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Dispute Resolution

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Special features of the judicial and extrajudicial settlement of disputes within the scope of energy sales in Germany

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A. Energy Sales as an Unregulated Growth Market with Peculiarities

On 29 April 1998, the "*Gesetz zur Neuregelung des Energiewirtschaftsrechts*" (Law on the New Regulation of Energy Industry Law) opened an entirely new field of sales in Germany – the energy market. From then on, consumers – both private and corporate – were free in their choice of electricity and gas supplier. From a sales point of view, this opened the possibility for all market participants to directly extend their previous sales area, which was limited to their own supply area, to the Germany as a whole. Although there were still obstacles to be overcome, such as the conclusion of various distribution agreements with the local grid operators, the road to the market was open.

Along with these new opportunities, new challenges and potential sources of conflict emerged. Energy sales remains almost unregulated and thus has a unique position within the German sales environment. This applies to both B2C and B2B sales, especially under the impression of homogeneity of the product "electricity" or "gas". Cross-selling products – especially in the private customer and SME sectors – such as financial or insurance products are heavily regulated by the state.

All that leads to a unique dynamic of the market and likewise to the resolution of disputes arising from this environment.

B. Sensitive Environment of Energy Sales

Energy sales operates in a sensitive environment, particularly in Germany. Regulatory requirements in the area of production and procurement have an impact on sales. Public perception continues to be dominated by the "misbelief" of a supply gap.

I. Peculiarities of Energy Sales

Due to the large number of participants involved on the way from production to transport to final consumption, different peculiarities with the energy market and in the context of energy sales have to be taken into account:

This becomes apparent, for example, through the separation of grid operators and energy supply companies (hereinafter referred to as "ESC"), which is motivated by antitrust law. Due to so-called "*unbundling*", these are – in particular, under corporate law – strictly separated from each other. For instance, customer data must not be exchanged. This

requirement, however, does not apply to ESC with less than 100,000 customers in the respective grid according to Section 7 (2) EnWG (German Energy Industry Act).

The increase in grid fees due to the development of renewable energies is another high-profile factor to the energy market. Rising prices inevitably increase the attention of customers.

Under these circumstances, it is surprising that sales in this particular environment is not subject to extensive regulation by the legislator. Such regulation is not uncommon in other business areas affecting both B2B and B2C customers. For example, the sale of financial products and insurance is subject to strict regulatory regulations in Germany, such as the need for a permit in accordance with Sections 34d et seq. GewO (German Trade, Commerce and Industry Regulation Act), a registration obligation as well as notification and consulting obligations in accordance with Sections 59 et seq. VVG[1] (German Insurance Contract Act). In some cases, this requires extensive disclosure and documentation obligations. Such requirements do not (yet) exist in energy sales.

Such a commercial freedom in terms of sales consequently allows a great freedom of scope in sales methods and structures by using direct, multi-level or online sales. The variations are hardly limited.

In addition, electricity and gas are highly homogeneous products that do not differ in product quality except for characteristics such as "green electricity". For the final consumer, "electricity comes from the socket". This high qualitative comparability of the product to be sold requires special sales approaches. This ranges from basic contract design and bonus models to cross-selling models.

All of this determines the special environment of energy sales in Germany.

II. Increased Public Awareness

The energy market has now been liberalized for decades. Supplier switching online platforms are attracting increased public attention concerning the change of the energy supplier. Companies - from SMEs to conglomerates - are intensively examining the potential savings in energy procurement. Nevertheless, there is still a certain fear of the so-called

[1] Cf. Küstner/Thume/Kneiß Handbook of distribution law vol. 3 Special distribution forms, p. 488 et seq.

supply gap in both the B2B and B2C sectors. Because of a lack of information, many customers often fear a supply failure in the event of an "unsuccessful" change of supplier.

Due to the separation between ESCs and basic suppliers or regional grid operators described under I. as well as the extensive, firmly defined switching and supply processes, the risk of a supply gap in the event of a change of supplier is nearly eliminated.

1. Special Media Presence at Energy Supply Companies threatened by Crisis

1.1 Special Attention in Insolvency Cases

The fear of a supply gap is not only relevant with a supplier change, but also in case of insolvencies of ESCs. The insolvency proceedings of the TelDaFax Group and the provisional insolvency of Bayerische Energieversorgungsgesellschaft mbH (BEV), for example, increased the media's presence. Within the scope of the TelDaFax insolvency, even investigations by public prosecutors were carried out and followed by the public with great interest.

