Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration in Germany in the Energy Sector

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I Introduction (1)

1 The complexity, the size and the long-term nature of energy projects have always exposed the market players in the energy and power sector to high risks. In addition, the German energy and power sector has been facing constant legislative and regulatory changes over the last decade. Liberalisation has turned the sector into a very dynamic market. As a consequence, the market players face rapid economic changes, uncertainties and increasing competition. Where such risks materialize, disputes become inevitable. Accordingly, it is not surprising that the sector is regularly reported to be among top users of arbitration. (2) Increasing competition and decreasing profit margins have added even more pressure on the market players to fight their conflicts out and reduce the possibilities for – and the likelihood of – an amicable dispute settlement.

2 As to the actors involved on claimant's and/or respondent's side in arbitral proceedings, one may essentially distinguish four major categories of disputes in the energy sector. They are:

- *State – State Disputes*: This category of disputes usually results from undelimited land and/or maritime boundaries. Such disputes involve sovereign states, both on Claimant's and Respondent's side, and they fall within the area of public international law. Usually, such disputes relate also to the control over natural resources. Even in today's world, they are less exotic as one may think and do not only take place in the Arctic or Antarctic. (3)

  The United Nations Convention on the Law of the Sea (UNCLOS) is the main source of law for delimiting maritime boundaries, as it has been ratified by most of the world's states. Under UNCLOS, the International Tribunal for the Law of the Sea (ITLOS) has been established in Hamburg, Germany. (4)

- *Investor – State Disputes*: Such disputes may arise in particular when governments unilaterally alter the terms and conditions of an existing contract or expropriate an investment in order to nationalize it. They may originate either from *(i)* investment contracts concluded between states and private investors (*e.g.* production sharing contracts (PSC), build, operate and transfer agreements (BOT), etc.); *(ii)* a bi- or multilateral

contracts (PSC), build, operate and transfer agreements (BOT), etc.), (ii) a BIT or multilateral investment (protection or promotion) treaty (BIT / MIT) concluded between the host country, *i.e.* the country in which the investment was made, and the home country of the investor; or *(iii)* possibly both. While investment contract arbitration is not so much different from commercial arbitration – except for involving a sovereign state and the implications resulting thereof – investment treaty arbitration is different and distinct from commercial arbitration. (5) In investment treaty arbitration, the arbitration agreement usually results from a host state having made a unilateral offer in a BIT or MIT with the home state of the investor to arbitrate disputes resulting under such treaty. The investor may accept the offer by commencing arbitration. In many cases, there may not even be a contractual relationship between the investor and the host state. The most particular and significant multilateral investment treaty to energy industry is the Energy Charter Treaty (*cf. infra* para. 13). (6)

- *Business – Business (B2B) Disputes*: This category of disputes is typically settled by means of (international) commercial arbitration if an amicable settlement of the dispute fails. They signify the majority of disputes in the energy sector and their importance to the energy business is determined by their size, financial significance and complexity. In this category, one may distinguish two main categories of disputes arising out of B2Bagreements, *i.e.* agreements on a horizontal level, *e.g.* amongst joint venture partners, or on a vertical level, *e.g.* construction contracts and sale and purchase agreements.
- *Business – Consumer (B2C) Disputes*: Whilst German energy utilities (*Energieversorgungsunternehmen* – 'EVU') (7) are committed to alternative dispute resolution (Conciliation Committee Energy), (8) arbitration itself is only of minor relevance in B2C disputes in the energy sector.

II State – State Disputes

A Introduction to UNCLOS

3 At the first glance, it seems to be slightly far-fetched to discuss arbitration arising out of the United Nations Convention on the Law of the Sea ('UNCLOS') in the context of Arbitration in the Energy Sector in Germany. However, the recent discussions about whether the Riffgat Wind park has been built on German territory or (at least) partially on the territory of the Netherlands (9) gave reason to look into this area of law in the context of this chapter for two reasons: first, under the UNCLOS, which governs border disputes like the aforementioned, member states (10) may *inter alia* opt for arbitration. And second, the International Tribunal for the Law of the Sea (ITLOS), (11) being the dispute settlement body established under the UNCLOS, (12) has its seat in Hamburg and is involved to some extent in the respective arbitration proceedings at the preparatory stage.

4 Territorial disputes are likely to increase in the future, (13) with more and more off-shore energy projects seeking and competing for the best sites and smaller gas and oil fields becoming financially attractive. Arbitration under the UNCLOS is likely to be key to the resolution of those disputes.

5 The UNCLOS provides the legal framework for the use and utilization of the seas and its resources. Part XV UNCLOS provides rules for the settlement of disputes arising from the interpretation or application of the Convention between member states. Pursuant to Article 287 (1) UNCLOS, disputes can be settled either by the ITLOS, the International Court of Justice ('ICJ') or arbitration, respectively special arbitration in accordance with Annex VII and VIII. Ideally, the preferred means of dispute resolution is chosen by the member states when signing, ratifying or acceding to the Convention.

B Ad hoc *Arbitration under UNCLOS*

6 However, while of the more than 160 parties to the UNCLOS less than a dozen have expressly chosen arbitration, 117 parties have omitted a declaration under Article 287 (1) UNCLOS. (14) As arbitration under Annex VII UNLCOS is the default dispute resolution mechanism if no express choice has been made by the respective party, aside from ITLOS arbitration under Annex VII UNCLOS can in fact be regarded as the widely accepted forum for UNCLOS disputes.

7 The arbitral tribunal constituted under the aforementioned Annex VII UNCLOS consists of five members, one arbitrator appointed by each party and the remaining three arbitrators either being appointed by agreement of the parties or, in the absence of such agreement, the President of the ITLOS, in accordance with Article 3 (e) of Annex VII UNCLOS, will appoint them unless the parties have agreed on a different appointing authority. The arbitrators appointed by the respective appointing authority shall be chosen from a list of arbitrators maintained by the Secretary General of the United Nations. (15) The *ad hoc* arbitration itself is usually administered by the Permanent Court of Arbitration ('PCA'), based in The Hague.

8 In case an arbitral tribunal is not (yet) constituted, the ITLOS may, in accordance with Article 290 (5) UNCLOS prescribe, modify or revoke provisional measures of protection if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires.

9 Absent an agreement by the parties, the arbitral tribunal determines its own procedure; decisions are taken by majority vote, whereas the president of the tribunal has a casting vote

in case of equality of votes. (16)

10 Article 1 of Annex VIII UNCLOS establishes a special arbitral tribunal focusing on questions of interpretation or application of the UNCLOS in questions of fisheries, protection and preservation of the maritime environment, marine scientific research and navigation (including pollution from vessels and dumping).

11 The major difference to Annex VII arbitration is that in Annex VIII proceedings, the arbitrators are renowned and recognized *experts* in the specific jurisdictional fields mentioned in Article 1 of Annex VIII UTCLOS.

12 It is noteworthy that the UNCLOS does not foresee any enforcement mechanism. It relies on the obligation to comply with the respective decision as stipulated in Article 296 (1) UNCLOS.

III Investor – State Disputes

A The Energy Charter Treaty

13 The Energy Charter Treaty ('ECT') – being the most significant and a multilateral investment treaty to energy industry – entered into force in Germany in 1998 after its signing four years earlier in 1994. Currently, forty-seven countries have ratified the ECT. (17) The ECT has its roots in the efforts after the end of the Cold War to further the co-operation between the succession states of the former Soviet Union, other Eastern European States and Western Europe. (18) It aims to create a multilateral legal framework in order to promote long term co-operation in the energy sector and sets out dispute resolution mechanisms in case such co-operations fail, which is not unusual: the energy industry has the highest proportion of ICSID disputes. (19)

14 The ECT covers four areas: (*i*) trade with energy and energy products, (*ii*) promotion of energy efficiency, (*iii*) transit of energy, and (*iv*) the protection of investments.

15 Article 26 ECT provides for the following four dispute settlement mechanisms if a dispute arises between an investor and a host state: (20) (*i*) arbitration under the Rules of Arbitration International Centre for the Settlement of Investment Disputes ('ICSID'), if the member state and the investor's state are both members of the Washington Convention (21) ; (*ii*) ICSID's Additional Facility Rules (22) in case only the investor's home state *or* the host state is a member state to the Washington Convention; (*iii*) arbitration under the Rules of the Arbitration of the Institute of the Stockholm Chamber of Commerce ('SCC') (23) ; and (*iv*) *ad hoc* arbitration under the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules. (24)

16 Part III – Investment Promotion and Protection (Articles 10 – 17) of the ECT provides – in particular in combination with the dispute settlement mechanisms in Article 26 ECT – for a material and procedural level of investment protection that is comparable to the level of the German Bilateral Investment Treaties ('BITs'). (25)

B Investment Protection under the ECT

17 According to Article 26 (1) ECT, a dispute must relate to an investment, a term defined in a rather broad manner in Article 1 (6) ECT: "*every kind of asset (...) associated with an Economic Activity in the Energy Sector*". However, the focus of the ECT is on investments made: pre-investment costs and development expenditures, *e.g.* power plants in their planning phase do not satisfy the 'investment' requirement. (26)

18 The protection standard under Article 10 (1) ECT is similar to the one found in most BITs, *i.e.* the "*fair and equitable treatment standard*" ('FET-Standard'). (27) The FET-standard has been interpreted predominantly in the spirit of the purpose of the investment agreements, with an aim to establish stable and favourable conditions of business for the investors. (28) However, the precise meaning remains subject to an ongoing debate in literature. (29)

19 Also comparable to most BITs, Article 10 (1) ECT prohibits the impairment of investments by unreasonable or discriminatory measures. This relates to state measures which do not yet qualify as an expropriation, *i.e.* situations in which the investment itself remains under control of the investor, but cannot be utilized in the manner realistically foreseen by the investor. Therefore, the investment remains substantially behind the investor's expectations regarding usability or profitability of the investment at the time when the investment was made.

