WIND INDUSTRY HUB

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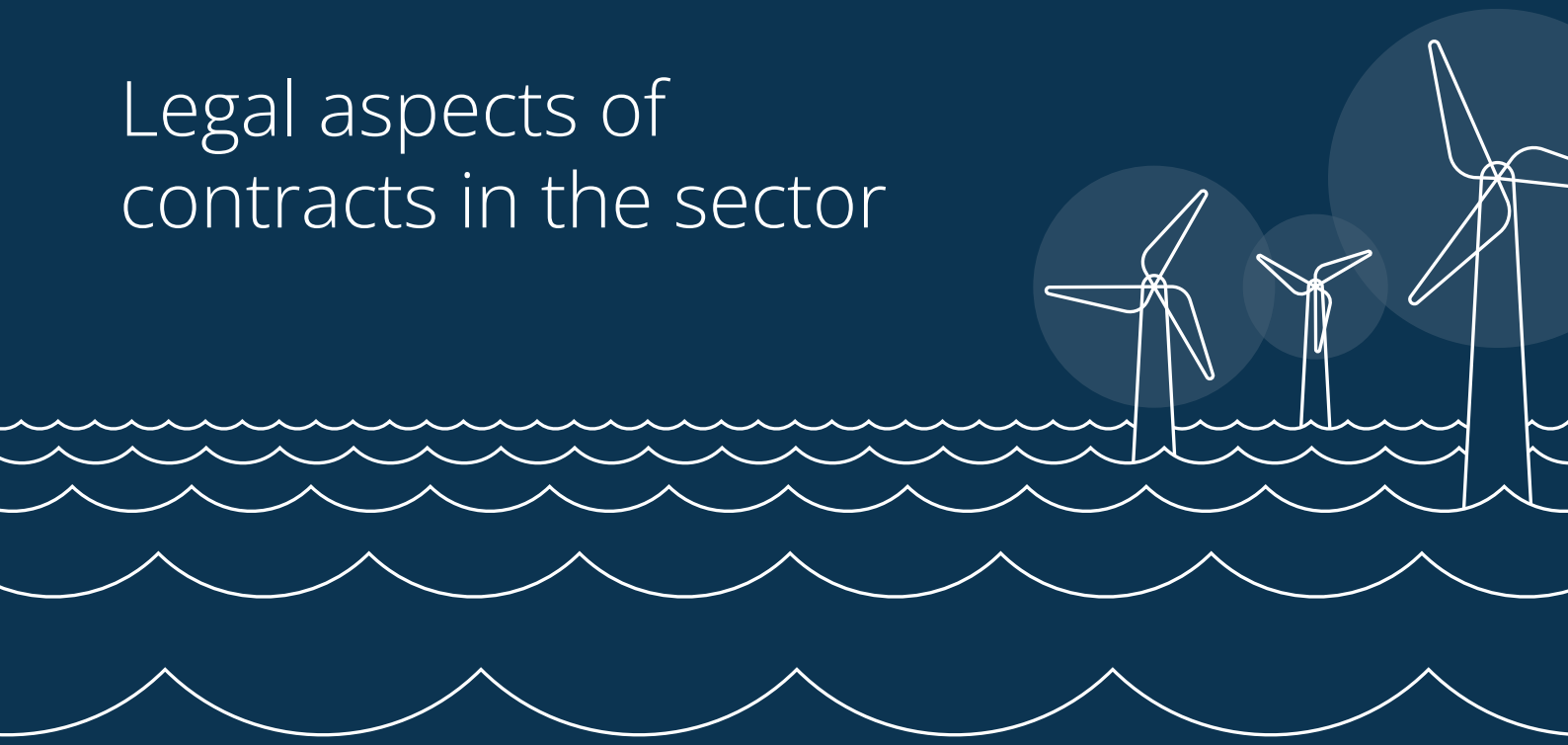
Development of offshore wind farms

Legal aspects of contracts in the sector



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OFFSHORE WIND POLAND

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Introduction

The development of offshore wind farms (OWFs) in Poland is not only becoming one of the main drivers of the economy, but also plays a key role in the country's energy transition. Offshore projects in the Baltic Sea are attracting multi-million-dollar investments that have the potential to significantly reduce CO_2 emissions and meet the growing demand for sustainable energy. The realisation of the planned 18 GW of capacity by 2040 is not only a landmark initiative in the history of the Polish energy sector, but also an opportunity to reindustrialise the country's industry around a low-carbon model. Poland faces a unique opportunity to become a leader in offshore wind in Central and Eastern Europe, with the potential to permanently transform its energy landscape.

This publication, prepared by the Wind Industry Hub (WIH) Foundation and the law firm DWF Poland, offers an in-depth analysis of key aspects of offshore contracting – from contractual standards to risk and liability issues. Contracting in the offshore sector requires not only a first-rate knowledge of the law, but also the ability to adapt to local conditions that affect the effective implementation of projects. Here we discuss the details of agreements governing investor cooperation, supply and service contracts and organisational models – from multi-contract strategy to EPC/EPCI contracts. Each of these aspects has its place in the complex map of offshore investment and contributes to the development of industry standards necessary for the sector's stability and predictability.

Special attention was given to so-called "local content", i.e., the involvement of local companies and resources. They strengthen the Polish economy and create added value in the form of new jobs and competence development. With the support of EU regulations, such as the Net-Zero Industry Act and national sectoral initiatives, Poland is creating favourable conditions for the development of offshore wind technologies, which can play an important role in the future of the renewable energy market.

This publication is not only a source of knowledge for investors, legal practitioners and project managers, but also an invitation to reflect on the culture of contracting in the offshore wind sector. Jointly developed standards, incorporating local resources, maritime conditions and changing regulations, can create a sustainable basis for the development of the industry, providing Poland with a competitive advantage in the region and a stable energy foundation for the future.

Wishing you an interesting and informative read.

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1. Market landscape

The birthplace of renewables, Europe has committed significant resources to the development of offshore wind farm technology, which has contributed to the rapid growth of this market in recent years. By 2030, nearly 90 GW of new offshore wind capacity is expected to be built on the Old Continent, of which 26.7 GW will be in the Baltic Sea.

