

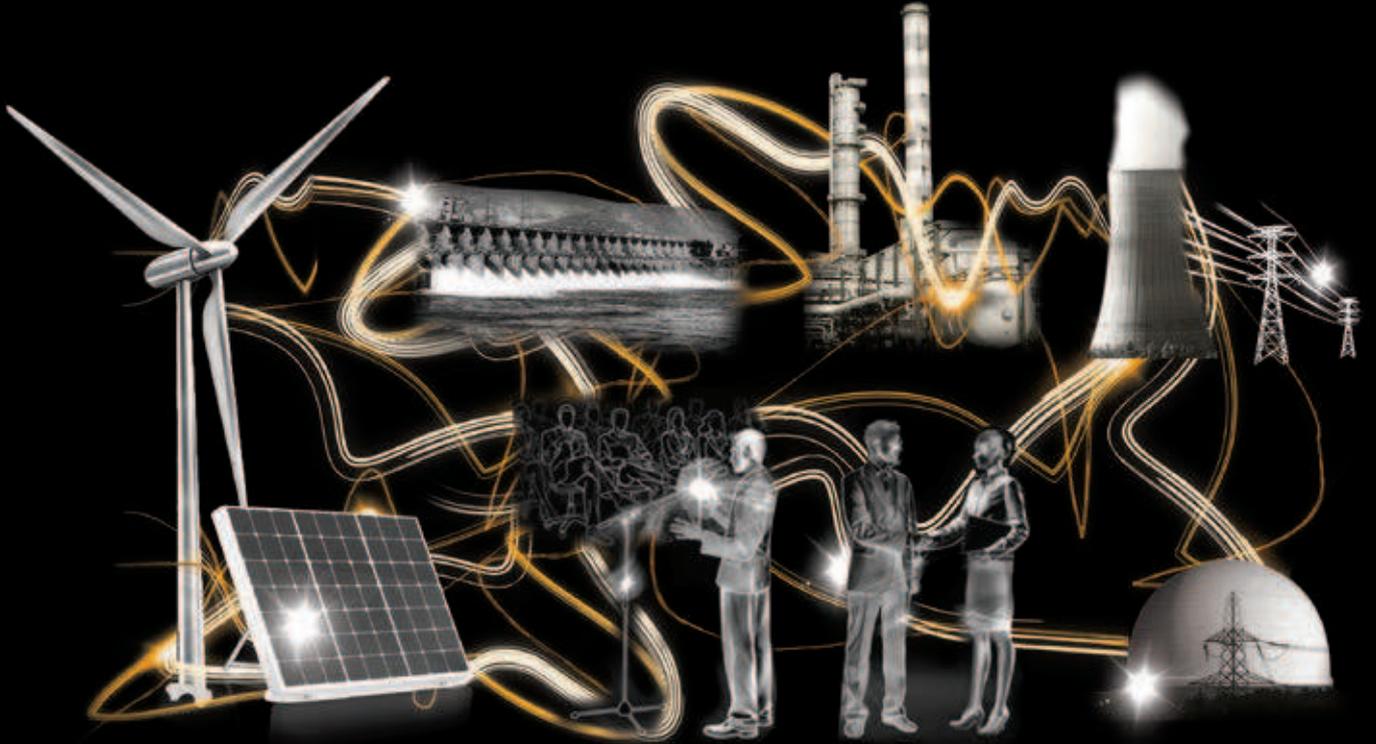
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THE ERECTION, OPERATION & MAINTENANCE OF WIND FARMS - MEASURES TO MINIMIZE PROJECT RELATED RISKS BY DRAFTING ADAPTED TURBINE SUPPLY AGREEMENTS, BALANCE OF PLANT AND "O & M" CONTRACTSⁱ

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ABSTRACT

Wind farm erection contracts are very complex. Adapted and balanced legal provisions are necessary in order to avoid or minimize project related risks. One of the most crucial issues is the exact description of the scope of supply including the description of the agreed quality parameters and technical standards together with an exact definition of the (provisional) acceptance procedure. The paper presents possibilities of drafting adapted legal solutions for situations of delay, defects and other impairment of performance and highlights the crucial issues to be considered within the framework of an O & M Contract.