20 Finally, the ECT grants also some level of protection to investments from interference by state owned enterprises. National companies (irrespective of whether state owned or not) are in principle not directly bound by international covenants. Article 22 ECT establishes, however, some basic rules for the state regarding the conduct of its enterprises in accordance with the state's obligations under the ECT.

C Dispute Settlement under Part V of the ECT – Selected issues

21 Beside the arbitration venues (*cf. supra* para. 15) the ECT avails to investors, it provides for the option to initiate proceedings against a member state in its respective state courts. However, arbitration cannot be initiated after the case has been submitted to national courts if the host state is listed in Annex ID referred to in Article 26 (3)(b)(i) ECT. (30)

22 Germany has not made such a reservation, which in two recent cases has led to the situation of it being sued by a foreign energy utility before German administrative courts and taken to

international arbitration in parallel. (31) The relationship of conflicting decisions between the arbitral tribunal and the state courts and the question to what extent the decision of the different deciding bodies have – at least – indicative effect for the respective other proceedings is still under discussion. The ongoing debate on the impact of international investment law on national regulatory autonomy is closely linked to that question. (32) It is generally accepted that states are free to regulate their energy sector in order to achieve certain targets of public policy and that such legitimate measures cannot open the gates for foreign investors to argue that they are protected against all changes in law. However, it is also clear that the state must not use regulatory measures as a fig leaf to justify actions constituting in truth a regulatory expropriation. (33)

23 Finding the right balance between justified policy making in the public interest on the one hand and fair and equitable treatment of the investor under the ECT on the other hand is a balance act. Some authors argue that the German state should ensure that actions taken by its government in the course of arbitral proceedings are transparent to the public, as well as to the parliament, due to the parliament's position as the legislative and controlling body of the executive branch. (34) Against this background it has been pointed out that if arbitral proceedings are kept confidential – either by individual agreement of the parties or by reference to arbitration rules (35) – an inherent tension is created between the interest of the parties to the arbitral proceeding (investor/government) and the interest of the legislative power in supervising all proceedings in which a state is involved. (36)

24 The view that arbitral agreements between private parties and the German state should be considered null and void in case the publicity of the complete proceeding is not foreseen expressly (37) is likely to be conceived by investors as outside of the equilibrium of interests. The suggestion (38) that the existence of arbitral proceedings and any arbitral award resulting therefrom are to be made public constitutes the minimum requirement for the checks and balances within a democracy is more in line with the current practise, *e.g.* ICSID.

25 While it does obviously depend on the respective case at hand, it is likely that some basic transparency (*e.g.* an abstract of the award) will strengthen the public acceptance and understanding of investment arbitration. As a possible option to elude the criticism set out above, the parties could consider in their specific case to what extent the arbitral proceedings really need to be confidential, define these areas and leave some room for public information by an according agreement.

26 Another current development shedding light on the relationship between investment protection under the ECT and regulatory changes driven by the European Union ('EU') is worth being reported in this chapter, because it might also gain relevance for Germany as efforts to further align and unify the European Singly Market for energy are intensified.

27 In *Electrabel S.A. (Belgium) v. Republic of Hungary*, (39) the arbitral tribunal had to decide on Electrabel's allegations against the Republic of Hungary regarding numerous violations of the ECT. In the mid 90's Electrabel had acquired the majority in *Dunamenti Erőmű Rt* ('Dunamenti'), a Hungarian utility that had entered a Power Purchase Agreement ('PPA') with *Magyar Villamos Müvek Zrt* ('MVM'), a state owned electricity supply company. The PPA provided for capacity fee payments to Dunamenti until 2015. After Hungary joined the European Union in 2004, the European Commission in 2008 issued a decision that PPAs like the aforementioned constituted a state aid towards the Hungarian utilities and were therefore violating EU law. Upon a respective request of the European Commission, Hungary terminated the PPA prematurely, leading to an alleged reduction of Dunamenti's revenues of 40%.

28 As the case touched on the question of the Court of Justice of the European Union ('CJEU') judicial monopoly (40) with regard to EU Law, the European Commission had a significant interest in the proceeding and took stand as *amicus curiae.* (41) Its argument, however, that Electrabel, being a European investor, should have brought its claim to the European courts was rejected. As the arbitral award points out that the "*proper avenue*" (42) for Intra-EU investment disputes does not automatically and exclusively lie with the community courts, it does to some extent strengthen the assumption that the mere fact that EU law is involved will not be seen by arbitral tribunals as a reason to refuse jurisdiction *per se.*

29 While in another recent case EU law has been seen as a mere fact, (43) the arbitral tribunal in *Electrabel* regarded EU law as international law and held that EU law would prevail over the ECT's substantive protections in case the ECT and EU law remained incompatible, notwithstanding all efforts to harmonise the interpretation of the both. (44)

30 Ultimately, Hungary was held not liable by the tribunal for implementing the European Commission's decision:

"Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary." (45)

31 In essence, it appears that in the future investors might face more difficulties in succeeding with their claims under the ECT against an EU member if regulatory changes have been triggered by EU law. It remains to be seen whether in the long run investors will in such cases consider initiating arbitral proceedings against the EU under the ECT directly.

IV Business – Business (B2B) Disputes

32 Business to Business disputes account for the most significant and important disputes in the energy sector. They include the full spectrum regarding size, complexity and financial impact and are usually called "(international) commercial disputes". On the different levels of the value added chain in the energy sector, the nature of the transactions and any dispute arising out of it may vary considerably. A vertically fully integrated energy utility may be engaged in the following six levels of the value added chain:

- exploration and production of fossil fuel (gas, oil, lignite) and biomass;
- procurement and trade with fossil fuel (gas, oil, lignite), biomass, electricity;
- generation of electricity and long distance heating (construction, operation and maintenance of large-scale power plants (fossil, nuclear, hydro, wind and biomass), decommissioning of large-scale power plants (fossil/nuclear);
- transport (construction and operation of gas and electricity grid (long distance));
- distribution of electricity and gas (development, operation and maintenance of the electricity and gas distribution grid); and
- sale of gas and electricity to consumers, industrial customers and municipal utilities.

33 Typical types of contracts include, *inter alia*, agreements such as: study and bid agreements, unitization agreements, (joint) operating agreements, farmout agreements, sale and purchase agreements, processing contracts, (long term) service agreements, front end engineering design ('FEED') contracts, construction contracts (Engineering, Procurement and Construction ('EPC') contracts or (multi-) lot-contracts), charter contracts.

34 In addition to the contracts needed at the different levels of the value added chain, large-scale projects (in particular) will often only be realized in joint ventures and with third party (project) finance. Further, the dynamic market often requires restructuring of the energy utilities. Accordingly, joint venture agreements, merger and/or acquisition and finance agreements are a regular occurrence in the energy sector.

35 It is fair to say that arbitration is a widely accepted and used dispute resolution method in the German energy sector for the resolution of disputes arising in connection with most of the aforementioned types of contracts. (46) This is particularly true if a contract is placed in an international context. The reasons are well known: arbitration provides a maximum of flexibility to the parties in how they want to resolve their dispute and has many advantages – including but not limited to: allowing the parties to choose their arbitrators; selecting and shaping the arbitration process; choosing the venue and agreeing on the confidentiality of the arbitration proceeding. In an international context, the possibility to choose the language of the proceeding, the forum where the arbitration will be held and the international recognition and enforceability of arbitral awards in foreign jurisdictions are additional advantages.

36 For the sake of avoiding duplication of text, this contribution will focus on arbitration in such commercial areas that *(i)* have either features that are unique to the B2B energy sector, or *(ii)* have not been dealt with in other contributions in Part IV of this book.

A Arbitration in the Energy Trading Sector

37 For most part of the last century, the German energy sector operated in absence of competition because of the existing natural gas and electricity grid oligopolies. This oligopoly was exempted from anti-trust provisions. As a rule, demand for and supply of energy was re-conciliated in large, regionally dominating and vertically fully integrated energy utilities. (47)

38 In the late 90's, the European Union started to pass its first legal acts to create competition within the European Single Market in the grid-bound energy supply sector. (48) Competition was achieved by separating and neutralizing the grid sector, *i.e.* the transport and distribution of energy, from the value added chain of energy supply. As a consequence of non-discriminatory and efficient access to the electricity and gas grid, (wholesale) trade developed as a new level of the value added chain in the energy sector. (49)

39 In the wholesale energy trade sector, two major means of trading may be distinguished: (*i*) Over-the-Counter trading ('OTC-Trading') trading (or off-exchange trading) and (*ii*) exchange trading. While OTC-Trading is undertaken directly between two parties and is based on contracts that are individually negotiated between those parties, exchange trading is subject to supervision by the public authorities. While the products traded at the exchange need to be standardized and need to match a narrow range of quantity, quality, and terms and conditions – which are defined by the exchange (50) and are identical to all transactions of a particular product – OTC-Trading offers more flexibility to the parties. Both forms of trading are signified by (*i*) a spot market, *i.e.* a market for the physical trading of energy (primarily electricity and gas), and (*ii*) a futures market, *i.e.* a market in which forwards, options and other structured products are traded and the fulfilment of which is either directed at a physical delivery of energy or a payment.

40 Whilst commodity arbitration (51) and stock exchange arbitration (52) have a long standing tradition in Germany, arbitration does not play a role in the commodity (forward) exchange trading in the energy sector. Neither the statutes (53) nor the trading conditions (54) of the

leading energy exchange in continental Europe, *i.e.* European Energy Exchange (EEX) based in Leipzig, provide for arbitration. The same applies for the European Commodity Clearing AG (ECC), *i.e.* the clearing house providing clearing services for energy and other commodities traded at EGH Gas Exchange of the Vienna Stock Exchange, European Energy Exchange (EEX), EPEX SPOT, Hungarian Power Exchange, Power Exchange Central Europe and Powernext. (55)

41 In contrast hereto, arbitration is the preferred dispute resolution mechanism in OTC-Trading. In OTC-trading one may distinguish: (*i*) transactions carried out under framework agreements or standard contracts, *e.g.* the General Agreements of the European Federation of Energy Traders ('EFET'), (56) allowing for high volume business, and (*ii*) truly customized contracts, reflecting particular needs of the parties.

