

Contracting themes in offshore wind charters

As part of the service provided to Members, the Club receives many contracts for review. With a global push to develop renewable energy sources, we have seen a rise in the number of contracts for provision of services within offshore windfarms – whether that be during construction or as part of the ongoing maintenance and servicing of the fields.

Whilst there are common themes amongst all offshore contracts, we have found that contracts such as WINDTIME in particular are drafted to be narrow in scope and remove boilerplate clauses, such as Clause Paramount or New Jason clauses, which are often not applicable to the works. This removal of superfluous clauses does not however reduce the complexity of the contract and through the Club's review of offshore wind contracts, we have identified several common industry-specific clauses. This article summarises those shared clauses and provides commentary on why they may be so prevalent.

Vessel capability

The installation and management of offshore wind farms are complex operations and entire programmes are often based on the availability of specialist vessels or equipment. It is therefore unsurprising that there is greater emphasis placed on the technical specifications of the vessel and its compliance with those specifications throughout the life of the charterparty.

Tenders often specify strict age and design requirements for vessels to be chartered. In-depth technical specifications of the chartered vessel are almost always included as an Annex to the charterparty and it is common for there to be a specific requirement for compliance with the Annex throughout the standard form contracts. We have observed instances where the standard off-hire clause is amended so that where there is non-compliance with the specifications set out in the charterparty, including the Annex, the vessel will be placed off-hire. It will be for the charterer to demonstrate that an event as listed within the off-hire clause has occurred but stricter requirements for compliance are likely to lead to a greater number of off-hire events occurring.

Windfarm contracts also frequently have increased seaworthiness obligations. For example, under SUPPLYTIME 2017 the owner is required to provide a vessel that is in "*thoroughly efficient state of hull and machinery*" only at the *date of delivery* (clause 3(a)). Whereas windfarm-specific contracts we have seen increase this obligation and require that the owner maintains the seaworthiness of the vessel and maintains the vessel as specified in the Annex for the duration of the charterparty. Where a vessel is found to be unsuitable, the owner will often be contractually liable for any costs borne by the charterers as a result of the non-working or unavailability of the vessel.

The right of the owner to provide a substitute vessel is usually more restrictive than that under a comparable contract such as SUPPLYTIME 2017 and, in addition requiring the prior written consent of the charterer, there could be a requirement that the alternative vessel is chosen from a pre-agreed “whitelist” or subject to an audit and survey by the charterer before selection. These amendments once again reflect the critical nature of the vessel specifications and the additional controls put in place by the charterer are to ensure that any vessel working on the project meets the over-arching project requirements.

Crew capability

Parallel to the specific vessel capability requirement, it is not uncommon for contracts to contain specific provisions in relation to the experience and capabilities of the crew. Clauses are often included which expressly require crew to be suitably qualified and experienced to perform the obligations and duties under the charterparty, to be properly qualified and certified for their respective positions, and to be suitably qualified and experienced to operate any specialist equipment on board the vessel. Whilst the competence and adequacy of the crew is often an implied obligation under the charterparty, and forms part of a vessel's seaworthiness obligation, this express obligation in offshore wind contracts reflects the precise technical nature of the work within the offshore wind farms and the need to ensure that those operating the vessel, or performing other services, are suitably trained to do so.

Delays

As previously mentioned, entire offshore windfarm programmes are regularly based on the availability of specialist vessels. It remains vital that the vessel arrives when expected to prevent project delay as a whole and jeopardise the costly (and lengthy) project preparation works. The WINDTIME proforma contract provides the charterer with an express right to liquidated damages for delay in delivery as per the rate set out in Box 14 (clause 2(f)). The rate is usually set at the charter hire rate, or the working day rate if this is specified, and is payable until the owners have delivered the vessel, delivered a substitute vessel, or until the charterers elect to cancel the charterparty. Under WINDTIME, if the owners know they will be unable to deliver the vessel by the cancelling date they are required to give notice in writing to the charterers stating the date by which they will be able to deliver the vessel. The charterer is then entitled within three days of receipt of this notice to cancel the charterparty or, if they fail to do so, the revised date becomes the cancelling date for the purposes of the charterparty.

Liability Provisions

The standard position for specialist offshore contracts, which is reflected in forms such as SUPPLYTIME 2017, is that liabilities are on a knock-for-knock basis. Knock-for-knock clauses remain the standard position in offshore wind contracts and there is usually a requirement for the charterers, or other entities within their group, to be named as a protective co-assured under the owner's P&I policy. A unique feature to offshore wind contracts, and a direct reflection of the complex nature of offshore operations and the number of parties involved, is the wider range of parties listed as falling within Charterers' Group. In addition to the parties ordinarily

listed under the SUPPLYTIME 2017 definition, in charterparties related to windfarm work we have seen this extend to financing parties, connected parties (of any description) and those with special roles in the project, for example, transmission system operators.