1. The legal framework

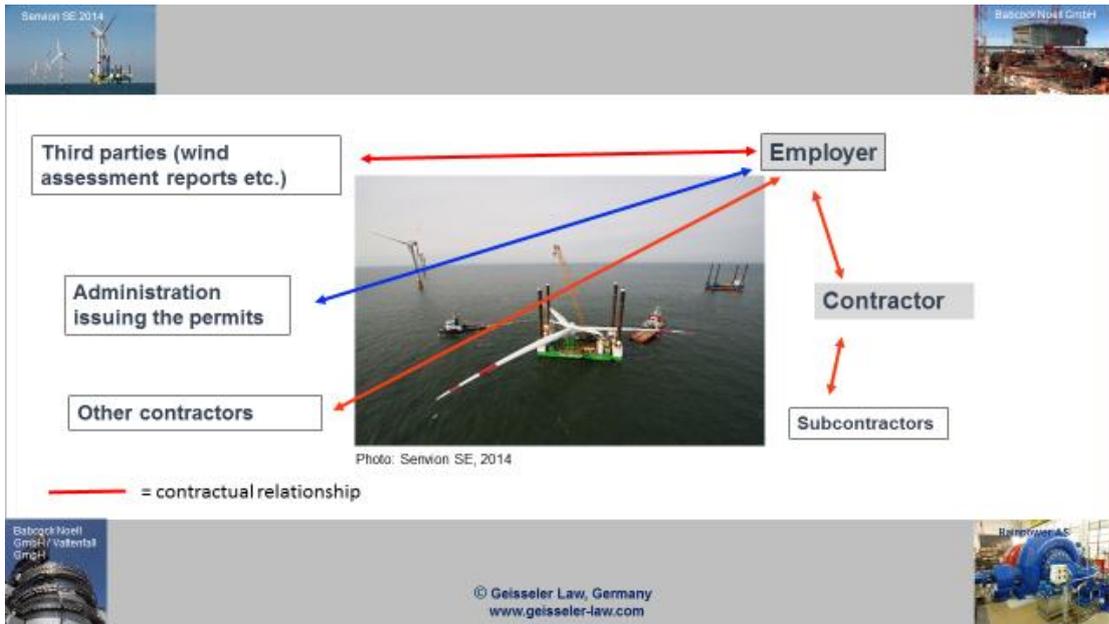
The aim of this paper is not to substitute individual legal advice, but to highlight typical project related risks and present legal clauses to cope with these situations in order to minimize disputes during the project execution phase. The detailed legal solution will always depend on the law governing the contract between the contractual parties. The parties (especially if having their company seat in different countries) should choose the applicable lawⁱⁱ. An in-depth knowledge of the chosen law will enable them to assess potential pitfalls of the applicable law and to evaluate to which extent they can and should derogate from provisions of the chosen lawⁱⁱⁱ. Contracts should provide for a dispute resolution mechanism (ordinary – state – courts or arbitration), determine the order of precedence of all documents being an integral part of the contract (in order to avoid ambiguities e.g. in the application of agreed standards resulting from different codes and guidelines) and – important! – determine the contract language and the language in which (technical and other) documents have to be submitted.

Before starting the procurement process the wind farm owner/ operator should carefully think about the contractual set-up. Besides the question of whether using internationally well-known and accepted standard form contracts such as the FIDIC contracts the owner will opt either for a Turnkey strategy or a multi – contracting strategy. Each of those strategies has advantages and disadvantages. By using a Turnkey strategy the interface risk between the different lots such as the supply of the turbine, the foundations and the inner - park - cabling is much lesser. On the other hand the owner has less possibility to exert influence on the execution of the main lots and has to pay a higher price.

