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BRIEFING

Mitigating risk in the energy transition

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The global shift towards clean energy is accelerating, investment is growing and changes in the market are reshaping infrastructure development and how risks are shared. As governments, regulators and markets drive the move towards cleaner energy sources, businesses are dealing with volatility and economic change. This transformation extends beyond the use of new technologies and raises complex questions around legacy assets, transition fuels, long-term supply arrangements, financing models and the resilience of existing infrastructure.

Across Europe, diversification away from traditional gas supply has driven increased reliance on LNG, new terminal developments and long-term offtake agreements, while creating challenges associated with under-used or economically redundant legacy assets. In Asia-Pacific, offshore wind is expanding, but projects are facing political and economic pressure. Emerging markets in the Middle East are pursuing strategies focused on grid expansion, LNG exports, hydrogen, ammonia and critical minerals, highlighting the scale of capital deployment required and the importance of stable legal and regulatory frameworks.

Regulatory reform, ESG-driven accountability and shifting policy priorities are directly influencing project bankability and investor protection. Informed legal analysis is critical to enabling capital to flow, managing risk and supporting the delivery of energy infrastructure at scale.

In this briefing, we discuss approaches to mitigating the inevitable risks which arise in the energy transition.

Key issues

1. Regulatory and ESG complexity is reinforcing the value of strong governance and well-structured projects across the energy transition.
2. Bankability and effective risk allocation are central to attracting capital amidst policy and market volatility.
3. The transition continues to offer significant global investment opportunities, while highlighting the importance of strategic asset management.

The changing ESG landscape

"The ESG (Environmental, Social, and Governance) landscape has become increasingly fragmented and politicised, making it more challenging for companies to navigate," says Jessica Gladstone, a partner in Clifford Chance's London office. "Regulations are diverging and constantly evolving, particularly between the EU, which is refining its sustainability frameworks, and the US, where anti-ESG sentiment is growing. This divergence creates conflicting obligations, disclosure standards and enforcement priorities for international businesses, increasing complexity and risk."

There is heightened scrutiny and litigation risk due to these changes. NGOs are actively broadening their focus across sectors to increase pressure, often supported by philanthropy and litigation funders. Many legal actions are novel, testing established legal principles against new climate attribution science and challenging whether companies' climate ambitions are adequate or properly implemented. Claims of greenwashing are a particular area of risk.

International and comparative law are increasingly being used as the basis for claims, with legal arguments building on developments across jurisdictions. Regulators are also more engaged, especially regarding consumer protection and financial disclosures. Strategic shareholdings are being used to raise challenges at AGMs, applying further pressure beyond litigation.

In response, companies are:

- Strengthening climate-related governance and scenario planning, integrating ESG metrics into risk management.
- Building resilient, low-carbon supply chains and imposing similar standards on suppliers.
- Reviewing and revising ESG policies and investment criteria.

Spotlight: United States

"The past 12 months have been particularly challenging for energy transition projects in the US," says Steve Nickelsburg, a partner in Clifford Chance's Washington, DC office, "largely due to a series of executive orders and regulatory actions from the federal administration." These measures have included both high-profile interventions and lower-level bureaucratic hurdles imposed by agencies and regulators, such as the Department of the Interior and the Environmental Protection Agency. This has resulted in a complex permitting process for project developers. "The market remains strong, with renewables, especially solar, continuing to be the fastest-growing source of new capacity, driven by the need for energy security, but there is considerable uncertainty about the pace and scale at which new energy sources will come online," says Nickelsburg.

The administration has targeted specific projects, such as imposing a moratorium on new offshore wind permits and issuing stop-work orders for major projects already under construction, in New England, New York and the Mid-Atlantic. Offshore wind has been particularly affected, with repeated permit withdrawals justified on shifting grounds, including national security concerns, despite prior reviews and mitigation agreements with relevant agencies. These actions have led to significant financial and operational disruption, with projects halted after years of preparation and substantial investment.