Whist knock-for-knock remains the standard position, we have observed a rise in the inclusion of carve out provisions for property of the “Employer”. These clauses are intended to respond to damage to property which would ordinarily be classed as “contract works”. As per these clauses, where there is loss or damage to cargo, any foundation components related to the Project, and/or property belong to the Employer, arising from any breach of contract, failure to comply or negligence of the vessel’s owner or their group, the owner shall be responsible for the applicable deductible under the relevant insurance policy. The Employer will have a Contract All Risks (CAR) Policy in place to cover any damage to the contract works and it is common for contractors, which would include the owner of the vessel, to be named as a Co-Assured under that CAR Policy. Where there is damage to the contract works, those named under the CAR policy will normally assume liability for the deductible under the policy. The deductibles are usually between US\$ 500,000 and US\$ 2,000,000 and so inclusion of this carve out could result in a large exposure for the owner. Damage to “contract works” is expressly excluded under the Club’s specialist offshore package. However, the Club can provide additional cover - a CAR Deductible Buy Back - for a Members’ liability for this deductible.

Licenses

The regulatory framework for licensing for offshore wind projects is a complex area and involves coordination with the relevant government and licensing party at every stage of the project.

Obtaining the required licenses is a lengthy and costly process, the details of which is outside the scope of this article. The relevant permissions and licenses from the responsible authorities for a vessel to enter, work-in and leave the windfarm are ordinarily the responsibility of the charterer. As with the position under SUPPLYTIME 2017, clause 11(d) of WINDTIME states that the charterer is required to *“pay for all permits, import duties (including costs involved in establishing temporary or permanent importation bonds), and clearance expenses, both for the Vessel and/or equipment, required for or arising out of this charterparty”*. The owner is often required to provide assistance in every way possible to secure the required licenses, however the ultimate responsibility falls to the charterers and any losses arising from loss, restriction or forfeiture of licences, concession or field interest often fall within the list of excluded consequential losses. Limitation of consequential losses will be particularly important within the context of complex offshore wind projects where the potential ramifications for damage and/or delay can escalate rapidly.

Assignment of Charterer's rights

Whilst the strict requirements in offshore wind contracts can make it more difficult for an owner to substitute the vessel, it is common for a charterer to enjoy a wide freedom to transfer or assign their obligations under the charterparty. The specifics of this right varies from contract to contract however it can allow a charterer to transfer its rights, sublet or assign the vessel, or

novate the charterparty to a wide range of parties, sometimes without requiring the owner's consent. These parties can include an affiliate, connected person, financing party or any holder of an offshore transmission license. These clauses reflect the fact that different stages of the offshore wind project may have different license holders or, for regulatory, financial or insurance purposes, it may be necessary to change the identity of the controlling party throughout the project term.

Confidentiality

In-depth confidentiality clauses are commonplace within offshore wind contracts and reflect the nature of the sector and the need to protect emerging products, works and processes.

WINDTIME contains a proforma clause which states that all information and data provided or obtained with the performance of the charterparty is and shall remain confidential, however this is often supplemented by an in-depth rider clause. These rider clauses often contain reference to the protection of intellectual and proprietary rights, and state that the confidentiality requirements will survive any termination of the charterparty.

Dispute resolution

A final shared theme within offshore wind contracts is the inclusion of rider clauses in relation to dispute resolution. Whilst WINDTIME contains the BIMCO Dispute Resolution Clause 2013, which sets out a clear framework for dispute resolution within several jurisdictions, we find this being amended to include specific requirements for the parties to engage in alternative dispute resolution before proceeding to arbitration. Frequently, this includes a requirement for the parties to engage in amicable negotiations – both at a standard and higher management level – and to engage in mediation within a specific forum, before proceeding to arbitration.

Additionally, we notice contracts include provisions which state that performance of the services under the contract shall continue during any dispute resolution process, unless a suspension order is issued by the charterer. This once again reflects the specialist nature of offshore wind contracts and a need to retain the specific vessels identified as suitable for the works in order to avoid any impact on the project planning.

Conclusion

Offshore wind is a high-growth sector, and we expect to see an increasing number of contracts over the coming years. Whilst the contractual landscape will continue to develop, by identifying some shared themes within the contracts we are seeing, we hope to provide Members with an additional insight into common practices within the industry and how those may differ from traditional oil and gas contracts.