Briefing

A-Z of issues in renewable energy projects: I-L

In this series of articles, Burges Salmon's Energy team provides an "A-Z" of key legal and practical issues in renewable energy projects. This third instalment covers "I to L" and sets out a number of issues that our construction, energy, environment and insurance teams regularly encounter.

Information rights

Be aware of the tension between public access to environmental information and the protection of commercial information

The renewable energy sector is full of innovation: there is significant investment in R&D to find new or better ways of harvesting renewable energy sources. The last thing that renewable energy operators want is for their confidential know-how to escape into the public domain. However, renewable energy projects require land use planning consent and often environmental permits, and the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (more succinctly known as the Aarhus Convention) requires that the public should be given access to detailed information on the environmental impacts of the technology. Sometimes access takes the form of information requests under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004. Other times, regulatory bodies consider themselves obligated to put information on to public registers under regimes such as the Environment Permitting (England and Wales) Regulations 2010. We are frequently asked to advise clients on the

tension that inevitably arises and the best way to protect commercial information from public release. We are now also seeing a rise in disputes over confidential information: for example, we represented a renewable energy client in a regulatory appeal to the Secretary of State over the release of confidential information by a government agency through its public registers. Businesses need to be alive to the risks of public access to environmental information and take steps to protect confidential information from the outset of the project.

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Interfaces: Mitigation of risk in multi contract projects

As the renewables market has developed and the demand for build out of complex process plant projects has grown, developers have found it increasingly difficult to enter into contracts with a single (EPC) contractor for the design and build out of the entire project works. The reasons for this are numerous: resource demands on EPC contractors; the lack of EPC contractors in more fledgling sectors such as tidal; increased confidence in developers (and funders) that EPC contractors may not be necessary (even on project financed transactions); and the high cost premium payable to EPC contractors. This has led to the increased use of multi-contractor arrangements for the delivery of projects.

From a developer and funder perspective, the key question on multi-contract arrangements will be how each contractor is to be managed and held responsible for the delivery of its works and, ultimately, the success of the project. The number of contractors should be limited so far as is possible with a focus on keeping packages of work easily distinguishable and appropriately separate. Ideally, the number of contract packages should be (save in limited circumstances) no greater than three (although this may vary from project to project and technology to technology - we have seen some projects recently with over eight contract packages).

Our experience is that early contractor engagement is absolutely key on projects utilising a multi-contract solution. A contractor's mind-set is often focussed solely on its own works rather than the successful delivery of the project or co-operating with other contractors. Workshops with contractors during the procurement process can help change this mind-set and ensure appropriate contractor buy-in.

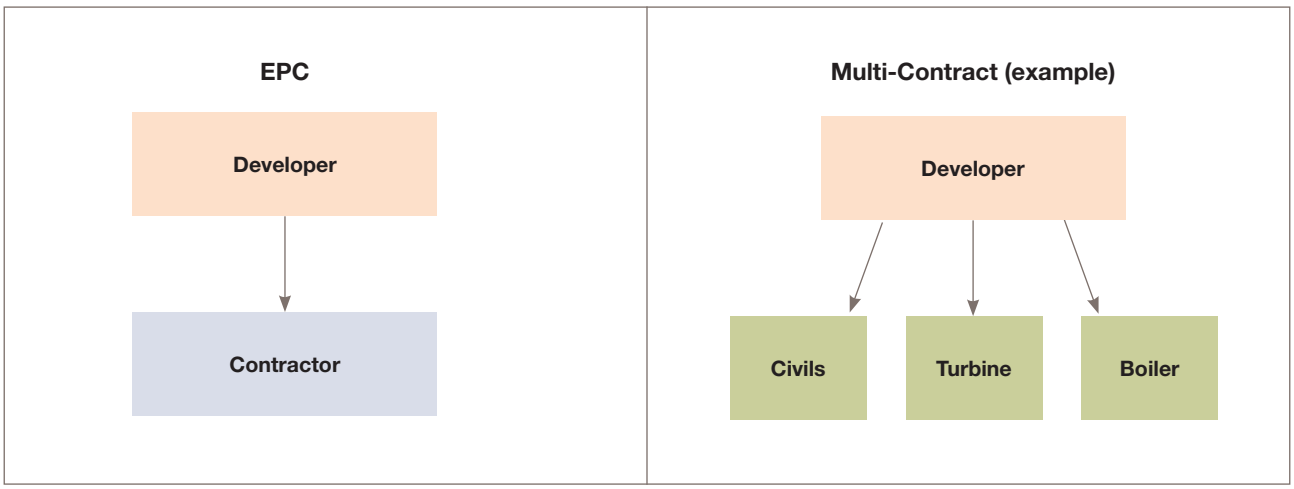
It is essential that each contractor understands that they will be engaged on robust contractual terms (especially where external finance is being sought) and that they will be incentivised to assist in the successful delivery of the project through the inclusion of provisions that will manage the project's interface risks. Such interface provisions will include, among other things: requirements relating to the contractor's programme; the overall project programme; design development; and information sharing. We have developed such provisions on a number of complex multi-contract projects and which have stood-up to intense project finance scrutiny.

