RENEWABLES AND CORONAVIRUS

AS THE SPREAD OF CORONAVIRUS CONTINUES TO DOMINATE HEADLINES GLOBALLY, **HENRY STEWART** AND **EMMANUEL NINOS**, PARTNERS, AND **JAMES HARRISON**, SENIOR ASSOCIATE, IN THE LONDON OFFICE OF **WATSON FARLEY & WILLIAMS LLP**, EXPLORE THE KEY LEGAL CONSIDERATIONS FACING DEVELOPERS, INVESTORS AND FINANCIERS ACROSS THE LIFECYCLE OF EUROPEAN RENEWABLES PROJECTS.

The global escalation of the coronavirus pandemic is causing disruption to businesses across sectors and jurisdictions. Within the renewables sector, many projects are assessing and taking mitigating steps to address the risk of delays during construction, or interruption of supply, as central governments and other governmental and regulatory authorities ramp up measures aimed at slowing down the spread of the virus, while global supply chain disruptions make it harder to source the necessary materials and services.

Even though key stakeholders in the sector still seem to be committed to their long-term focus on supporting the transition to a renewables-based economy and a carbon-free future, the unprecedented spread of the coronavirus has positioned itself as an over-riding priority to be dealt with first.

The concerns around its impact means there is a pressing need for all project parties to carefully consider implications under their project documents. In light of such concerns, we explore below a number of potential legal issues that are linked to coronavirus and faced by European renewable projects. In doing so, we note that any resolution of the legal issues will depend on a careful analysis of the specific contractual wording found in the relevant project agreement.

Force majeure

A number of European renewables projects under construction are considering the validity of claims by their contractors for force majeure relief, eg under their EPC contracts, and the potential for the project itself to claim force majeure under its relevant contracts, eg power purchase agreements, or EPC contracts where projects are providing components as free issued equipment, if ultimately required.

Wherever relevant contracts include express force majeure provisions, careful analysis of the specific wording of the relevant contracts will be required to establish whether relief is available.

Contractual force majeure provisions tend to require that multiple levels of tests be satisfied for relief to apply, while relief is often only available where contractually specified procedures, eg around notification and mitigation, are followed by the affected party.

Such provisions also tend to provide relief from the performance solely of directly affected obligations, and only for so long as those obligations are actually affected.

Where projects are looking to claim force majeure relief on the basis of one of its contractors claiming force majeure against the project, particularly careful analysis will be required to ensure that force majeure relief flows through the contractual chain as required. Where underlying contracts are subject to civil law systems, careful analysis of relevant legislation will also be required.

Projects should also consider the extent to which any force majeure events may have given rise to, or may in future give rise to, termination rights under their project contracts or may have delayed the occurrence of milestones that have been backed-off under other relevant agreements.

In all events, financed projects should not forget to ensure that in managing force majeure claims they comply with the requirements of their finance documents, nor forget to establish what consequences, eg a drawstop or default, may flow under the finance documents from the occurrence of force majeure under their project contracts.

Frustration

Outside of force majeure relief the, English law, legal doctrine of frustration, and its civil law equivalents, eg the doctrine of rebus sic stantibus, are also worth considering. While case by case legal analysis will invariably be required, at present frustration, and rebus sic stantibus, appears significantly less likely than force majeure to apply in the European context, and it is worth noting that (in the case of English law) successful claims for frustration have historically been few and far between.

Within the renewables sector, many projects are assessing and taking mitigating steps to address the risk of delays

Material adverse effect

Where projects have debt financings in place, care should be taken to consider whether, aside from any specific default triggers, eg around project timelines, any more general triggers for the occurrence of a default under the relevant finance documents have been or may presently be tripped.

The most likely general trigger is that of the occurrence of a material adverse effect (MAE), or similar, a term which is frequently drafted broadly.

While the specific wording of the term will require case by case consideration, particular points to consider are the degree to which the contract provides financiers with the discretion to determine whether or not an MAE has occurred and the degree to which a MAE may be declared in light of anticipated future developments.

Positively for developers and sponsors, financiers are generally reluctant to declare events of default based solely on the occurrence of an MAE, given the scope for disagreement as to how to interpret the typically broad language of its definition, although financiers may not be so reluctant to declare a drawstop on the basis of an MAE.

