



ODRC News

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Introduction

“Through the last 20 years through which I practiced law as an attorney, I had a special focus on infrastructure and offshore wind industry. Through this journey I simply noticed that disputes in the wind energy industry often gravitate around a technical issue upon which the parties contend, making the resolution of the dispute a technical issue rather than a purely legal matter. I also witnessed that the parties to a dispute mostly fear the delay in identifying a good expert in the relevant field and within a short time frame.

This specificity, complexity, and uniqueness of the nature of disputes in the offshore wind industry made me fully committed in pursuing my international advocacy work in favor of an accelerated implementation of an ADR institution dedicated to the offshore wind in the global renewable energy mix. The WFO Offshore Dispute Resolution Committee gives us the opportunity as an industry to realize solutions for resolving disputes in a way appropriate to us within our WFO membership and beyond. I am looking forward to welcome key industry players to the Committee to join us in these efforts that we are sharing with WFO community. Today, in my function of the Co-Chairman of WFO Offshore Dispute Resolution Committee, shared with the WFO General Counsel Dr. Christian Knütel, I act within the Committee as an

executive body of WFO to help solving project disputes speedily, expediently and at an early stage. This WFO’s new industry-driven and international initiative is providing for a specialized ADR tool adapted to the offshore wind deployments worldwide. Our initiative stems from the fact that I have always firmly believed that a tailor-made ADR mechanism responding to the specific requirements of the offshore wind industry is a major key in the development of the sector. By this initiative, we contributed to creating alternatives to the traditional mechanism available to the practitioners and actors in the offshore wind market for solving disputes arising either before, during the project’s execution or afterwards.

We bring together not only international offshore wind industry leaders but also internationally recognized ADR specialists with proficiency in different methods of the Alternative Dispute Resolution mechanisms. As an industry-driven initiative, the WFO Offshore Dispute Resolution Committee has the objective of enhancing the engagement of the experts of the industry in the dispute solving process and enabling cost reductions and time efficiency of the dispute resolution procedure.”

Tobias Voigt, *Chairman of the ODRC*

The ODRC has developed ADR Expert Rules to better support businesses and stakeholders from the offshore wind industry



WFO's ADR Service

The Alternative Dispute Resolution (ADR) service that WFO provides is operating under the auspices of the Offshore Dispute Resolution Committee "ODRC" which acts as a dispute resolution appointing authority offering the expert determination as a dispute resolution tool to businesses and individuals operating in the wind offshore industry, a tool that can be used in combination with other Alternative Dispute Resolution mechanisms or can be opted for separately. In summary, this service is intended for all parties involved in inter parties Expert Determination proceedings before the ODRC.

The ODRC has developed ADR Expert Rules to better support businesses and stakeholders from the offshore wind industry to provide them with customized and more adapted options for effective dispute resolution. The attraction of ADR is that the wind offshore related disputes can be time-consuming, unpredictable, and high-priced.

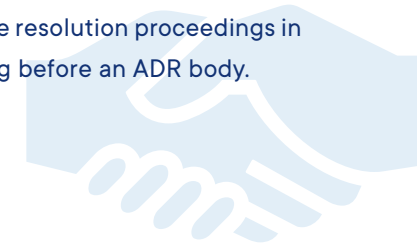
The costs are not limited to the professional fees required to conduct effective litigation, but also extend to the management time spent administering any ongoing legal proceedings. The WFO offers a tailor-made expert determination relying mainly on the WFO Expert Rules in order to assist clients in the search for quick and cost-effective global resolution of their disputes.

Expert Determination as an ideal tool

Expert determination is a process in which an expert appointed by the parties to a dispute gives an opinion, whether binding or not, on the issues that have been submitted for expert determination. It is primarily intended for use by parties to a dispute who are unable to reach agreement on certain legal, commercial and/or technical issues in another ongoing alternative dispute resolution process, most often arbitration.

Normally, the issues referred to expert determination are technical or legal issues that are part of the overall dispute, but on which the parties are unable to reach agreement.

The expertise will be provided through a written report and the decision to appoint an expert is requires the consent of both parties to the dispute. A request for an expert opinion may be made by the parties at any time during any alternative dispute resolution proceedings in connection with a proceeding before an ADR body.



WFO has set up a WFO Expert List



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The WFO Expert List

One of the key tasks of the WFO is timely appointment of experts in the frame of an expert determination procedure. This can only be achieved through effective appointment mechanism relying on an efficient list of experts. To this end, the WFO maintains a list of experts.