1.2 Media Presence through Restructuring

Restructuring within conglomerates in the energy sector also attracted increased attention. This applies to the split-up of E.ON and Uniper as well as RWE and Innogy. Such restructuring creates new market positions and thus has a direct impact on energy sales.

For example, a takeover of Innogy by E.ON led to significant market power for E.ON and thus to possible price increases.[2] Consumers in particular often perceive such developments critically.

C. Potential Conflict Scenarios and their Peculiarities

The disputes arising in the context of energy sales are associated with serious consequences for the companies involved. In the energy sector, there are particularities especially when involved companies are likely to lose their reputation. This can be the case, in particular, in court proceedings with a public external impact. Both customers and business partners could associate negative aspects with a litigation and possibly look for new contractual partners.

[2] Cf. *Lothar Gries*, Steiniger Weg für E.ON, Vor Übernahme von Innogy, available under: https://www.tagesschau.de/wirtschaft/boerse/eon-innogy-103.html (German), last visited: December 17, 2019

Although such consequences can become relevant both in the B2C and B2B sector, conflict scenarios in the sector of B2B business are the focus of this article. The potential consequences for sales companies will be discussed by way of example, using the problem areas that occur most frequently in practice.

I. Disputes within the Framework of Large-Scale Energy Supply Contracts

Although all energy supply contracts regulate typical contractual services such as the supply of energy in return for payment, these contracts are by no means congruent. Rather, their contents differ depending on which actors in the energy market conclude the contracts and which products they relate to. This contractual freedom in the area of special-rate customers[3] has potential for conflict.

1. Controversial Clauses within an Energy Supply Contract

1.1 Take-or-Pay-Clauses

Take-or-pay clauses (**"ToP"**), in particular, so-called "hard ToP", are considered critical from the customer's point of view. A ToP is a form of minimum purchase and remuneration obligation. Thereby, the parties agree on the obligatory purchase and remuneration of a minimum quantity, irrespective of the actual consumption.

However, even hard ToP clauses are harmless in the context of general terms and conditions according to Section 307 (1) sentence 1, (2) no. 2 BGB (German Civil Code). This applies in particular if they do not exceed a limit of 70 % to 80 % of the calculated and anticipated customer supply requirement.[4] This can also not be assessed as questionable lump-sum compensation according to Section 309 No. 5 BGB or even a contractual penalty to be examined according to Section 309 No. 6 BGB.[5] The above applies all the more if a special clause in the contract provides that the missing payments can be compensated in subsequent years (so-called "make-up" or "carry clause"),[6] whereby such clauses are hardly to be found in current contract drafting. In the business sector, the provisions of Sections 308 and 309 BGB would in any case provide no more than an indication for the valuation of such clauses.

[3] Electricity customers with a consumption of > 30.000 kWh/a; gas customers who are not supplied as basic-/substitute customers.
[4] *Schöne* in: v. Westphalen/Thüsing Contract law/GTC, electricity supply contract, 2018, margin no. 115.
[5] Federal High Court of Justice NJW 2013, 856.
[6] Cf. *Büttner/Däubner*, ZNER 2001, 210; *Sachsenhauser Rupert*, CuR 2009, 96.

More common, however, are under- and overrun quantities deviating from the contractually agreed delivery quantity, which are reimbursed or recalculated on the basis of formulas when the actual delivered quantity is established, depending on whether they are over- or underrun. In particular, if these formulas are linked to transparent parameters such as the arithmetic average of the EEX prices, there are no objections to their effectiveness.

1.2 Price Regulations and Price-Adjustment clauses

Especially from a supplier's point of view, price adjustment clauses can be an option in contract drafting for energy supply contracts with long contract terms. Such an adjustment clause should make it possible to continue a contract even in the event of a changed market situation - in particular a changed purchase price situation - instead of terminating the contract (for cause). Such price adjustment clauses are possible in different variations.

For example, a - nowadays no longer common - linking of the gas price to the development of the heating oil price is permissible in general terms and conditions of business transactions. This is the result of jurisdiction of the German Federal Court in the context of general terms and conditions in accordance with Section 307 (1) BGB.[7]

Unilateral price adjustment clauses in favor of ESCs have to be assessed more critically. In order to avoid unreasonable disadvantage within the meaning of Section 307 (1) s. 1 BGB, such clauses must remain straightforward and give the customer the opportunity to comprehend the price adjustment and at least to check its plausibility.[8] In order to prevent an ESC from being able to raise prices without any limitation, which would result in unreasonable disadvantage to the customer within the meaning of § 307 (1) s. 1 BGB, such a clause may provide the right to adjust prices only subject to the limitation of Section 315 (1) BGB. Pursuant to this, the price adjustment could only be exercised at equitable discretion, which in turn would mean taking into account cost reductions in the interest of the customer and, if necessary, passing them on to the customer.[9]