Poland has embarked on the development of offshore wind energy in response to growing needs for decarbonisation of the energy mix, sustainable development and environmental protection. The key document governing this area is the Polish Energy Policy until 2040 (PEP2040), which sets targets for the development of offshore wind farms. The government envisages installing 5.9 GW by 2030 and a further 12 GW by 2040, resulting in a total of 18 GW over the next several years. The potential of the Polish part of the Baltic Sea in terms of offshore wind reaches as much as 33 GW, which provides perspectives for further development of this technology after 2040. Its full utilisation would allow for almost 60% of domestic demand for electricity (approximately 130 TWh) to be covered via the help of offshore wind farms.

At the same time, according to the draft National Energy and Climate Plan to 2030 (NEEAP), released for public consultation in October 2024, wind energy (onshore and offshore) is expected to supply 70% of Poland's electricity in 2040. It is therefore no exaggeration to state that wind energy is the main technology for decarbonising the Polish economy.

In order to encourage investors to build offshore wind farms in Poland, the Polish government has prepared a special support system. This model, provided for in the Act on the Promotion of Electricity Generation in Offshore Wind Farms, is based on the concept of the so-called bilateral differential contract, already proven in Poland and the region, which is used in the current support system for renewable energy sources (RES). Electricity generators from offshore wind farms that are included in the support system are entitled to cover the negative balance. This means that, at the billing stage for the energy generated, they will receive compensation for the difference between the market price of energy and the price that allows them to cover the costs of generating electricity offshore. The amount of support provided will be calculated as the product of the planned installed capacity of the offshore wind farm and 100,000 hours. This solution allows the support to be spread out over the time; it will be provided for, i.e., a maximum of 25 years (the lifetime of an OWF). The support system for offshore wind farms in Poland has so far been

RES in electricity sector

2030		2040
29.0 GW 24.6 TWh		46.2 GW 43.1 TWh
19.0 GW 47.7 TWh		25.8 GW 69.5 TWh
5.9 GW 21.7 TWh		17.9 GW 67.4 TWh
1.5 GW 11.1 TWh		1.6 GW 12.3 TWh
1.1 GW 2.9 TWh		1.2 GW 3.0 TWh

divided into two (2) phases (although, according to industry analyses, further phases are also possible).

The so-called Phase I projects in the Polish Baltic Sea economic zone are currently in the process of having their business/financial models finalised, which brings them closer to final investment decisions. So far, only Baltic Power can boast such a settlement. The 1.2 GW project is being developed by a consortium of Orlen Group and Canada's Northland Power. It is likely to be joined later in 2024 by Baltica 2, a 1.5 GW project between PGE Group and Denmark's Ørsted. Also in line for FID are the Baltica 2 and Baltica 3 projects (owned by Polenergia and Equinor), BC-Wind (Ocean Winds), Baltica 3 (PGE and Ørsted) and F.E.W. Baltic II (RWE Renewables).

Relatively few investors choose to finance the construction of offshore wind farms with their own funds. Due to the capital-intensive nature of the projects, most use debt financing provided by consortia under the project finance formula (usually several to dozens of institutions forming a consortium). The security for such a loan can be the stability of revenues resulting from, for example, Contract for Difference (CfD) contracts.

For Phase I offshore wind projects in Poland, the right to support was granted in the form of individual decisions by the President of the Energy Regulatory Office (ERO). The CfD price was set as a result of negotiations with the ERO and approved by the European Commission. The reference level was the rate of PLN 319.60/MWh, set in the Ministry of Climate and Environment (MoE) Decree of March 2021 (Decree on the maximum price for electricity generated in an offshore wind farm of 30 March 2021, MoE). This proved to be insufficient just one year later. The reason was a large increase in the price of raw materials and components, as well as the cost of services, logistics and transport, caused by broken supply chains as a result of the pandemic and Russia's aggression against Ukraine. The situation was exacerbated by increased demand for components for offshore wind farms on the global market, due to growing ambition in relation to offshore wind capacity growth.

In response to these challenges, the IOC amended the Offshore Act in December 2022 to include, among other things, annual indexation of the maximum price for Phase I projects and the possibility of partial settlement in euros. The aim was to protect investors from the effects of a weakening zloty. Despite this, a number of challenges were encountered in the construction of the Phase I of offshore wind farms in Poland, affecting the pace and cost of investment. Several key aspects can be identified that are relevant to the analysis and evaluation of future phases of offshore projects:

- Global inflation, and in particular increases in the prices of construction materials and energy, had a significant impact on the cost of building wind farms. Increases in the price of raw materials such as steel, copper and cement have resulted in higher manufacturing costs for turbines, foundations and transmission infrastructure. In addition, rising energy costs have impacted on operational expenses related to the installation and transport of large-scale components to sites.
- Supply chain issues were one of the key challenges that arose during Phase I. Delays in the delivery of components, such as submarine cables, turbines and foundations, resulted from global disruptions related to the COVID-19 pandemic, as well as limited production capacity of some suppliers. This caused delays in construction schedules and higher logistics costs.
- The Phase I of offshore projects in Poland was the process of establishing and stabilising the regulatory framework. Although Poland adopted ambitious offshore wind energy targets, regulations related to permitting, financing and integrating projects into the grid were still at the formation stage. A stable but still new legal framework resulted in delays in investment processes and limited certainty for investors.
- Instability in the timing of future phases of offshore wind farms has also affected the effectiveness of synergies between investments. A clear timetable for Poland's energy transition and long-term commitments would enable better supply chain management and cost reduction.
- Too slow and inadequate development of port infrastructure, which has forced developers to commit capital and personnel to invest in installation and service ports.
- There is a lack of readiness on the part of the domestic supply chain, but also a lack of systemic, institutional support for the Polish industry to develop domestic manufacturers and service providers for the offshore wind sector.

On the back of initial experience with Phase I of OWFs in Poland, a number of strategic and regulatory challenges requiring urgent action have already become apparent in the new government's first year. Although a pool of funds for port development and offshore wind farm construction was earmarked to support the offshore wind energy sector under the 'unblocked' National Recovery and Resilience Plan (NRP), from which the Offshore Wind Energy Fund was created, with a budget of €5 billion. However, these funds come so late in the process of financially assembling projects that, unfortunately, the effectiveness of KPO disbursement is now in

question. The KPO funds for offshore wind projects is managed by National Economy Bank (NEB) as part of a competition announced in August 2024. The fund's plan is to finance at least two offshore wind projects with a total capacity of at least 3 GW. Loans are to be available for projects with a capacity of at least 300 MW.