1. EFET-Agreements

42 EFET (57) thrives to improve the conditions for energy trading, *inter alia*, by providing the markets with standard contracts for (physical) wholesale energy transactions (including gas, LNG, coal, electricity and biomass). (58)

43 EFET provides its General Agreements in English language. Meanwhile, EFET Germany (59) has provided a German translation of the General Agreement concerning the delivery and acceptance of natural gas and the General Agreement concerning the delivery and acceptance of electricity.

44 The EFET General Agreements are designed as standardized bilateral framework contracts. (60) The parties may adapt these General Agreements, *i.e.* the terms and conditions of the Framework Agreement, by means of a so called "Election Sheet" to their particular needs. Via the Election Sheet, the parties may elect to apply or not to apply or to alter or replace certain provisions of the General Agreement. (61) Individual contracts are finally concluded by means of the so-called "Confirmation of Individual Contracts", specifying, *inter alia*, the particular delivery times, contract capacity and quantity and the contract price. The General Agreements contain model forms for fixed price, floating price, call-option and put-option transactions.

45 § 22 (2) of the current version of the EFET General Agreement Concerning the Delivery and Acceptance of Electricity (62) ('EFET Electricity Agreement') provides:

'*Arbitration: Unless otherwise specified in the Election Sheet*, any disputes which arise in connection with the Agreement shall be referred for resolution to the German Institution of Arbitration (DIS) and decided according to its rules, ousting the jurisdiction of the ordinary courts. The number of arbitrators shall be three. The arbitration shall be conducted in the *language specified in the Election Sheet*.'

46 As the EFET model contracts have been designed for cross-border trading, the parties may wish to consider to not only specify the language of the proceedings, but also the place of arbitration in the respective Election Sheet. The place of arbitration determines the applicable arbitration law, the jurisdiction of state courts for supportive or supervisory measures, and it is, as a general rule, a crucial factor for the methodology used in fact-finding and the taking of evidence in course of the arbitral proceeding. It is not, however, necessary to conduct the arbitral proceeding at the place of arbitration. To the extent a place of arbitration in Germany is agreed upon, §§ 1025 *et seq*. ZPO apply. (63) The Agreement provides for the application of the substantive of law Germany to the exclusion of United Nations Convention on the International Sale of Goods of 11 April 1980 ('CISG').

47 In deviation from § 22 (2) EFET Electricity Agreement, § 22 of the current EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas ('EFET Gas Agreement') (64) provides for two options regarding the applicable substantive law and the dispute resolution forum. Option A stipulates (*i*) the applicability of English law, excluding the application of the CISG and (*ii*) arbitration under the LCIA Arbitration Rules with the place of arbitration being London, where all hearings and meetings shall be held. In deviation thereof, Option B stipulates (*i*) the applicability of the substantive law of Germany, excluding the application of the CISG and (*ii*) the arbitration under DIS Arbitration Rules (*cf. supra* para. 45). In absence of a choice of the parties in the Election Sheet or an individual agreement between the parties otherwise, Option A shall apply as a default rule. Accordingly, parties should thoroughly consider the implications that the application of the default rule would have, in particular if both parties are continental parties. (65)

2. Individual OTC-Contracts and in particular Long Term Gas Supply Contracts

48 Lately, another category of OTC-contracts has given rise to numerous arbitration proceedings, *i.e.* gas price revision disputes relating to long term natural gas supply contracts, (66) the majority of which contains an arbitration clause. (67)

49 *a. Introduction*: Such disputes have in the past usually been solved amicably between the business partners, as the choice of action was limited due to the high level of interdependency between the market players. In addition, these long term natural gas supply contracts were the core of the business of long distance gas utilities. It is not surprising that the business partners were reluctant to transfer the decision making on their core business to a neutral third party decision maker, *i.e.* arbitrators. Often, long standing business ties as well as corporate cross shareholdings further helped bringing about amicable settlements.

50 At the heart of the so called "gas price revision disputes" are long term natural gas supply contracts for a validity period of up to twenty or even more years. These contracts have been

entered into by gas exploration companies and long distance gas utilities and often date back to the 90's or even the 80's. Such long term contracts provide the buyers (long distance gas utilities) with security regarding their gas supply and – to a certain extent – with some flexibility regarding the acceptance of the gas supply. The seller (exploration utility) in return enjoys a predicable minimum sale and flow of revenues from these contracts, which make the profitability of infrastructure projects in the field of gas exploration predictable and helps satisfy lenders' requirements or bringing third party investors on board.

51 The gas price itself is usually determined by a – more or less complex – price formula that is negotiated between the parties. The price formulae themselves are usually linked to indices of competing fuels, such as oil or coal products or the like (*e.g.* inflation indices) or a combination thereof. The gas price is "adapted" automatically within certain periods, *e.g.* monthly or quarterly, according to the development of the referenced indices.

52 As the economic circumstances may change considerably and even structural market changes may occur throughout the extremely long contract terms, or referenced indices may cease to exist, long term contracts usually additionally provide for a price formula review mechanism that allows for the review of the gas price formulae itself within certain periods and under certain conditions. In addition, some contracts provide the parties with the right to request a revision of the gas price formula 'extraordinarily' on a fixed number of occasions throughout the term of the contract.

53 *b. Economical Background*: The liberalisation of the European and German gas market – *i.e.* the separation and the neutralization of the gas grid by enforcing free non-discriminatory access to the gas grid (68) and anti-trust measures (69) – marked such a structural market change in Germany. (70) Due to the liberalisation, gas trading at energy exchanges and off-exchange OTC-Trading with short term contracts gained importance. Simultaneously the gas market became increasingly liquid and the quantities of so traded energy increased considerably. This resulted in a price drop for natural gas at the spot markets and the energy exchange below the price level of long term natural gas supply contracts.

54 The long distance gas transport utilities in Germany were particularly affected by the market developments, as they were bound by – what had become – expensive long term supply contracts while new market players could take advantage of decreased wholesale prices at the spot market or the exchange and offer regional or local gas distribution utilities gas at lower price levels. As a result, the long distance gas transport utilities attempted to "renegotiate" the gas price formula relying on the so called "gas price revision" or "gas price re-opener" provision contained in most long term supply contracts, which resulted in numerous large scale arbitration proceedings.

55 *c. Gas Price Formula Revision Clause*: The following clause contains the typical elements of a gas price formula revision clause:

'a. If the circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.

b. Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.

c. Each Party shall provide the necessary information to substantiate its claim.

d. Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.

e. As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement – including the price provisions – shall remain applicable unchanged. Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the difference calculated at a rate reflecting the conditions on the international financing market.' (71)

56 In practice, the specific content of such "price review" or "price re-opener" clauses may vary considerably. (72) However, most of the clauses have certain elements in common:

- the obligation of the parties / the right of a party to review the price formula when an event has occurred ('trigger');
- the parameters / methodology for revising the price formula;
- the formal requirements of a request and the process in which such revision shall be conducted, if need be, by third parties; and
- the (retroactive) applicability of the so adapted price formula. (73)

57 "Price review" or "price re-opener" clauses are not be confused with so-called general loyalty- or hardship-clauses that allow for the renegotiation of a contract or give an entitlement to the adaptation of a contract under certain conditions. (74) Hardship-clauses

rarely co-exist in contracts containing a price formula review clause, as the latter forms a provision *specialis* in relation to a general hardship clause.

58 In order to request a price formula review, the party requesting such a review must usually establish that a 'trigger' event has occurred. Triggers often refer to the occurrence of objective events, such as the change of a particular magnitude in benchmark indices or simply the expiry of a certain time period. (75) The price formula review provision addressed above (*supra* para. 55) requires, for example, that "*circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions (...).*" Accordingly, the party requesting a price formula revision must establish *(i)* that the occurrence of the circumstance was beyond the control of either party and that *(ii)* the assumptions underlying the price provision have changed "significantly". Obviously, the term "significant" is open to interpretation. However, comparable "wide" terms are regularly being used in price formula review provisions to offer the parties a certain extent of flexibility throughout the term of the contract. It comes as no surprise that the parties' view on what constitutes a "significant" change may differ considerably and that many of the so called gas price revision disputes relate to the interpretation of the trigger provision. (76)

59 Usually, price revision formulae also provide for the legal consequence if a request for the revision of the price formula is well founded, *i.e.* the parameters / methodology according to which the price formula shall be revised. Again, the contracts vary considerably in their approach. In the gas price formula review clause discussed above (*supra* para. 55), the party requesting the revision shall be "*entitled to an adjustment of the price provisions reflecting such changes*", *i.e.* significant changes in the underlying assumptions. In any case *"[t]he price provisions shall [...] allow the gas to be economically marketed based on sound marketing operation."* This wide wording may be construed as a right of a party to request a complete renegotiation of a new price formula instead of its amendment or the revision of its indexed parameters as to reflect the significant changes proven. Other price formula review clauses may provide for a very specific scope of review, *i.e.* limit the review to specific indices or the method of calculation in the price revision formula used. (77)

60 As for the formal requirements, the gas price formula review clause (*supra* para. 55) provides that "*[e]ach Party shall provide the necessary information to substantiate its claim.*" Failure to do so may result in an invalid request. In that context, it should be noted that reference to the wrong trigger may also invalidate a request for review in its entirety. (78) That is a particular risk if the price revision provision foresees very specific trigger events.

61 Another important question not being addressed by all price formula review clauses is when the revised price formula is to come into effect. Possible dates include: (*i*) the date the price formula review clause was invoked; (*ii*) the date the parties reach an agreement or the arbitrators / experts make a determination; or (*iii*) the date when the trigger event takes place.

