "M. (2023, January 19). *Guest blog: Renewable energy disputes - Answers in arbitration - ICC - International Chamber of Commerce*. ICC - International Chamber of Commerce. https://iccwbo.org/news-publications/guests-blog-speeches/guest-blog-renewable-energy-disputes-answers-in-arbitration/"

Benefits[11]:

- When compared to litigation, arbitration is a more time- and cost-efficient choice that also requires less time. When compared to regular court proceedings, arbitration is intended to facilitate a more expedient and negotiated resolution. Moreover, it is less expensive than going through the legal system.
- They tend to provide a better degree of experience than judges do, which strengthens businessmen's confidence and conviction in the procedures and the award that is ultimately rendered. This is due to the fact that arbitrators are selected from a group of specialists who have specialized understanding of a certain trade or business. In most cases, arbitration is used in insurance disputes, and rather than judges with a more general perspective, arbitrators who are professionals in the sector are used.
- In spite of the fact that the arbitrator may have made a mistake in either the facts or the law, the decision reached by the arbitrator is final and cannot be reversed. However, there are very few opportunities for any further appeal. International commercial arbitration is also unbiased, and in contrast to the procedures that are followed in courts, arbitration protects the confidentiality and privacy of the subject matter that is being contested, and it does not divulge the identities of the parties that are involved.
- Arbitration is generally regarded as a more flexible option in comparison to litigation. Generally, the laws regulating litigation are significantly more complex than the laws governing arbitration. Litigation must conform to the regulations of civil court law and follow to the guidelines outlined in the CPR rule book. In contrast, arbitration rules are notably less intricate and have a smaller quantity. Arbitration lacks a pre-established set of processes and instead relies on the parties involved to determine the process. They have the freedom to come to an agreement and settle on any course of action they see appropriate.
- It is also possible for arbitration to provide higher importance justice compared to the majority of the country's courts, which are already overwhelmed. The conclusion reached

[11] "M. K., & M. K. (2022, June 29). *The Viewpoint: Navigating Arbitration in Renewable Energy Disputes*. Bar And Bench - Indian Legal News. https://www.barandbench.com/law-firms/view-point/navigating-arbitration-in-renewable-energy-disputes"

through arbitration in international conflicts is of a better quality than that reached through local courts.

JUDICIAL PERSPECTIVE IN INDIA

When it comes to the electricity industry in India, the point of dispute between the Arbitration Act of 1996 (Arbitration Act)[12] and the Electricity Act of 2003 (Electricity Act) over who has the authority to override the other has been resolved by the Supreme Court in the case of *Gujarat Urja Vikas Nigam vs. Essar electricity Ltd*.[13] Furthermore, the Supreme Court has made it clear that conflicts pertaining to the energy sector are of an arbitrable nature, provided that the referral to the arbitration is made by the commission of the state that is associated with the matter. In accordance with the electrical Act, Section 158, which is part of Part XVI, provisions have been made for the referral of electrical issues to arbitration. In this context, it is important to highlight the critical significance that Sections 79(1)(f) and 86(1)(f) of the Electricity Act play in regulating the powers of the Central Commission and the State Commission, respectively. It is made very apparent in Section 79(1)(f) that:

"Central Commission shall discharge the function of regulating the tariff of generating companies owned or controlled by it. Further, it is entrusted with the task of regulating the tariff of generating companies entering into or otherwise having a composite scheme for generation and sale of electricity in more than one State. The Central Commission shall also regulate the inter-State transmission of electricity and determine the tariff; it shall adjudicate upon disputes involving generating companies or transmission licensee and refer any dispute for arbitration."[14]

According to the harmonic interpretation of this paragraph, the legislator's objective is clearly visible in the process of resolving the electrical issue through arbitration. Furthermore, this can be confirmed by the regulations specified in Section 86(1)(f) of the Electricity Act by the drafters. According to these laws, the State Commission is responsible for adjudicating conflicts between licensees and generating businesses, as well as referring any disagreement for

[12] "The Arbitration and Conciliation Act, No. 26 of 1996".
[13] MANU / SC / 1055 / 2008
[14] The Electricity Act, No.36 of 2003, Section 79(1)(f), 86(1)(f).

arbitration. Therefore, the laws in India actively promote the use of arbitration for resolving energy conflicts between parties. Although India's growth pace is not on par with or surpassing that of Latin America, India is nevertheless experiencing growth in this industry.

OBSTACLES TO ARBITRATION

“Parallel or multiple proceedings can take place in any industry, but they are more common in the energy sector because of the frequent occurrence of multi-party and multi-contract transactions, especially in complex construction projects and joint venture agreements”. Additionally, there is a possibility of overlapping claims under state contracts and investment treaties. Consolidating parallel processes is a frequent occurrence in the energy sector. In cases of disputes arising from identical contracts, it is not mandatory for a party to consent to arbitration for all such disputes. Without the agreement of the parties involved, it is not feasible to merge parallel procedures in the United Kingdom. As a result, numerous arbitrations may proceed concurrently. The laws in the jurisdiction where the arbitration or enforcement will occur may prohibit the arbitration of certain issues, such as deadlocks in joint ventures, specific contract execution, and related topics. When dealing with energy conflicts like these, it becomes challenging to conduct arbitration due to the potential for the award to be reversed.

Not all arbitral institutions have a group of arbitrators who specialize in the energy sector, and even if they do, there is a lack of expertise in this field. This is a dilemma due to the scarcity of proficient arbitrators. By utilizing national courts, a party can challenge a particular policy or government notification that affects the price environment.