For Phase II projects to be implemented in the coming decade, the use of NRP funds is unlikely to be counted on, unless a revision of the programme allows for a pre-development phase, i.e., so-called "development", or shifts funds towards the supply chain (e.g., to a variance instrument or "pre feed" mechanisms).

The price for OWF Phase II projects in Poland will be set in the CfD contract, through competitive auctions. By the end of 2024, the regulation specifying the reference price, i.e., the maximum rate for the auction in 2025, should enter into force. For investors, this is key information, as the level set will determine the financial viability (or lack thereof) of projects.

The market discussion on the level of the reference price started in August 2024. The wind sector criticised the Ministry of Climate's initial proposal (Draft Regulation of the Ministry of the Environment of 14 August 2024 on the maximum price for electricity generated in offshore wind farms), arguing that the proposed rate of 471.83 PLN/MWh could make it impossible to realise Phase II OWF projects in Poland. The industry argued that the Ministry of Environmental Protection did not take into account the growing investment and operational costs in its calculations, and unrealistic assumptions were made regarding energy balancing and expenditures on connection infrastructure. They also pointed to the lack of a reliable assessment of the so-called learning curve (because the first auction will take place before any of the projects from the first phase are completed) and the failure to take into account risks related to constraints within the electricity networks and negative energy prices. Along with the call for the proposals to be made more realistic to current price benchmarks, it was also pointed out that the increased expectations from the Ministry of Defence in terms of the physical protection of offshore infrastructure, as well as the deployment of elements of the state security system within it, are generating new, previously unplanned costs. In response to these arguments, the Ministry of Climate and Environment announced (in October 2024) an increase in the maximum price to 512.32 PLN/MWh, and on 4 November this year, the draft amendment appeared on the Government Work List (RCL).

Participants in the consultations on the draft of this regulation suggested that the maximum price should be between PLN 550 and PLN 600 per MWh. In the discussions, there were also postulates to differentiate the reference price depending on the distance of the project from the shore and the power exit point. A longer distance of the farms from the

shore and the need for the investor to cover the costs of construction of the connection infrastructure, both at sea and on land, significantly increases the costs of project implementation. This has been taken into account in the updated proposal for the regulation.

It seems, however, that there is still a lack of full awareness among decision makers and the Polish public about the importance and scale of the offshore wind investment programme for our country. The lack of a nationwide information campaign, in turn, results in a complete misunderstanding of the basic concepts within this technology and its implementation system – such as the fact that the so-called "maximum price" in offshore auctions IS NOT the execution price, i.e., the sale of energy to the market. Indeed, as PWEA points out in its analyses, the more offshore wind power in the national mix, the more energy from this source will drive down energy prices on the market[1].

The failure of the first auction for offshore wind in Poland could jeopardise investment continuity. In the meantime, investors and their contractors agree that moving quickly to Phase II projects will support the development of the local supply chain and reduce energy costs for all Poles within a few years. The development of offshore wind energy in Poland is an opportunity to strengthen the domestic industry and create strong production centres for the sector in our country. Engaging the potential of local companies can have multiplier effects for the entire economy.

All the more so as currently the European Union, based on the industrial policy being developed from 2019 onwards, supports the development of local production. The Green Deal and related regulations, represent both a challenge and an opportunity for Polish industry. They require huge investments and modernisation, but at the same time they open the way to innovation, reducing operating costs and strengthening competitiveness in the global market. How Polish industry takes advantage of these opportunities depends on its readiness for change and effective engagement of available support tools. A good example of this is the Net-Zero Industry Act initiative, which promotes manufacturing related to the green transformation of the economy. The introduction of non-price criteria in RES auctions could help domestic suppliers. In the EU, from 2022 onwards, it is accelerating with legislation aimed not only at decarbonisation, but also at trying to ensure industry competitiveness for green technologies. The upcoming term of the European Commission, led by Ursula von der Leyen, is expected to focus on shaping the Clean Industrial Deal[2]. It is worthwhile taking this trend into account when formulating and implementing offshore wind energy contracts in Poland, and to already refer to it, given the rather short implementation periods for individual EU guidelines and regulations.

The development of offshore wind farms (OWFs) in the Baltic Sea in the Polish Exclusive Economic Zone, which includes Słupsk Shoal, Central Shoal and Odra Shoal, is an opportunity to dynamically strengthen domestic industry and build a local supply chain. Investments worth more than PLN 130 billion are attracting Polish and international companies, generating jobs and technological development. An example is the Baltic Power project (Orlen and Northland Power), which involves consortia of GE Poland and Enprom, as well as Van Oord for transport and installation, with a planned capacity of 1,200 MW by 2026. PGE and Ørsted are collaborating on the Baltica 2 and 3 projects with a total capacity of over 2.5 GW, involving Van Oord, Boskalis and Polimex Mostostal, among others. These projects will be powered by newly built installation terminals, including the terminal in Świnoujście, which Budimex (onshore part) and PORR (hydro part) are developing as a logistics centre for the transport and installation of offshore turbines. In addition, the planned T5 terminal at the Gdansk Baltic Hub, with an estimated value of PLN 1.2 billion, is to serve as a base for the Baltica 2 and 3 projects, enabling logistical support for the installation of offshore components.

Offshore projects also require investment in factories and production facilities, which ensures continuity of supply and strengthens the local supply chain. In Szczecin, the Danish company Vestas is building a nacelle and turbine blade assembly centre on Ostrów Brdowski, while Spain's Windar has begun construction of a wind tower plant. Similar efforts are underway in Gdansk, where a wind turbine tower factory is being built on Ostrow Island by Baltic Towers, a company owned by the Industrial Development Agency (ARP) and GRI Renewable Industries.

1 https://www.psew.pl/analiza-psew-wiatraki-na-morzu-sie-oplacaja-ceny-energii-moga-byc-nizsze-o-polowe/

2 https://www.euractiv.pl/section/energia-i-srodowisko/news/europejski-zielony-lad-co-zrobi-nowa-komisja-europejska/

2. Stages of implementation of offshore wind farms. Project life cycle

2.1. Key steps in the OWF investment process

In order to identify specific contracting scopes in OWF investments, it is first necessary to analyse the investment process for the construction of such projects.