62 Certainly the law governing the contract will also play an important role. While long term gas supply contracts tend to be exhaustive and recourse to statutory provisions is not required, the applicable law might have an impact on the contractual construction and interpretation of the clause. (79)

63 Last but not least, a common element of price formula review clauses is a provision on dispute settlement in case the parties do not agree on a revised price formula review clause. The majority of long term gas supply contracts will refer disputes on the contractual construction and interpretation of the price formula review clause to arbitration, (80) as confidentiality of the purchase conditions and in particular the price and the price revisions formula is of essence to the market participants. (81)

64 *d. Arbitration*: Arbitrating disputes resulting from long term gas supply contracts exposes the parties to a number of particular challenges. In order to avoid decisions which are less founded by commercial and legal rationale than by the attempt of the arbitral tribunal to please both parties, it is of great importance to find arbitrators that possess the required legal, technical and market knowledge. In addition, the arbitrators should have proven to have successfully handled arbitral proceedings of comparable complexity and size. These requirements limit the number of potential candidates considerably and often the question as to the independence and impartiality of arbitrators arises.

65 It is common ground that sitting in parallel arbitral proceedings in which comparable or sometime even identical legal, commercial or economic issues are at stake does not justify a challenge of an arbitrator on the ground of his lack of independence or impartially. (82) Likewise, there exists no obligation on the part of the arbitrator to disclose such circumstances. However, in case arbitrators intend to base their decision on findings made in other arbitral proceedings, it would constitute a violation of the parties' right to be heard if the parties were not given the chance to comment on any consideration that was made the basis of an arbitral award. (83)

66 It is also generally accepted that multiple appointments of an arbitrator by one party do not *per se* constitute a reason to challenge that arbitrator for a lack of independence or impartiality, as long as these multiple appointments do not qualify as a "permanent relationship". (84) The distinction line has to be drawn on a case by case basis, but some guidance may be drawn from Sections 3.1.3 (85) of the IBA Guidelines on Conflicts of Interest in International Arbitration of 2004 ('IBA-Guidelines'). (86) Pursuant to Part II, Section 3.1.3. IBA-Guidelines, two or more appointments in the course of the past three years by one party

constitute an orange ground, *i.e.* a circumstance to be disclosed to the other party. Such disclosure does not automatically result in the disqualification of the arbitrator and a party is deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. If a party objects to the appointment, it needs to be explored further whether objectively – *i.e.*, from a reasonable third-person's point of view having knowledge of the relevant facts – there exists a justifiable doubt as to the arbitrator's impartiality or independence.

67 Further, confidentiality is an issue of particular importance in arbitral proceedings relating to gas price review clauses. For example, the gas price formula review clause above (*supra* para. 55) provides that *"[t]he price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation."* In order for the claimant to prove its entitlement to have the gas price formula adapted under this clause, it seems necessary to compare both the gas prices the claimant is charging to its customers and the respective price it is charged by the respondent. Such price comparison will almost inevitably require the disclosure of sensitive business secrets.

68 Thus once more, the advantages of arbitration may come to shine. Different from state court proceedings, the parties may provide for additional procedural tools to limit the disclosure of business secrets to the other party and the arbitrators in course of the proceedings, without running the risk of having the claim rejected for lack of substantiation. Absent an agreement by the parties, the arbitral tribunal may weigh the interest in confidentiality of one party against the other party's right to be heard, *e.g.* order only the limited disclosure of certain information to the other party, while the information is fully disclosed to the arbitral tribunal. (87) The IBA Rules on the Taking of Evidence in International Arbitration of 2010 (88) explicitly empower the arbitral tribunal to, *"where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection."* Irrespective of the measures so ordered, the arbitral tribunal will always have to order appropriate measures to safeguard the other party's right to be heard.

B Arbitration in the Gas Grid Sector

69 The current version of § 20 (1) lit. b) Energy Industry Act (*Energiewirtschaftsgesetz* – 'EnWG') was induced by endeavours of the European Union ('EU') regarding the liberalisation of the electricity and gas sector in the Single Market of the European Union and, *inter alia*, provides such right of access to the gas grids (long-distance and distribution grids) on the basis of entry/exit model. (89) It obliges gas grid operators to ensure:

- the non-discriminatory and efficient access to the gas grid;
- a contractual system that is transaction and transmission path-independent; (90) and
- that transmission customers are able to supply an end consumer/customer with gas by entering into only one entry (capacity feed-in) contract and one exit (capacity feed-out) contract (unless such cooperation is technically impossible or economically unreasonable). (91)

70 In order to achieve the above, § 20 (1) lit. b) EnWG requires the close cooperation among grid operators. (92) The obligation to cooperate is further specified by § 8 (8) Gas Grid Access Regulation (*Gasnetzzugangsverordnung* – 'GasNZV'), requiring the gas grid operators to enter into a cooperation agreement setting out the particulars of their cooperation necessary to ensure a transparent, non-discriminatory, efficient access to the gas grids suitable to carry out bulk business at reasonable conditions.

71 The gas grid operators have discharged their obligations by entering into the "Agreement on the cooperation pursuant § 20 (1) lit. b) EnWG between the operators of gas distribution grids situated in Germany" (*Vereinbarung über die Kooperation gemäß § 20 Abs. 1 b) EnWG zwischen den Betreibern von in Deutschland gelegenen Gasversorgungsnetzen* – 'Cooperation Agreement'). The Cooperation Agreement is a further example of the wide spread use of arbitration as a preferred means of disputes resolution in the energy sector. (93)

72 The Cooperation Agreement contains an *ad hoc* arbitration clause, which is typical for the energy sector, in particular with regard to its appointing mechanism. The arbitration agreement (§ 60 of the Cooperation Agreement) provides for the President of the Higher Regional Court (*Oberlandesgericht* – 'OLG') in Düsseldorf or for the President the *OLG* at the seat of the applicant (94) as appointing authority in case of the Respondent not appointing an arbitrator or the two party appointed arbitrators not appointing the chairperson.

73 There are two observations to be made in that context: (*i*) While it is still quite common practice in the energy sector to provide for a president of a higher regional or regional court as appointing authority in *ad hoc* arbitration clauses, there exists no legal obligation of the president so designated to act as appointing authority. (95) If the court's president refuses to appoint an arbitrator, the appointment mechanism has failed. In that case, § 1035 (4) Code of Civil Procedure (*Zivilprozessordnung* – 'ZPO') applies, *i.e.* the parties may apply to the competent Higher Regional Court for the appointment of an arbitrator. (96) As the Cooperation Agreement does not provide for a place of arbitration, the competent court would be the *OLG* in whose district the claimant or the respondent has his place of business (provided that the designation of the president of the *OLG Düsseldorf* would not be considered to imply a choice of *OLG Düsseldorf* as the competent court in the sense of § 1062 (1) ZPO). (*ii*) In addition, it could be argued that in case the arbitration agreement provides for more than one appointing

authority, all of contractually agreed authorities must have refused to appoint an arbitrator as a precondition to the admissibility of an application for the appointment of an arbitrator before the competent *OLG*.

C Arbitration under the Renewable Energy Sources Act

1. The Renewable Energy Sources Act

74 The German Renewable Energy Sources Act (*Erneuerbare-Energien-Gesetz* – 'EEG') remains to be the central steering instrument for expansion of renewable energy sources.

P 75 Recently, the EEG that first entered into force in 2000 has been substantially revised for the fourth time. The current version of the EEG entered into force on August 1, 2014, which is why it is therefore beingcalled 'EEG 2014'. (97) While the Federal Government (98) considers the EEG a successful tool in achieving the scale-up target for sources of renewable energy of the German Government, its economic and environmental efficiency, as well as aspects such as the exemptions for certain industry sectors, are under debate.

76 As per § 1 (1) EEG 2014 the purpose of the law is to facilitate:

- a sustainable development of energy supply, particularly for the sake of protecting our climate and the environment;
- to reduce the costs of energy supply to the national economy, also by incorporating external long-term effects;
- to conserve fossil fuels; and
- to promote the further development of technologies for the generation of electricity from renewable energy sources.

77 In order to achieve the aforementioned goals, the EEG 2014 aims at increasing the share of renewable energy sources in electricity supply to at least 40 to 45% until 2025, to 55 to 60% until 2035 and to 80% by 2050 (§ 1 (2) EEG 2014). The aim of the EEG 2014 is to integrate energy produced from renewable sources into the market and thereby reduce the costs of the so-called energy turnaround ('*Energiewende*') in Germany. To achieve this goal the EEG 2014 *inter alia* (i) focuses on the promotion of cost-effective renewable energy sources; (ii) ends the fixed feed-in-tariffs scheme still contained in the EEG 2012 in favor of a direct marketing obligation for electricity generated from newly installed renewable energy sources; and (iii) broadens the financing base by abolishing exemptions to pay the EEG surcharge, which was introduced to help finance the German energy turnaround.

2. Dispute Resolution under the EEG – the Clearing House EEG

78 § 81 EEG 2014 provides for a Clearing House EEG (*Clearingstelle EEG*) (99) that is operated by a legal person incorporated under private law. (100) Pursuant to § 81 (3) EEG 2014, the Clearing House EEG *inter alia* has the function and purpose of avoiding and settling questions and disputes relating to the application of § 5 (Definitions), § 7 (Statutory obligations), §§ 7-55 (Grid connection, purchase, transmission and distribution), §§ 19-55 (Financial Subsidies), §§ 70 and
P 71 (Transparency), § 80 (Prohibition of Multiple Sale) and §§ 100 and 101 (Transitional Provisions) of the EEG 2014 (*cf.* § 81 (2) EEG 2014). (101) Accordingly, its function must not be confused with a clearing house in the financial sector, that has the purpose of reducing the risk of one trade partner failing to honor its trade settlement obligations.

79 The procedures offered by the Clearing House are determined by § 81 (4) – and (5) EEG 2014. They may be categorized in two main categories: *(i)* adversarial procedures, in which two opposing parties with conflicting interests are participating (*cf.* § 81 (4) EEG 2014), and *(ii)* autonomous procedures, upon application by one party without an opposing party, (102) that shall clarify abstract questions of interpretation and application of the EEG 2014 (*cf.* § 81 (5) EEG 2014).

