

Q2 2023

# Finance Quarterly

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# Quarterly wind disputes

**In Q2 the offshore wind market has continued to grow, with most developments taking place in the bottom-fixed space in Europe. However, the floating offshore wind sector is seeing progress, with several auctions and tenders planned for later in the year (including in the UK, Spain and Portugal) and France pressing ahead with tenders off the coasts of Brittany and Marseille.**

As is often the case in a hot market, disputes have arisen at early stages during the floating wind tender process. An example can be seen in the recent Scottish Court decision in *Moray Offshore Renewable Power Limited v Bluefloat Energy UK Holdings Limited*, a dispute between two developers. Moray Offshore claimed £400 million in damages on the basis that it alleged Bluefloat had exaggerated its experience in the industry in order to win the tender process. While the court dismissed the claim in part on issues of causation (because Moray Offshore could not prove it would have won the bidding process had Bluefloat not made the alleged misrepresentations), it is an interesting indicator of the kinds of disputes which can arise in this type of market.

While an element of growing standardisation in bottom-fixed wind means that stakeholders are getting more comfortable with the technology and installation requirements, the market has continued to see disputes globally around defects, delays and disruption, seabed and weather conditions, and disputed variations as more projects get in the water. As more turbines are installed, the danger of serial defects, and the knock-on effects of issues in a scaled-up supply chain, continues to grow. While there may be pressure from those entities at the top of the contractual nexus to simply get on with things, the importance of keeping a clear eye on the contractual requirements cannot be over emphasised. If, for example, there are notice requirements for any potential claims, a party is unlikely to get any sympathy from an arbitration tribunal or court if these were not followed, irrespective of what may have been said at the time.

In Q2, the industry has continued to look at developing standard supply and construction contracts, as occurred in the oil and gas sector in the 1990s with the LOGIC contract forms. This was an initiative that was specifically discussed during a presentation by IMCA at the recent Global Offshore Wind conference in London in June 2023. The initiative would include developing bespoke dispute management mechanisms suited to offshore wind projects. Indeed, there

is a discernible trend, in the often-conservative offshore wind industry, to look carefully at such mechanisms with a view to providing a viable (and less costly) means of resolving disputes without recourse to arbitration or court proceedings. Use of dispute boards, for example, is specifically designed to assist parties in avoiding formal disputes, but if they do occur, it is possible for the parties to agree that the boards have the power to issue a binding decision. Similarly,



expert [EDITORIAL-USE-ONLY]-shutterstock\_677787295 determination or recommendation can provide a quick and independent view on disputes, particularly on a technical issue, which then allows the parties the opportunity to attempt to reach an amicable agreement. In this respect, WFO maintains a list of experts with relevant competencies, which provides parties with a useful resource, and its dispute resolution committee has produced a standard expert determination clause which can be incorporated into offshore wind contracts.

Within the market, there have also been developments in certain longstanding offshore wind related disputes, albeit not strictly related to supply and construction contracts. For example, Orsted and BP have recently settled their disagreement regarding an overlapping area of seabed between Orsted's Hornsea 4 development and BP's Endurance carbon capture project – a result which means that the Hornsea 4 development can now proceed. Similarly, the long-running Siemens Gamesa and GE patent dispute regarding wind turbine design was settled on a confidential basis in both the US and Europe in April. The industry had been following this dispute with interest,

not least because different conclusions were reached on patent infringement in the US and UK courts. Agreeing worldwide cross-licences for the relevant patent families allows both parties to move forward without having to navigate complex and inconsistent patent positions in different jurisdictions.

There is currently great pressure on the industry to meet the targets laid down by governments around the world, and there is much concern about the need for the global supply chain to grow substantially in a very short time. While disputes are inevitable, having contractual mechanisms in place that provide an opportunity for their early resolution has the potential to minimise delays and reduce costs; that in turn can help mitigate the consequences of disputes and ensure that relationships and margins remain unaffected. We expect to see a continued dialogue in this area amongst the stakeholders over the course of the year ahead. ■

— ANDREAS DRACOULIS,  
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