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Renewable Energy Disputes in the Asia-Pacific – Emerging Trends and Challenges

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The Asia-Pacific countries are experiencing exponential growth in renewables projects, as they seek to transition away from power generated through fossil fuels. Disputes inevitably arise as stakeholders navigate complex challenges in the rapidly evolving field, and a number of trends have emerged insofar as these disputes are concerned. **In the next 10 years, some $3.3 trillion of investments into power generation across the Asia-Pacific region is expected; half in renewables. Indeed, more than half of the world's power will be generated in the Asia-Pacific, of which almost half is expected to be from renewable sources. While these ambitious projects present enormous opportunities for stakeholders, there are also significant commercial risks and challenges that have in turn led to an increase in disputes. This update highlights some of the key risks for parties to consider in allocating risks, and proposes steps to better prepare for any disputes.** The Asia-Pacific countries are experiencing exponential growth in renewables projects, as they seek to transition away from power generated through fossil fuels. Notably, Japan and South Korea have pledged to achieve net zero by 2050. Recently, China for the first time made clear policy statements on carbon neutrality, declaring its goal to achieve carbon neutrality by 2060. At the same time, many Asia-Pacific countries have experienced an unprecedented surge in energy demand. These factors have accelerated the growth in the renewables sphere. Disputes inevitably arise as stakeholders navigate complex challenges in the rapidly evolving field. A number of trends have emerged insofar as these disputes are concerned. **Disputes caused by the rapid evolution of underlying technologies** First, a significant number of disputes relate to defective or ineffective technology. This is due to a number of reasons, including:

- Reliance on novel technologies that are rapidly evolving. In many projects, the technology being implemented is still in infancy. It is not uncommon for these technologies to falter or fail to perform to the expectations of various stakeholders.
- Inexperienced labor may contribute to inability to properly develop projects utilizing novel technologies.
- The lack of established industry standards such that parties are unable to accurately gauge how the project will operate upon completion.

Disputes may then crystallize, involving claims of misrepresentation or breach of contract. Ascertaining the party at fault (designers, suppliers and contractors) and to what extent require extensive scientific and engineering expertise, oftentimes in areas where research is limited. A further issue that the technology gives rise to is that the technology employed at the start of the project may quickly (and unexpectedly) become outdated by completion, leading to buyer's remorse. **Complex interplay of project and finance structures** Renewables projects typically require significant investment. Whether the financing is by debt or equity, a couple of issues tend to arise:

- The project assets and revenue streams are typically used as collateral. This requires energy generation within an economically viable time period. Therefore, any delays in achieving the generation required (often the case) have knock-on effects on the financing arrangement.
- Moreover, the capital-intensive nature of such projects often means having to pool investment from multiple investors, potentially giving rise to divergent interests.

In addition to complex finance structures, stakeholders must also navigate a web of relationships with an array of third-party contractors and suppliers, governed by a multitude of contracts including engineering, procurement and construction contracts, service agreements, and operation and maintenance agreements. **Increased vulnerability to climate change** The operational efficacy of the technologies utilized in renewables projects may be substantially impacted by the adverse effects of climate change. Solar panels (ironically) experience diminished functionality and output amid warmer temperatures and wind turbines may shut down in response to excessively high wind speeds. Decreased precipitation and increasing evaporation rates caused by rising temperatures also pose significant challenges to hydropower generation. Even mild weather fluctuations – such as a drop in wind speed or increases in cloud cover – can significantly affect the power output of renewable sources. Asia, the continent with the greatest land mass extending to the

Artic, is warming significantly quicker than the global average. Extreme weather and climate change impacts are also increasing in Asia, with the continent having experienced numerous severe droughts and floods in recent years. For example, the Lower Sesan 2 Dam in Cambodia, which became operational in 2018, has struggled to reach full generation capacity due to prolonged droughts. Stakeholders must thus proactively assess climate-related risks and cater for the allocation of such risks in the project documents. **Heightened regulatory risks** The renewables sector is exposed not only to commercial or counterparty risks faced by conventional construction and energy projects, but also distinctly greater regulatory risk. In particular, renewable energy projects are typically located in remote areas over large areas of land, making environmental and land use permits more difficult to obtain compared to other construction projects. In an age of environmental consciousness, approval processes for renewables projects are often subject to considerable public and political scrutiny, sometimes even after the project has been approved. Delays in obtaining licenses will likely lead to disputes when deadlines and milestones set out in the project documents are not satisfied; or worse, a refusal to license or a revocation of a license could jeopardise the project entirely. **Supply chain issues** In an increasingly fractious world, and a 'war' on technological advancement being waged openly by major powers, there is every risk that technology or components or material needed from one country could, at moment's notice, become the subject of export control, disrupting supply chains and the completion of a project. **Proactive engagement and careful allocation of risks** The risks associated with renewables projects require careful attention to a number of substantive and procedural issues. First, and most obviously, risk allocation. Among others, a few key points should be considered.

- Possibly the most challenging aspect of renewables projects are the disputes that arise from the implementation of the technology, the degradation of the technology, and how the efficacy of the technology could be affected by the environment. These issues are unlike typical construction disputes because the causes and effects of any damage done to the project are not necessarily linear or not easily assignable to any particular party. Careful thought as to who should bear the risk of such damage is advisable.
- The need for express stipulation may depend on the governing law chosen. Particularly when it comes to the ability of a party to rely on external circumstances to discharge one's liability, different laws are stricter than others. The English (and Singapore) common law for instance requires the external event to be both unforeseeable and to affect the root of the contract. Any circumstances short of this high threshold will therefore require contractual stipulation.
- Parties should also stipulate the extent of compensation or damages that they could be liable for in the event of default. Again, different laws may impose limitations: for example, on the extent of liquidated damages or exclusions of liability.
- Where relevant, exit options should also be negotiated and stipulated. Any compensation for the exercise of options should also comply with any relevant laws. For example, there was a period when options governed by Indian law were being challenged until the Supreme Court resolved the uncertainty.

Second, the risk of government interference or action adversely affecting the project makes it advisable for investors to structure their investment so that they are able to avail themselves of investment treaty protection should it become necessary. If the project involves the government as a counterparty, stabilization clauses and other guarantees should be considered as well. Third, disputes may involve multiple parties and contracts. While most major institutional rules today allow for consolidation or joinder, their permissiveness and the timing of when the necessary applications should be made vary slightly. Moreover, thought should be given to whether to include advance consent to consolidation, joinder and claims under multiple contracts in order to avoid prolonged jurisdictional and admissibility fights when the dispute arises. Last but not least, we have consistently found that parties who pro-actively manage their projects by consulting with their legal advisers and experts throughout the life-cycle of the project tend to be better prepared when a dispute arises.

The following Gibson Dunn lawyers prepared this update: Paul Tan, Jonathan Lai, and Viraen Vaswani.

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