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ENERGY TRANSITION AND RENEWABLE INFRASTRUCTURE DISPUTES

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HOT TOPIC

ENERGY TRANSITION AND RENEWABLE INFRASTRUCTURE DISPUTES

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David Dunn is a highly qualified strategic thinker and decision maker with over 20 years of experience as a restructuring adviser, distressed investor and fiduciary in a number of complex in- and out-of-court restructurings, M&A transactions, distressed financings and litigation-oriented investments. As a partner at Province, he serves in executive officer roles, as adviser to or member of boards of directors, in ad hoc and official creditors' committees and as litigation/liquidating trustee, plan administrator or examiner.

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Tanya Bodell is a partner leading StoneTurn's energy and sustainability offerings in business advisory services, regulatory support and expert testimony in large-stakes litigation, levering more than 25 years of experience in energy industry matters and associated environmental impacts. In this role, she helps businesses to achieve net zero and new energy technologies and start-ups commercialise their technologies in an industry with multiple layers of regulatory requirements.

CD: From an economic and market design perspective, what structural factors are driving the recent increase in disputes across renewable and energy transition infrastructure projects?

Bodell: The energy transition in the US has faced a partial roadblock due to rescinded policy promises and a change in federal focus back to fossil fuels. This renewed focus on fossil fuels is both reinforced and offset by huge demand growth tied to data centres. Grid interconnection queues have ballooned for both generation and large load, encouraging whichever generation technology can come to market fastest. We are seeing disputes emerge from the collision of clean energy projects already underway, rising project costs, new market needs and a truncated set of federal incentives. Long-dated power purchase agreements written under one set of market assumptions are being stress-tested against fundamentally different conditions, producing a structural recipe for commercial conflict. Many developers, capital investors and counterparties are revisiting the fundamental economics of projects already underway, and making economic calculations about who has what obligations and whether it makes sense for a project to proceed.

CD: How are you seeing energy transition disputes change as governments simultaneously incentivise and regulate renewable projects, especially when policies shift or reverse?

Dunn: Policy simultaneity is one of the most analytically interesting challenges in this space. Governments are effectively operating as both market-maker and regulator, which creates inherent tension. The incentive structures created by former policies drove an enormous wave of capital into projects, many of which were underwritten on the assumption of policy continuity. Now, with ongoing uncertainty, we are seeing a significant number of commercial disputes playing out through in-court restructuring activity. Through this process, developers, initial capital partners and creditors are revisiting the fundamental economics of projects that are already completed or under construction. In order to resolve these restructurings, we are seeing change of ownership, new capital requirements and right-sizing of capital stacks.

CD: How do shifts in input prices, interest rates and supply chain volatility alter the economic foundations of large scale clean energy projects? How are these pressures manifesting in commercial or regulatory disputes?

Bodell: The ongoing investment model for utility-scale renewables assumed declining cost curves to achieve parity with fossil fuel generation. When the direction of the cost curve reversed post-pandemic due to inflation, supply chain disruptions and new tariffs, it exposed how competitive margins can be decimated through external factors, making many projects unprofitable. Higher interest rates compounded this problem by increasing the cost of capital – particularly punishing for renewable generation projects whose costs are almost entirely front-loaded through upfront capital investment. Assuming liability was limited through predefined liquidated damages clauses, some counterparties either delayed or walked away from their contractual obligations. Quantifying damages in those situations requires a detailed rebuild of the project economics. What were the original set of projections or expectations? What actually happened? And what mitigation actions could the damaged party have pursued?

CD: What trends are most influencing the allocation of risk in today's renewable infrastructure contracts, particularly around grid access, curtailment and system operator performance?

Bodell: We are seeing an interesting separation of risk allocation between build versus buy investment decisions, which is impacting renewable infrastructure contracts. The risk of renewable infrastructure has increased due to the accelerated expiration of federal tax incentives. The new federal tax incentive end dates mean that projects not built by the deadlines could become uneconomic to proceed, creating stranded costs for investors and cancelled generation resources that the grid was expecting to use to meet growing demand. At the same time, generation interconnection queues, recently dominated by renewable resources, increase the risk of negative prices and involuntary curtailment once a project does come online. Renewable infrastructure contracts often allocate the risk of operational delays, negative pricing and

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curtailment with specific clauses that address each. We have seen an increasing number of contracts that share those risks versus allocating them solely to one of the counterparties.