While it is too early to make judgments of trends, and this is an area that will merit ongoing monitoring, we are currently working on a number of transactions that are continuing to drive towards financial close and utilisation notwithstanding the current situation. We are not currently aware of MAE having been declared under any live financings for European renewables projects.

MAC and finance-out clauses

A number of M&A transactions in the European renewables sector are currently between deal signing and completion. In such cases, a close review of the closing conditions under the relevant transactional documents is recommended.

Although slightly less common in the sellers' market prevailing immediately before the outbreak of coronavirus, some M&A transactions will include material adverse change (MAC) or finance-out clauses.

Under the former, the parties to an M&A transaction seek to prevent or ultimately forego completion of the transaction in case of a material adverse change in market conditions relevant to the transaction, while under the latter the same is sought to occur conditional upon related debt financing for the transaction being available.

In each case, careful analysis of the specific language used in the underlying transaction documents will be key in determining the parties' rights under such clauses in the individual case.

More generally, it is still too early to predict the medium and long-term effects of the coronavirus on M&A activity in the European renewables sector. However, long-term drivers for equity investments in the sector, such as government support for the energy transition, pension fund liquidity and a low interest rate environment, allow for a cautiously positive long-term outlook.

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Insurance

Another potential consideration is that of insurance and whether or not any delays associated with coronavirus may be subject to claims under project insurance policies. As a rule, any analysis here will be centred on delay in start-up and business interruption policies.

While such policies tend only to insure against risks associated with physical damage rather than delay, the wording of relevant individual policies will need to be interpreted to determine the extent to which those policies may respond. As always with insurance, projects will need to be careful to ensure that they comply with the letter of their insurance policies to maximise the probability of payout.

Change in law

One potentially novel source of compensation for projects may prove to be the relevant governments. With government policies responding to the coronavirus pandemic changing on a daily basis, developers and sponsors would do well to watch government policy in this area closely.

In the meantime, a careful analysis of the nature of restrictions currently imposed by relevant governments on relevant activities is advisable for affected projects, in particular with a view to establishing whether relevant government action may qualify as a Change in Law, or similar, entitling the project or its counterparties to contractual relief, or may render relevant contractual obligations illegal or ineffective and so, depending on the jurisdiction, provide parties with relief from those obligations.

Considerations for distressed projects

Finally, while we are not aware of any adverse trends in the European renewables sector linked to coronavirus in this regard, should projects become distressed, as always sponsors and developers should ensure that they fully understand the implications of the insolvency regimes in each potentially relevant jurisdiction – likely to be that in which the project is located and/or the project vehicle is incorporated – and take care to comply with the requirements of those

regimes and those regulating directors' duties more generally.

This is particularly important given the potential liabilities, including personal liabilities for directors, that could arise from a failure to do so.

In response to the pandemic and the financial stress it is putting on businesses generally, a number of governments have announced modifications to their insolvency regimes, for example, in the UK, Germany and Luxembourg.

These changes have particularly focused on the obligations of directors to commence insolvency proceedings and their liability in relation to wrongful trading. These new measures are currently expected to be in force for a relatively limited duration, eg three months, but depending on how the crisis develops they are likely to be extended.

The measures are designed to give businesses breathing space to assess the impact of the crisis on their operations, the government support that may be available, as well as whether further funding can be secured from shareholders or lenders.

Further measures may also be forthcoming, for example general moratoriums on credit-led insolvency proceedings such as liquidation and winding up. Therefore, up to date advice should be sought in relation to the specific jurisdiction in order to understand the exact scope of the modification of the law and whether it is in force, as implementation may lag the announcement of the measure by a government.

Early discussions are key

The circumstances associated with the coronavirus pandemic present sponsors, financiers and other participants in European renewables projects with a range of legal considerations. These also need to be considered in combination with the various legal and economic measures taken by European governments, such as social-distancing guidelines and compulsory business closures.

These governmental measures do not only attempt to contain the spread of the virus but also the shock waves it has caused across global financial markets. As a result, any legal considerations will invariably need to be evaluated on a case by case basis.

Given the ever-changing situation and the complex web of contractual relationships that together form individual projects, in assessing and responding to related issues as they arise, developers and sponsors should seek so far as possible to work hand in hand with their other project parties.

Our experience to date indicates that early, clear and open discussions between affected parties, that are pragmatically focused on short to medium-term solutions for immediate challenges, can greatly assist in enabling all parties to address those challenges effectively. ■

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