80 In comparison to § 57 (3) EEG 2012 (103) , § 81 (4) No.1 EEG 2014 does not enumerate the various procedures to be offered by the Clearing House EEG for the avoidance or settlement of disputes between installation operators, (104) grid system operators, (105) and direct selling entrepreneurs (106) ('Parties'). § 81 (4) EEG 2014 merely stipulates that the Clearing House EEG may conduct procedures for the avoidance or the settlement of disputes upon joint application of the Parties, but leaves it to rules of procedure (*Verfahrensordnung* – 'VO') of the Clearing House EEG to determine the various procedures that will be offered (*cf. infra* para. 81). It provides further that *these* (*sic!*) procedures may also be conducted as arbitration proceedings within the meaning of the ZPO, *i.e.* §§ 1025 *et seq.*, provide that the parties have concluded an arbitration agreement. (107) It is obvious that in the latter case, the right of the parties to initiate ordinary court proceedings in parallel pursuant to § 81 (4) last sentence EEG 2014 may not apply because of § 1032 (1) ZPO. (108)

81 In addition, § 81 (4) No. 2 EEG 2014 provides that the Clearing House EEG may – upon request of a Party to proceedings before ordinary courts of law – issue expert opinions for the courts (expert opinion proceeding (*Stellungnahmeverfahren*)). (109)

3. The Arbitration Rules of the Clearing House EEG

82 Pursuant to § 81 (6) sentence 1 EEG 2014, the Clearing House EEG shall perform its functions

in accordance with the VO which shall be established by the Clearing House EEG itself. The VO is subject to the prior consent of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (*cf.* § 81 (6) sentence 3 EEG 2014).

83 Pursuant to Section 5 (1) No. 3 VO of the Clearing House EEG, (110) the Clearing House EEG (*i*) – upon joint request of the Parties – may conduct the procedure on the clarification of questions of the application of the EEG 2012 (111) between the Parties (*ii*) by amicable agreement of the Parties in the form of arbitration proceedings within the meaning of the ZPO, in accordance with Section 21a VO. (112) Here, the double requirement "upon joint request" and "amicable agreement" must probably be read in conjunction with Section 21a VO, making the signing of an elaborate "hybrid arbitration and arbitrators' agreement" between the parties and the Clearing House EEG (*not* the individual arbitrators) a precondition to the conduct of an arbitral proceeding. In other words: even if the parties had validly concluded an arbitration agreement within the meaning of §§ 1025 (2), 1031 ZPO, (113) Section 21a VO would still make the conduct of an arbitral proceeding dependent on the conclusion of a further agreement in accordance with Section 21a VO (as to the formal requirements and the content *cf. infra* para. 85 *seq.*).

84 The rules of arbitration (Section 21a VO) provide for an administered arbitral procedure, which may only relate to disputes within the meaning of Section 4 (1) VO, *i.e.* disputes between the Parties on the content or the extent of their obligations or rights under the EEG 2012 (114) and regulations relating thereto (Section 21 a (2) VO).

85 In deviation from § 1044 ZPO and most other institutional arbitration rules, the arbitral proceeding commences – pursuant to Section 21a (6) No. 4 VO – with the signing of a written "arbitration agreement" between the Parties and Clearing House EEG (*not* the individual arbitrators) (115) . The VO does not clearly distinguish between the arbitration agreement (*Schiedsvereinbarung*) and the arbitrators' agreement (*Schiedsrichtervertrag*). Accordingly, the period of limitation will only be suspended in accordance with § 204 (1) No. 11 Civil Code (*Bürgerliches Gesetzbuch* – 'BGB') if all parties have signed the arbitration agreement, *i.e.* under the present VO the "hybrid arbitration and arbitrators' agreement.

86 Section 24a (4) VO sets out certain minimum requirements as to the formal content of the arbitration agreement. Further, Section 24a (6) VO contains a list of additional recommended provisions ("*should contain at least the following corresponding provisions*"). The most important provisions are:

- Section 24a (6) No. 2: In deviation from §§ 1034, 1035 ZPO the Clearing House EEG determines the composition of the arbitral tribunal and the appointment of arbitrators in accordance with Section 17 VO. The arbitral proceeding will be "lead" by a member of the Clearing House EEG and the number of arbitrators will be determined by Clearing House EEG. All arbitrators have to be members of the Clearing House.
- Section 24a (6) No. 3: The place of the arbitration will be determined in accordance with Section 13 (1) sentence 2 VO. Section 13 (1) sentence 2 VO provides that proceedings are to be conducted at the facilities of the Clearing House EEG in Berlin or at a different location, if so determined by the chairperson or the sole arbitrator. It appears that the VO assumes that the place of arbitration and the location at which the proceedings will be conducted are to be identical and that a deviating agreement by the parties is inadmissible.
- Section 24a (6) No. 6: The arbitral tribunal determines the applicable law in the sense of § 1051 ZPO. In practice in most cases the arbitral tribunal will apply German law. It appears that deviating agreements by the parties shall be inadmissible.
- Section 24a (6) No. 8: The Higher Regional Court (*Oberlandesgericht* – 'OLG') having jurisdiction pursuant to § 1062 (1) ZPO shall be the *Kammergericht Berlin*.
- Section 24a (6) No. 9 provides for the applicability of a number of general rules of procedure, such as: Section 6 (1) VO (in writing requirement), Section 8 (1) sentence 1 VO (quorum), Section 10 (data protection and confidentiality); Section 11 and 12 VO (lack of impartiality and challenge); Section 15 (costs); Section 20 (3) VO (suspension), Section 31 and 31a VO (exclusion of liability).

87 The parties may agree with the Clearing House EEG on additional procedural rules, *e.g.* a time schedule for the proceedings, pursuant to § 1042 (3) ZPO and Section 21a (3) sentence 3 VO. Failing an agreement by the parties, and in the absence of provisions in the Tenth Book of the ZPO, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.

88 Pursuant to § 1056 (1) ZPO, the arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with § 1056 (2) ZPO. The parties may agree with Clearing House EEG that no reasons are to be given in the arbitral award (Section 21a (6) No. 7 in conjunction with § 1054 (2) ZPO).

4. Summary

89 The Clearing House EEG has been established as a vital and central dispute resolution mechanism in the EEG. An important element of its credibility is that the Clearing House EEG is and remains independent and impartial. Whether or not the Clearing House EEG will become a major player in the field of administered arbitration will to a great extent depend on whether

or not it provides rules of arbitration that are up to date and competitive with other market players, such as the German Institution of Arbitration e.V. (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.* – 'DIS').

90 The procedures offered be the Clearing House EEG – with exception to the arbitration procedure –are based on the voluntary participation of the parties and the will of the parties to come to an amicable settlement. It is therefore difficult to see how an arbitral proceeding that is generally of a contradictory nature and as a rule ends with a decision of a third party, *i.e.* arbitral award, blends into the consensual dispute resolution mechanisms offered by the Clearing House EEG. Here, the approach taken by the Clearing House EEG raises a number of procedural questions. If enforceability is the key, the parties could always resort to an attorney's settlement pursuant to § 796a (1) Code of Civil Procedure (*Zivilprozessordnung* – 'ZPO'), which is an enforceable title pursuant to § 794 (1) No. 4b ZPO but would involve additional costs.

91 Irrespective thereof, the legislator should consider clarifying that not only parties to ordinary courts proceedings are entitled to rely on the expertise of the Clearing House EEG under § 81 (4) No. 2 EEG 2014 but also parties to arbitration proceedings operating *ad hoc* or under the auspices of an arbitral institution other than the Clearing House EEG. (116)

V Business – Consumer (B2C) Disputes

92 In the European Union ('EU') a clear trend towards alternative dispute resolution ('ADR') in consumer matters is to be observed. (117) In reaction to an observation that consumers (118) are still confronted with obstacles regarding the enforcement of their rights when buying goods and services on the European Single Market, (119) the European Parliament recently passed the Directive on consumer ADR (120) ('Directive') that complements existing EU consumer protection measures. According to the Directive, the member states are, *inter alia*, to ensure that disputes covered by the Directive (121) can be submitted to an ADR entity that complies with the requirements set out in the Directive.

93 The Directive aims at defining quality standards more precisely than EU Commission Recommendations had done in the past (122) and makes such standards mandatory. The Directive describes the following quality requirements in detail: Article 6 – Expertise, independence and impartiality, Article 7 – Transparency, Article 8 – Effectiveness and Article 9 – Fairness.

94 These standards had previously only to be fulfilled by such ADR entities that were notified to the EU Commission by the member states. (123) One of those ADR entities is the Conciliation Committee Energy (*Schlichtungsstelle Energie e.V.*) (124) in Berlin. The Conciliation Committee Energy is organized in form of a private association (*eingetragener Verein* – 'e.V.'). In October 2011, it has been recognized as a central conciliation committee in the meaning of § 111b para. 3 Energy Industry Act (*Energiewirtschaftsgesetz* – 'EnWG') by the Federal Ministry for Economic Affairs and Energy and the Federal Ministry of Food and Agriculture. Among its founding members are the leading sectoral federations; (125) it currently counts more than 100 members. (126)

95 Pursuant to § 111b para. 1 sentence 1 EnWG recourse to the Conciliation Committee Energy is available in disputes between consumer and entrepreneur regarding the access to and usage of the connection to the gas or electricity grid, the supply and the measuring of energy. Pursuant to § 111b (1) sentence 2 EnWG, the entrepreneur is obliged to take part in the conciliation proceeding if a consumer files a request for conciliation with the Conciliation Committee Energy. (127) Such request is, however, only admissible if the consumer has filed a complaint with the entrepreneur first and the entrepreneur has not granted the redress sought by the complaint. (128)

96 The Conciliation Committee Energy does not decide the disputes but it issues non-binding conciliation recommendations to the parties. (129) The parties must notify the Conciliation Committee Energy within two weeks after receipt of the Committee's conciliation recommendation on whether or not they accept the recommendation. (130) In case both parties accept the recommendation, a court action does not become *per se* inadmissible. However, since the parties – by accepting the recommendation – have concluded an out-of-court settlement, such agreement and not the underlying legal relationship will form the basis of any future court action. (131)

97 The Conciliation Committee Energy – pursuant to § 111b (4) EnWG – may – and in fact does – request a fee from the EVU participating in the conciliation proceeding. (132) Consumers will be requested under exceptional circumstances only, *i.e.* if the request for conciliation was obviously abusive. (133)

98 In the first 21 month of its existence, more than 22,000 requests have been filed with the Conciliation Committee Energy. (134) The fact that the Conciliation Committee Energy offers a rather risk free access to redress and the relatively small amounts in dispute may be reasons why arbitration in consumer disputes is a rare occurrence.

