

Business

International energy disputes: Avoiding, resolving them, part two

By **Barry Leon**

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(June 12, 2023, 9:05 AM EDT) -- This is part two of a two-part series. Arbitration, as well as alternative dispute resolution (ADR) and dispute avoidance, for energy disputes — including energy transition disputes — were considered in the recently released the Future of International Energy Arbitration Survey Report. The 50-page report of a survey of over 900 users of dispute resolution worldwide provides a picture of the state of international dispute resolution, including in the energy sector generally and in the energy transition sector more particularly.

Part one of this article (see below for link) described and discussed the report's findings, including on the suitability of international arbitration for resolving energy disputes and its features and procedural elements that are most important for those disputes. Part two continues a discussion of the findings, including innovations suggested by survey respondents to make arbitration more economic, accessible and efficient.

Innovations that could be made (1) to international arbitration for energy disputes, and (2) for the use of alternatives to arbitration

The survey yielded interesting information on innovations that could be made to international arbitration for energy disputes, and innovations that could be made for the use of alternatives to arbitration. Arguably the responses are broadly applicable to the respondents' views regarding international arbitration and its alternatives.

'What innovation(s) would you like to see to make international arbitration more economic, accessible, and efficient?' (Question 32, page 33)

Many respondents, and several interviewees (in follow-up interviews), noted that international arbitration could be improved by strengthened case management at the initial stages of the formal dispute process.

Most respondents who were asked for follow-up on this question indicated they believed arbitrators to be in the best position to "hold parties' feet to the fire" to prevent *mala fide* delay tactics, to encourage the narrow tailoring of arguments, and to provide avenues for summary disposal of claims.

"Virtual hearings and improvements and the provision by (arbitral) institutions of online case management platforms were another popular response to this question," according to the report.

Other feedback from respondents focused on the perception that arbitration is overly legalistic and unnecessarily confrontational, and that practitioners and arbitrators are not making use of the flexibility afforded to them, resulting in a lack of commerciality.

Tellingly, in response to a question about dispute boards, but apparently as an overall observation, one corporate counsel stated: "Most outside counsel tend to grossly underestimate the desire of

companies to avoid disputes.” It would be interesting to have a comparison between the views of end users and the views of other respondents regarding companies’ interest in dispute avoidance and the importance they attach to it.

Dispute resolution for energy transition disputes

Thirty-three per cent of respondents thought arbitration is most suited to energy transition disputes (Question 26, page 27).

The next most-selected choices were “negotiation” (19 per cent) and “mediation” (16 per cent), followed by “Litigation,” “Dispute Boards or equivalent,” “Expert determination,” and “Hybrid” processes.

Observations by Annette Magnusson and Michael McIlwrath on report

Annette Magnusson of Climate Change Counsel and Michael McIlwrath of MDisputes concluded in a May 29, 2023, Kluwer Arbitration blog post (see “Energy Disputes and Climate Targets: Survey Reveals How to Plan”) that the real focus of survey respondents was (1) preventing disputes or resolving them early, and (2) preserving the parties’ ability to seek binding resolution in arbitration or courts. The use of these mechanisms would be consistent with the desire expressed in the survey for speed of resolution.

“The types of contracts associated with energy projects are highly diverse — from financing institutions to providers of technology, services, and construction, to government actors — but they are likely to share two common features: the introduction of new technologies and the need for timely completion of projects, often on an accelerated timescale.

“Against this backdrop, parties may wish to include in their contracts a method of dispute resolution that allows them to keep a project on track through conclusion. In this, we draw a different conclusion from the report’s authors, who believe that arbitration emerged as a ‘clear favourite’ over other forms of resolution such as negotiation and mediation. We do not interpret the responses as preferring arbitration *over* these and other methods. Rather, the data appears to indicate that parties in energy projects view them as complementary means that can precede or take place alongside arbitration or court litigation.”

Arbitration community’s greener practices

The survey also asked about the practices of the arbitration community in reducing their carbon emissions.

“The Campaign for Greener Arbitrations [<https://www.greenerarbitrations.com>] has focused on areas in which the arbitration community can commit to reducing its carbon emissions. What are your priorities?” (Question 36)

For respondents, the most popular items on the Campaign for Greener Arbitrations’ proposed practices for reducing carbon emissions were:

- “using videoconferencing for meetings and hearings” (81 per cent),
- “avoiding unnecessary travel, particularly flights” (69 per cent), and
- “using of electronic bundles at hearings” (66 per cent).

According to the respondents, “the widespread adoption of virtual hearings and meetings brought on by the COVID-19 pandemic has changed the nature of international arbitral practice for the foreseeable future, and arguably allows for more diversified and global participation in international arbitration.

It shows consistent (and encouraging) support for innovation in making international arbitration more economical, efficient, and accessible.

Many respondents noted that the efficiency gains and cost reductions allowed for by the normalization of virtual hearings go hand in hand with environmental considerations.”

Conclusions

As energy transition becomes an increasingly important part of our lives, and increasingly important for all business and other organizations everywhere, it becomes increasingly important that leaders of those organizations, governments and professional advisers — particularly transactional lawyers and dispute resolution practitioners — become increasingly conscious of, and focus on, maximizing the effectiveness of both dispute avoidance and dispute resolution procedures and practices.

This is part two of a two-part series. Part one: International energy disputes: Avoiding, resolving them, part one.

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