

# INTERNATIONAL ARBITRATION: UPDATES IN ASIA

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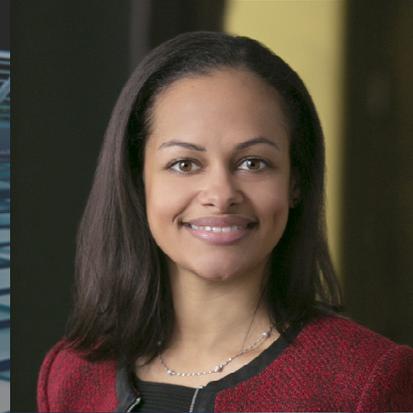
# Presenters



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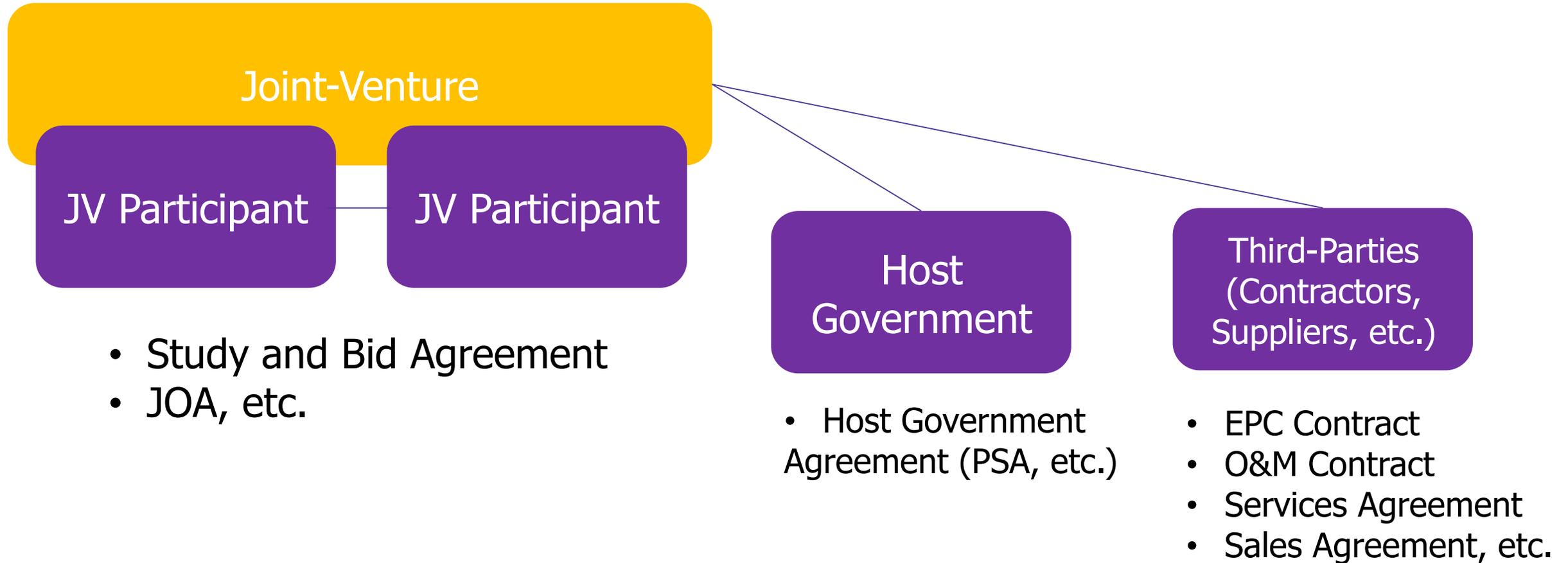
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# OVERVIEW

- I. Overview of Energy Disputes in Practice**
- II. International Arbitration: The Preferred Mode of Resolving Cross-Border Energy Disputes**
- III. Causes of Energy Disputes: Past and Foreseeable**
- IV. Lessons and Trends**

