LEXOLOGY
Getting The Deal Through

Energy Disputes

in Germany

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GENERAL

Development

Describe the areas of energy development in the country.

The German energy landscape shows a conventional energy share in total electricity production of 23 per cent lignite, 13 per cent hard coal, 13 per cent gas, 12 per cent nuclear energy, 1 per cent oil, and 35 per cent renewable energy, according to data available for 2018.

Owing to international obligations as well as the corresponding political will, efforts have been undertaken towards reducing greenhouse gas emissions and empowering the renewable energy sector. On 21 December 2018, hard coal mining officially ended in Germany. Looking at nuclear power, all nuclear power plants will have shut down by 2022.

Lignite remains the most important energy source in the production of electricity. Nevertheless, recently the voices demanding a complete withdrawal from lignite used for power generation grew stronger. The reason for this is the high emission of greenhouse gases by coal and lignite power plants. In the meantime, Germany has also appointed a special Commission (Kohlekommission) made up of experts representing various scientific and civic areas. The Kohlekommission presented on 26 January 2019 a roadmap for a step-by-step permanent shutdown of all lignite power plants between 2022 and 2038.

While natural gas plays a key role in its mix of energy sources, Germany is still highly dependent on imports of natural gas. In 2017, about 95 per cent of Germany's gas consumption was covered by imports, with more than 51 per cent of natural gas imports originating from Russia, 27 per cent from Norway and 21 per cent from the Netherlands.

Moreover, Germany continues its energy transition, started in 2011, which has brought many initiatives with a focus on promoting renewable energy and its smooth integration into the market. Therefore, the energy transition equally addresses, among other things, storage, network and security of supply issues. The renewable sector today makes up about 35 per cent of total electricity production. It mainly consists of solar power and wind energy as well as biomass, hydropower and geothermal energy. While renewable energy is associated mostly with generating electricity, it also plays an important role for heat production.

Role of government

Describe the government's role in the ownership and development of energy resources. Outline the current energy policy.

The ownership and development of energy sources is mostly part of the private sector. In principle, neither the Federal Republic of Germany nor the states of Germany aim at owning or developing energy resources. Nevertheless, some of the large German utilities have public shareholders, for example, the two principal shareholders of EnBW, NECKARPRI with a 46.75 per cent share and OEW with a share of 46.75 per cent, are public entities, and municipalities hold a share of approximately 24 per cent in RWE. In addition, on the local and regional level, which represent a market share of 52 per cent in the electricity sector and 62 per cent in the gas sector, numerous municipal utilities with mixed private and public ownership structures exist. Vattenfall's sale of the lignite production sites in eastern Germany has triggered a political discussion on the bailout of the lignite sector.

The government's role is to define the energy policy and to set up the regulatory framework. Recently, the government's most important decisions refer to the phasing-out of nuclear generation by the end of 2022, and shifting its focus towards an energy transition that encompasses the decision to produce energy on a sustainable basis (at least 80 per cent until 2050) to make Germany one of the most energy-efficient and environmentally compatible economies in the world. The expansion of renewable energy is one of the main pillars in Germany's energy transition. Germany's energy

supply is becoming 'greener' from year to year, although the Renewable Energies Act was recently amended again to further limit an 'uncontrolled extension' of renewable energy generation. Additionally, the government focuses on grid extension and development to integrate the growing onshore and offshore wind energy production into the market. On the local level, a trend towards small-scale energy generation is visible, and in many regions citizens set up local cooperatives that own and operate solar parks and onshore wind parks. Eventually, the government will set up numerous support programmes to enhance energy efficiency measures, especially in the heating sector, and to contribute to the developing technology of energy storage, for example, through batteries.

COMMERCIAL/CIVIL LAW – SUBSTANTIVE

Rules and industry standards

Describe any industry-standard form contracts used in the energy sector in your jurisdiction.

In wholesale trading, the European Federation of Energy Traders (EFET) standard reflects industry practice. Supplying household customers is governed either by directly applicable ordinances or by freely negotiated contracts, that, however, have to comply with Germany's strict law on standard terms and conditions.

As regards access to the regulated electricity and gas networks, specific provisions exist that predefine the content of such contracts. In the electricity sector, the Federal Network Agency defined model contracts for network access. Electricity network operators are obliged to apply the model contracts to all their customers (ie, replace all existing contracts accordingly).

In the gas sector, a multilateral agreement between the gas network operators exists – the Cooperation Agreement – that contains provisions on the organisation of network access and cooperation between the gas network operators.

What rules govern contractual interpretation in (non-consumer) contracts in general? Do these rules apply to energy contracts?

As a general rule, the interpretation of contracts under German law starts with the wording of the contract. The aim is to determine the will of the parties, as it can be discerned by an objective third party. If the interpretation of the wording yields no clear result, surrounding circumstances are also taken into consideration (German Civil Code, sections 133, 157).