The judicial review of the equitable discretion pursuant to Section 315 BGB may pose a particular challenge for courts. The particularities of the energy market discussed above may cause considerable difficulties for a court inexperienced in this field to assess equity. As a result, a review procedure would have to be carried out. Representatives would have to

[7] Federal High Court of Justice, Judgement of 14.05.2014 – VIII ZR 114/13 and VIII ZR 116/13.
[8] Cf. Danner/Theobald/Heinlein/*Weitenberg*, 100. SD December 2018, EnWG Section 41 margin no. 23.
[9] Cf. Federal High Court of Justice NJW 2016, 936, 942; Danner/Theobald/Heinlein/*Weitenberg*, 100. SD December 2018, EnWG Section 41 margin no. 24.

present and explain the respective special conditions in detail to the court in order to be able to cause an appropriate decision of the court.

1.3 Termination Clauses

1.3.1 Termination with Notice

Even from a solely legal point of view, the drafting of special contracts in terms of energy supply permits some special features: For example, a termination does not have to be bound to the end of the month,[10] as this is not objectionable under GTC law. However, such a termination "during the month" can still be effectively waived with regard to the excessive processing effort involved in this case.[11] Moreover, since the maximum limit for a notice period of three months pursuant to Section 309 no. 9 BGB is generally considered not to apply in B2B transactions,[12] six or twelve-month notice periods would also be permissible under German GTC law in special contracts. In the past, such extensive notice periods were quite common. However, the continuing competition within the energy market has improved the negotiating position of the customers, which is why shorter notice periods are becoming more and more standard.

1.3.2 Termination for Cause

In addition to the possibility of a termination with notice, special contracts also require the possibility of a termination for cause under special circumstances. Beside the legal basic concept of Section 314 BGB, the clauses in many special contracts are based on the role model of Section 21 StromGVV (German Ordinance Regulating the Provision of Basic Electricity Supplies) respectively GasGVV (German Ordinance Regulating the Provision of Basic Gas Supplies). This provision stipulates the right for a termination for cause within the scope of basic supply. Although such an orientation is not mandatory with regard to Section 314 BGB, it is common practice in contract drafting. The background to this link is the reference in Section 21 StromGVV respectively GasGVV to the corresponding Section 19 StromGVV respectively GasGVV. In each case, the prerequisites for an interruption of supply are stipulated therein. Recourse to these interruption prerequisites makes it possible, on the one hand, to regulate an interruption directly in the special contract and, on the other hand, to define concretely defined criteria for a termination for cause. By means of such contract

[10] Compare to this renewal the EnWRVÄndV of 30.04.2012 (BGBl. I, p. 1002).
[11] Cf. v. Westphalen /Thüsing/*Kalwa* Contract law/GTC, gas supply contract, margin no. 48.
[12] Cf. Palandt/*Grüneberg*, Section 309 margin no. 96.

drafting, questions of interpretation - which are difficult to determine in proceedings - can be avoided.

2 Potential Impacts in the Case of Defeat

In the event of an escalation of the conflict, the aforementioned contractual sources of conflict may have serious consequences for the losing party. Especially for the customer, the interruption of supply or the unexpected termination of the contract can have enormous consequences. The interruption of supply can lead to production losses and a termination to supply by basic supply. Both would involve considerable costs and a potential loss of reputation. This shows that public legal proceedings in the event of disputes in connection with large-volume energy supply contracts are subject to significant risks.

Before possible approaches regarding the solution of this problem are pointed out, frequently occurring disputes between sales partners are discussed.

II. Disputes Between Sales Partners

Disputes between sales partners can often be traced back to disagreements regarding commission payments and customer loyalty models. A distribution partnership is usually based on the intention of a long-term cooperation and not only on a purely economic and technical business basis. Rather, an open exchange of information and mutual trust is also required. However, the respective economic advantages of the parties remain essential.

1. Drafting of Commission Models

In most cases, the remuneration of the sales performance is based on commission. In practice, various commission models are used, each of which has its own advantages and disadvantages.

While the distribution for private customers is mainly based on fixed commission rates per contract (for which deliveries have been made), remuneration in the commercial customer sector is often based on a consumption-based commission. In this case, the agent of the contract receives a previously determined amount as commission which is based on the consumed kilowatt hour of energy.