# Overview of Energy Disputes in Practice

# Project Participants Involved



# Main Types of Disputes

## Commercial Disputes

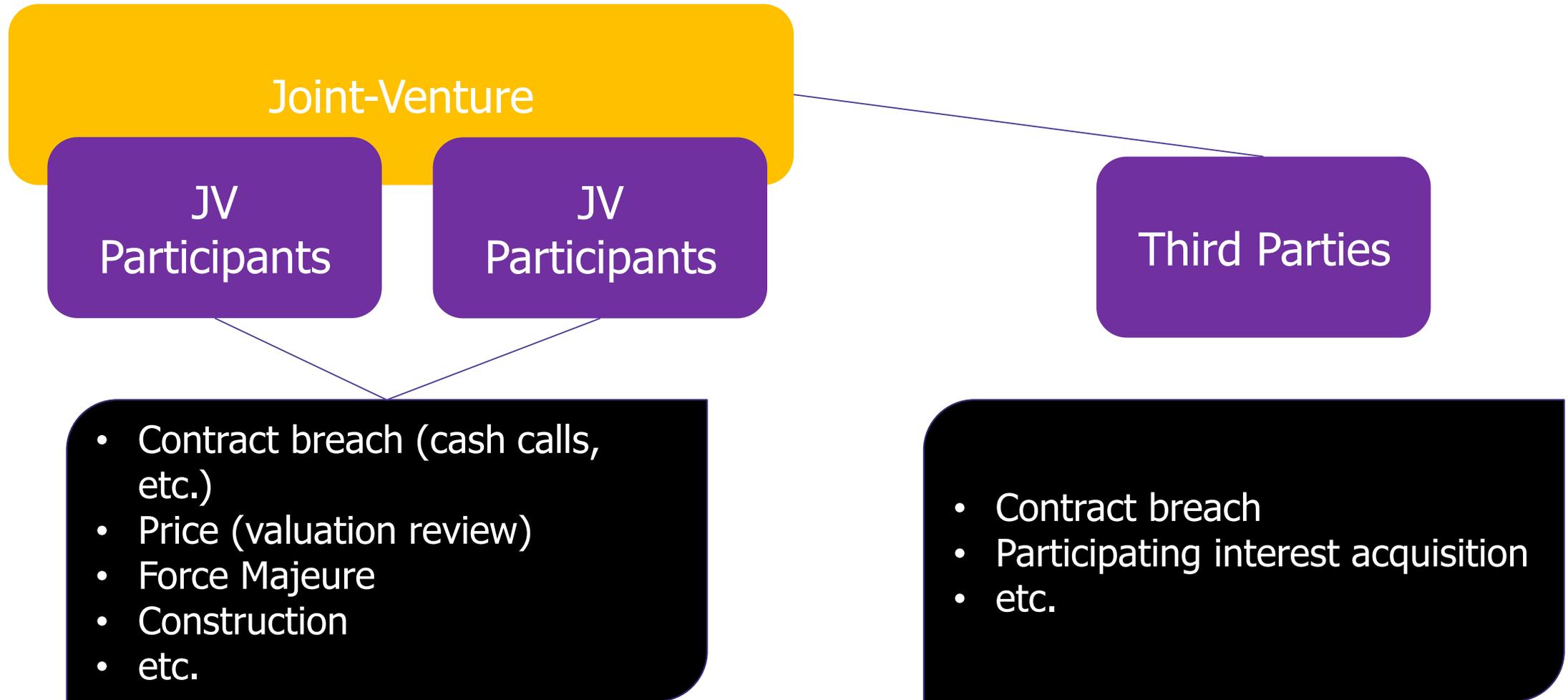
- JV-type disputes
- Disputes with third-parties

## Investor/State (NOC) Disputes

- Disputes with a State/ NOC as a sovereign entity
- Disputes with a State/ NOC as a project participant