The purpose of the list is to enhance the WFO's capacity to conduct its activities, including the appointment of experts in an expert determination procedure, and allow the WFO to fulfil its mission by supporting more effective and flexible delivery of its tasks, particularly in cases where very specialized, unexpected, or urgent expert intervention may be required.

To extend its list of experts, the WFO has set up a WFO Expert List. Experts with relevant expertise in the offshore wind industry are invited to apply. Based on their prerequisite competences, experts will be appointed by the WFO in a structured expert determination procedure. As an appointing authority, the WFO needs to rely on experts with a specified skillset to fulfil its assignments.

The WFO Expert List reflects a promising growth of the numbers of applications and a diversification of profiles, joining up the list from all over the globe. This expansion shows that ADR is broadly recognized and well received

among the top stakeholders of the industry. Also, the WFO continues to be appointed as a dispute resolution institution in several contracts, which underlines the markets demand for new agile dispute resolution institution.

→ For more information about the
enrollment to the list please check:

www.wfo-global.org/#odrc



The WFO Expert Rules provide a model Expert Determination clause



The Standard WFO Expert Determination Clause

The WFO Expert Rules provide a model Expert Determination clause to facilitate the parties' agreement to settle disputes out of court. Parties wishing to refer to the WFO's Expert Determination Procedure shall include such appropriate contractual clauses in any contract relating to offshore wind. The contracting parties may thus agree that, in the event of any dispute arising, they will use the Expert Determination as a sole method of dispute resolution as a preliminary step to any subsequent legal proceedings.

Note: The following model clause may be used by the parties in their general conditions of contract to supplement the respective dispute resolution clause if they wish to provide for the WFO either as appointing authority for ad hoc expert proceedings or as administering authority for administered proceedings:

"If the parties so agree or if any dispute arises out of or in connection [reference to clause / issue] of this contract, the parties may, at any time, start [option: Proposal / Appointment / Administered] Proceedings in accordance with the [WFO Expert Rules]. The expert shall be appointed or confirmed in accordance with the [WFO Expert Rules]."

[The expert's findings shall not be binding] [Option: The expert's findings shall become contractually binding if neither party gives a notice of objection in accordance with clause 3.5(c) or 3.5(e) of the WFO Expert Rules to the other party within three (3) weeks of receipt of the expert's report including a declaration not to accept the expert's findings as binding.]

*Regarding the subject matter of the respective dispute and the underlying factual circumstances, as soon as a request for expert proceedings pursuant to the [WFO Expert Rules] has been notified to the non-requesting party, the parties shall not have the right to make an application for any dispute resolution or adjudication proceedings under clause [***] of this contract or for any kind of preliminary, interim, emergency or expedited legal proceedings under the applicable arbitration or procedural rules at any time prior to expiry of the contractually agreed time limits for the rendering of the expert report or prior to conclusion of the expert proceedings, whichever is earlier, but in any case for a maximum of 100 days.*

*The language of the expert proceedings shall be [***]. The seat shall be [***]."*

Interview

Prof. Dr. Martin Skiba



As an introduction to the interview, Martin was invited to share insights about his general background, and career.

“I have been involved in offshore wind energy for over twenty years now. My educational background is a mechanical engineering degree. In 2001, I went to work for Repower Systems AG. This was a wind turbine manufacturer. I worked there for seven years developing, building and managing the market launch of the first large five MW offshore wind turbine “REpower 5 M”. During the market introduction of this turbine I was also involved in the development and construction of the first offshore wind demonstrators in Belgium (Thornton Bank Phase 1), Germany (Alpha Ventus) and Scotland (Beatrice)”.

On the question about the extensive role he played as a pioneer in the wind industry and the chief positions he had, Martin responded:

“I went to RWE in 2008 and I was in charge of the wind energy division there, so development, construction, and operation

of the wind farms. I worked there for five years. We developed and constructed offshore wind farms in England, Germany, and the Netherlands and we built two Jack-up Vessels. In 2014 I started my own business and since then I have been working as a consultant and independent expert exclusively in the offshore wind industry. This is one part of my work. As another part, I am active in various associations promoting offshore wind energy. Together with Gunnar Herzig, I am a co-founder of the World Forum Offshore Wind (WFO), and I am on the board of the German Offshore Wind Foundation and the Federal Association of Wind Farm Operators Offshore (BWO). Association work is therefore also one of my activities. In addition, I am teaching students at the TU Hamburg / Harburg as a lecturer, and I am co-hosting now for eleven years the annual Economic Forum Offshore Wind on Heligoland.

