Tamarindo

WORLD FORUM OFFSHORE WIND

Quarterly Wind Disputes

In this edition of our regular column, World Forum Offshore Wind (WFO) Honorary General Counsel Christian Knütel dives into a dispute successfully handled by a private pre-arbitration body appointed by the parties on a European offshore wind project.

Honorary WFO General Counsel Christian Knütel

Recently, the existence and performance of a standing Dispute Adjudication Board with custom-tailored procedural rules proved to be very instrumental in helping two deeply entrenched parties – the developer and the Wind Turbine Generator supplier – to quickly resolve a complex dispute.

The completion of the offshore wind farm was significantly delayed. The reasons for these delays were multifold and included a delayed connection to the onshore grid, delayed supply of the various WTGs with power and grid connections, various scope gaps and required variation orders, but also the delayed availability of many of the WTGs and quality issues.

The originally planned installation sequence was not followed and the existing documentation was incomplete. Furthermore, the developer asserted the existence of almost 16,000 (!) defects or deficiencies in the installed WTGs, of which a material number were alleged to be serial defects. The overall volume of the disputes exceeded €1 billion.

Each of the parties had started its own DAB proceedings at the same time shortly before Christmas by submitting a lengthy statement of case plus exhibits. Hence the DAB and the parties had to deal with two parallel proceedings at the same time. Since the submission of the statements

of case, it took the DAB only six months to issue decisions in both proceedings on all issues in dispute. The parties ultimately accepted the decisions and entered into an overall settlement, of which conformity to these decisions was a major element.

How was that achieved?

First, the parties had opted for and appointed a standing three-member DAB, consisting of two engineers who also had a business background, and a senior lawyer with experience in acting as arbitrator in complex international arbitrations. The DAB was generally familiar with the project and the parties.

Second, the parties had agreed on a rather rigid procedure: After receipt of a statement of case, the defendant had only 42 days to reply. Counterclaims or set-offs were excluded. The oral hearing was agreed to take place 30 days after receipt of the reply. The DAB had the right to request additional information, and used it. The rules expressly stated that the hearing was not to be turned into a “mini-arbitration”, and that the DAB should issue decisions based on a summary assessment of each matter. The DAB was required to issue its decision within 30 days of the date of the hearing. All deadlines could be extended by agreement of the parties.

Third, the DAB and the parties were rigid and disciplined in meeting agreed deadlines and honoring agreed procedures. Some three weeks after receipt of the two initial statements, case management conferences were held and procedural timetables were agreed. These timetables included oral hearings of some three days each in both proceedings, and some extensions of applicable deadlines for practical

reasons but also with a view to the multitude of claims which were the subject matter of the proceedings. The final deadline was the one for the DAB to issue its decisions in less than half a year after the start of the proceedings. As with all the other deadlines, this final one was met.

Fourth, the parties and their advisors had made available the considerable and sufficiently experienced resources required to deal with such a multitude of complex issues in such a short time. The submissions and the explanations in the hearing enabled the DAB to easily understand the core of the various matters.

Finally, the DAB members and in particular the chairman of the DAB had a certain "gravitas" and not only managed the proceedings well but also issued convincingly and extensively reasoned decisions, which did not necessarily satisfy each party in all respects. However, the decisions were balanced. The risk of achieving a material improvement in a subsequent arbitration was so high that neither party wanted to take it.

— Christian Knütel, February 24, 2023

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