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COVID-19 IN THE OFFSHORE WIND INDUSTRY - STILL A FORCE MAJEURE EVENT UNDER GERMAN LAW?

During the last year the COVID-19 pandemic impacted everybody's life. Companies worldwide suffered difficulties, including loss of income and additional costs by implementing health and safety measures for its employees. The pandemic also had a huge impact on various projects in the offshore wind farm industry. Due to the fact that the pandemic and governmental restrictions are still ongoing and an end is not foreseeable, we expect that companies worldwide will still have to face various constraints in the future.

It is especially challenging that wind farm projects do not only involve two parties but rather numerous contractors and sub-contractors. Different construction phases are coordinated on a tight schedule and are co-dependent. Now, besides weather challenges and technical difficulties, these schedules are impacted by travel restrictions and further governmental measures. Hence, little impacts caused by the COVID-19 pandemic can lead to extensive problems in the overall schedule of a project.

Force majeure

One issue in the offshore wind farm industry has been the assessment on whether or not the COVID-19 pandemic and the implications it has caused qualify as a force majeure event. Contractual provisions prevail over statutory law. In case contractual provisions are unclear, contradictory or contain gaps, however, statutory law applies. German statutory law does not specifically define the term "force majeure", but it contains two clauses that are relevant in this case: Section 275 and Section 313 of the German Civil Code (GCC).

Section 275 GCC provides that no party must perform a duty that is legally impossible. It is clear from German case law that this also applies to parts of a contract that are impossible to perform and also to duties that are temporarily impossible to perform. In such cases, no party is liable to the other party for performance of the works (as long as they are impossible to be performed) and for any damages arising from this obstacle. If one party wishes to terminate the contract based on this impossibility, it is in their right to do so partially in relation to the affected works, or wholly, if the affected works are of such an essential interest to one party that it would be unreasonable to uphold the remaining parts of the contract without the part that cannot be performed.

Similarly, Section 313 GCC governs that in case circumstances arise that – had they been known at the time of contract conclusion – would have

led to the parties not concluding the contract at all or with different terms, then the parties have a good faith duty to adapt the contractual agreement taking into account the new circumstances. However, if such adaptation is impossible or to the severe detriment of one party, the contract may be terminated. The applicability of Section 313 GCC must be examined on a case-by-case-basis and is in most cases very difficult to prove in front of a competent court.

Looking at the developments surrounding COVID-19 in the last months the pandemic can likely be a reason to invoke either Section 275 GCC (in case of legal obstacles to the performance, such as by administrative orders regarding the mobility of employees, port closures etc.) or Section 313 GCC (particularly in cases of risen costs, unavailability of materials, delays in the schedule or other impacts that do not amount to a legal impossibility).

Severe delays

Offshore wind farm projects suffered severe delays relating to impacts of the COVID-19 pandemic. Such delays may have arisen in connection with delayed delivery of equipment, partial or whole shutdowns and lockdowns of factories, governmental measures in terms of health and safety of employees and the implementation of such measures. Especially the implementation of these new measures posed high costs and efforts on companies and they had to deal with these also on an internal level which again lead to organisational delays.

Most of the delays can be attributed directly to the COVID-19 pandemic or rather the restrictions resulting thereof and the party suffering the delays is therefore most likely excused due to certain contractual provisions or statutory law. One should note that the pandemic, however, can only be considered a force majeure event as long as it puts the contracting party into a position where it is impossible to perform. Due to the fact that the pandemic is now already going on for about one year, one cannot exculpate itself by simply arguing that the pandemic is a force majeure event (please see further below). In addition, companies are generally obliged to mitigate delays as much as possible. We have seen the difficulties for the parties to prove that their mitigation measures were sufficient, or necessary. Therefore, concrete lists including full evidence should be prepared and updated on an ongoing basis in order to have them available in case of negotiations or disputes.

The delays most likely lead to delayed project and milestone schedules.

Causation

As the COVID-19 pandemic might be considered force majeure under German statutory law, it can relieve one party of its obligations under above mentioned Sections. However, a force majeure event alone will not do the trick. The obstacles one party faces must be strictly related to the pandemic and its consequences. The force majeure event must be the only or at least a substantial cause of the hindrance or impossibility suffered. Hence, the party seeking relief must establish a full chain of causation to obtain relief under force majeure and they bear the burden of proof.

Foreseeability

As the COVID-19 pandemic has been going on for about one year one could question the (un)foreseeability of it. Unforeseeability is required under most contractual force majeure clauses in order for them to be invoked by one party.

It is widely accepted that the COVID-19 pandemic has been an unforeseeable event before 2020 or at least the far reaching restrictions resulting thereof. It is also clear that meanwhile any impacts of the known scale i.e. lockdowns, travel restrictions, immigration restrictions and quarantines have become foreseeable for contracts entered into within the last year.

As a first consequence, next to general force majeure clauses, contracting parties should implement COVID-19 clauses for the time in which the pandemic presumably will have effect on the contracted project. This raises important questions for contracts already in performance: How long will the parties be able to invoke force majeure clauses until the events in fact become foreseeable? Will foreseeable incidents also be excused if they could not have been reasonably prevented?

To fill this with a specific scenario: arguably, it was foreseeable during summer 2020 already that a second COVID-19 wave that was highly anticipated would cause travel

restrictions and shut downs of sites. Hence, a shutdown of a wind farm site in January 2021 was probably foreseeable. This, however, does not change the fact that no party had any means to prevent any damages arising thereof. Arrangements could only have been made prior to the pandemic e.g. by setting up a different project milestone schedule. During the pandemic, however, amendments were difficult if not impossible to implement while holding on to the original goals of a contract.

The question therefore cannot be whether the pandemic became foreseeable in the process but rather whether one party could have reasonably taken preventative measures.

The same applies under German statutory law. Section 275 GCC applies regardless of the foreseeability of the event. If something is impossible it does not have to be and cannot be performed. However, if the circumstance rendering performance impossible was preventable, the party is obliged to pay damages.

Under Section 313 GCC the relevant point in time in order to determine whether or not a contract should be adapted is the time of conclusion of the contract. However, also in this case both parties have to take mitigation measures and might be liable to compensation for damages.

On another note: we have seen many provisions that allow force majeure excuses but at the same time give a time limit to these excuses. So there might also be contractual limitation as to the duration of the excuse which needs to be taken into account in particular by the project management and legal teams.

Claims handling and settlement

Companies in the wind farm industry currently have to handle various claims and counter-claims which arose out of or in connection with the COVID-19 pandemic. This poses new challenges for project management teams. An adaptation of the contract or a change in performance with respect to new circumstances may be a solution to shift the execution phase and the milestone dates. Such adaptation must take into account both sides of the dispute and should be well-balanced. It should also consider the fact that the pandemic is still ongoing and restrictions, vaccine distribution as well as new laws evolve sometimes on a daily basis. A preliminary commercial settlement may help to dissolve the claims and enable the parties to proceed with the works.

KEY CONTACT

DR ECKEHARD VOLZ, LL.M. (STELLENBOSCH)
PARTNER I RECHTSANWALT

M +49 151 1460 6826
T +49 40 11 47100–2

eckehard.volz@noordenjones.com