



Madjid Kübler, Managing Director at Team Consult

ARBITRATION

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MADJID KÜBLER

Madjid Kübler is Managing Director of Team Consult. He heads Team Consult's dispute resolution practice. Prior to Team Consult, he has worked in senior positions at Accenture and Arthur D. Little.

He is an experienced expert witness and commercial arbitrator in gas price and further energy disputes.

FIRM PROFILE

Since 1987, Team Consult offers independent strategic advisory services for global and local energy companies.

Team Consult is a leading adviser for questions regarding the North-West European energy markets. Development and trends in the international energy business are identified at an early stage. The range of products and services offered by Team Consult comprises: Evaluation of long-term gas supply contracts, support in negotiation and dispute resolution, support for de-/ investment decisions (e.g. power plant projects, transportation/logistics, storages, renewables) and development of market entry strategies, market design and regulatory framework.

Team Consult's experts have been assigned in disputes relating to natural gas, power and renewables for more than a decade.

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Gas.Power.Experience.

The energy sector is beginning to change a substantial amount, with concerns of increased levels of CO₂. We speak with Madjid Kübler, who reveals what is changing and how to prepare for arbitration hearings.

With environmental concerns changing the energy sector, how have you seen legal cases changing over the years?

The trend to cleaner energy and energy efficiency and the reduction of CO₂ emissions are global ambitions.

On the one hand, we see a complete new cluster of cases, where investments in and revenues from renewable energy sources are at dispute, e.g. delay of commissioning or cut in regulated revenues.

We have also seen indirect changes ever since renewable energies and increased energy efficiencies have impacted market forces and prices in more traditional energy markets too. The rise of renewable energy affects the profitability of third parties being active in the traditional energy sector. Overall, there is hardly any energy business not affected by the development of a cleaner and more efficient use of energy.

Do you think arbitration is the better method of resolving such cases? Do you ever see this changing?

The question to whether arbitration or a commercial solution is the better method depends on the specific situation of the parties and the issue. Commercial solutions offer a higher degree of freedom to find possible resolutions and allow for more budget control. Arbitration demonstrates the severity of one's position, and the external and neutral assessment of the issue can also be beneficial towards upper management and supervisory boards.

If we compare arbitration with ordinary jurisdiction, it also depends. Arbitration has clear advantages, like speed and confidentiality of the

dispute. However, arbitration is not a feasible option for all cases. Disputes in regulated business or participation of states or state-owned companies might require ordinary jurisdiction.

What are three top things to be prepared for in case of arbitration proceedings?

i) Know your contract and its history. Many approaches are feasible to "open" a contract for adjustments: contractual openers like hardship clauses or general openers like competition law. In order to determine an appropriate contractual adjustment or quantify damages, many approaches are conceivable. Even if the contract seems to give clear guidance in your understanding, be aware that different interpretations are mostly possible.

ii) Start early! Use commercial experts and lawyers for early assessment before the case becomes formal. Obtain a second opinion as early as possible. This applies if you prepare your own claim but also if you might be threatened by being taken to court. Early assessment involving outside experts can avoid filing a claim which would turn out unpromising. Both legal and commercial experts will be a valuable test for the robustness of your arguments. Let the experts be the devil's advocate. Early preparation is also important in a defendant's position. A strong defence prepared for court filing might not always be needed and then perceived as unneeded spending in hindsight. But the opposite is true. Defence is especially valuable, when not needed in court.

iii) Do not close communication and negotiation lines to counterparty. Disputes often are played hardball. Don't let the rough language of

submissions disturb your partnership with the counterparty. Distinguish between the submissions and the long-term relationship the parties have had and which will hopefully still be honoured. Therefore never close communication lines for commercial negotiations (unless temporarily for strategic reasons).

How do you advocate your clients? Any current activities?

We advocate our clients in different ways. When arbitration proceedings are initiated, we support them by advising strategically, and by providing expert reports and testifying as expert witnesses in court. In cases where we are involved earlier, we rather advise our clients in the background when the parties are still in commercial negotiations. Our current activities comprise both formal and commercial disputes. Current disputes are requests for price adjustments and compensation for damages, based on contractual revisions clause or other legal positions such as competition law have gained importance, too.

What disputes are present and how do they differ?

In the renewable energy sector, many disputes are about compensation for damages, e.g. from delays in construction or lost revenues. The quantification thereof is getting more complicated since revenues are more market driven: what is the damage from missed revenues after regulatory reforms? Disputes in the LNG sector have something in common with pipeline gas disputes: price level, delivery flexibility or oil indexation are typical issues. Yet, the LNG disputes become more complicated when LNG specifics like destination clauses are also dealt with. **LM**