# Commercial Disputes - Illustrations

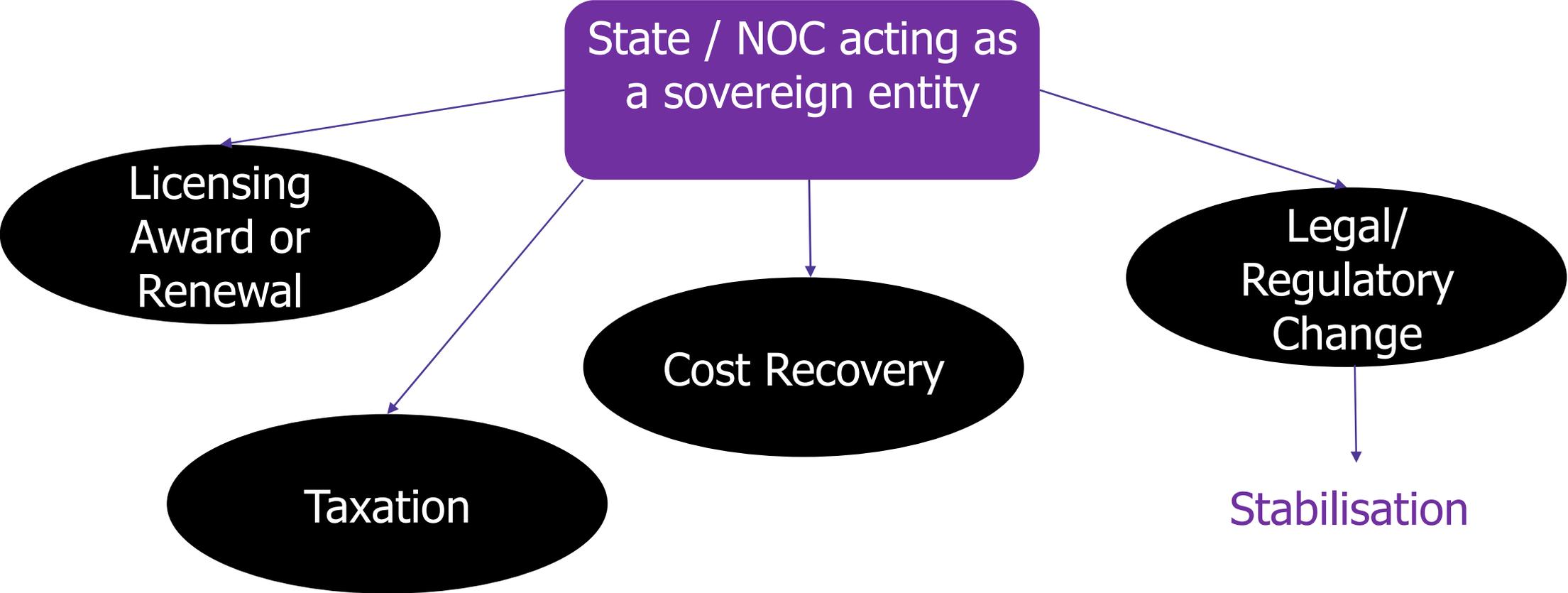
# Commercial Disputes





# Investor/State Disputes - Illustrations

# Investor(s)/ State Disputes



# International Arbitration: The Preferred Mode of Resolving Cross-Border Energy Disputes

# International Arbitration

- Commercial disputes arbitration
  - In commercial contracts between parties
  - Administered by, for e.g.:
    - International Chamber of Commerce (“ICC”)’s International Court of Arbitration
    - London Centre of International Arbitration (“LCIA”)
    - Singapore International Arbitration Centre (“SIAC”)
- Investment disputes arbitration
  - Under investment treaties which offer a degree of protection for the foreign investor
  - Administered by, for e.g. the International Centre for the Settlement of Investment Disputes (“ICSID”)

# The Preferred Mode of Resolving Energy Disputes

- International arbitration is the preferred forum for resolving cross-border disputes in the energy sector
- Between 1972 and 2012, 40% of all cases registered with the ICSID involved The energy sector
- In 2021, 46% of cases registered with ICSID concerned energy-related disputes
- In 2021, 25% of the cases registered with the LCIA involved the energy and resource sector

# Why is International Arbitration is the Preferred Forum for Resolving Energy Disputes ?

- Neutrality
- Control
- Enforceability

# Popular Seats of Arbitration

- London and Singapore are the most popular seats of choice
- London is the most popular choice of arbitral seat
  - Stability of its commercial law was one of the main reasons for London's popularity
- Singapore is the second most popular choice of arbitral seat
  - Singapore is receiving a larger share of Asian disputes due to changing perceptions about Hong Kong as an international arbitral seat
  - Singapore is also popular for parties resolving disputes related to the Indian subcontinent
  - Parties based in Australia, China and South-East Asia are also feeding their disputes into Singapore