Many affected parties have responded by filing lawsuits, and federal courts have generally ruled in their favour, granting injunctions and restoring permits. The courts have relied on the Administrative Procedures Act, which provides for challenges to government actions on the basis that they are not rationally supported or are arbitrary or capricious. In these cases, the courts generally found the administration’s justifications to be lacking in reasoned decision-making. Despite these legal setbacks, the federal government continues to appeal decisions and persist in its deterrent approach, aiming to increase the cost and difficulty of pursuing these projects.

"There is some hope that broader political considerations may prompt a change in approach, as there is bipartisan consensus on the need for permitting reform to facilitate pipelines and transmission infrastructure," says Nickelsburg. "Congressional Democrats have indicated they will not support such reforms while the administration maintains its stance against offshore wind and solar. Pressure from industry stakeholders, including oil & gas executives, is mounting on the administration to reconsider its position to enable legislative progress before the next election. Nevertheless, ongoing political hostility towards energy transition projects is expected to persist from certain quarters, with continued legal and political battles likely across the sector."

Managing construction risk and structuring bankable projects

"As a front-end construction lawyer, the primary objective is to ensure construction risks are allocated in line with market norms and to structure projects so that they are capable of attracting investment or debt," says Sandy Hall, a partner in Clifford Chance's London office. "The construction industry is highly dynamic, with what is considered bankable or investible changing over time and dependent on the particular sector and relative liquidity amongst other factors. Importantly, allocating risk in a contract does not eliminate it; risks must still be managed if they materialise. The guiding principle is to allocate risks to the party best placed to manage them, while maintaining a structure that supports investment."

Beyond tendering, drafting and structuring, lawyers have an important part to play in the “grey space” after projects reach financial close and move into execution. This includes claims management and dispute avoidance, which require a deep understanding of construction contracts, industry standards and the interests of multiple stakeholders. "Finding practical, strategic solutions that balance these interests is both challenging and rewarding," says Hall.

Currently, the industry is experiencing significant turmoil and volatility, with force majeure claims arising from events in the Middle East and Ukraine. It is important to focus on structuring projects at the outset to meet varied and sometimes conflicting commercial objectives, such as cost optimisation, speed to market, cost and time certainty, or asset quality. "These priorities must be balanced, as prioritising one often impacts the others. In the energy transition, speed to market and urgency of implementation are particularly important, especially where rival technologies are fighting to achieve dominance in their markets," says Hall.

What is considered bankable varies by market, sector and liquidity. In sectors such as offshore wind and clean hydrogen, high liquidity can make lenders more flexible on certain structural features, allowing for disaggregated procurement structures that would not be acceptable in other markets. Procurement strategy is also heavily influenced by technology and speed to market. For novel technologies, such as green ammonia or plastics pyrolysis plants, key suppliers may only be willing to provide equipment rather than a full EPC (engineering, procurement and construction) solution, leading again to disaggregated contract structures.

Proprietary technology and intellectual property (IP) licensing add further complexity, especially when licensors are deeply protective of their IP and may not be willing to share with competitor contractors.

"Early selection and embedding of technology providers can streamline procurement but may reduce the developer’s leverage and threaten bankability if not managed carefully," says Hall.

Disaggregation can take the form of vertical splits (separate EPC contracts for distinct units or parts of the wider project) or horizontal splits (different parties handling equipment design, supply, transportation and installation), each presenting unique challenges in risk allocation and co-ordination.

Mitigants for these risks include having an overall master schedule with built-in buffers between packages, inspection and design hold points at key stages, and ensuring warranty and dispute resolution provisions are co-ordinated across all contracts. Competition can be an effective risk mitigant: "Maintaining competitive tension among bidders for as long as possible helps secure bankable terms and favourable pricing. Sole sourcing reduces leverage and makes achieving a bankable project significantly more difficult. Sponsors are advised to structure procurement to preserve competition for as long as possible," says Hall.

Spotlight: Africa

"Africa's energy transition is characterised by urgent demand growth, infrastructure challenges, regulatory complexity and evolving market risks," says Sam Brown, a partner in Clifford Chance's London office. "Risk management is critical for investors, with construction risks prominent in large grid infrastructure upgrade projects. For generators, disputes with government offtakers under power purchase agreements (PPAs) are common, often involving attempts to reopen tariffs or pricing following political changes."