Further, courts can review standard terms and conditions for 'appropriateness' even in business-to-business (B2B) contracts. 'Inappropriate' clauses are invalid. Furthermore, it is a general rule that, in case of doubts, standard terms and conditions are interpreted against the entity that supplied them. These rules also apply to energy contracts.

Describe any commonly recognised industry standards for establishing liability.

Generally, liability requires at least negligence on the part of the defendant. There are three forms of negligence corresponding to different degrees of carelessness: gross negligence, ordinary negligence and slight negligence. It is possible to agree on different standards of liability in a contract. However, if the limitation of liability is part of the standard terms and conditions, it is subject to the legal rules set out in sections 305 to 310 of the German Civil Code. According to the latter, neither liability for wilful default nor liability for grossly negligent actions can be excluded in contracts. Likewise, it is not possible to limit liability for injuries to life, body or health of a person. Slightly less strict rules apply to B2B contracts.

There are several industry standards for the different kinds of contracts in the energy sector such as grid connection agreements and energy supply agreements. For example, the European Federation of Energy Traders sample contracts are commonly used. Pursuant to section 12.2 'General Agreement Concerning the Delivery and Acceptance of Electricity', a party is not liable for any damages except where such damages are due to gross negligence, wilful default or fraud of the party, its employees, officers, contractors or agents.

Moreover, there are specific regulations that contain strict liability, such as, for example, section 26 of the Atomic Energy Act, which provides for a combination of strict liability and fault-based liability.

Performance mitigation

Are concepts of force majeure, commercial impracticability or frustration, or other concepts that would excuse performance during periods of commodity price or supply volatility, recognised in your jurisdiction?

'Economic impossibility' can excuse performance for economic reasons (section 275 of the German Civil Code). However, the hurdles for its application are very high and will not be fulfilled in most cases of commodity price or supply volatility.

In addition, German law recognises the concept of 'interference with the basis of the transaction' (section 313 of the German Civil Code). While this concept does not excuse performance per se, it primarily allows a party to demand the adaptation of a contract if:

- circumstances, which became the basis of a contract, have significantly changed since the contract was entered into;
- the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change; and
- one party cannot reasonably be expected to uphold the contract without adaptation.

The adaptation is carried out at the discretion of the court. In the adaptation, all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, are to be taken into account. If contract adaptation is impossible or unreasonable, the contract can be terminated.

To the extent applicable, article 79 of the Vienna Convention on the International Sale of Goods also recognises that parties are not liable for a failure to perform any of their obligations if they prove that the failure was due to an impediment beyond their control and that they could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

Nuisance

What are the rules on claims of nuisance to obstruct energy development? May operators be subject to nuisance and negligence claims from third parties?

Generally, pursuant to section 1004 of the German Civil Code, the owner is entitled to file an action for injunction if a third party interferes with its ownership. Hence, operators may be subject to such claims.

Pursuant to section 64 of the Federal Nature Conservation Act, nature conservation organisations are entitled to collective action against certain decisions of environmental authorities, for example, regarding projects that affect the environment, such as the erection of a power plant.

Liability and limitations

How may parties limit remedies by agreement?

Parties to an individually agreed civil law contract can agree that a simple form of negligence will not entitle claims to damages. However, a party cannot be released in advance from liability for wilful conduct (section 276, paragraph 3 of the German Civil Code). The parties can also agree on lump-sum claims of damages. This would be understood as a prior estimation of the amount of damages, so as to reverse the burden of proof. The entity causing the damage cannot be prevented from proving that the actual damage is less than what was agreed beforehand.

In standard terms and conditions, lump-sum claims for damages cannot be agreed to the extent that they either exceed (i) exceed the damage expected under normal circumstances or (ii), the customarily occurring decrease in value. The same applies or if the other party to the contract is not expressly permitted to show that damage or decrease in value has either not occurred or is substantially less than the lump sum (section 309, No. 5 of the German Civil Code). Similarly, in standard consumer contracts, liability for any injury to life, body, and health and in general for gross negligence cannot be excluded (section 309, No. 7 of the German Civil Code).

Is strict liability applicable for damage resulting from any activities in the energy sector?

The possessor of the nuclear facility is bound to damages and compensation, if nuclear fission or nuclear radiation result in injury, death or property damage (section 26 of the Atomic Energy Act). The obligation to indemnify is excluded if the damage is inevitable and if there is no defect in the protection device.

Offshore windfarm operators can demand compensation from the responsible transmission system operator (TSO) for delays in construction or interruption to operation of the offshore connection systems irrespective of whether the TSO is responsible for the interruption of the offshore connection system (section 17e of the Energy Industry Act (EnWG)).