# Causes of Energy Disputes: Past and Future

# Causes of Energy Disputes: Past

- Construction of energy assets
- Volatility of energy markets
- Renewable energy disputes

# Causes of Energy Disputes: Foreseeable

- Infrastructure and Construction disputes in the context of China's Belt & Road Initiative
- Expiring Production Sharing Agreements
- Renewable energy disputes

# Lessons and Trends

# Lessons

- Force majeure clauses must be carefully considered
- Companies should consider the ways that their investments are structured
- Alternative dispute resolution clauses

# Commercial Disputes Between JV Participants: Focus on JOA Disputes

- Cost-related issues
  - Authorisations for expenditures
  - Cash calls and Default
- Operatorship issues
  - Operator's role and liability
  - Removal of operator
- Exclusive Operations
- Transfer and Pre-emption Rights

# Investor-State Disputes: Taxation and Investor Incentives

- Tax and Customs exemption regimes
  - Scope
  - Time limit
  - What happens when the exemption ends
- Signature bonus, licence award bonus
  - Amount determination
  - Recovery

# Investor/State Disputes: Licensing Award or Renewal

- Type of licences
  - Project licences
  - Ancillary licences
- Granting and renewal conditions
  - Financial and technical conditions
  - Submission
  - Regulatory procedure and Recourse
- Contractual provisions to address gap in the regulation

# Investor-State Disputes: Cost Recovery and Audits

- Contract to set:
  - General principle of recovery
  - Non-exhaustive list of recoverable costs
  - Recovery allocated to a given project stage
- State audit of the cost recovery
  - Process
  - Time limit
  - Budget

# Investor-State Disputes: Anticipating Regulation Changes (Stabilisation)

- Type of stabilisation provision
  - Freezing stabilisation clause
  - Economic stabilisation clause
  - Hybrid clause
- Scope of the stabilisation (licence holder, extension of benefits to subcontractors, affiliated entities, etc.)
- Conflict between regional, national and supranational regulations, and between State's obligations under treaties
- Carve-out for environmental and labour legislative changes

# Investor-State Disputes: Anticipating Disputes Against States

- Waiver of sovereign immunity
- Pre-arbitration settlements
  - Amicable settlement
  - Mediation
  - Expertise for technical issues
- Consider contractual revisions for recurring issues

# Trends

- Energy-transition related disputes
  - Decommissioning of fossil fuels
  - Development and deployment of new technology
  - ESG-related claims

# THANK YOU

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# Biography



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David Waldron is a solicitor advocate and accredited mediator. He counsels clients regarding insolvency and restructuring, international arbitration, and litigation, serving the aviation, oil and gas, alternative energy, and financial services industries in particular. David's experience in international commercial disputes includes matters involving aviation, industrial projects, infrastructure projects, investment funds, private equity, derivatives, supply agreements, sale agreements, joint ventures, fraud, investigations, and asset tracing.

David litigates and arbitrates many disputes in the oil, gas, and energy industry, including gas supply agreements, pipeline agreements, refinery fires, fraud, seismic provisions, and CO2 allowances.

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Pardeep is a partner at Morgan, Lewis & Bockius LLP and also a director at Morgan Lewis Stamford LLC, a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.

Pardeep has a broad practice focusing on commercial and civil litigation, international arbitration, and corporate crime and investigations. He has advised and acted for high-profile clients including governments, statutory boards, listed companies, and high-net-worth individuals in high-value, complex, and multijurisdictional disputes relating to oil and gas, construction, engineering, infrastructure, shipping, and civil fraud.

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Allison Soilihi is a corporate energy lawyer focusing on mergers and acquisitions (M&A), private equity transactions, joint ventures, and project development. Allison advises clients in connection with production sharing agreements, joint operating agreements, mineral resources transportation and supply agreements, and sale and purchase agreements of energy assets across the upstream, midstream, and downstream cycle. She also counsels on a variety of M&A and general corporate matters in France and the United Kingdom, as well as in emerging markets. Allison is an active member of the firm's energy industry team, international energy and projects working group, and hydrogen working group.