The initial stage for the execution of an OWF is to obtain a permit for the erection of artificial islands and structures ("PSZW"), which determines the location, conditions for the execution and characteristic technical parameters of the investment in Polish maritime areas. Pursuant to the Act on Maritime Areas of the Republic of Poland and Maritime Administration of 21 March 1991 (i.e., Journal of Laws 2024.1125; "UOM"), the execution of an OWF is permitted in the exclusive economic zone, and the proposed location of the OWF must correspond to one of the predefined locations set out in Annex No. 2 to the Act on the Promotion of Electricity in Offshore Wind Farms of 17 December 2020 (i.e., Journal of Laws 2024.182; "Offshore Act"). These locations are consistent with the areas designated for the implementation of the renewable energy generation function in accordance with the Spatial Management Plan for the Polish Maritime Areas (Regulation of the Council of Ministers of 14 April 2021 on the adoption of the Spatial Management Plan for Internal Maritime Waters, the Territorial Sea and the Exclusive Economic Zone at a scale of 1:200 000, Journal of Laws of 2021, item 935; "SMPMP").

The PSZW is granted by the minister responsible for the maritime economy (currently the Minister of Infrastructure), after the application has been approved by other competent authorities and ministries (including the Minister of National Defence and the Internal Security Agency). In the case of interest in a particular location by more than one investor, the granting of the PSZW is preceded by a competitive procedure (the so called "determination procedure") aimed at selecting the entity, which gives the guarantee that the project will be executed in the best possible manner. The determination procedure consists of an evaluation of individual applications for the PSZW according to the statutory criteria (among others, compliance with the IPMP, the manner of financing the project, possibilities to create facilities for its execution), and its result is the granting of the PSZW to the entity with the highest number of points. In 2023 the Minister of Infrastructure granted the PSZW ten (10) projects located in the above areas (the so-called Phase II). One (1) area remains to be developed (a body of water designated in the PSZW as POM.53.E), which is currently used for NATO military exercises.

The OWF investor must also secure permits analogous to the PSZW for the power lead-out infrastructure (agreement and permission to lay and maintain cables), obtained on the basis of the UOM. These permits can only be obtained once the connection conditions for the project have been secured.

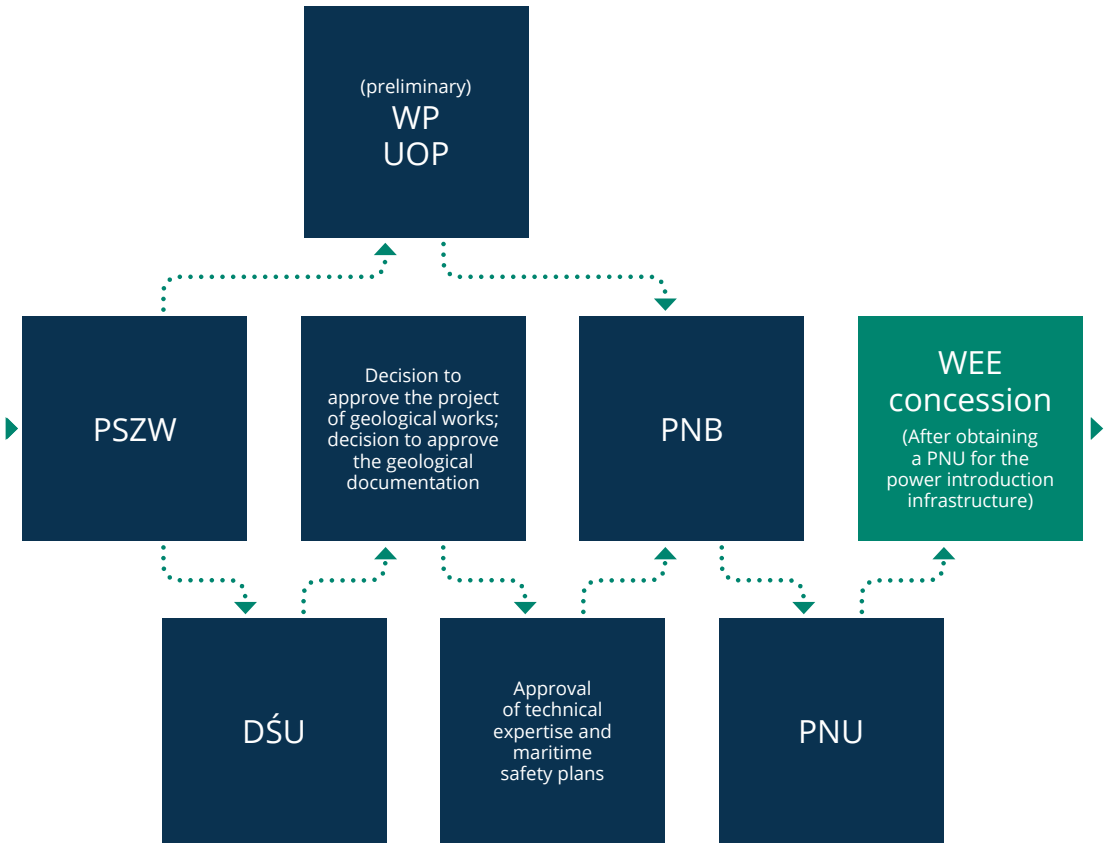
The next milestones in the OWF investment process are obtaining key investment decisions, i.e., among others, the decision on environmental conditions ("DŚU"), decisions issued under the Act of 9 June 2011, Geological and Mining Law, the Water Law Permit and the Construction Permit ("PnB"), and ultimately the Permit for Use ("PnU"). On the basis of the Offshore Act, administrative decisions issued for OWFs are subject to a separate legal regime aimed at streamlining procedures. According to the experience of the most advanced offshore projects, which were granted PSZWs in 2012–2013, the average duration of the proceedings to obtain a DŚU for a project was more than one-and-a-half years, and more than six months to obtain an amendment to the DŚU. If the above provisions prove to be effective, the investment process for offshore projects could be significantly shortened.