2. Involved parties and attribution of risks

One of the success factors of a good contract is the attribution and balancing of risks between the Employer and the Contractor. The parties should carefully think about potential risks and allocate them to either of both parties. That will later on avoid discussions on claims for extension of time (EOT claims) and compensation of additional costs incurred by Contractor in case of unforeseen events. If – as an example - the stability of the underground, on which the foundations are to be erected is of other quality or depth than foreseen, it should be clear which of both contractual parties bears the risk.

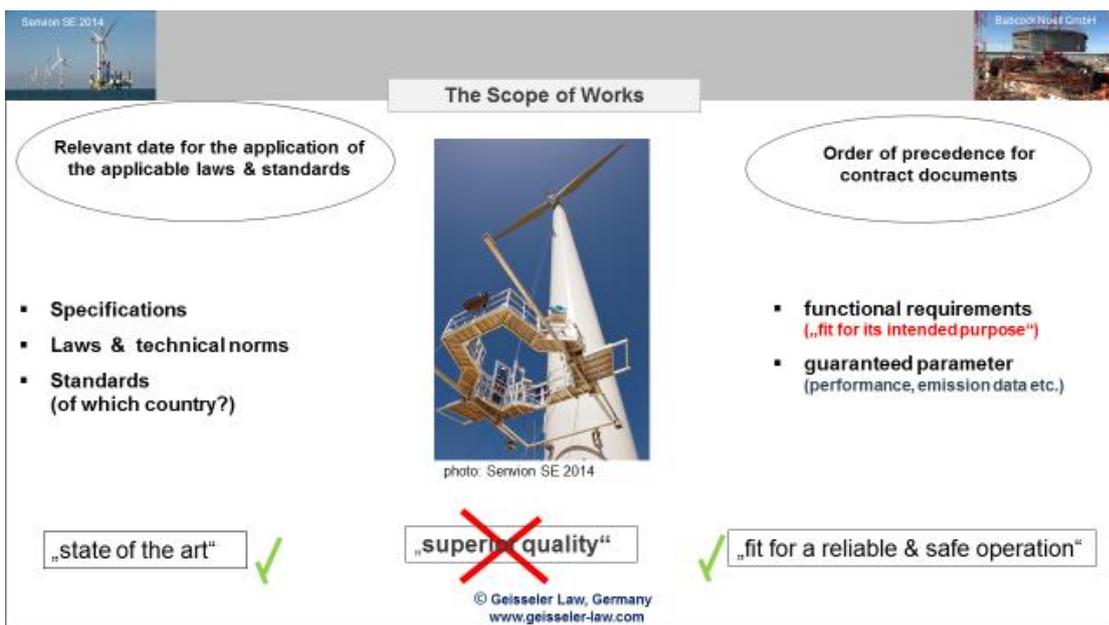
In complex projects as it is the case for wind farm erection projects a lot of (third) parties are involved. Between some of them there is a contractual relationship, between others not. Here again, the contractual parties should be aware to which party the acts or omissions of third parties will or should be attributed in case of an impairment of performance. The cause for the delayed issuance of a necessary permit can be the result of omissions of the state authority, but can be as well the result of poor design submitted by Contractor. In case of incorrect load specifications issued by the turbine supplier resulting in an instability of the foundations it will be the Employer bearing this risk in the contractual relationship to the Contractor supplying and installing the foundations.



3. The crucial clause: exact definition of the scope of supply/ services as well as Employer's obligation to provide information

Experience shows that a lot of disputes between the contractual parties result from a lack of clarity or exactitude in the definition of the scope of supply. Employers with a long - lasting experience in the construction of power generating plants sometimes prefer to issue detailed specifications, whereas others focus on the definition of the requirements of the plant ("fit for purpose" / "Employer's Requirements") and leave it to the Contractor how to achieve these requirements. In any case the applicable technical standards – if they do not result from the applicable law – should be clearly defined. The determination of whether the wind farm respectively its components has a defect or not depends on the clear description of the scope of supply including the exact definition of the agreed quality.