Dunn: From a transactional standpoint, prospective lenders and investors are pushing much harder on curtailment provisions during diligence. Projects that are now in dispute often have contracts written before that scrutiny became standard. That mismatch between contractual language and current-day risk allocation creates conflicts around what was intended by the parties. We are seeing expensive litigation play out as a result, with varied methods of resolution, such as significant payments to right-size risk allocation and buyouts of offtake agreements. Needless to say, these disputes will shape the future viability of many projects.

CD: To what extent do information asymmetries – such as incomplete performance data, evolving technology risks or uncertain long-term revenue forecasts – contribute to disagreements between project sponsors, investors and counterparties?

Dunn: Information asymmetries show up most concretely when distressed projects hit the workout process. Sponsors controlling operational data – actual generation curves, equipment service records and grid curtailment logs – have significant informational advantages over lenders and other creditors trying to assess recovery value. That asymmetry directly affects valuation disagreements, requiring underwriting of distressed and pro forma valuations on behalf of creditor constituencies, working from imperfect data and sometimes reaching a very different conclusion from project sponsors. Resolving those disagreements in a distressed situation requires independent forensic analysis of actual versus projected performance and often reveals that the original underwriting reflects

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> *David Dunn, Province, LLC*

assumptions that are not viable currently or on a go-forward basis.

CD: How are disputes around technology failures – such as component defects in wind or performance degradation in solar – changing in terms of evidence, expert analysis and warranty interpretation?

Bodell: For damages tied to technology failures, there usually is an initial period of major finger-pointing between the original equipment manufacturer, engineering, procurement and construction, site engineers, developers and off-takers. This determines who was responsible for the alleged wrongdoing and, therefore, liable for damages. Warranty interpretations can be the most consequential, including working through all of the caveats that have economic implications. Manufacturers have become increasingly sophisticated about drafting warranties that limit recovery to component replacement rather than consequential damages, lost revenue or financing costs. When a turbine gearbox fails, and a project is offline for six months, the economic harm to the project can be enormous – but whether that harm is recoverable depends entirely on how the warranty was drafted and how parties allocated that risk. The economic damages analysis required in these cases has to be consistent with the legal theory of the case and the technical failure analysis.

CD: Across emerging technologies like long duration storage, green hydrogen or offshore wind, what analytical challenges arise when assessing causation, quantifying damages or evaluating counterfactual scenarios in a dispute context?

Bodell: The counterfactual analysis – estimating what the project would have earned absent the breach or failure – often requires building an economic model from first principles rather than calibrating against observable market data. This 'but-for' world, even when tied to generally accepted industry-standard estimation methodologies, can generate significant expert disagreement, making such disputes harder to resolve efficiently. Damages tied to energy storage require understanding how such assets are optimised based on a shadow price reflecting opportunity cost. Green hydrogen requires understanding the economics of both inputs and outputs of production. Offshore wind needs to account for well-known natural phenomena tied to lightning strikes, equipment wear and wind patterns. Quantifying lost profits for businesses engaged in these areas requires assumptions and understanding about technology life, cost curves and

market development, which can be highly contested, regardless of the economic and industry support.

CD: Given the increasing cross-border nature of renewable investment, how do differences in regulatory regimes, subsidy structures and permitting frameworks create conditions for international arbitration or valuation disagreements?

Bodell: Cross-border renewable investment creates layered regulatory environments where project economics depend on overlapping frameworks – international tariffs, national subsidies, regional grid codes and local permitting. The most significant valuation disagreements arise when government action changes economics across multiple layers simultaneously. Tariffs do not just affect equipment costs, they can also affect construction timing – shifting commodity price exposure, interconnection queue position and potentially subsidy eligibility. Quantifying those cascading effects requires economic analyses that trace impacts from an alleged wrongdoing through each layer of the regulatory and commercial structure.

Dunn: When cross-border projects hit distress, differing insolvency regimes and creditor priority rules across jurisdictions create enormous complexity in restructuring negotiations. For example, we are seeing sponsors seek relief under relatively new and untested insolvency regimes in Europe with varying degrees of success. A lender with priority under one country's framework may have very different recovery expectations than a co-lender operating under another. Obtaining consent from multiple governments in order to effectuate ownership transfers can add further friction to restructurings where the pro forma capital stack cannot be resolved without simultaneously navigating multiple legal systems. CD