1.1 Final Accounting for Consumption-Based Commission Models

Within the framework of consumption-based commission models, sales organisations are interested in advance payment of the commission, either when the contract is concluded or

when delivery commences, in order to create liquidity quickly. Since such an advance payment can only be calculated based on the forecast consumption volumes of the referred customer, the requirement of a final accounting according to the actual consumption volumes (by measuring the respective grid operators) is indispensable.

If advance quantities and quantities actual delivered are not determined in detail and precisely, and no offsetting or disbursement mechanism is defined, it is difficult to avoid conflict between the sales partners.

1.2 „Airtime-Commissions“

Especially in private customer sales, so-called "Airtime-Commissions" have been established as a tool for customer retention.

An "Airtime-Commission" is a follow-up commission which is due when the customer who has been referred renews his contract with the ESC - consciously or unconsciously - after the initial term has expired. Usually, the commission of a referred customer is based on a fixed amount which is calculated on the basis of a cluster of estimated consumption and the initial contract term. After expiring of the initial term no further commission is to be paid since the customer was expected to stay with the ESC for a longer period anyway.

However, with the continuously increasing market power of online price comparison platforms like "Verivox" and "Check24", such a retention time can no longer be relied upon. Consequently, granting “Airtime-Commissions” is an attempt to make a further referral of a customer unattractive and leaving the customer with the existing supplier more attractive. On the one hand the payment of commissions for customers already acquired represents a considerable financial expense for ESCs. On the other hand, it offers a sustainable source of income for the intermediaries. Therefore, precise and transparent contractual provisions must be established in order to avoid or at least minimise disputes.

This is the case because in the event of litigation, there is a risk that commission agreements are to be disclosed both to competitors and to customers. Particularly private customers might consider "trade" with their supply contracts negative. Furthermore, commission rates should not become public in such disputed market as the energy sales market.

2. Qualitative Selection Criteria of Referred Customers

In most cases, ESCs will provide energy supply for customers in advance. However, advance payments in return are hardly practiced on the market - due to the resistance of customers.

For this reason, ESCs determine quality criteria for customers which will/may be referred to them. In terms of B2B sales, for example, the size of the company is used as a criterion for this. However, the creditworthiness of customers is of paramount importance when evaluating potential new customers. Such criteria should also be agreed transparently between the sales partners in order to avoid high rejection rates and fruitless sales efforts. Particularly in the case of rejected customers, whose data the ESC has already received, data protection and - with regard to possible "customer protection" - antitrust issues must of course be taken into account here.[13]

D. Opportunities from Energy Sales and its Considerable Particularities

It can be stated that the sensitive and yet unregulated environment of energy sales requires precise contract drafting, because otherwise there is a high potential for disputes. In the event of a dispute, peculiarities will come along and thus the following recommendations.

In the area of private customer sales, the possibility of calling the conciliation board pursuant to Section 111b EnWG in the relationship between the ESC and the consumer must always be considered. Procedure before the conciliation board can already be seen as a warning signal for the respective sales partner, as conflicts between the ESC and the consumer can very probably have an impact on the intermediary relationship and the associated commission payments. In order to have a certain lead time from the sales partner's point of view, it would be conceivable to include an information clause in the sales partnership agreement, which would oblige the ESC to disclose procedures before the conciliation board to the partner.

Between sales partners there would also be the possibility of agreeing on an arbitration clause in the respective agreement. In such a case, proceedings would take place before an arbitral tribunal instead of a regular (public) court. The advantage of arbitration is that the parties themselves would be able to determine the framework of the proceedings to a large extent or have it determined by an arbitral institution. In addition, arbitrators may be selected who have special expertise and are thus able to take the peculiarities of energy sales as described above into account. Furthermore, arbitration proceedings will not become public, which prevents the problem of an impact on the public image in proceedings before ordinary courts. Despite all advantages of arbitration, such proceedings involve considerable costs, which are only worthwhile if the amount in dispute is correspondingly high. For this

[13] Since this article provides an overview, further details are waived.

reason, an arbitration clause appears to be only appropriate for large-volume sales partnership agreements.

Due to the distinctive characteristics of energy sales and the sensitivity of the environment, the focus should therefore be on dispute avoidance. In the event of a conflict, the dispute should be settled by consultants with expertise and energy market know-how in order to take these particularities into account appropriately. Especially in proceedings before regular courts, the background and details of the sales structures must be presented precisely and effectively.

Until energy sales is more strictly regulated, this market will remain extremely dynamic and therefore offers a multitude of opportunities, but also risks, which must be assessed accordingly.

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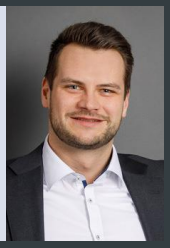

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