The Employer usually has to provide Contractor with information, e.g. regarding the site conditions (wind assessment reports etc.), whereas it will be the turbine supplier's obligation to provide a site suitability statement. A contract should clearly state which of the information provided by an Employer is so-called rely upon information having the effect that Contractor is released from the obligation to perform own investigations or even from the obligation to cross check the information provided by Employer.



4. Project execution: Contractor's further obligations and Employer's rights

Another success factor is the regular reporting by Contractor and the exchange of information on events having an impact on the due performance. Thus a contract should provide for Contractor's obligation to inform Employer immediately on any delay of the project or any obstacles the Contractor incurs. The mutual communication is particularly important in case of a multi – contracting strategy allowing the Employer to coordinate the different lots and to minimize interface risks.

It is standard that contracts provide for Contractor's obligation to submit (design) documents for approval, which usually does not release Contractor from any of its obligations to meet Employer's Requirements, and for broad inspection rights of Employer. Usually the Employer reserves the right to approve subcontractors for main components and the key personnel (especially the Contractor's project manager). Part of the contract – especially in large wind farm erection projects - should be detailed provisions on the project organisation including the language to be used on the site and in the communication with the Employer.

Some legal systems provide for broad instruction rights in favour of the Employer. Nevertheless the exercising of such instruction rights by Employer is a critical issue. In those cases Contractor has and must (!) have the right to oppose by informing Employer on potential negative impacts on Employer's Requirements. In case Employer insists on its instruction, Contractor is released from its responsibility when complying with the instruction.

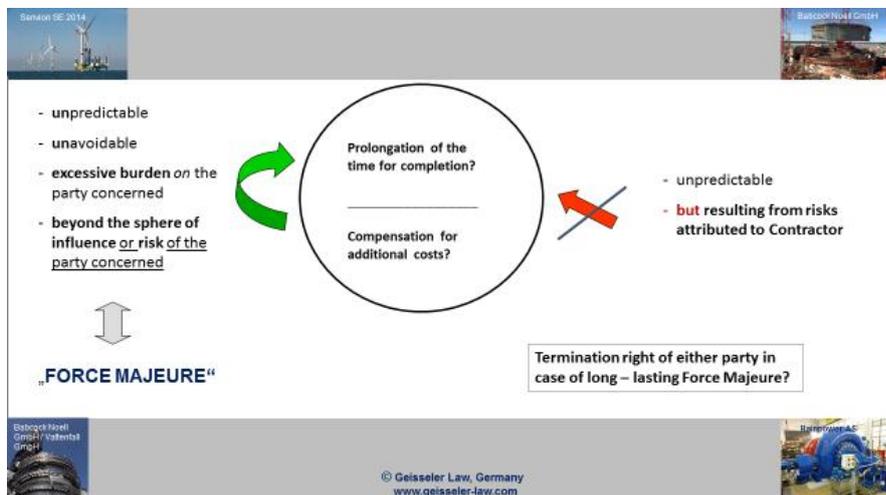
An important part of Contractor's obligation is the hand-over of a complete and accurate documentation (as built drawings, operation manual) at the end of the execution phase. Employers are well advised to link this obligation with a payment of a considerable amount in order to avoid that this obligation is neglected.

5. "Time is of essence": the milestone schedule and legal consequences of delay

Parties should agree on the consequences of a delay attributable to Contractor. Different legal systems provide for different rights of Employer. Thus it is of utmost importance – as mentioned before - to know the provisions of the applicable law. Usually the contracts provide not only for a fixed date of completion, but for various milestones – Key Dates -, which are fixed dates. In case the Contractor does not achieve those milestones for reasons attributable to it, the contract usually provides for acceleration measures and the payment of pre- agreed liquidated damages (LDs). It is up to the parties to agree whether Employer would like to reserve any further rights resulting from the applicable law such as claims for compensation of further damages (not covered by the payment of the LDs) or even – as the German civil code provides for – rescission rights or whether the parties want to exclude those Employer's rights by stipulating that the agreed LDs are Employer's sole and exclusive rights in case of a delay.