Martin has been asked about his opinion on the challenges faced by wind industry in particular pose to the market and its market participants, both from a legal and economic standpoint:

“Firstly, the economic perspective is shaped by the general political environment, including the current war and its impact on offshore wind energy, the crisis caused by Covid, the disruption of supply chains, and rising inflation. As a second aspect, the underlying legislation, i.e. the policy framework set by the respective governments is a crucial factor. It is now the case worldwide that almost all projects are auctioned, and accordingly the auction design is quite decisive for the underlying supply chain, the implementation of the projects and thus also for the economic viability, which brings us to the legal perspective. We are also talking about dispute resolution, which is a common theme in the offshore wind industry. Of course, such projects are often fraught with conflicts, so it makes sense to be able to apply a suitable procedure, which in the end leads quickly and efficiently to a solution. I personally have been involved in many such conflicts, either as a client, as a contractor or as an independent expert. This problem will continue to occupy us over the next two decades and is also the topic area where we as WFO have seen potential for improvement.”

Why is alternative dispute resolution a well-suited means of efficiently resolving conflicts in the offshore wind industry?

A question we asked Martin:

“In general, there is already a long history in the industry of generating a solution that is tolerable for all through out-of-court proceedings. This is often driven by the fact that the courts are overburdened with both time and the required technical know-how. The problem, according to my experience over the last fifteen years, is that time and efficiency have moved out of the focus of arbitration proceedings, and in some cases arbitration proceedings take as long as normal court proceedings and, with equally inefficient execution and end up with unsatisfactory results.”

We wanted to know from Martin how the ADR mechanism that the WFO offers differentiates itself from the other classic tools available in the market:

“We did two things initially. First, we created an Expert List and second, we developed specific Expert Rules. Carried

is the whole concept by the know-how. Because the construction and operation of offshore wind turbines is a very complex project so a procedure and its results can only be as good as the know-how of the experts behind it. Therefore, as a very first step, one can actually say as step zero, we have launched the Expert List. There is an extensive application process for this list, which ensures that the experts are highly qualified. As a result, we have a pool of experts available for such procedures. We then designed the Expert Rules, which regulate how the experts can be deployed and retrieved. Here we can either recommend an expert for the different knowledge areas for other expert proceedings or we have also proposed a first procedure how an expert can be relied on under the guidance of the WFO, for the preparation of an independent expert opinion. To adapt the procedure to the needs of the market, we have involved the industry by way of introducing an Offshore Dispute Resolution Committee. Thus, we have achieved a first milestone, but already an applicable milestone. Because even now anyone can either call the experts for expert

determination or also use the experts under a WFO led expert proceeding.”

As a final question, we were curious to hear about the current feedback from the industry, regarding the WFO Expert Determination.

“So far, I have already heard from some market participants that they find the concept very promising, and the Expert Rules have also already been included in some contracts. In addition, a request was made in one case for an expert from the Expert List to write an independent opinion. On the other hand, we have received feedback that the current concept is not yet sufficient. Of course, we are aware of this. As already mentioned, we are still at the very beginning and must finally be able to provide a full set of ADR tools that include adjudication and ultimately arbitration procedures.”

Martin Skiba

is a mechanical engineer with a PhD, Martin is a consultant, a member of the board of BWO e. V. and the German Offshore Wind Foundation. He is also the vice chairman of the World Forum Offshore Wind, a former member of the supervisory board of Senvion S.A. (until 1 July 2017) and 8.2 Consulting AG, and honorary professor at Leibniz University of Hanover and a lecturer at TUHH in Hamburg. Between 2001 and 2008, he set up the offshore wind power division at REpower Systems AG. From 2008 to 2013, he was responsible for the development, construction, and operation of all offshore wind power stations of RWE Innogy GmbH.



Key Developments

In the Scottish case of *Van Oord UK Ltd v Dragados UK Ltda* [2022] CSOH 30, the decision issued by the adjudicator on the sixth adjudication (out of seven, in total) between the two parties was set aside by the Scottish Courts on the grounds of being against natural law.