In parallel to obtaining the administrative decisions, investors are obliged to secure connection conditions ("WP") for the project and conclude a connection agreement ("UOP"). The Offshore

Act introduces special regulations in this respect in relation to the Energy Law of 10 April 1997 (Journal of Laws 2024.266) and stipulates that the so-called "preliminary connection conditions" are issued for projects intending to benefit from the support scheme.

According to the Offshore Act, a dedicated support system for offshore wind projects was established, divided into two (2) Phases of support. Under Phase I of the support system for offshore wind farms, support was granted on the basis of individual administrative decisions of the President of the ERO, granting the generator the right to certain payments upon fulfilment of certain conditions, in the form of the right to cover a negative balance (contract for difference). The support decisions were limited to a total capacity of 5.9 GW and only to projects located in offshore areas delimited on the basis of geo-centric geodetic coordinates contained in Annex 1 to the Offshore Act (projects that received PSZW in 2012–2013). The ERO President issued seven support decisions up to 30 June 2021. The order in which the right to cover the negative balance was granted was determined by the order in which complete applications with attachments were submitted (first come, first served principle). Phase II of the support system, on the other hand, is to consist of competitive auctions organised by the President of the ERO. Only projects with secured PSZW, DŚU and the so-called preliminary connection conditions or connection agreement will be able to take part in the auctions. The first auction is planned for 2025, and subsequent ones for 2027, 2029 and 2031. In total, support is to be granted in the auctions for projects with a total installed capacity of 12 GW. An auction can only be held if a minimum of three projects are admitted to the auction. In this context, it is therefore uncertain whether the auction planned for 2025 will take place due to the lack of a sufficient number of advanced projects.

Investment decision chain for the OWF



2.2. Life cycle of OWF projects

The life phases of OWF projects are typically divided into four (4) phases (development, construction, operation and decommissioning phases), which determines what type of contracts are concluded for the scope of works, supplies or services in each phase. These phases differ in duration and in the quantity and quality of the inputs resulting from different human, technical or organisational resource needs.

DEVELOPMENT PHASE

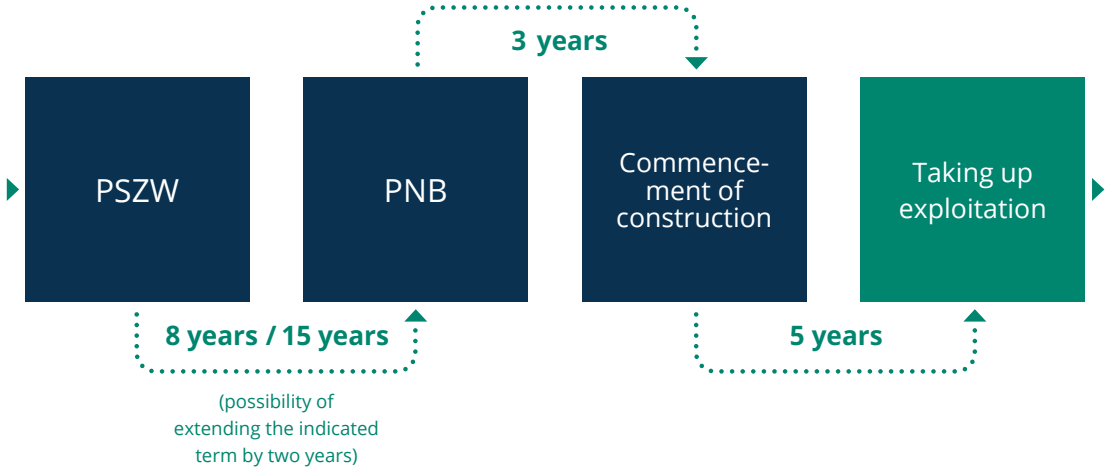
Typically, beginning of the process is considered to occur when the investor obtains the final PSZW, and the end of the process when the investor takes the so-called Final Investment Decision ("FID"). Obtaining the PSZW is naturally preceded by preparatory works, such as the preparation of the application for the PSZW or the preparation of analyses concerning the conditions of the given basins.

During the development phase, it is necessary to collect relevant data on the planned project location, prepare the technical design and verify the availability of technology suppliers and draw up a preliminary supply chain plan with implementation at the contracting stage. Critical to the success of the project in this phase is the securing of the project site and logistics, meaning the selection of the installation port, the location of the base for the OWF operation phase and securing the required fleet of installation and service units[3].

CONSTRUCTION PHASE

The start of the OWF construction phase is typically considered to be the undertaking of the FID or the submission of the winning auction bid. Its duration is concluded by the date of commencement of the commercial operation of the project (Commercial Operations Date; "COD"), which can be considered to coincide with the obtaining of the PnU. According to the UOM, the commencement of construction of the OWF should take place within three years from the date of obtaining the PnB, and the commencement of operation should take

Timetable framework for OWF implementation resulting from statutory regulations:



3 Marcin Sowiński, Rozwój i realizacja projektu [w:] Morska energetyka wiatrowa – praktyczne wprowadzenie, red. Łukasz Sikorski, OnePress, 2023.

place within five years from the commencement of construction, on pain of expiration of the PSZW.

Within the FID, decisions are made on the financing of the project. Key contracts for works, material supply and services are also concluded, i.e., for the supply and installation of the main components of the OWF (wind turbines), internal and external cabling, foundations, transformer stations, as well as installation units[4].

The construction phase requires adequate preparation of the construction site and infrastructure facilities in both the onshore and offshore parts, based on a thorough survey of the seabed in the location. One of the first steps at sea is the installation of foundations, which are necessary for the stable foundation of the turbines. Subsequently, internal and external cables (power lead) are laid and a marine substation is installed. The turbines are transported by sea from the port to the installation port indicated by the investor or directly to the installation site at sea. Their installation is carried out using specialised offshore units. The connection of the OWF to the grid requires the parallel progress of works in the onshore part, i.e., the construction of the onshore part of the power lead-out cable, the main power point and the connection.

Numerous risks are inherent in the construction phase of an OWF, such as the duration of the work and the proper coordination of the supply of components and materials as well as the availability of service providers, offshore weather conditions and the significant costs of offshore work compared to onshore work. Proper management of the construction phase is crucial to the project's success.