6. Changes to the Contract and impairment of performance/ problems during the project execution phase – adjustments to the milestone schedule and the contract price?

Obstacles or unforeseen events during the execution phase always lead to the question whether and to which extent the Contractor is entitled to an extension of time and / or the compensation of additional costs incurred. This depends on the cause for the obstacle. In cases of a "Force Majeure" event Contractor is not only released from its obligation to perform, but contracts typically provide for an extension of time including an adequate time for remobilisation. But it should be kept in mind that not every unforeseen situation can be considered as Force Majeure. When the parties have clearly attributed risks to one or the other party, the materialisation of one of these risks will not be considered as Force Majeure.



In cases of other obstacles, e.g. in cases, in which the Employer does not fulfil its duties in a correct or timely manner, contracts will usually grant the Contractor an extension of time and the compensation for additional costs incurred.

The contract should contain adequate provisions regarding variations to the (scope of) the contract. It might be in the interest of the Employer to reserve the right to instruct a variation order, at least within a certain spread (e.g. x% of the contract price), whereas Contractors want to protect themselves by accepting variations only after an agreement on the adjustment of the contract price, the time schedule and – if necessary - other contractual conditions such as guaranteed parameters.

In case of breaches of contract by Contractor (other than defects or delays) the contract usually grants the Employer a termination right depending on the severity of the non-compliance. And last but not least contracts often grant Employer a right to declare the suspension of the contract execution for a certain period. In such cases Contractor usually will be granted a right to claim the compensation of additional costs and a right to terminate the contract in case of long – lasting suspension.

7. Provisional acceptance procedure und defects' liability, especially in case of non-achievement of guaranteed parameters

It is of utmost importance to clearly stipulate the provisional acceptance procedure with fixed deadlines within which Employer has to fulfil its cooperation and approval duties. The contract should provide for solutions regarding situations in which acceptance cannot be achieved for reasons beyond Contractor's responsibility. Regarding the evidencing of the guaranteed parameters (power curve, noise emissions, availability) the definitions have to be clear and the parties should pre-agree on the measuring methods respectively certifying bodies performing the measuring.

Employer's remedies in case of defects are usually the right to claim repair and or replacement, to claim a price reduction or to make use of the rescission right (a real sword of Damocles for a Contractor, which any contractor will try to limit to severe defects). Parties should be aware that legal systems (the applicable law) might grant Employer the right to additionally (besides the right of rescission) claim compensation of damages.

In case of non - achievement of the guaranteed parameters parties usually agree on the payment of LDs.

The contract should stipulate the defects' liability period and Employer's remedies in case of serial defects.

8. Limitation of liability

Any Contractor wishes to limit its liability. Regarding the payment of LDs those are often capped to a certain amount - a % of the contract price. Often contracts allow Employer to make use of its rescission right once the cap for the LDs, especially regarding guaranteed parameters, is reached. The same mechanism – the limitation to a % of the contract price - usually applies for the overall liability. Parties should agree on whether the overall cap applies as well to repairing costs and removal costs in case of the rescission of the contract. Additionally Contractor will request the exclusion of the liability for so – called consequential damages such as loss of production etc. This is – in view of the fact that quite a number of countries grant feed-in tariffs - a very important / critical issue.

9. Operation and maintenance agreements (“O & M Contract”)

There is not ONE strategy for the operation and maintenance of a wind farm. The parties of the turbine supply agreement often agree on an O & M Contract at least for an initial period in line with the defects' liability period – often with Employer's option to prolong the contract for a further period. In the offshore wind business the trend seems to go towards long-time (15 – 20 years) full service agreements. The above mentioned principles apply more or less to the same extent to O & M Contracts. One of the core provisions of such a contract is the availability guaranty which turbine suppliers often only want to guaranty if they can perform the service and maintenance within the framework of an “O& M Contract”. The agreed fee covers in principle all regular maintenance and repair work during scheduled or unscheduled standstills. In case the O & M Contractor is the turbine supplier (OEM) the causality question for unscheduled standstills is not crucial, whereas the O & M Contractor will request compensation for repairing costs in case of external causes for unscheduled standstills.

