

Energy Disputes

Contributing editors

William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado
and Ayaz Ibrahimov



2018

GETTING THE
DEAL THROUGH

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Lauren W Varnado and Ayaz Ibrahimov
Norton Rose Fulbright

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Law Business Research Ltd
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Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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Preface

Energy Disputes 2018

Third edition

Getting the Deal Through is delighted to publish the third edition of *Energy Disputes*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on India.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Wood, Neil Q Miller, Holly Stebbing, Lauren W Varnado and Ayaz Ibrahimov of Norton Rose Fulbright LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
January 2018

Germany

Markus Burianski and Thomas Burmeister

White & Case LLP

General

1 Describe the areas of energy development in the country.

The German energy landscape shows a conventional energy share in total energy consumption of roughly 35 per cent oil, 20 per cent gas, 12 per cent hard coal, 12 per cent lignite and 8 per cent nuclear energy. The much-talked-about German energy transition has brought many initiatives with a focus on promoting renewable energy and its smooth integration into the market. The energy transition equally addresses, among other things, storage, network and security of supply issues.

Due 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. Looking at nuclear power, it has been announced that Germany will shut down all nuclear power plants by 2022. In December 2016, the German parliament voted for a law that limits the nuclear power plant operators' liability to the closing down and demolition of the nuclear power plants. In return, the state takes over the liability for temporary and ultimate storage.

Recently there have been more and more voices advocating a withdrawal from lignite and coal used for power generation. The reason for this is the high emission of greenhouse gases by coal and lignite power plants. Starting in October 2016 and until October 2019, seven lignite power plants shall be temporarily shut down and used only in emergency cases. After four years of such temporary shutdown, those power plants shall be finally shut down.

The high percentage of oil consumption mainly stems from the transport sector, which accounts for over 50 per cent of German petroleum consumption. In order to reduce consumption, the government fosters electro mobility and the use of alternative fuels, such as natural gas and liquefied natural gas.

While natural gas plays a key role in its mix of energy sources, Germany is still highly dependent on imports of natural gas. Thirty-five per cent is imported from Russia, 34 per cent from Norway, 29 per cent from the Netherlands and 2 per cent from other countries. Domestic production of natural gas covers about 7 per cent of gas consumption. With regard to transportation, the network of gas pipelines with a total length of more than 510,000km shall be used as a composite system. In that system natural gas, biogas as well as hydrogen and synthetic methane produced from renewable energy shall be combined.

Hard coal and lignite account for almost a quarter of primary energy consumption. Coal is the most important energy source in the production of electricity. Around 45 per cent of electricity is generated from coal.

The renewable sector today makes up almost 13 per cent of total energy consumption. 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.

2 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 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

3 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, which, 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.

4 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 from 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 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.

5 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 of the 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 EFET-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.

6 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, it 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.

7 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.

8 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 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 exceed the damage expected under normal circumstances, the customarily occurring decrease in value 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 gross negligence cannot be excluded.

9 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 of 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

10 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.

11 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 formulations chosen by the parties: they have to specify when one 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 has recently made clear 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.

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.

12 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.

13 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).

14 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 722 and 328 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 of foreign awards in selected bilateral relationships.

15 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.

16 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 EPC 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.

17 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.

18 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.

Update and trends

The Federal Ministry for Economic Affairs and Energy has recently issued a legislative proposal for an amendment to the existing German regulation for access to the electricity network. In this proposal the German legislator intends to codify the single bidding zone (price zone for electricity) in Germany. Until today, the single bidding zone has been the longstanding custom and practice in Germany, but has yet to be codified in the form of law. One of the main motives of the proposal is to prevent Transmission System Operators (TSOs) from unilaterally dividing the German bidding zone without any prior public consent.

However, this amendment may not be in line with future European law. In the 'Winter Package', the European Commission has already expressed its intention to strengthen the electricity market within the EU and maximise economic efficiency and cross-border trading opportunities. The Commission plans to implement a formal procedure (the 'Bidding Zone Review'), in which TSOs shall submit a proposal to the Commission regarding whether to amend or maintain the bidding zone configuration. The Commission will then have the final decision regarding the division of bidding zones within the European Union.

19 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'.

20 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

21 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.

22 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 institute 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.

23 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.

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

In August 2016, legislation was passed regarding hydraulic fracturing. According to the amended Federal Water Act, the fracturing of shale formations and coal beds for the exploitation of oil or natural gas is generally not allowed. However, such fracturing may be allowed for experimental measures in order to examine the effect of hydraulic fracturing to the environment, in particular to underground formations and to groundwater. Such examinations subsequently shall be evaluated by an independent expert committee deployed by the federal government. This expert committee shall report on the results of the experimental measures annually, for the first time by 30 June 2018 and publish their reports publicly on the internet. The federal government will then, on the basis of these reports, decide in 2021 on the continuance of the general prohibition of hydraulic fracturing according to the Federal Water Act.

25 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.

26 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 the investment by third-country investors into German energy transmission networks. In case 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. 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.

27 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 material 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 €50,000. Criminal liability applies to individuals only; however, representatives of a company may also be held liable.

Other

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

The German energy market changes due to the energy policy turnaround, with the phasing out of nuclear energy and an ever-increasing

share of electricity from renewable energies. The centre of electricity generation shifts to the north, with around 7GW offshore wind capacity 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.

29 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.

30 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.

31 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 German 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 obligated to implement technical and organisational measures to ensure the infrastructure's integrity, safety and confidentiality. The Federal Bureau publishes guidelines in this area (eg, the 'IT Grundschutz'). In

WHITE & CASE

Markus Burianski
Thomas Burmeister

mburianski@whitecase.com
tburmeister@whitecase.com

Bockenheimer Landstrasse 20
60323 Frankfurt
Germany

Tel: +49 69 29994 0
Fax: +49 69 29994 1444
www.whitecase.com

Graf-Adolf-Platz 15
40213 Düsseldorf
Germany

addition, the EU is close to finalising a new directive designed to create common standards on network and information security across the EU (the 'NIS Directive', also known as the 'Cybersecurity Directive'), which might lead to further changes in German law.

The German Energy Act includes dedicated provisions on cybersecurity in the energy industry sector (sections 21b et seq EnWG). They particularly apply in the area of smart metering and smart grids and aim to secure the gateway components and network. However, large parts of such legislation are based on regulations to be issued by the relevant ministry, detailing the technical and organisational requirements, which have yet to be enacted.

Further (general) provisions are held in the German Federal Data Protection Act (BDSG), the German Telecommunications Act and the German Telemedia Act. In particular, the Annex to the first sentence of section 9 of the BDSG includes further details on technical and organisational measures.

Getting the Deal Through

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Anti-Money Laundering
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Arbitration
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Cartel Regulation
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