Generally, the compensation amount is limited to 90 per cent of the lost feed-in remuneration as of day 11 of the system interruption. If the TSO acts wilfully, the compensation amounts to 100 per cent as of day one. However, under certain conditions, the responsible TSO is entitled to pass on the compensation payments for delays in construction or interruptions to the operation of offshore connection systems to the other TSOs.

COMMERCIAL/CIVIL LAW – PROCEDURAL

Enforcement

How do courts in your jurisdiction resolve competing clauses in multiple contracts relating to a single transaction, lease, licence or concession, with respect to choice of forum, choice of law or mode of dispute resolution?

When confronted with competing clauses in multiple contracts, courts analyse the contracts to decide which is relevant to the dispute at hand. This could either be a framework agreement or the more specific, latest agreement between the parties. The court will have to ascertain whether the latest agreement speaks to what is at issue between the parties.

With regard to choice of forum, a German court will assess whether the parties have reached a valid agreement on the competent court, testing the content of and the competence to conclude the agreement (section 38 of the German Code of Civil Procedure). Should one of the parties not have its seat in Germany, German courts will apply Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters or other applicable conventions between the respective home states.

With regard to the choice of law, the relevant regulation concerning contractual obligations is Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

With regard to different modes of dispute resolution, the court would interpret which of the agreements guides the relevant dispute and consider itself competent or not in light of the findings.

Are stepped and split dispute clauses common? Are they enforceable under the law of your jurisdiction?

Stepped dispute clauses are not uncommon, but rarely provide for more than two steps. The obligation to negotiate before commencing proceedings is the most usual step. The enforceability of the stepped dispute clauses depends on the wording chosen by the parties: they have to specify when the first step of the mechanism agreed in a clause ends and the next becomes relevant and possible, according to their agreement. The German Federal Court of Justice clarified in 2016 that the non-compliance with a stepped dispute clause does not affect the jurisdiction of the arbitral tribunal. However, the tribunal is prevented from deciding the respective case on the merits. Similarly, the Higher Regional Court of Cologne decided in 2017 that a complaint filed without prior negotiation as provided by the stepped and split dispute clause is also inadmissible.

Split dispute clauses, where one party can decide whether to go to arbitration or to litigation and the other party just has one of these options, are unusual. Such split dispute clauses are enforceable under German law, if they have been agreed in an individually negotiated contract or if the party that is not the user of standard terms and conditions is the party that can choose. Otherwise, if the split dispute clause solely benefits the user of the standard terms, the clause might be unenforceable. In any event, the party with the right to choose would have to contractually agree to notify the other party within a specified time frame which jurisdiction it intends to follow.

How is expert evidence used in your courts? What are the rules on engagement and use of experts?

Expert evidence can be provided only through court-appointed experts. A court will appoint an expert if one party requests the appointment of an expert and identifies the facts to be assessed by the expert. Expert testimony will be provided primarily in writing, but the court may order the expert to explain its report in a hearing. Courts often ask the parties to propose suitable experts to be appointed by the court.

In addition, parties are free to submit written expert evidence as part of their court submissions. Such submissions by party-appointed experts are qualified as substantiation of the party's pleading only and will not be considered as independent expert evidence.

What interim and emergency relief may a court in your jurisdiction grant for energy disputes?

There are no specific rules for interim and emergency relief with regard to energy disputes. Energy disputes are generally brought before civil law courts. As regards disputes between an electricity or gas network operator and the Federal Network Agency, the competent first instance court is the Higher Regional Court in Düsseldorf (civil court).

In civil courts, a party can apply for an injunction regarding the subject matter of the litigation (sections 935 and 940 of the German Code of Civil Procedure). There must be a concern that a change of the status quo might frustrate or render more difficult the realisation of the right enjoyed by a party. Furthermore, a party can apply for a writ of seizure, as an emergency matter to secure the later enforcement of a monetary claim (section 917 et seq of the German Code

of Civil Procedure).

Under administrative law, pursuing a legal remedy against an administrative act will generally suspend the binding effect of such act. In circumstances where the pursuit of a legal remedy does not have a binding effect (either by law or administrative act), interim relief against an administrative act of the state can be obtained in administrative courts both by the addressee of the act and affected third parties (section 80, 80a of the Code of Administrative Court Procedure). Furthermore, a party can apply for an interim order to preserve the status quo or obtain a temporary order as regards the dispute if there is a danger a right could be frustrated if the existing circumstances changed or if such change is required for the protection of the respective right (section 123 of the Code of Administrative Court Procedure).

What is the enforcement process for foreign judgments and foreign arbitral awards in energy disputes in your jurisdiction?

The general rules apply to the enforcement of foreign judgments and foreign arbitral awards resulting from energy disputes. For judgments rendered in an EU member state, Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies and permits the recognition and enforcement of foreign judgments just like domestic judgments, unless one of the limited grounds for refusal applies, most importantly that the judgment is manifestly contrary to public policy in the member state addressed. Similar rules apply to judgments rendered in Switzerland, Norway and Iceland.