ⁱ See as well Bettina Geisseler, “Wesentliche Aspekte zur Errichtung und Wartung von Windparks (On- und Offshore) – Strategien zur Risikominimierung“; published in „Kraftwerkstechnik 2014 - Strategien, Anlagentechnik und Betrieb“ (Kraftwerkstechnisches Kolloquium Dresden, 2014)

ⁱⁱ The law applicable to the contract is not necessarily identical with the (administrative) law applicable at the site of the plant, which will be the decisive law for issues such as the granting of the building and operation permit, allowed emissions etc.

ⁱⁱⁱ This is not possible in case of mandatory law / „ordre publique“ provisions

SUMMARY

Wind farm erection contracts are very complex. Before starting the project the Employer should decide about the procurement strategy and contractual set-up: turnkey contract for the entire plant or „multi - contracting“ procurement of the major components. The parties should choose the applicable law and the dispute resolution mechanism (ordinary – state – courts or arbitration), determine the order of precedence of all documents being an integral part of the contract and – important! – determine the contract language and the language in which (technical and other) documents have to be submitted.

One of the success factors of a good contract is the attribution and balancing of risks between the Employer and the Contractor. The parties should carefully think about potential risks and allocate them to either of both parties. That will later on avoid discussions on claims for extension of time (EOT claims) and compensation of additional costs incurred by Contractor in case of unforeseen events.

The crucial clause of a wind farm erection contract is the exact definition of the scope of supply/ services. Experience shows that a lot of disputes between the contractual parties result from a lack of clarity or exactitude in the definition of the scope of supply. The same applies for information to be provided by Employer. The contract should clearly state which of such information is so-called rely upon information having the effect that Contractor is released from the obligation to perform own investigations.

Parties should agree on the consequences of a delay attributable to Contractor. Different legal systems provide for different rights of Employer. Usually contracts provide not only for a fixed date of completion, but for various milestones – Key Dates -, which are fixed dates. In case the contractor does not achieve those milestones for reasons attributable to it, the contract usually provides for acceleration measures and the payment of pre-agreed liquidated damages (LDs).

Obstacles or unforeseen events during the execution phase always lead to the question whether and to which extent the Contractor is entitled to an extension of time and / or the compensation of additional costs incurred. This depends on the cause for the obstacle. It should be kept in mind that not every unforeseen situation can be considered as Force Majeure. When the parties have clearly attributed risks to one or the other party, the materialisation of one of these risks will not be considered as Force Majeure. In cases of other obstacles, e.g. in cases, in which the Employer does not fulfil its duties in a correct or timely manner, contracts will usually grant the Contractor an extension of time and the compensation of additional costs incurred.

The contract should contain adequate provisions regarding variations to the (scope of) the contract and regarding termination rights of Employer in case of breaches of contract by Contractor (other than defects or delays).

It is of utmost importance to clearly stipulate the provisional acceptance procedure with fixed deadlines within which Employer has to fulfil its cooperation and approval duties. Employer's remedies in case of defects are usually to right to claim repair and / or replacement, to claim for a price reduction and or to make use of the rescission right - in addition to the right to claim compensation of damages. In case of non - achievement of the guaranteed parameters parties usually agree on the payment of LDs.

Usually contracts provide for a limitation of Contractor's liability and – upon Contractor's request – an exclusion of the liability for so – called consequential damages.

The parties of the turbine supply agreement often agree on an O & M Contract at least for an initial period in line with the defects' liability period – often with Employer's option to prolong the contract for a further period. In the offshore wind business the trend seems to go towards long-time (15 – 20 years) full service agreements. The above mentioned principles apply more or less to the same extent to O & M Contracts. One of the core provisions of such a contract is the availability guaranty which turbine suppliers often only want to guaranty if they can perform the service and maintenance within the framework of an “O& M Contract”. The agreed fee covers in principle all regular maintenance and repair work during scheduled or unscheduled standstills.