The inclusion of such provisions in the contracts should be backed up by the engagement of an EPCM consultant to manage the project's various interfaces. The EPCM consultant is often appointed externally should the developer not have the appropriate experience and resource to carry out this role.

Across the multi-contracts the use of consistent terms relating to such things as dispute resolution and payment timescales, as well as including consistent terminology, will assist the developer and the EPCM consultant in the administration of the contracts.

The construction contractor(s') interface with any operation and maintenance ('O&M') contractor should also be considered. The O&M contractor should be required to engage at any early stage including, for example, being required to comment on any design developed by the contractors. It is, after all, the O&M contractor that will be operating the facility so his input at an early stage will be important.

Even where the developer engages an EPC contractor, the interface with the O&M contractor will be important. It is not unusual for the same entity to be engaged as both EPC and O&M contractor but under separate contracts. This should be appropriately considered and terms should be included in both the EPC contract and the O&M contract to protect the developer in such circumstances. For example, in the event of an O&M contractor default, the EPC contractor should not as a result of such O&M default be entitled to make a claim under the EPC contract against the developer. Again, we have developed key provisions that can be included in contracts to assist with this.



Joint ventures as EPC contractors: a good idea?

On any renewables project, the more attractive option for any developer (and their funders) is to find one single contracting entity to deliver the build out of the works: otherwise known as providing an EPC wrap. However, as the renewables market has evolved, we are increasingly seeing two or more contractors enter into joint venture arrangements to provide the required EPC wrap. The drivers for this are various but can include: each contractor having different technology specialisms; resource resilience; and/or where one contractor who has traditionally worked in a different development sphere looking to move into the renewables market (and therefore seeking a partner to bolster his appeal for this transition).

So what is a joint venture ("JV")? From a legal perspective a JV can take a number of different forms, which range in formality and legal consequence. In some instances, a JV will be formed between two or more parties as a separate vehicle – however, for the purposes of this article we have focussed on a contractual JV where the contractors will enter into a direct contractual arrangement with the developer (i.e. the EPC Contract). In this instance, the contractors will work together to deliver the project with a separate joint venture agreement between the contractors setting out all the details of this arrangement.

However, whilst this can be beneficial for developers, there are a number of important matters which must be considered and dealt with between the contractors.

One of the fundamental points to address is how any liability will be apportioned between the contractors forming the JV. The developer (and any funders) will expect the contractors to enter into the EPC contract on a joint and several liability basis – this means that any one contractor can be held fully liable for all losses (even if those losses were caused by another JV contractor). This raises a number of interesting questions and means that the developer can have recourse to more than one balance sheet, providing the luxury of being able to select which contractor to pursue in the event of a breach of the EPC contract. It is therefore absolutely fundamental that,

as between the contractors, the JV agreement addresses how any individual non-defaulting contractor is to be refunded by the defaulting contractor(s) in such circumstances.

Additional points which need to be addressed include:

- which contractor(s) will provide what forms of performance security? It is not unusual for the developer to insist that a parent company of each contractor provides a parent company guarantee: although consolidated bonds are normally acceptable;
- how the insurance package will work if both contractors have insurances which cover the same loss. For example, which insurance will pay out and will any one contractor's policy of professional indemnity insurance pay out in the event that loss is caused by another JV contractor?;
- what happens in the event of insolvency of one of the contractors? Does the EPC contract terminate for the insolvency of just one contractor (from a developer perspective, will the remaining solvent contractor(s) have the expertise and resource to deliver any outstanding obligations?)?

The developer will also want to know that the contractors have fully considered the relations between them are to be managed (for example, who takes the lead / what happens when the contractors disagree etc.). The last thing the developer wants is for the contractors to end up in a dispute which could impact upon the performance of the EPC contract.