For judgments rendered in most other countries, the domestic rules for the recognition and enforcement of foreign judgments apply (sections 328 and 722 of the German Code of Civil Procedure). In addition to specific requirements relating to the particularities of the individual case, the key criteria for the recognition of foreign judgments are reciprocity between the state rendering the judgment and Germany, and compliance of the foreign judgment with public policy. It is pertinent to note that reciprocity is not confirmed for China and Russia.

The recognition and enforcement of foreign arbitral awards is based on the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention is incorporated into section 1061 of the German Code of Civil Procedure. Further conventions exist, which may permit facilitated recognition and enforcement of foreign awards in selected bilateral relationships.

Alternative dispute resolution

Are there any arbitration institutions that specifically administer energy disputes in your jurisdiction?

No, there is no specific arbitration institution for energy disputes. The German Institution of Arbitration (DIS) also administers energy disputes.

Is there any general preference for litigation over arbitration or vice versa in the energy sector in your jurisdiction?

With regard to disputes between private parties, the mode of dispute resolution depends on the parties' choices and agreements. Disputes between companies on energy supply or engineering, procurement and construction contracts are often referred to arbitration. Disputes arising out of contracts with consumers almost exclusively go to court. As a consequence of the process regulation in the Energy Industry Act, disputes concerning regulatory or competition

issues are exclusively subject to ordinary jurisdiction.

Are statements made in settlement discussions (including mediation) confidential, discoverable or without prejudice?

It is usual for private companies in settlement discussions to agree that the content of their written and oral statements and the results of the settlement discussions or mediation are confidential and may not be disclosed, either by the parties or counsel. Such a confidentiality agreement is binding on the parties.

Settlement discussions and the results of such settlement discussions are without prejudice in the sense that no prejudice or admission is created by the outcome of such discussions or the positions held for any future proceedings.

Settlement positions and outcomes are generally not discoverable from private entities. The main reason is that the concept of 'discovery of documents' does not exist (exceptions apply, most notably, the discovery of documents is often possible in arbitral proceedings). Each party generally has to submit its own evidence.

Privacy and privilege

Are there any data protection, trade secret or other privacy issues for the purposes of e-disclosure/e-discovery in a proceeding?

German law does not contain any specific regulation on e-discovery. Data privacy rules are important in German law and strict standards have to be consistently respected in all legal undertakings, such as the transmission of data, for example, for the purposes of discovery or disclosure in foreign court proceedings.

Noteworthy is the newly enacted Regulation (EU) 679/2016 of 27 April 2016 (General Data Protection Regulation (GDPR)), which came into force on 25 May 2018 and limits the ability to process personal data for the purposes of court and arbitration proceedings. The GDPR provides for increased liability of companies for improper processing, storing or distribution of private data.

What are the rules in your jurisdiction regarding attorney-client privilege and work product privileges?

Because the concept of discovery generally does not exist, both attorney–client privilege and work product privileges as defences against discovery do not exist as such. The German law equivalent is professional secrecy, which obliges attorneys and their assistants to keep secret anything they learn in their role. Accordingly, attorneys have a right to refuse testimony about facts that have become known to them in their role. The professional secrecy obligation encompasses the attorneys' files in their possession. As of today, in-house lawyers are not considered attorneys in relation to their employer and are neither obliged nor benefit from the concept of professional secrecy.

Jurisdiction

Must some energy disputes, as a matter of jurisdiction, first be heard before an administrative agency?

As pursuant to general administrative law, final decisions of the regulatory authorities require preliminary administrative proceedings in which the affected party is granted the right to be heard. Consumer claims may need to be heard by a

conciliation agency before they can go to court if the amount in dispute is below €750 (section 15a of the Introductory Act to the German Civil Code in connection with local statutes in the states of Germany).

REGULATORY

Relevant agencies

Identify the principal agencies that regulate the energy sector and briefly describe their general jurisdiction.

The Federal Network Agency as well as the relevant regulatory authorities of the states of Germany are the responsible authorities for the regulation of energy network operators. The Energy Industry Act and the corresponding regulations contain, in a nutshell, provisions regarding network access and network connection as well as provisions regarding the calculation of the grid fees for the use of the energy networks. Due to the monopoly structure of energy networks, the respective system operators are subject to specific grid regulation to ensure non-discriminatory grid access and grid usage.

The Federal Cartel Office as well as the relevant cartel authorities of the states of Germany are independent competition authorities responsible for the protection of competition. The German Competition Act is the central legal basis for the cartel offices' work. With regard to the value chain of the energy sector, the generation, trade and supply of power to customers shall take place in free, non-regulated markets. To ensure competition on these markets, the Federal Cartel Office and respective cartel offices of the states of Germany are empowered to investigate and prosecute anticompetitive or manipulative practices.