99 Irrespective thereof, an energy utility may validly conclude an arbitration agreement with a private customer if the form requirements of § 1031 (5) Code of Civil Procedure (*Zivilprozessordnung* – 'ZPO') are observed. (135) Pursuant to § 1031 (5) ZPO, the arbitration agreement must be in the form of a separate document; it must be in writing, signed by both

parties and shall only contain the arbitration agreement itself, but no other agreements. It does not need to set out all details of the arbitration procedure and a reference to a set of arbitration rules is admissible. (136)

100 A standard form arbitration agreement can be validly used. In particular, the requirements of the consumer protection law – *i.e.* the provisions on standard terms contracts (§§ 305–310 Civil Code (*Bürgerliches Gesetzbuch* – 'BGB') – are met by an arbitration agreement that fulfils the criteria of § 1031 (5) ZPO, *i.e.* if the arbitration agreement is contained in a separate document or if the arbitration agreement is at least sufficiently segregated and individually signed. The German Federal Court of Justice (*Bundesgerichtshof* – 'BGH') (137) confirmed that the user of the standard form contract does not have to show a special interest in concluding an arbitration agreement. In practice, energy utilities in their dealings with private customers only provide for an arbitration agreement in exceptional cases.

VI Summary

101 This chapter focused on arbitration in Germany in the energy sector in various relationships, *i.e.* state – state, investor – state, B2B and B2C relationships. While it is fair to say that arbitration does not play a major role in B2C dealings, it very much does in all other constellations.

102 While states generally prefer to try to negotiate their border disputes instead of submitting themselves to third-party determination, it does not seem farfetched to predict that the number of disputes that will be submitted to a formal dispute resolution process under the UNCLOS, such as ITLOS or *ad hoc* arbitration, will be increasing in the future. New technologies allowing the exploration of oil and gas fields that had been out of reach until recently will certainly contribute to an intensification of the situation. In addition, the location itself, *e.g.* for wind-parks or tide generating plants, is becoming increasingly interesting for states.

103 As a matter of course "investor – state arbitration" in the context of investment treaty arbitration (*e.g.* in the context of the ECT) will continue to play an important role for the energy sector, as it accounts for the largest and most complex infrastructure projects of our times. Access to investment protection under investment promotion treaties – including the access to arbitration – will certainly continue to help promoting the flow of investment into politically relatively unstable jurisdiction. Recently the system of investment protection, and in particular investment treaty arbitration, has been under criticism. Accordingly, it will be particularly important for the continued acceptance of arbitration as a dispute resolution mechanism in investment protection treaties to take such criticism seriously, to tirelessly canvass the manifold and doubtlessly existing amenities of arbitration and to adjust the system where such adjustment is required to reflect well founded concerns.

104 As for B2B transactions in the energy sector, arbitration will remain the preferred dispute resolution mechanism because the energy sector – just like any other economic sector – often requires expert knowledge. While the German state court system is – generally speaking – a very reliable and trustworthy court system, it may not be taken for granted that a state court judge will always have the time to acquire the expertise necessary to decide the matter in a way that satisfies the parties' expectations. Arbitration offers the opportunity to choose arbitrators that possess the required skills and expert knowledge and mitigates this risk. In addition, confidentiality plays a particular important role in the energy sector. Arbitration offers the opportunity to safeguard business secrets, if the available toolboxes are used wisely. In that regard, German arbitration law provides a set of rules guaranteeing procedural predictability and flexibility, *i.e.* the possibility to customize the proceedings to the parties' needs.

References

***)** The views expressed in this article are solely those of the authors and they do not reflect the position of the E.ON SE Group.

1) Cases without further citations are available for free on the DIS Database, < http://www.dis-arb.de>.

2) *Cf. e.g.* Chart 33: Respondents by Industry of the 2010 International Arbitration Survey: Choices in International Arbitration, available at < http://www.whitecase.com/files/upload/fileRepository/2010International-Arbitration-Survey-Choices-International-Arbitration.PDF>; ICSID, The ICSID Case-load – Statistics (Issue 2012-2) available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32>: 25% of all state – investor proceedings take place in the Oil, Gas & Mining sector and 8% in the Electric Power and Other Energy sector.

3) *Cf. e.g.* the on-going dispute between Germany and the Netherlands on the boundary delimination in the river mouth of the river Ems in connection with the erection of the wind farm Riffgat: < http://www. spiegel.de/wirtschaft/unternehmen/ewe-windpark-riffgat-grenzstreit-zwischen-deutschland-undniederlande-a-839554.html>.

4) *Cf.* < http://www.itlos.org/>.

5) *Cf. infra Escher/Nacimiento/Weissenborn*, Investment Arbitration paras 1 et seq.

6) *Cf. infra Escher/Nacimiento/Weissenborn*, Investment Arbitration paras 33 et seq.

7) § 3 No. 18 *Energy Industry Act* (Energiewirtschaftsgesetz – 'EnWG') defines an EVU as "a natural or legal person, delivering energy to a third party, or operating an energy distribution net or having the power of disposition over an energy distribution net as an owner."
8) *Cf. infra* paras 93 *et seq*.
9) *Cf. supra* fn. 3.
10) Border disputes may also be brought before the Seabed Dispute Chamber of the ITLOS, not only by member states but also by some state enterprises and natural or juridical persons referred to in Article 153, paragraph 2(b) UNCLOS.
11) It is noteworthy that while the International Tribunal for the Law of the Sea has been constituted by the virtue of the UN Convention on the Law of the Sea in 1996, it is not an UN institution but an autonomous law finding body of international law; *cf.* also *Talmon*, Der Internationale Seegerichtshof in Hamburg als Mittel der friedlichen Beilegung seerechtlicher Streitigkeiten, JuS 2001, 550.
12) UNCLOS also provides for non-binding dispute resolution in the form of mediation and conciliation.
13) *Cf. Petkovich*, in King (2012), p. 245; *cf.* also: *Martin* Dispute resolution in the international energy sector, Journal of World Energy Law and Business 2011, 350 (354), who points out that less than half of all existing 430 maritime boundaries have agreements addressing them.
14) *Cf. Roach* Arbitration under the Law of the Sea Convention, in: Moore (ed.), International Arbitration, Leiden 2013, p. 135 (135).
15) Article 2 (1), Annex VII UNCLOS. Every state being party to UNCLOS is entitled to nominate fourarbitrators for the list.
16) Article 8, Annex VII UNCLOS.
17) The ratification of the ECT is still pending in Australia, Belarus, Iceland and Norway. Russia applied the ECT provisionally until 18.12.2009 when its provisional application terminated.
18) *Gundel*, Regionales Wirtschaftsvölkerrecht in der Entwicklung: Das Beispiel des Energiechartavertrages, AVR 2004, 157.
19) *Cummins/Giaretta*, in: King (2012), p. 225 (227); by mid-March 2014, fifty-one cases are reported on the website of the Energy Charter Secretariat, < http://www.encharter.org/>.
20) Disputes between member states are governed by Article 27 (1) ECT, according to which the states shall endeavor to settle disputes through diplomatic channels. Article 27 (2) *et seq*. ECT provide for *ad hoc* arbitration under the rules of Article 27 (3) ECT in case diplomatic intervention has failed.
21) Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966.
22) Under the Additional Facility Rules the Secretariat of ICSID can administer certain proceedings that fall outside the scope of the ICSID Convention.
23) *Cf.* < http://www.sccinstitute.com>.
24) *Cf.* < http://www.uncitral.org>.
25) For a detailed description of investment arbitration and the protection level offered by German BITs *cf. infra Escher/Nacimiento/Weissenborn*, Investment Arbitration paras 27 et seq.
26) *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case ARB/00/2), <https://icsid.worldbank.org/ICSID/>.
27) For a more detailed description of the fair and equitable treatment standard *cf. infra Escher/Nacimiento/ Weissenborn*, Investment Arbitration paras 28 et seq.
28) *Bernasconi-Osterwalder/Hoffmann*, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration?, Briefing note of the International Institute for Sustainable Development, June 2012, available at < http://www.iisd.org/pdf/2012/german_nuclear_phase_out.pdf>.
29) For an overview on the different positions, *cf. Happ*, German Yearbook of International Law 2002, 331 (349 *et seq.)*.
30) States listed in Annex ID do not consent unconditionally to arbitration in cases the investor has already submitted the dispute to a national court or tribunal or to a previously agreed dispute resolution mechanism.
31) In 2009 the Swedish utility company Vattenfall initiated proceedings under Article 26 ECT against the Federal Republic of Germany claiming damages of more than 1.4 billion EUR alleging an indirect (or an alternatively used term: regulatory) expropriation. At that time Vattenfall was still trying to set aside the administrative restrictions in the operation permit of its coal fired power plant in Hamburg-Moorburg that would have allegedly limited down the operability of the plant to an extent that it could not have been operated profitable before the national administrative courts. The case has been settled by the parties in 2011. *Cf.* < http://www.encharter.org/fileadmin/user_upload/Investor-State_Disputes/VattenfallGermany_Award.pdf>. In 2012 Vattenfall initiated ICSID proceedings against Germany in the light of the German nuclear phase out decision. According to Vattenfall's financial statement for the year 2011 the nuclear phase out caused a damage of 1.18 billion EUR. (< http://corporate.vattenfall.com/Global/corporate/investors/interim_reports/2012/q4_report_2012.pdf>. Again, in parallel, Vattenfall launched a constitutional complaint at the Federal Constitutional Court (*Bundesverfassungsgericht* – 'BVerfG').