OPERATION (MAINTENANCE) PHASE

The exploitation phase of the OWF lasts from the COD date to the date when the installation is completed and dismantled. This is the stage when the OWF starts generating electricity and supplying it to consumers. Operation includes the day-to-day management of the farm, performance monitoring, turbine servicing and other activities to keep the farm fully operational.

Its duration is affected by the maximum period of validity of the PSZW. According to the UOM, the PSZW is issued for a period of thirty years from the day on which the OWF was put into operation, however the authority issuing the PSZW, upon the investor's request, may extend its validity for a period of up to twenty years. The second issue is the fitness of the given installation for operation, with the typical period being twenty-five years. This period coincides with the period of the right to cover the negative balance resulting from OWF support schemes. However, in view of the intensive technological progress in the RES industry, it can be expected that this period will be gradually extended.

One important aspect of the operation phase is the ongoing monitoring of the operation of the OWF (remote monitoring of turbine operation with data analysis as to turbine performance, power production, weather conditions and potential failures). The maintenance and upkeep of the OWF (Operation & Maintenance; "O&M") in order to ensure reliable energy production requires regular inspection of the OWF components and ongoing response to potential failures. Ensuring adequate availability of spare parts, qualified technical experts to provide repair services and appropriate specialist service units is crucial in this context.

DECOMMISSIONING (DISMANTLING) PHASE

The decommissioning phase of the OWF includes the dismantling and – as a rule – removal of all elements of the installation as well as the reclamation of the marine environment in the farm area (if required). In the process, the investor must take into account the need to contract farm dismantling services early enough and the costliness of the process. There is relatively little experience of OWF decommissioning worldwide, which poses some risks. Each site requires an individual approach, and the lack of decommissioning standards can lead to potential legal, operational and technical problems.

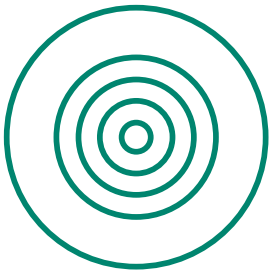
The alternative to completely removing the farm components is to leave parts of them in the sea to protect the so-called artificial reefs created there and the marine habitats and ecosystems they produce.

4 Marcin Sowiński, Rozwój i realizacja projektu [w:] Morska energetyka wiatrowa – praktyczne wprowadzenie, red. Łukasz Sikorski, OnePress, 2023.

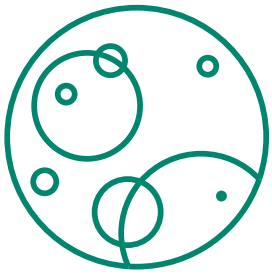
3. Contracting models for works, services and supplies in offshore investments

When entering into key contracts for the OWF investment process, investors can use different contracting models. Choosing the right strategy depends on the specifics of the project, the complexity of the project, the financing structure and risk management expectations. OWFs are projects of exceptional technical and logistical complexity that require precise coordination of deliveries, installation services, engineering and management of the overall investment. Depending on the contracting model adopted, responsibility and project or financial risks may be assigned to different participants, which affects the overall dynamics of the project and the level of control over its various stages.

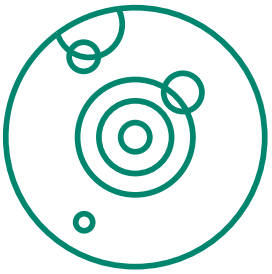
The key contracting models used for offshore wind projects are outlined below, along with their key features, benefits and potential challenges:



Centralised model
(General Contractor, EPCI)



Multi-contract procurement strategy



Hybrid model
(EPCM)

3.1. Centralised model (General Contractor, EPCI)

Under this model, the investor enters into a contract with a single general contractor who is responsible for the overall implementation of the project, including the coordination of the work of subcontractors, suppliers, service providers and so on. This is beneficial in terms of minimising risks on the investor's side, but at the cost of less direct control over the progress of the various stages of implementation. In many cases, the centralised model can ensure effective management of the project schedule and budget, but requires the investor to have a high degree of trust in the general contractor/implementer.

In the centralised model, the EPCI (Engineering, Procurement, Construction, and Installation) contractual formula is most commonly adopted.

This is the most comprehensive contractual model, where the developer enters into a single, turnkey contract with a single contractor. This contract covers the full range of activities – from design, purchase and delivery of the necessary materials to transport and installation at the designated offshore location. The general contractor is responsible for achieving a specific result (fit for intended purposes). The general contractor may use its own manpower or engage subcontractors for part of the work, but the general contractor bears primary responsibility for meeting the schedule and achieving the quality and financial targets set out in the client's requirements. The general contractor therefore bears the risk of the interface, the links regarding scopes of work and the allocation of risks between different suppliers and subcontractors. The remuneration in this model is most often set at a flat rate and includes a risk premium to compensate the general contractor for potential difficulties and unpredictable offshore working conditions. The result of the work under an EPCI contract is a fully functional turnkey facility, ready for operation immediately upon completion.

3.2. Multi-contract procurement strategy

This strategy is based on dividing the project into different scopes (known as packages) and entering into separate contracts for each of these components. This can involve single-scope contracts (e.g., for the supply of turbines or foundations) or package contracts (e.g., for the supply and installation of a specific component). Each package is carried out by a different contractor, giving the developer more control over the selection and management of individual suppliers and allowing for flexible budget adjustments. However, this model presents challenges in terms of project management and coordination between different contractors, which may require sophisticated project management tools and significant investor involvement.

3.3. Hybrid solutions (EPCM)

This is an approach that combines elements of a centralised model and a multi-contract strategy. For example, the developer can enter into separate contracts for key elements such as the turbines and entrust the remaining work to a single general contractor. The hybrid model allows flexible risk management and control of individual project elements, while simplifying the management of the overall implementation schedule.

In the EPCM (Engineering, Procurement, Construction, Management) model, the developer employs a contractor or group of contractors as advisors who manage and oversee the various phases of

the project, such as engineering, procurement and construction, but do not themselves carry out direct construction work or make purchases on behalf of the developer. The EPCM contractor acts as the project manager, supporting the investor in decision-making and coordinating the work of subcontractors. This model gives the investor more control over the project and flexibility in managing the supplier selection process, but also means that the investor is ultimately responsible for hiring and controlling subcontractors. EPCM is particularly beneficial for large projects that require complex coordination and close monitoring of costs. It also allows for the involvement of local suppliers as part of a multi-contract strategy.