Moreover, there are several authorities competent to issue public permits for the construction or operation of energy projects, such as the mining offices of the states of Germany or the Pollution Control Authorities.

Access to infrastructure

Do new entrants to the market have rights to access infrastructure? If so, may the regulator intervene to facilitate access?

The Energy Industry Act provides new entrants with the right to non-discriminatory access to the existing gas and electricity networks. Network operators have to grant access to everyone subject to objectively justifiable criteria. The network operators can deny such claims for access only if they can prove that granting access is either impossible or unreasonable. Access can, for example, be impossible due to technical preconditions or it could be deemed unreasonable if the access would lead to disproportionate detriments for the network operator.

Such rejection of network access has to be substantiated thoroughly by the network operator and reported to the regulator. If rejected, the petitioner for access has the option to initiate proceedings before the regulator against the network operator. If the regulator decides that the rejection was unjustified, it can order the network operator to grant access. Furthermore, the new entrant could also initiate court proceedings against the network operator.

Judicial review

What is the mechanism for judicial review of decisions relating to the sector taken by administrative agencies and other public bodies? Are non-judicial procedures to challenge the decisions of the energy regulator available?

Decisions of the regulator can be appealed. The judicial procedure for such appeals is set forth in the Energy Industry

Act and basically follows the rules of administrative jurisdiction. The appeal against a decision must be filed within one month after service of the decision. The reasons for the appeal must then be handed in within another month starting with the filing of the appeal.

With regard to litigation, the Higher Regional Court in Düsseldorf is the exclusively competent court at first instance for the appeal against decisions of the Federal Network Agency. The decisions of the Higher Regional Court in Düsseldorf may be appealed to the Federal Supreme Court.

The legal framework (ie, the Energy Industry Act), does not contain non-judicial procedures to challenge the formal decisions of the energy regulator.

Fracking

What is the legal and regulatory position on hydraulic fracturing in your jurisdiction?

In August 2016, legislation was passed regarding hydraulic fracturing. On 11 February 2017, an act to prohibit unconventional fracturing entered into force in Germany. The Act forms part of a package of laws and regulations that regulate various aspects of fracturing and related mining, water, and environmental law issues (Act to Amend Water and Environmental Law Provisions to Prohibit and Minimise the Risks of Fracturing Technology) (Fracking Act), 4 August 2016, Federal Law Gazette I at 1975, BGBl website).

The Fracking Act generally prohibits unconventional fracturing, which is fracturing in shale, marl, clay and coal seam rocks. (Fracking Act, article 1(2, § 13a), 1, no. 1). It provides that the German Bundestag (parliament) will re-examine the appropriateness of the prohibition in 2021, taking into account the state of the art and the progress in research (id. article 1(2), § 13a, 7).

The German states are allowed, however, to permit a maximum of four experimental fracturing measures for research purposes to address existing knowledge gaps (id. article 1(2), § 13a, 2). An independent expert commission without decision-making power, whose members are selected by the German government, will supervise the experiments, report the findings to the German Bundestag and also make them available online. In addition, the independent expert commission will regularly update the public on the progress and results of the experiments. There will be an opportunity for the public to comment on the reports (id. article 1(2), § 13a, 6).

In addition, every fracturing project has to undergo an environmental impact assessment. (Regulation to introduce Environmental Impact Assessments and Mining Requirements for the Use of Fracturing Technologies and for Deep Drilling), 4 August 2016, BGBl. I at 1957, BGBl website).

Other regulatory issues

Describe any statutory or regulatory protection for indigenous groups.

In Germany, there is no specific protection for indigenous people, given that there is no distinguishable group of indigenous people.

Describe any legal or regulatory barriers to entry for foreign companies looking to participate in energy development in your jurisdiction.

Under the Foreign Trade and Payments Act the trade in goods, services, capital, payments and other types of trade with foreign territories, as well as the trade in foreign valuables and gold between residents (foreign trade and payments) is, in principle, not restricted. There are exemptions to this rule if national security interests are concerned.

On the basis of the European Energy Package, Germany introduced a rule on investment by third-country investors in German energy transmission networks. If certification is requested by a transmission system owner or a transmission system operator that is controlled by a person from a third country (ie, non-EU member state), the national regulatory authority shall notify the European Commission (compare section 4b paragraph 1 of the German Energy Industry Act). The regulatory authority shall also notify the European Commission if a third-party investor intends to acquire control over a transmission system or a transmission system operator (compare section 4c, 2nd sentence of the German Energy Industry Act).

What criminal, health and safety, and environmental liability do companies in the energy sector most commonly face, and what are the associated penalties?