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Knock for knock indemnities

Knock for knock indemnities (sometimes rather macabrely referred to as 'bury your own dead' indemnities) refers to the mutual hold harmless indemnity regime commonly found in off-shore construction and operating contracts.

The essential aim of the knock for knock indemnity regime is to make each party to an off-shore construction contract responsible for its own property, personnel and consequential losses (such as loss of profit) no matter which party is ultimately responsible for causing the loss. This is achieved through a series of mutual, reciprocal indemnity clauses.

There are two key features to the knock for knock regime:

- a mutual exclusion preventing the parties from suing each other for loss or damage to their own personnel or property; and
- mutual indemnities in respect of third party claims (for example, if an employee of party A sues party B for personal injury caused by B, the indemnity will pass the financial burden back to party A).

It is important to note that knock for knock indemnities are only intended to apply to loss or damage suffered to the parties' own personnel and property, and not more widely. Generally they are not intended to apply, for example, to a party's failure to deliver under the contract or for damage caused to the project works themselves.

It is also worth noting that knock for knock agreements are not only used by the contractors involved in off-shore construction, but also related contracts such as charterparty and towage agreements for the marine vessels used in the course of the construction.

Although well established in the oil and gas sector and utilised widely in the rollout of existing offshore wind projects, knock for knock regimes may be unfamiliar territory for many offshore project participants, including contractors intent on expanding their onshore experience into offshore work and investors considering taking a stake in upcoming major offshore renewables projects. A clear understanding of knock for knock as well as other bespoke matters relevant to the delivery of offshore projects (e.g. vessel procurement) will be key to understanding a project's (or contract's) risk profile and the way in which the works can be successfully delivered.

The Ronseal problem – does it do what it says on the tin?

While the general perception is that a knock for knock agreement will make each party responsible for its own losses, close attention needs to be paid to how the indemnity agreement is actually worded.

Most will ensure that standard liabilities, e.g. for breach of contract, negligence, breach of statutory duty etc., are covered.

However, the indemnity agreement may not cover less common liabilities such as nuisance claims, or may try to carve out liabilities arising from wilful misconduct or gross negligence.

Therefore, close attention needs to be paid to the types of liabilities that a particular project may give rise to and that the indemnity agreements are drafted with suitable breadth to match.

Although it may appear an obvious point, it is important to bear in mind that the terms of a particular knock for knock indemnity only apply to the parties to the contract in question; they do not apply to claims brought by other contractors unless they also have a knock for knock agreement in place with you.

It is therefore necessary to assess if, and if so to what extent, knock for knock indemnities are being used consistently throughout the project documentation. Some contractors may insist on wider or narrower clauses and some may refuse to use them completely. Such differences can complicate the risk assessment of a project, high-lighting the importance of thorough due diligence and appropriate risk mitigation arrangements.

A final point to bear in mind is choice of law. While the English courts are familiar with and give effect to knock for knock indemnities, some jurisdictions treat them quite differently. Therefore, as off-shore construction can involve multiple jurisdictions, ensuring that the agreements are governed by English law and that the English courts have jurisdiction is highly desirable.

What are the indemnities worth?

While off-shore renewable construction projects do not face the same sorts of risks found in the oil and gas space (it is hard to imagine a wind-turbine equivalent of Piper Alpha or Deepwater Horizon), off-shore construction is nonetheless a perilous environment. If a nightmare scenario occurs and the claims come flooding in, the parties will need their knock for knock agreements to come good.

However, an indemnity is only ever as good as the indemnifier's ability to honour it. Evaluating the counter party's credit risk is therefore as important (if not more so) as simply making sure the indemnity is legally watertight.

Whether the counter party is an SPV or a major corporate, an assessment should be made of its financial covenant and consideration given to whether the indemnity should be backed up with a parent company guarantee or insurance.

Similarly, parties need to give careful consideration to the credit risk they accept under their indemnity obligations. This risk can be mitigated through insurance or bonds but, again, close attention needs to be paid to the drafting of the insurance to ensure that it will respond to the contractual obligations assumed under the indemnities.

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Litigation

As is true at the start of any relationship, none of the players in a renewable energy project want to turn their minds to the fact that things might go wrong. However, sometimes things do go wrong, and disputes, litigation and arbitration are not uncommon in the industry. Indeed, all the ingredients are present for difficult and costly disputes: the technology is often novel and innovative, the engineering challenges can be significant, the costs of the venture can be high, the regulatory and political landscape contains uncertain terrain and opponents to some technologies are vociferous. However, the rewards are there for those who can navigate through such waters. This short note cannot hope to cover all issues that might arise in the journey of a renewable energy project, and it does not seek to address those areas of litigation which might already be familiar, such as consenting appeals, construction disputes and contract claims with the supply chain. Rather, this article provides a summary of three emerging trends or points of interest, to have on the radar when plotting a course.