A notable example of the challenges faced is a major onshore wind farm in East Africa, which was completed but delays and defects in constructing the hundreds of kilometres of necessary transmission lines led to years of delay to operations and significant financial penalties for the government.

Africa's role in the global LNG market is evolving. "While North Africa has traditionally dominated gas and LNG production, there is a shift towards sub-Saharan Africa, with new projects and discoveries driving increased output. This growth is spurring major infrastructure investments, including cross-border and transcontinental pipelines. The risks associated with these projects mirror those in the power sector, with added complexity from market volatility," says Brown. The scale of LNG mega-projects in development and ongoing market volatility means that there is likely to be increased focus on commissioning provisions in offtake agreements, particularly in light of recent high-profile arbitrations involving delays in commissioning projects.

Managing delays, defects and disputes

"The risks associated with large-scale energy projects, such as new nuclear and offshore wind, are varied, real and potentially significant," says Sachin Trikha, a partner in Clifford Chance's London office. "These projects are among the most complex and high value globally, often undertaken under significant time pressure and with rapidly evolving technologies, making them fertile ground for disputes."

A primary source of disputes is delays, which can amount to hundreds of days and even extend into several years. For example, a delay in fabricating components for an offshore wind farm could lead to missing a critical shipping window, which results in further delays due to the need to secure a new ship and wait for suitable weather conditions, ultimately causing a setback of several months.

Defects, including serial defects, are another significant risk, especially given the pace of technological change. "Identifying the root cause of defects early is crucial, but pressure to do so quickly can lead to mistakes and recurring issues. Sometimes, defects or changes in regulations or their interpretation require design changes and rebuilding, which can trigger substantial disputes," says Trikha.

Effective risk management is essential to avoid or mitigate disputes. Early identification of risks is key: spotting issues as soon as possible allows for timely intervention, such as renegotiating shipping arrangements to avoid delays. Adherence to early warning mechanisms, best-in-class project execution, regular progress updates and risk registers, and strict compliance with contractual notice provisions, are all vital.

Some risks, such as those arising from unforeseen events such as COVID-19 or the conflicts in Ukraine and Iran, are unavoidable and must be managed as best as possible. When claims do arise, they can be highly distracting for project teams. Having a dedicated task force to manage claims, separate from the main project execution team, is recommended, as is establishing clear lines of authority and decision-making.

Settlement is generally preferable to escalation through arbitration, provided the settlement agreement is robust and carefully drafted to avoid further disputes. When disputes become likely, it is important to formalise communications, involve legal teams and avoid making unnecessary admissions.

Ultimately, successful delivery of energy transition projects will turn on disciplined risk allocation, clear governance and early intervention when issues arise. In a more fragmented policy and ESG environment, and with projects exposed to uncertainty and volatility, investors, developers, contractors and lenders will need to test contractual and financing structures for bankability, align notice provisions and early warning processes across packages, and build dispute-avoidance and resolution plans that work in practice. Taking these steps early can protect value and help keep projects on track.

Marie Berard
Partner, London

marie.berard@cliffordchance.co
+44 207006 2435

Sam Brown
Partner, London

sam.brown@cliffordchance.com
+44 207006 2295

Jessica Gladstone
Partner, London

jessica.gladstone@cliffordchance.com
+44 207006 5953

Sandy Hall
Partner, London

sandy.hall@cliffordchance.com
+44 207006 6806

Melissa Hollenders-Brown
Senior Associate, London

melissa.hollenders-brown@CliffordChance.com
+44 207006 1135

cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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Ross Howard
Partner, London

ross.howard@cliffordchance.com
+44 207006 5092

Moritz Keller
Partner, Frankfurt

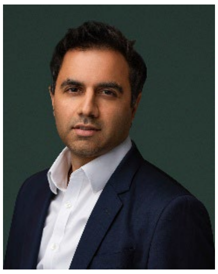
moritz.keller@cliffordchance.com
+49 69 7199 1460

Craig Nethercott
Partner, Dubai

craig.nethercott@cliffordchance.com
+971 4503 2606

Stephen Nickelsburg
Partner, Washington DC

steve.nickelsburg@cliffordchance.com
+1 202 912 5108



Sachin Trikha
Partner, London

sachin.trikha@cliffordchance.com
+44 207006 8548