There is no specific framework on energy companies' liability. Liability in the sense of legal consequences of non-compliance may derive from a broad range of substantive laws applicable to companies in the energy sector. In general, non-compliance may lead to public as well as civil liability (the latter one not covered here) and to criminal liability. It depends on the respective business activities and the applicable material laws.

Health and safety, as well as environmental requirements, may derive from the respective permits or statutory provisions. As regards the energy sector, the Federal Emission Control Act is of particular importance: the competent authorities may issue subsequent orders, also with regard to observing the evolving state of the art, and enforce necessary amendments to the plant in question. The competent authorities have the power to demand compliance with these requirements and may also take the measures necessary to enforce them, most notably by imposing penalty payments that may be significant. Ultimately, the authorities may also execute by substitution or even revoke the respective permit.

Apart from the broad range of material laws applicable in a particular case, such as liabilities under the Federal Soil Protection Act and corresponding remediation orders, further environmental liabilities may derive from the Environmental Liability Act and the Environmental Damage Act.

Non-compliance with the requirements of permits or statutory provisions may also qualify as a criminal act or, which is less severe, as an administrative offence, and be sanctioned accordingly. The individual material laws themselves define which wrongdoings qualify as an administrative offence or a criminal act, respectively. Further, the German Criminal Code qualifies certain environment-related conduct, such as water, soil and air pollution, as a criminal act. Administrative offences are sanctioned by administrative fines, which may also be imposed on the respective company; under the Federal Emission Control Act, such fines may amount to up to €50,000. Criminal liability applies to individuals only; however, representatives of a company may also be held liable.

Finally, the newly issued Federal Climate Protection Act dated 12 December 2019 provides for fines of up to €50,000 in case of non-compliance with yet-to-be released regulations of the federal government regarding the procurement of emission data from different sectors (energy industry, industry, buildings, traffic, agriculture, garbage industry, soil exploitation).

OTHER

Sovereign boundary disputes

Describe any actual or anticipated sovereign boundary disputes involving your jurisdiction that could affect the energy sector.

The German energy market changes owing to the energy policy turnaround, with the phasing-out of nuclear energy and the anticipated determination on the lignite and coal phase-out respectively, as well as an ever-increasing share of

electricity from renewable energies. The centre of electricity generation shifts to the north, with around 7GW offshore wind capacity to be installed by the end of this decade. This leads to a shift in load flows, too, as the majority of electricity consumption still takes place in the south. Neighbouring countries are affected because the load flow abroad also reacts to the changed situation in Germany. This led to political discussions about the pan-European market area design and it cannot be excluded that utilities or even member states will approach the courts to claim compensation or appeal against measures taken by European bodies such as the European Commission or ACER.

In addition, disputes occasionally concern hydroelectric power stations located in border waters such as the river Rhine, or offshore windfarm projects located in the exclusive economic area, where determining the specific border location may be challenging.

Furthermore, actions regarding climate change-related claims against companies, governments and individuals are becoming more and more important worldwide and in Germany, too. Claims are directed at challenging climate change-related legislation and policies or their application with the overall objective to accelerate the transition to decarbonisation. This has implications for entities in carbon-intensive sectors as well as in energy production.

Energy treaties

Is your jurisdiction party to the Energy Charter Treaty or any other energy treaty?

The Energy Charter Treaty entered into force in Germany in 1994.

Investment protection

Describe any available measures for protecting investors in the energy industry in your jurisdiction.

National and foreign investors are protected by the guarantees of access to courts in which the decisions and measures of the state can be reviewed. The ultimate guarantee for national investors are the fundamental freedoms contained in the Basic Law, the German Constitution. These include the right to property and the state institutions' obligation to act in accordance with the law. Specifically, the German Constitutional Court has recently found that the Basic Law's safeguard for private ownership can protect (nuclear) investments of energy companies made in trust in the existing legal framework as it stands at the time.

Foreign investors in the energy industry are protected against measures imposed by the state through investment protection treaties. In addition to the Energy Charter Treaty, Germany is bound by a multitude of bilateral investment treaties, which protect investors depending on their nationality.

It is worth emphasising that the European Court of Justice's decision in the widely noted Achmea case may affect the ability of EU investors to rely on investment protection on the basis of intra-EU BITs. The Court found intra-EU investment arbitration in its current format incompatible with the doctrine of full effectiveness of EU law. The German Federal Court of Justice has subsequently annulled the investment arbitration award in the Achmea case and thereby followed the European Court of Justice.

However, this does not necessarily mean a loss of investment treaty protection in the Energy industry altogether. The investment arbitration tribunal hearing the case between the Swedish company Vattenfall and the Federal Republic of Germany has held that the reasoning for intra-EU BITs does not apply to an investment treaty entirely different in nature, namely the Energy Charter Treaty to which the EU itself is a party.

Cybersecurity

Describe any legal standards or best practices regarding cybersecurity relevant to the energy industry in your jurisdiction, including those related to the applicable standard of care.