32) *Schill*, ZaöRV 2011, 247 *et seq*.; *Krajewski*, The Impact of International Investment Agreements on Energy Regulation, EYIEL 2013, available at SSRN: < http://ssrn.com/abstract=1855639>.
33) *Krajewski*, The Impact of International Investment Agreements on Energy Regulation, EYIEL 2013, available at SSRN: < http://ssrn.com/abstract=1855639>.
34) *Wolff*, NVwZ 2012, 205 (207); *Schorkopf*, NVwZ 2003, 1471 (1473).
35) *Cf. e.g.* s. 43 of the DIS Arbitration Rules.
36) *Schill,* DÖV 2010, 1013 (1016).
37) *Wolff,* NVwZ 2012, 205 (208).
38) *Schill,* DÖV 2010, 2013 (1016).
39) *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, for more information including the arbitral award *cf.* <https://icsid.worldbank.org/ICSID>.
40) *Hindelang*, Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Mechanisms Provided for Inter-se Treaties? The Case of Intra-EU Investment Arbitration, (39) Legal issues of Economic Integration 2012, 179 (187 *seq*.).
41) *Cf.* Article 37 (2) ICSID Arbitration Rules.
42) *Cf.* final arbitral award in *Electrabel S.A .v. The Republic of Hungary*, ICSID Case No. ARB/07/19, para. 5.37, <https://icsid.worldbank.org/ICSID>.
43) *AES Summit Generation Limited and AES-Tisza Erömü Kft. (UK) v. Republic of Hungary*, ICSID Case No. ARB/07/22, para. 7.3.4: "*Community law is thus merely a fact to be considered by the Tribunal* ".
44) *Cf.* final arbitral award in *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, para. 4.189, <https://icsid.worldbank.org/ICSID>.
45) *Cf.* final arbitral award in *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, para. 6.72, <https://icsid.worldbank.org/ICSID>.
46) For its acceptance in the energy sector in an international context *cf.* pwc 2013 International Arbitration Survey: "Corporate Choices in International Arbitration – Industry perspectives" at p. 7 (arbitration is the preferred dispute resolution mechanism of the energy sector), < http://pwc.com/arbitrationstudy>.
47) *Spicker*, in: Schwintowski (2006), para. 13.
48) The first EU Directives date back to 1996 and 1998: Directive 96/92/EC of the European Parliament and of the Council of 19.12.1996 concerning common rules for the internal market in electricity, < http://eur-lex.europa.eu>; Directive 98/30/EC of the European Parliament and of the Council of 22.06.1998 concerning common rules for the internal market in natural gas, < http://eur-lex.europa.eu>.
49) The value added chain in the German energy sector pre-liberalisation knew only three value added chain levels: (i) Exploration & Production, (ii) Transport/Distribution, and (iii) Sale. Post-liberalisation the following value added chain levels may be observed: (i) Exploration & Production, (ii) Wholesale (iii) Sale. Transport/Distribution is now a separate function that needs to be performed at all levels of the value added chain.
50) *Cf. e.g.* European Energy Exchange Contract Specifications, Release 0037b of 18.12.2013, available at <https:// www.eex.com/en/trading/ordinances-and-rules-and-regulations>.
51) *Cf. supra Karstaedt*, Trade Arbitration in Germany, paras 1 *et seq*.; *Korte*, Die Hamburger freundschaftliche Arbitrage – ein Überblick anlässlich des 100-jährigen Jubiläums des § 20 Platzusancen für den hamburgischen Warenhandel, SchiedsVZ 2004, 240 with further references.
52) *Cf. supra Horn*, Arbitration of Banking and Finance Disputes in Germany, paras 7 *et seq.*
53) Statutes of the European Energy Exchange: EEX Exchange Rules, Release 0028a of 19.12.2013, available at <https:// www.eex.com/en/trading/ordinances-and-rules-and-regulations>.
54) EEX Trading Conditions, Release 0035a of 19.12.2013, available at <https:// www.eex.com/en/trading/ordinances-and-rules-and-regulations>.
55) Pursuant to § 6.4 (2) of the ECC Clearing Conditions, Release0021b as of 15.01.2014 the ordinary courts of Leipzig, Germany have exclusive jurisdiction in all matters relating to the ECC Clearing Conditions; the ECC Clearing Conditions are available at < http://www.ecc.de/en/about-ecc/Rules.
56) *Cf.* < http://www.efet.org >.
57) EFET was established in 1999 and today represents more than one hundred energy trading companies operating in over twenty five countries. Its mission is the promotion of European energy trading across national borders.
58) *Cf.* < http://www.efet.org/Standardisation/Legal-EFET-Standard-Contracts-and-Documentation>.
59) *Cf.* < http://www.deutschland.efet.org/ >.
60) For a detailed commentary and description of the EFET General Agreements *cf. Fried*, in: Schwintowski (2006), paras 303 *et seq*.; *Liesenhoff*, in: Horstmann/Cieslarczyk (2006), paras 1 *et seq*.
61) Depending on the provision the Election Sheet usually gives the parties the choice to either (*i*) apply or not apply, or (*ii*) to apply or replace a certain section of the General Agreement.
62) EFET General Agreement Concerning the Delivery and Acceptance of Electricity, Version 2.1(a) of 21.09. 2007, available at < http://www.efet.org/Standardisation/ Legal-EFET-Standard-Contracts-and-Documentation/Electricity-And-Electricity-Annexes>.
63) For a detailed commentary on §§ 1025 *et seq*. see Part II, *Wagner*.

64) EFET General Agreement Concerning the Delivery and Acceptance of Natural Gas, Version 2.0(a) of 11.05.2007, available at < http://www.efet.org/Standardisation/Legal-EFET-Standard-Contracts-and-Documentation/GasAndGasAnnexes>.
65) *Cf. supra* para. 46.
66) *E.g.* Handelsblatt (Online edition) of 03.07.2011 < http://www.handelsblatt.com/unternehmen/industrie/preisanpassungen-eon-und-gazprom-einig-ueber-neue-gas-vertraege/6827966.html>; ManagerMagazin (Online edition) of 07.06.2013, < http://www.manager-magazin.de/unternehmen/energie/a-904354.html>.
67) *Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (30).
68) *Cf. supra* paras 36 et seq.
69) *Cf. e.g.* order of the German Federal Cartel Office of 13.01.2005 – B 8 113/03 1, JurionRS 2006, 10063 <https:// www.jurion.de/Urteile/BKartA/2006-01-13/B-8-113_03-1>; confirmed by BGH 10.02.2009 – KVR 67/07, JurionRS 2009, 19150 <https:// www.jurion.de/Urteile/BGH/2009-02-10/KVR-67_07>.
70) *Cf. Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (31) for an overview on the structural changes in the U.S. American and British market.
71) *Dickel/Konoplyanik/Selivanova*, in Energy Charter Secretariat (2007), p. 143 (155), < http://www. encharter.org/fileadmin/user_upload/document/Oil_and_Gas_Pricing_2007_ENG.pdf>.
72) For three further examples *cf. Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (30 and 38) with further references; *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 291; *Greeno/Kehoe*, in: King (2012), p. 109 (111).
73) *Greeno/Kehoe*, in: King (2012), p. 109 (114).
74) Under German law hardship-clauses are considered a contractually agreed special case the doctrine of frustration "*Wegfall der Geschäftsgrundlage*" that is inherent to German civil law, *cf. Pörnbacher/Duncker/ Baur*, SchiedsVZ 2012, 289 (291).
75) Not all price formula review clauses require for sophisticated trigger events. They may also provide that a review shall take place periodically and that no further conditions need to be satisfied. In that case the occurrence of the trigger event can easily be established. *Cf. Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (37).
76) *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 289 (291); *Greeno/Kehoe*, in: King (2012), p. 109 (111).
77) *Greeno/Kehoe*, in: King (2012), p. 109 (118).
78) For an example *cf. Greeno/Kehoe*, in: King (2012), pp. 109 (115 *seq.*).
79) *Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (39 *seq.*).
80) *Greeno/Kehoe*, in: King (2012), pp. 109 (112 *seq.*), the authors argue that arbitration is preferred over expert determination, because of the international enforceability of arbitral awards; *Holland/Ashley*, (30) Journal of Energy & Natural Resources Law 2012, 29 (40).
81) *Greeno/Kehoe*, in: King (2012), pp. 109 (112 *seq.*) for further advantages.
82) *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 289 (291).
83) *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 289 (291).
84) *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 289 (291) with further references; *OLG Hamm* 22.07.2002 – 17 SchH 13/01, < http://www.dis-arb.de/de/47/datenbanken/rspr/-id238>.
85) Section 3.1.3. provides: "*The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties*".
86) For the fulltext *cf.* < http://www.ibanet.org/Publications/publications_IBA_guides_and_free _materials.aspx>.
87) *Pörnbacher/Duncker/Baur*, SchiedsVZ 2012, 289 (291) with further references and examples of possible measures and tools ensuring confidentiality.
88) For the full text *cf.* < http://www.ibanet.org/Publications/publications_IBA_guides_and_free _materials.aspx>.
89) *Cf.* Directive 2003/55/EC of the European Parliament and of the Council of 26.06.2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, < http://eur-lex. europa.eu>; the first EU Directives date back to 1996 and 1998: Directive 96/92/EC of the European Parliament and of the Council of 19.12.1996 concerning common rules for the internal market in electricity < http://eur-lex.europa.eu>; Directive 98/30/EC of the European Parliament and of the Council of 22.06.1998 concerning common rules for the internal market in natural gas, < http://eur-lex.europa. eu>.
90) *Britz/Hellermann/Hermes-Arndt* (2010), § 20 para. 127.
91) *Britz/Hellermann/Hermes-Arndt* (2010), § 20 paras 140 *et seq.*
92) *Britz/Hellermann/Hermes-Arndt* (2010), § 20 paras 166 *et seq.*
93) *Cf.* for its latest version of 28.06.2013 and as in force of 01.10.2013 < http://www.bdew.de>.
94) *Cf. OLG Koblenz* 19.02.2004 – 2 Sch 04/03 (2), < http://www.dis-arb.de/de/47/datenbanken/rspr/id1278>. The court noted that arbitration clauses providing for more than one appointing authority are valid, provided that the relevant appointing authorities are designated in a clear manner; *Kröll*, SchiedsVZ 2005, 139 (142).