Challenging Government policy: Renewable energy businesses have human rights too

The recent political climate has been turbulent for renewable energy companies, but the sector is fighting back, and not just through political channels such as lobbying. In the past few years we have seen the debate move into the courtroom with the rise of judicial review actions and claims under the Human Rights Act 1998. Companies are 'legal persons' and have the same 'human' rights as natural persons.

Last year, the High Court held that solar developers who had signed contracts at the time of the Government U-turn on FIT subsidies had suffered an infringement to the right to the enjoyment of their possessions under Article 1 of the First Protocol to the European Convention of Human Rights *(Breyer Group v DECC)*. The contracts which could not be performed following the Government decision constituted "marketable goodwill" and therefore were classified as possessions, and the state had interfered with those possessions through its unlawful change of policy. This follows the case of *Infinis v Ofgem* where the court awarded several million pounds in damages for Ofgem's unlawful refusal to grant ROCs to a qualifying power plant after a finding that Infinis' entitlement to ROCs that it had not received constituted a possession.

However, the threshold for a legal challenge to changes in Government policy remains high. Last summer, the Court of Appeal rejected an argument by Drax that the Government had unlawfully changed its position on financial support for converting coal-fired units to biomass units. DECC had initially proposed financial support in December 2013, but in April 2014 it reduced the level of support by some £1.3billion. Drax brought a challenge to that decision, and in July the High Court held that the Government's decision was unlawful. However, the Court of Appeal overturned the decision, holding that the change of policy was within the discretion of the relevant ministers. In November last year, the Court dismissed a challenge by four solar companies against the Government's decision to bring forward the closure of the RO scheme for large solar projects to April 2015. The Court held that the Government had given no assurances that the RO would remain open for large solar until 2017 and that no 'legitimate expectation' had arisen.

However, the trend is clear: challenges to Government decisions on renewable energy support mechanisms are here to stay.

Vociferous neighbours: disputes in the operational phase

Even after planning permission has been granted and a renewables project is operational, committed opponents can still seek to limit or disrupt the operation of the facility using the law of nuisance to assert that the activities of that facility are harming the enjoyment of their land. If the Court decides there is a nuisance, then the starting point is for the Court to consider an injunction which might limit the operation of the facility, with the potential for significant financial detriment (the recent Supreme Court decision of *Coventry v Lawrence* makes it clear, however, that the Courts can be flexible with remedy).

The most high-profile examples to date are cases against onshore wind turbines: one case based on noise nuisance settled out of court for an undisclosed sum, another case about sunlight reflecting from a turbine's blades is ongoing.

However, it is not just wind farms that are at risk from such challenges. There are numerous other scenarios that could give rise to complaints during the operational phase, such as odour nuisance from anaerobic digestion, claims for particulate pollution from energy-from-waste plants, claims against hydroelectric schemes for interference with water flow or fishing rights and noise from the construction and operation of most forms of energy generation, to name just a handful.

We have wide-ranging experience of claims relevant to renewable operators. As well as defending some of the leading claims, we have acted to resolve numerous disputes at an early stage to the mutual benefit of both parties.

Relationship breakdown: disputes within the team

Renewable energy projects depend on long-term relationships: the journey from concept to grid connection, to consent and then to construction, and ultimately to generation, can be

fraught, as the above examples demonstrate. We are seeing a number of disputes arising from projects that have not gone to plan, and where one of the parties wants an early exit, or to run the project alone, or simply to cut its losses from a bad deal. For some, the contracts between the parties have planned for such circumstances and provide a mechanism for a clean break. In many others, a reluctance to consider such issues at the start has given rise to some difficult, and in some cases costly, break-ups.

We have advised on the successful resolution of a number of such disputes for renewable energy clients including negotiating a solution for a developer who had invested millions without signing a written contract, disputing and negating an attempt by one shareholder to buy-out another under a contractual buy-out provision for financial benefit, and obtaining increased revenue for a consortium who, due to an ambiguity within the agreement, were not receiving the full value of renewable energy support mechanisms from the operator.

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For futher information on Burges Salmon's renewables and wider experience please go to **http://www.burges-salmon.com/Sectors/energy_and_utilities/default.aspx**

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