The legal framework for cybersecurity is composed of several provisions in different laws. Only a few of them are specific to the energy industry.

The 2015 IT Security Act, primarily introducing changes to existing laws such as the Act to Strengthen the Security of Federal Information Technology, applies to 'operators of critical infrastructure', such as businesses in the energy sector. The operators are obliged to implement technical and organisational measures to ensure the infrastructure's integrity, safety and confidentiality. The Federal Office for Security in Information Technology publishes guidelines in this area (eg, the IT Grundschutz). The changes to German legislation required by the NIS Directive, also known as the Cybersecurity Directive, were relatively small, since the key requirements are already part of the 2015 IT Security Act. For instance, a new aspect is the regulation on digital services providers. Furthermore, the EU Cybersecurity Act (EU Regulation 2019/881) entered into force on 27 June 2019, setting the new mandate of ENISA, the EU Agency for Cybersecurity, establishing the European cybersecurity certification framework and complementing the NIS Directive. The act also targets the energy sector. Generally, companies in the EU are supposed to benefit from having to certify their products, processes and services only once and see their certificates recognised across the EU.

The Act on Digitalisation of the Energy Transition includes dedicated provisions on cybersecurity in the energy industry sector (sections 19 et seq, Energy Act). They particularly apply in the area of smart metering and smart grids and aim to secure the gateway components and network.

Further (general) provisions are held in the Federal Data Protection Act, the Telecommunications Act and the Telemedia Act.

UPDATE AND TRENDS

Update and trends

List any major developments (case law, statute or regulation) that are anticipated to affect the energy sector in your jurisdiction in the next 12 months, including any developments related to the taxation of energy projects. What is the anticipated impact of climate change regulations, treaties and public opinion on energy disputes?

As briefly stated above, we are witnessing a growing global trend for climate change litigation. While the term is broad, it generally encompasses litigation between private individuals and public entities based on public law and between private entities arising from modifications to the regulatory framework to protect the environment. Most frequently, such litigation aims at challenging climate change-related legislation or their application, preventing emissions and their detrimental impact or seeking compensation for necessary adaptation to climate change. For companies active in the energy sector, litigation against public entities in areas related to climate change becomes increasingly common and viable. Such disputes may target, for example, certain emission levels, fossil fuel bans, minimum renewable energy obligations or restrictions imposed by executive actions.

A new trend in this context is the attempt to hold companies with higher emissions liable for detrimental environmental consequences elsewhere in the world. A prime example is a case brought by a Peruvian farmer against RWE. The action targets RWE as the company is allegedly responsible for the melting of a glacier due to climate change, which now affects the city of Huaraz from which the farmer originates. While the first instance court (Regional Court of Essen) dismissed the action, the Peruvian farmer lodged an appeal with the Higher Regional Court of Hamm. The

Peruvian farmer succeeded in convincing the Higher Regional Court of Hamm to accept jurisdiction and hear the case, arguing that RWE is liable for the negative impact of the resulting water level rise in his home town of Huaraz, Peru, as it is a major contributor to global warming. The appeal is still pending, and the Higher Regional Court Hamm has recently started taking expert evidence.

Another noteworthy complaint was initiated by three farming families and the environmental organisation Greenpeace before the Administrative Court of Berlin to compel the German federal government to combat climate change much more vigorously than it has done so far. An affirmative judgment of the Administrative Court of Berlin would likely have led to state liability proceedings in front of the civil courts. Since the state usually tries to reduce its damages liability risk, this climate complaint could have compelled the German federal government to push for stricter legislation in the field of climate and environmental protection. However, the Administrative Court of Berlin rejected the complaint as inadmissible on 31 October 2019, but allowed the appeal against the decision to the Higher Administrative Court of Berlin-Brandenburg due to the fundamental importance of the case.

Finally, from a legislative point of view, Germany issued the above-mentioned Federal Climate Protection Act on 12 December 2019, which aims at implementing the climate protection goals of the Paris Agreement on Climate Change and sets the German climate objectives for 2030.

On 22 May 2019, the EU Council of Ministers adopted four Directives and four Regulations of the Clean Energy Package, the most comprehensive EU legislative package on energy and climate policy to date.

The Regulations will be directly applicable in each member state, while the Directives will have to be transposed into national law.

By 2030, the European Union has set itself the target of reducing internal EU greenhouse gas emissions by at least 40 per cent compared with 1990 levels. In addition, the share of renewable energies in the EU's final energy consumption is to be increased to 32 per cent and the EU's primary energy consumption is to be reduced by 32.5 per cent compared with a reference development. For this purpose, the European electricity markets are to grow closer together and be made fit for the increasing share of renewable energies throughout Europe. Furthermore, the rights and opportunities of final customers in the electricity markets are to be strengthened.