3.4. Models used in Poland

In Polish offshore wind farm projects implemented under the so-called Phase I, mostly a package model (multi-contract strategy) was adopted. Examples of projects such as Bałtyk II and Bałtyk III, implemented by the partnership between Equinor and Polenergia,

	 **Centralised model**	 **Multi-contract strategy**	 **Hybrid model**
Number of contracts	**Packages, covering 1 to 3 scopes of work**	**Over 9**	**4 to 9**
Contract price	**Relatively high,** includes risk premium, lump sum	**Relatively low** compared to EPCI	**Average**
Risk exposure	**Relatively low,** usually capped	**Relatively high** responsibility of the contracting authority for interfaces between contractors	**Average**
Control by the contracting authority	**Relatively low**	**High, direct**	**High,** but less than with EPCI

confirm the application of this strategy, where investors sign separate contracts for different components such as turbines, foundations and cable systems. This allows for flexible management of individual project segments and suppliers and cost optimisation. It does, however, require advanced management and coordination of all stages. The projects are planned to be commissioned between 2027 and 2028, with each of the main components of the project being carried out by separate contractors, such as Siemens Gamesa (turbines) and SIF Netherlands (foundations)[5]. Similarly, the Baltica 2 project, which is part of a cooperation between PGE and Ørsted, is also divided into separate contracts, which allows for efficient risk management and the execution of different work packages, such as the transport and installation of transformer platforms, according to the project schedule and technical requirements[6].

The multi-contract strategy used in this phase of Polish OWF development reflects the investors' desire for greater control over the project and the ability to select specialised suppliers for individual elements of offshore infrastructure, which is crucial for complex, large-scale projects.

5 Source information: https://www.power-technology.com/projects/baltyk-offshore-wind-farms-poland/?cf-view; https://balticwind.eu/equinor-and-polenergia-with-agreements-to-design-foundations-for-baltyk-ii-and-baltyk-iii-offshore-wind-farms/; https://www.equinor.com/news/archive/20210412-breakthrough-polish-wind

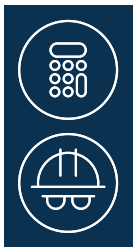
6 Source information: https://offshorewindpoland.pl/en/category/phase-i/

4. Selected examples of contracts in OWF investments

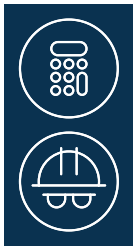
There are a variety of contracts involved in the construction and operation of OWFs, covering all stages of the project lifecycle – from initial analysis and preparation, through supply and installation, to long-term operation and maintenance.

Examples of the types of contracts used in OWFs investments are set out below:

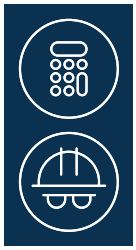
Geotechnical & Hydrographic Survey Services contracts: are essential in offshore wind projects to assess the seabed's conditions and the marine environment. These contracts include geotechnical surveys to evaluate soil composition and stability, as well as hydrographic surveys to map seabed topography and measure water depths. The data collected informs foundation design, cabling routes, and risk mitigation, ensuring safe and efficient project execution.



Project Management Services contracts: concluded with companies specialising in project management, they include schedule planning, cost control, quality monitoring and risk management. These contracts are key to ensuring the smooth running of the construction of an OWF, especially with the multi-contract model, where multiple entities need to be coordinated.



Consulting Services Contracts: contracts for consulting services including feasibility studies, environmental reports, technical assessments and legal support. They are important at the investment preparation stage, when it is crucial to obtain the relevant permits and environmental approvals.



Environmental Assessment Services contracts: contracts for the analysis and monitoring of the impact of OWFs on the environment, particularly marine ecosystems and potential pollution. These studies are a regulatory requirement, but also an expression of investors' concern for sustainability.

Engineering & Design Services contracts: engineering firms provide design and technical specifications for offshore infrastructure, including turbines, foundations and cables. They also include structural analyses and risk assessments technical.

Transportation and Installation Contracts: transportation and installation contracts in offshore developments govern the delivery and installation of large offshore components (e.g., turbines, foundations). They cover the organisation of specialised transport, delivery and installation schedules, risk management (including insurance against damage and delays), and quality and safety standards. They also provide acceptance, testing and post-installation technical inspection procedures. These contracts are crucial because they coordinate the work of many actors and must meet high legal and technical requirements to ensure the smooth implementation of the project under demanding maritime conditions.

Communication & Monitoring Services contracts: provide real-time monitoring and communication systems, which is essential for offshore operations, especially for monitoring turbine health and forecasting weather and offshore conditions.

Turbine Supply Agreements ("TSA"): Agreements with turbine manufacturers governing the terms and conditions for the purchase and delivery of wind turbines. Depending on the scope of the agreement, the TSA may also include provisions for the installation and commissioning of the turbine, or this may be subject to a separate agreement. The TSA often includes performance guarantees, specifying the minimum energy production or operational availability that the turbines must achieve within a certain period. If the turbines do not meet these standards, the manufacturer may face penalties or be required to make improvements. In addition, the contract usually provides guarantees for the turbines, covering defects in materials or workmanship for a specified period after commissioning. The contract may also include options for the manufacturer to provide long-term maintenance (O&M) contracts. The TSA specifies a payment schedule, which is usually based on milestones (e.g., part of the payment is made after the contract is signed and further payments are made after the delivery, installation and commissioning of the turbines).

Foundation Construction Contracts: these contracts cover the design, manufacture and installation of turbine foundations, which must be adapted to specific marine conditions such as water depth, seabed composition and strength of currents. These contracts also include testing of the quality and strength of the structure and insurance against any damage.

Subsea Cable Laying Contracts: these provide for the supply and laying of subsea cables that connect the turbines to the transformer platform and then to the onshore grid. These contracts include, among other things, cable protection, monitoring of the condition of the cables during installation and insurance against damage during installation and operation.

Offshore Substation Construction Contracts: these contracts cover the design, construction and installation of transformer platforms that convert energy from turbines before sending it to the grid. The platforms must meet strict quality and safety standards, and their construction and installation involve significant logistical and technical challenges.

