Managing change, risk and disputes in offshore wind farm construction

Our sector specialists, and what we can do for you
At Eversheds, we have a team of lawyers who specialise in advising our energy sector clients on problems connected with the design and construction of offshore wind farms.

We support our clients with their offshore wind projects throughout the construction phase and into the operation and maintenance phase. We advise on change and risk management, dispute avoidance and we help our clients resolve disputes. These include disputes concerning construction delays, cost-overruns and defects, as well as shipping disputes and claims by third parties such as fishery disputes and noise nuisance claims.

We want to use our specialist knowledge and significant expertise to help you with the successful delivery and operation of your offshore wind farms.

**How we support our clients**

**Project support, change and risk management**

The multi-party contracting model favoured for the construction of offshore wind farms requires a proactive approach to project management and management of change during the lifetime of the project. We understand the challenges faced by offshore wind developers in managing multiple contracts and the interface risk between them where the consequences of a failure to deliver on time, within budget, and with the requisite quality can be very high.

We provide practical and specialist legal advice to support our clients during the construction of offshore wind farms to resolve live issues as and when they have arisen. Our aim is simple – to protect our client’s position, avoid unnecessary disputes and costs, and ensure that the project proceeds as intended.

**Making a difference**

- Advising a client on de-scoping their balance of plant contractor part-way through installation of the transition pieces due to the unsuitability of the contractor’s selected installation vessel and failure to identify and rectify the root cause of health and safety breaches as Principal Contractor under the CDM Regulations. We drafted and negotiated a deed of variation to the BOP contract in an extremely short timescale so that the client could secure the charter of an alternative installation vessel as soon as possible, thus mitigating the delays to the wind turbine generator installation.

**Lessons learnt**

We can draw on lessons learned on other projects to help you, including:

- The importance of managing the interface risk between different work packages to ensure appropriate allocation of liability for variations, delay and defects;
- How to mitigate cost exposure to one contractor when another contractor is in delay;
- Appropriately documenting the omission of works without putting the programme at further risk, the value of which has been recently highlighted in MT Højgaard v E.On;
- Dealing with insolvency in a relatively limited and often international supply chain; and
- The benefits of putting in place an early strategy for the resolution of disputes that arise during construction to reduce potential liabilities and programme impact.

**Making a difference**

- Producing a strategy report on short notice and for a fixed fee on claims that had arisen across three works packages with a gross value of c.€70m during the construction of the wind farm. The claims included adverse weather, health and safety and marine warranty surveyor intervention. Our report assessed the merits of each claim, the interfaces between the contracts and recommended a robust strategy to facilitate resolution of the disputes, which was subsequently adopted by the JV developer’s board.
Construction disputes and dispute resolution

If you have an issue which cannot be resolved without recourse to formal dispute resolution, we have the knowledge and expertise to help.

A recent example of where we assisted our clients to resolve a final account dispute is by developing a strategy to commence multiple adjudications against a balance of plant contractor, a relatively unusual move by an employer, to enable our client to dictate the dispute resolution agenda. By selecting the disputes in which our client’s case was strongest, we were able to secure adjudication wins with a significant impact on the overall financial position between the parties.

From acting across the range of dispute resolution procedures in complex and high value offshore wind farm disputes, we have extensive knowledge of the types of construction disputes you may face. As our lawyers do not need to go through a learning curve to understand the technical, practical and legal issues, we can save you valuable time and cost. Our expertise has been endorsed by recent significant mandates including LCIA arbitrations for offshore wind farm developers relating to disputed sums of many €10 millions.

Construction defects

Defects may become apparent when carrying out completion tests but often do not appear until a wind farm becomes operational. We are experienced in both scenarios, and know the importance of finding a practical solution that protects generation income and the long-term integrity of the turbines, whilst ensuring the costs of rectifying the defects can be recovered.

Our recent instructions include advising on grouted connection defects, leaking cable entry systems, corrosion issues, fatigue, vibration issues, defective davit cranes and issues with gas leaking into transition piece working spaces. We can use our knowledge to help deal with the challenges raised by defects including:

• Finding the right technical expertise to ascertain the cause of the defects and identify an appropriate remedial solution, particularly key when faced with novel defect issues;
• Dealing with the difficulties of work in the hostile offshore environment and the impact this has on access, project management and logistics;
• Dealing with changing design and industry standards due to the offshore wind industry being in its relative infancy, including the difficulties of pursuing claims in the absence of a fitness for purpose obligation;
• Assessing the impact of defects over the life-cycle of the wind farm and the need to protect the long-term structural integrity of the monopiles, for example with corrosion protection;
• Meeting the needs of stakeholders such as funders, insurers and JV partners; and
• Satisfying assurance, health and safety and other regulatory requirements.

Shipping

Each phase of a wind farm project involves a wide range of shipping specific issues where we are able to offer our clients specialist advice, for example the navigational issues arising from the siting of wind farms, advising on the purchase of vessels engaged in the construction of wind farms, interfacing with the shore based operations of an offshore project via ports development agreements, and advising on regulatory (offshore) considerations. Careful consideration of the associated maritime issues avoids issues and potential disputes further down the line. Some of the factors to consider include the following:

• The shortage of specialist vessels in the market for construction of off shore wind farms which has the potential to allow vessel owners to dictate rates and favourable contracting terms;
• The marine environment which poses particular challenges and the need for careful consideration of the contracting regime to minimise risk and share the costs of delay; and
• Arbitration issues and strategy which will also need to be examined upfront.
We have experience of resolving issues and disputes for our clients that have arisen out of the employment of specialised vessels, collision/damage claims, as well as navigational and planning problems too. We have a wide range of experience of shipping litigation claims, including court and arbitration proceedings, and alternative dispute resolution such as mediation. Recent experience of our advice to clients in offshore wind farm disputes include the following:

- Advising on a misrepresentation claim against the owners of a jack up barge that was chartered by the project developers. The jack up barge was unable to carry the load represented by the charterparty contractual terms and resulted in a dispute over liability for additional hire required to undertake the task for which the vessel was employed. We were able to assist our clients in obtaining a favourable settlement;
- Advising on navigational issues and traffic separation schemes resulting from the siting of a wind farm. We have also been involved in disputes concerning vessel collisions; and
- Acting for charterers in an off-hire dispute involving a defective gangway of a crew transfer vessel. We advised our client on their liability to the vessel owner which resulted in a swift resolution of the dispute.

Third party claims

We also assist our clients with claims that may be brought by third parties affected by the construction of the wind farm. For example:

- We have advised several clients on the resolution of claims brought by fishermen who contend (despite having signed agreements and received compensation from the developer) that they have suffered and will suffer loss and damage due to the effect of the wind farm on their fishing grounds; and
- We have also acted for wind farm developers defending noise nuisance claims made by residents and other groups.

Key Contacts

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