The revised Renewable Energy Directive (EU) 2018/2001

The revised Renewable Energy Directive provides a new framework for renewable energies. The share of renewable energies in the EU's final energy consumption is to be increased to at least 32 per cent by 2030. In addition to common funding rules for electricity from renewables, the Directive also contains measures in the heating and transport sectors, which together account for two-thirds of energy consumption. For example, the member states will have to increase the share of renewables they use for heating and cooling by 1.3 percentage points annually from 2021. In the transport sector, fuel distributors will be obliged to increase the share of renewable fuels to 14 per cent by 2030 – primarily through new technologies and fuels such as electro mobility and 'power to X' (electricity-based synthetic fuels). The share of first-generation biofuels produced from food crops are to be limited.

The revised Energy Efficiency Directive (EU) 2018/2002

The revised Energy Efficiency Directive stipulates that primary energy consumption within the EU are to be reduced by 32.5 per cent by 2030 compared with a reference development. Member states remain free to decide on their indicative contribution to the EU energy efficiency target for 2030. The main implementation instrument – the 'energy efficiency obligation' – was extended beyond 2020. In this context, annual real savings of 0.8 per cent were agreed for the first time. Although the member states had to adopt measures to achieve 1.5 per cent so far, there were numerous exceptions by which countries could reduce this target to below the real rate of 0.8 per cent, which has now been agreed.

The revised Energy Performance of Building Directive (EU) 2018/844

The revised Energy Performance of Building Directive provides for a further development of the long-term renovation

strategies previously regulated in the Energy Efficiency Directive. Furthermore, the Directive contains requirements with which new buildings can be better adapted to the future needs and possibilities of the energy and transport infrastructure. The Directive provides an incentive for the establishment of the necessary infrastructure for electro mobility. In addition to the continuing possibility of 'alternative measures', there will be another alternative to the inspection of heating and air-conditioning systems in the future: the installation of building automation and control systems. The EU Commission will also develop an intelligence capability indicator to assess the technological capability of a building for self-regulation and communication with residents and the electricity grid.

New version of the Internal Electricity Market Directive (EU) 2019/944

The new version of the Internal Electricity Market Directive strengthens the rights of consumers and their participation in the electricity market in Europe. Electricity suppliers with more than 200,000 customers will have to offer flexible electricity tariffs in future. This is of particular interest to consumers who use an intelligent electricity meter (smart meter). These consumers can choose a tariff that allows them to purchase cheaper electricity at certain times and adjust their consumption patterns accordingly, for example, charging their electric car when electricity costs are at the lowest price. For the first time, the new Electricity Market Directive also contains basic rules that facilitate the work of independent aggregators. These are suppliers that bundle small capacities from different consumers and distribute them on the market.

Governance Regulation (EU) 2018/1999

The new Energy Union Governance Regulation provides a new planning and monitoring system for the implementation of the Energy Union's objectives, in particular the EU-2030 energy and climate objectives. Member states are required to draw up Integrated National Energy and Climate Plans (NECPs) by 2030, along the lines of the German Energy Concept, and to develop long-term strategies for reducing greenhouse gases and carbon emissions by 2050.

New version of the Electricity Market Regulation (EU) 2019/943

The new version of the Electricity Market Regulation provides, among other aspects, for the interconnectors to be opened up more to cross-border electricity trading. According to the new Regulation, the capacities made available for trading will gradually increase to 70 per cent. The aim is to increase EU-wide electricity trading and, thus, among other aspects, to reduce the cost of electricity supply. Associated with this is also the question of how member states deal with internal bottlenecks in their grid. Increased cross-border trade increases the pressure on the grids. In future, member states with internal bottlenecks will be able to decide whether to divide their electricity market into several bidding zones or to submit an action plan to reduce grid bottlenecks.

In future, security of supply should be considered more on a cross-border basis. That is because power plant capacities in neighbouring countries also contribute to security of supply in the member states. As a result, security of supply can be achieved more reliably through the Europe-wide exchange of electricity and the associated costs can be reduced, as less power plant capacity is required overall. The European Energy Security Report shall provide the foundation for this.

For the first time, Europe-wide binding requirements for capacity reserves and capacity markets have been introduced. For example, carbon-intensive power plants are excluded from participating in capacity mechanisms.

New version of the ACER Regulation (EU) 2019/942

The national regulatory agencies in the energy sector (in Germany: the Federal Network Agency) will in future be better involved in the internal decision-making processes of the European Agency for the Cooperation of Energy Regulators (ACER). In addition, ACER's competencies can be expanded.

Risk-preparedness Regulation for the electricity sector (EU) 2019/941

The new Risk-preparedness Regulation stipulates that member states should first develop national crisis scenarios that represent the main risks for their national electricity supply. On this basis, the member states must then draw up risk prevention plans containing both national and cross-border crisis prevention and management measures.