Typically, these difficulties arise from writ petitions submitted to High Courts, which may remain unresolved for a significant duration. Hence, the verdict of the writ petition will directly influence the decision of the Arbitral Tribunal, leading to adverse consequences for the arbitration proceedings. On some occasions, the courts may also issue anti-arbitration injunctions, which will temporarily halt the arbitration process. Regarding recognition and enforcement actions, numerous countries seek to construe public policy in a comprehensive manner, hence increasing the difficulty of enforcing awards. Arbitrators cannot reasonably believe that arbitration will remain a suitable platform for resolving disputes related to renewable

energy, as it has done for conventional energy matters. The arbitration market must respond and potentially adapt the arbitration process to meet the needs of the renewables industry.

Arbitration clauses have been challenging to implement consistently in contracts for corporate power purchase agreements (PPAs) due to the involvement of numerous parties and the frequent inclusion of state entities as offtakers. PPAs have emerged as a prevalent contract type in the renewable energy sector. Thus far, this has been the situation. Administrative tribunals and civil courts often have conflicting opinions regarding jurisdiction in cases where a state entity is the offtaker under a Power Purchase Agreement (PPA). Consequently, parties may be obligated to pursue their claim in both administrative and civil courts.[15]

Implementing universally accepted arbitration clauses would be advantageous in resolving this issue; yet, this task will provide challenges. Additionally, it is feasible to incorporate FIDIC-type contracts, which are formulated and mutually accepted by the industry and eventually become the prevailing norm. This could serve as an alternative response. Future conflicts in this region may potentially encompass climate change concerns. This could potentially weaken the advantage of anonymity that is linked to commercial arbitration, especially when there is an expected increase in transparency. The International Chamber of Commerce (ICC) is taking steps to improve the transparency of arbitral processes conducted by the International Court of Arbitration, in response to demands for greater visibility. These policies encompass the dissemination of certain court case details on the Internet, with the majority of the information being anonymised. The International Criminal Court (ICC) intends to commence the publication of arbitral findings if there is consensus among all relevant parties.

UNCITRAL and other bodies are actively striving to enhance openness. The inclusion of certain methods in the rules of the UNCITRAL, as well as other international arbitration organizations, can be helpful in resolving disputes related to renewable energy. Arbitration is a crucial means of

[15] "Paralika, M. (2022, January 24). *Arbitration: An answer to disputes in the renewable energy sector?* Fieldfisher. https://www.fieldfisher.com/en/insights/arbitration-an-answer-to-disputes-in-the-renewable"

resolving issues related to renewable energy on an international level. This could be particularly advantageous in circumstances that entail climate change ramifications.

Arbitration practitioners must find the most effective way to present issues related to renewable energy to arbitral tribunals, rather than relying on court-appointed independent specialists who may provide misleading technical evidence. This will assist the tribunals in gaining a more comprehensive understanding of the intricate conditions under discussion.

Arbitration offers a notable advantage in the form of utilizing experts designated by the parties involved. These specialists might be included in the proceedings at an early stage and help expedite the case. However, a significant disadvantage of arbitration in the context of renewable energy projects is the challenge of extending the binding nature of arbitration to third parties, issuing a notice to third parties, or including additional parties in the proceedings. Arbitral organizations are increasingly adopting procedures that facilitate the inclusion of third parties.[16] However, this frequently necessitates the presence of consecutive contracts that possess equivalent arbitration provisions.

During the last Conference of the Parties (COP26) in Glasgow, lawyers urged delegates to contemplate the use of arbitration as a means to resolve energy disputes and to include this provision in the COP agreement. Although the COP26 agreement does not officially endorse arbitration as the preferred means of resolving conflicts, it does permit the use of voluntary measures by countries that need agreements between states and industries. These contracts are capable of accommodating arbitration agreements.

CONCLUSION AND THE WAY FORWARD

In order for India to be able to portray itself as a center for the resolution of international disputes, its legal system and judicial system will need to progress in terms of their functioning and operations. On the other hand, the way to acquire that progression is not a difficult one.

[16] "Using ADR to Resolve Energy Industry Disputes: The Better Way, Report of The Energy ADR Forum, October 2006, https://naturalresourcespolicy.org/docs/collaboration-conflict-resolution/using-adr-energy-disputes.pdf, Last visited 5th May 2024".

When dealing with several contracts between the same parties, it is necessary to take into consideration the potential of including the same terms and provisions on the resolution of disputes into each and every one of the contracts that include the same parties. By doing so, we will guarantee that there will be no cases of operations being repeated in other locations. For the purpose of avoiding recurrent arbitration proceedings, which will save both time and energy, as well as to solidify any future issues that may emerge, this is a vital step to take. Additionally, the arbitration clause in each contract must have the capacity to permit the consolidation of conflicts from related contracts, and the scope of the dispute resolution clause must be expansive. Both of these requirements must be met. First, it is recommended that the parties come to an agreement on the methods for consolidation, and then they should give their approval for the consolidation process to proceed. There is a widespread belief that domestic courts are reluctant to enforce verdicts that are against the government. This perception is related to the interference of domestic courts.

This concerns the intervention of domestic courts. In order to ensure that arbitral rulings are final, it is vital to restrict the scope of judicial interference. In the process of entering into such contracts, Med-Arb terms may also be taken into consideration. A harmonious relationship between the parties involved in future contracts can be maintained through the use of mediation and arbitration, which can work together to resolve complex conflicts. By drafting contracts for shorter periods of time, such as three years rather than five, it may be possible to eliminate or at least reduce the need for price reviews, so removing a substantial disagreement ground entirely. In the process of selecting the location of the arbitration, the parties need to exercise caution with regard to the approach taken by the courts located at the location. Last but not least, it is recommended that arbitral institutions that have a panel of specialists in the subject be given preference, and that arbitrators become acquainted with the dispute and the technical features of it before the proceedings begin.

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