95) *OLG München* 05.04.2012 – 34 SchH 1/12, < http://www.dis-arb.de/de/47/datenbanken/rspr/id1393, *id.* 11.12.2009 – 34 SchH 10/99, < http://www.dis-arb.de/de/47/datenbanken/rspr/-id1051>. In both cases the president of the Higher Regional Court of Munich refused to appoint an arbitrator. The Applicant had then to apply to the competent senate of the president's court for the appointment.

96) *OLG München* 05.04.2012 – 34 SchH 1/12, < http://www.dis-arb.de/de/47/datenbanken/rspr/-id1393>, *id.* 11.12.2009 – 34 SchH 10/99, < http://www.dis-arb.de/de/47/datenbanken/rspr/-id1051>.

97) Information on the EEG 2014 is available at the website of the Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, < http://www.erneuerbare-energien.de/EE/ Navigation/DE/Home/home.html>. It is expected that the website will soon also be available in English again.

98) Report 2011 on the Renewable Energy Act pursuant to § 65 EEG to be presented to the German Parliament (Deutsche Bundestag) by the Federal Government (Bundesregierung), pp. 3 *et seq.* < http://www.erneuerbare-energien.de/die-themen/gesetze-verordnungen/erneuerbare-energien-gesetz/ eeg-erfahrungsbericht-2011/>.

99) *Cf.* <https:// www.clearingstelle-eeg.de/>.

100) Since 2007, the Clearing House EEG is being operated by RELAW GmbH – Gesellschaft für angewandtes Recht der Erneuerbaren Energien. While the Clearing House EEG has been commissioned with its tasks by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, it is independent of, and not subject to the supervision of the Federal Ministry, *cf.* for the EEG 2012 *Chatzinerantzis/Fach*, EnWZ 2012, 19.

101) *Cf.* for the purpose and function of the Clearing House EEG under the EEG 2012: *Bauer*, ZUR 2012, 39 (40).

102) Pursuant to § 81 (5) EEG 2014 the clearing house may conduct autonomous proceedings "in order to clarify questions of application having general significance beyond the individual case, provided an application to this effect has been made by at least one installation operator, one grid system operator or one association concerned, and there is a public interest in clarifying the questions of application."

103) The EEG 2012 in § 57 (3) enumerated the various procedures that the clearing house may conduct. They included inter alia: (i) on the joint application of the Parties, conduct proceedings to clarify questions of application between the parties (conciliation proceeding (*Schlichtungsverfahren*)); (ii) on the joint application of the Parties, issue opinions on questions of application for the parties (non-binding expert determination (*Votumsverfahren*)); or (iii) on the request of a Party to proceedings before ordinary courts of law, issue expert opinions for the courts (expert opinion proceeding (*Stellungnahmeverfahren*).

104) Pursuant to § 3 No. 2 EEG 2014 "installation operator" (*Anlagenbetreiberin oder Anlagenbetreiber*) shall mean anyone, irrespective of the status of ownership, who uses the installation to generate electricity from renewable energy sources or from mine gas.

105) Pursuant to § 3 No. 27 EEG 2014 "grid system operators" (*Netzbetreiber*) shall mean the operators of grid systems for the general electricity supply, independent of the voltage level.

106) Pursuant to § 3 No. 10 EEG 2014 "direct selling entrepreneurs" (*Direktvermarktungsunternehmer*) shall mean a person that is entrusted by the operator of a renewable energy source with the direct selling of electricity or is buying electricity from renewable sources for business purposes without being the ultimate consumer. As the direct selling entrepreneur will play a more important role under the EEG 2014 than it did under the EEG 2012 it was introduced as a possible party to adversarial proceedings before the Clearing House EEG.

107) The possibility to conduct arbitral proceedings was introduced by the legislator in the EEG 2012 for the first time. *Cf.* for the EEG 2012 *Chatzinerantzis/Fach*, EnWZ 2012, 19 (20).

108) *Cf.* for the EEG 2012: *Salje* (2012), § 57 Clearingstelle para. 15, for different view *see Bauer*, ZUR 2012, 39 (41).

109) The wording of § 81 (4) No. 2 EEG 2014 is misleading to the extent that it gives the impression that a court may apply *sua sponte* to the Clearing House EEG. *Cf.* for the EEG 2012: *Chatzinerantzis/Fach* EnWZ 2012, 19; *Salje* (2012), § 57 Clearingstelle para. 14 citing the reasoning of the draft act of the Federal Government for the situation under the EEG 2012.

110) The Rules of Procedure of the Clearing House EEG of 01.10.2007 in the version of 24.06.2014 are available at <https:// www.clearingstelle-eeg.de/files/downloads/Arbeitsordnungen/VerfO_140624.pdf>.

111) When the current Rules of Procedure of the Clearing House EEG entered into force, *i.e.* 24.06.2014, the EEG 2014 had not yet entered into force, which is why the VO still refers to the EEG 2012. It is to be expected that the VO will be soon be amended in order to reflect the entry into force of the EEG 2014 and to overcome this discrepancy.

112) It would seem that because of § 3 (2) Mediation Law (Mediationsgesetz – 'MediationsG') the decision to have the proceedings conducted in form of an arbitration needs to made prior to entering into a conciliation proceeding. *Cf.* for a critical analysis of the MediationsG on the issue of a mediator becoming an arbitrator in the same subject matter *Trappe*, SchiedsVZ 2012, 79 (84).

113) Such arbitration agreement could *e.g.* be seen in the joint request, provided that certain formal requirements are met, *cf.* § 1031 ZPO.

114) *Cf.* fn. 22.

115) *See* also Section 21a (3) sentence 2 VO; *cf.* however *e.g. Prütting*, SchiedsVZ 2011, 233 *et seq.* for a description of the legal relationship between the arbitrators and the parties.
116) The EEG 2014 falls short of such clarification. § 81 (4) No. 2 still provides that only parties to ordinary courts proceedings may address the Clearing House EEG and seek for an expert report.
117) *Wolst*, EnWZ 2013, 455; *Isermann/Berlin* VuR 2012, 47 (48).
118) § 13 Civil Code (Bürgerliches Gesetzbuch – 'BGB') provides: "A consumer means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.". Translation cited from < http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0045>.
119) *Cf. e.g.* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee (Alternative dispute resolution for consumer disputes in the Single Market), COM (2011) 793 final at pp. 2 *et seq.*, < http://ec.europa.eu/consumers/redress_cons/ docs/ communication_adr_en.pdf>.
120) Directive of the European Parliament and of the Council of 21.05.2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), < http://eur-lex.europa.eu>.
121) According to Article 2 (Scope) the Directive: "shall apply to procedures for the out-of-court resolution of domestic and cross-border disputes concerning contractual obligations stemming from sales contracts or service contracts".
122) Commission Recommendation of 30.03.1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/EC), < http://eur-lex.europa.eu/>.
123) Member States may notify the Commission about ADR schemes which they consider to conform fully with Commission Recommendation 98/257/EC (*cf.* fn. 123) and Commission Recommendation of 04.04.2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC), < http://eur-lex.europa.eu/>.
124) *Cf.* < http://www.schlichtungsstelle-energie.de/>.
125) Federation of German Consumer Organisations (*Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* – 'vzbv'), the Federal Association of the Energy and Water Industry (*Bundesverband der Energie- und Wasserwirtschaft e.V.* – 'BDEW'), the German Association of Local Utilities (*Verband kommunaler Unternehmen e.V.* – 'VKU') and the Federal Association of New Energy Providers (*Bundesverband Neuer Energieanbieter e.V.* – 'bne').
126) *See* < http://www.schlichtungsstelle-energie.de/index.php?id=8>.
127) *Isermann/Berlin*, VuR 2012, 47 (49).
128) § 111b (1) sentence 3 EnWG.
129) Section 9 (2) sentence 3 Conciliation Rules of the Conciliation Committee Energy of 01.07.2013, < http://www.schlichtungsstelle-energie.de/fileadmin/images_webseite/pdf/Verfahrensordnung_01.07.13.pdf>.
130) Section 9 (2) sentence 4 Conciliation Rules of the Conciliation Committee Energy of 01.07.2013, < http://www.schlichtungsstelle-energie.de/fileadmin/images_webseite/pdf/Verfahrensordnung_01.07.13.pdf>.
131) *Wolst*, EnWZ 2013, 455 (457).
132) *Cf.* Schedule of Fees of the Conciliation Committee Energy of 01.07.2013, < http://www.schlichtungs stelle-energie.de/fileadmin/images_webseite/pdf/Kostenordnung_neu.pdf >; *Wolst*, EnWZ 2013, 455 (457); on the financing of conciliation committees in general *cf. Isermann/Berlin*, VuR 2012, 47 (48 *seq.*).
133) § 111b (6) sentence 2 EnWG.
134) *Wolst*, EnWZ 2013, 455 (457).
135) For a detailed commentary on § 1031 (5), *cf.* Part II, *Trittmann/Hanefeld*, § 1031 paras 22 *et seq.*; for a general overview on arbitration agreements in standard terms and conditions *cf. Hanefeld/Wittinghofer*, SchiedsVZ 2005, 217 *et seq.*
136) *Stumpf*, Alternative Streiterledigung im Verwaltungsrecht, Tübingen (2006), p. 121.
137) *BGH* 13.01.2005, SchiedsVZ 2005, 95 *et seq.*

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