The dispute under the relevant adjudication arose from Van Oord’s subcontract to dredge silts, sands, gravel, and glacial till as part of the project for expansion of the Aberdeen Harbour Expansion Project.

In summary, the adjudicator determined Van Oord’s entitlement to extension of time and prolongation costs which derived from one of four compensation events. However, the decision did not take into consideration that the baseline program used by the adjudicator had been expressly rejected by both parties and their experts.

Indeed, whereas the expert from Van Oord used a program from October 2018 and Dragados’ expert sought to rely on a program from April 2019, the adjudicator had chosen to base his decision on a program that had been prepared in March 2019 and had subsequently been rejected by not only both parties, but also their experts, resulting in the determination of a critical date which was two days earlier than the date Van Oord had proposed.

The adjudicator delivered his decision without assessing the critical date or its consequences and without offering the parties an opportunity to comment or make submissions on these specific points. Dragados argued that such adjudicator’s failure constituted a breach of natural justice.

In this context, the Scottish Courts considered the validity of the adjudicator’s decision in light of two basic elements, namely:

- Did the adjudicator’s decision been reached on basis not canvassed by the Parties and, if so,
- Did that imply into a material breach of natural justice?

In the Court’s decision it was highlighted that fairness demanded that the adjudicator should have given the parties such opportunity to address him and comment on those issues, providing the parties with the possibility of dealing with the consequences of the determined critical date, rather than “going off on a frolic of their own”. Dragados argument related to one of the pillars for enforcement of adjudication: the breach of nature justice. In English law, the other requirement would be that the adjudicator should have jurisdiction. In relation



to the breach of justice In Van Oord, Lord Braid agreed with Dragados' submission that:

"It was not for Dragados to show that their argument would have necessarily succeeded, simply that Dragados was deprived of the opportunity of making it."

A key factor in Dragados is that while considering as basis of its decision a program had been rejected by the parties and their experts, the adjudicator created an opportunity for manifest injustice. Dragados had even argued that, had they been aware that the adjudicator was considering a date rejected by the parties and their experts, i.e., an alternative critical date, Dragados would have argued that the entire claim was time barred under the subcontract. This aspect was a material issue which as such, required the parties' submissions, an opportunity that was denied to Dragados.

New Education & Knowledge Subcommittee

On 23 March we held our ODRC meeting during which we introduced our new Education and Knowledge Subcommittee. The subcommittee is chaired by our WFO members Andreas Dracoulis (Haynes Boone) and Leo Grutters (C2S Global).

Andreas is an English law qualified solicitor and is a partner in the London office of Haynes Boone. Andreas advises clients in the energy, construction and shipping sectors, with much of his practice focused on disputes in the offshore / marine construction space.

Leo is a civil engineer and dispute resolution expert with over 35 years of professional experience. He holds an MBA, is a Fellow of the Chartered Institute of Arbitrators and is also a member of FIDIC's President's List of Approved Dispute Adjudicators. He has been appointed as an arbitrator, independent expert and adjudicator, and has sat on dispute boards, in connection with a wide range of international construction and engineering projects in various sectors, including in the offshore and renewables space.

The purpose of the subcommittee is to provide a forum to impart knowledge and best practice in relation to contractual and legal issues relevant to the offshore

wind sector. This will be achieved through quarterly on-line meetings, at which interactive presentations will be delivered by professionals from different backgrounds (including lawyers and other experts qualified in different fields relevant to the offshore wind sector).

There will be a number of key themes that will form the basis of those sessions. These will include: pre-contract issues related to procurement and contract formation, administering of ongoing projects / contract risk management, dispute management / avoidance, dispute resolution procedures and other discrete contractual and / or legal developments of interest to the membership within this context.

The subcommittee will also contribute to this periodical by way of articles and thought pieces on issues of particular interest to the membership.

We do however welcome any thoughts from the membership on topics you would like to see covered. In that respect, please do therefore feel free to contact Andreas (andreas.dracoulis@haynesboone.com) and Leo (lgr@c2s-global.com) or alternatively Gunnar Herzig (gunnar.herzig@wfo-global.org).

Meanwhile, please reserve in your schedule the date of the next Education and Knowledge Subcommittee meeting, which will take place on Thursday 15 June at 11 am CET. Further details of the issues to be covered at the meeting will follow soon!



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Next Education and

Knowledge Subcommittee meeting:

Thursday 15 June | 11 am CET



Andreas Dracoulis

Leo Grutters

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