Balance of Plant (BoP) contract for installations/support facilities: in the offshore wind sector, the BoP contract refers to the infrastructure and services that support the operation of wind turbines but are not part of the turbines themselves. The BoP contract typically covers the design, procurement, construction and installation of all the components necessary to make the wind turbines operational, beyond the turbines themselves. This includes foundations, electrical systems (e.g., cabling and substations) and access roads or offshore substations. The primary objective of the BoP contract is to ensure the successful delivery and integration of all non-turbine infrastructure necessary for the operation of the OWF.

Operation and Maintenance (O&M) contract: this contract covers the ongoing operation, servicing and repair of the OWF after its construction and commissioning. Its purpose is to ensure efficient and reliable operation of the installation throughout its lifetime. The contract aims to maximise energy production and minimise downtime by providing a structured approach to maintenance, troubleshooting and continuous monitoring of the wind farm's performance. The O&M service provider is responsible for maintaining an appropriate availability factor for the wind farm (the 'availability factor'). The availability factor refers to the percentage of time that an OWF is operational and capable of generating electricity in each period. It is a critical performance indicator in offshore wind projects and is usually defined as the ratio of the actual time the turbines are available for operation to the total possible operating time, excluding scheduled maintenance or outages. O&M contracts often include specific availability targets (e.g., 95%–98%) that the O&M provider must achieve. If availability falls below this target, it may be subject to contractual penalties. Downtime due to planned maintenance or force majeure events (such as extreme weather conditions) are usually excluded from availability calculations. High availability means higher energy production and profitability.

Power Purchase Agreements (cPPAs/vPPAs): cPPAs (Corporate Power Purchase Agreements) are concluded between a power purchase company and a renewable energy supplier (an OWF developer). The agreement regulates the delivery of physical energy, specifies quantities, rates and duration. The main objective of the cPPA is to ensure stable energy prices in the long term. The vPPA (Virtual Power Purchase Agreement) differs from the cPPA in that it does not involve the physical delivery of energy. It is a financial contract in which the settlement price of energy is set. The energy producer sells the energy to the market and the buyer pays the difference between the market price and the price set in vPPAs.

Each of these contracts plays an important role in the offshore wind development process, ensuring effective cooperation between the various parties and meeting technical, legal and environmental requirements. Particularly in Poland, where offshore wind energy projects are developing dynamically, these contracts must be adapted to local conditions and regulations, which requires not only precise preparation of contractual documentation, but also effective project management at each stage of the wind farm life cycle.

5. Regulations on the participation of the Polish local content

The issue of local content is closely linked to the contracting model and culture in offshore wind projects. Investors and contractors who seek to include local resources need to adapt their approach to contracting to optimise the participation of local companies, requiring them to be more flexible in their models and adapt their contracts to the specifics and capabilities of the local market.

The Offshore Act does not contain a legal definition of the term "local content". In considering local content, therefore, only the general wording of the Offshore Act can be used. According to these, investors applying for the right to a negative balance are obliged to submit a material and service supply chain plan specifying, among other things:

- share of investment outlays expected to be incurred by the generator for the benefit of entities having their registered office or branch in the territory of the Republic of Poland, in total outlays for the construction or operation of the project (i.e., OWF with power take-off);
- activities that the manufacturer or suppliers of materials and services intend to undertake in the territory of the Republic of Poland in order to develop human resources in terms of competencies and professional qualifications needed for the construction/operation of the project;
- the estimated number of jobs to be created in the territory of the Republic of Poland by the manufacturer or supplier of materials and services for and in connection with the construction/operation of the project.

In the above categories, the developer, in addition to its own expenditures or activities, may also include expenditures or activities of undertakings of the group to which the developer belongs. The determination shall be made separately for the construction phase and for the operation phase of the project.

Importantly, the investor is not required to meet any minimum requirement in the above categories. The assumptions made by the investor in the chain plan are also not assessed in the process of applying for the right to a negative balance, which is granted on the basis of a price criterion.

The investor to whom the right to a negative balance is granted is bound by reporting obligations regarding the realisation of the assumptions made in the supply chain plan. Information on the degree of realisation of these assumptions shall be provided to the ERO President within specified deadlines and, in the event of significant deviations from these assumptions, the investor shall provide appropriate explanations. Given that the local content values declared by the investor are in no way rewarded, the regulations do not in any way penalise the lack of implementation of the assumptions made in this respect either. Thus, even if the investor fails to meet his declared commitments regarding the supply chain, he will not face negative consequences.

A certain motivator for the implementation of local content in offshore projects was to be the Agreement

signed on 15 September 2021, Sectoral Agreement for the Development of Offshore Wind Energy in Poland ("Agreement"), concluded by representatives of the government administration and key representatives of the private and public offshore wind energy sector, to support Polish entrepreneurs in participating in the supply chain for planned investments. The Agreement defined strategic goals for, inter alia, the growth of offshore wind capacity and employment in the sector. Local content was defined by the signatories as the participation of entrepreneurs seated in Poland or foreign entrepreneurs having a branch or a representative office in the territory of the Republic of Poland and conducting production or service activities in the territory of the Republic of Poland, forming a supply chain, in the execution of orders for the construction and exploitation of an OWF in the Polish exclusive economic zone. It was declared that the desired local content indicator should be respectively:

- at least 20–30% of the total value in the pre-feasibility, installation and operation phase for OWF projects implemented under the first, pre-auction phase of the support scheme,
- at least 45% of the total value in the pre-feasibility, installation and operation phases for OWF projects implemented by 2030 under the second, auction phase of the support scheme,
- at least 50% of the total value in the pre-feasibility, installation and operation phases for OWF projects implemented after 2030.

Z uwagi na niewiążący charakter Porozumienia, wartości te mogą mieć charakter wyłącznie kierunkowy.

Given the non-binding nature of the Agreement, these values can only be directional.

However, legal regulations concerning the implementation of local content by offshore investors may change in the near future. The experience of the Phase I of the Polish offshore industry, indicating cases of investors contracting key components of the offshore wind farm in third countries, has highlighted the need to adopt legal mechanisms rewarding or even directly obliging investors to maintain local content. In addition to purely economic considerations, this is also justified by national security considerations in relation to energy critical infrastructure. The adoption of the so-called Net-Zero Industry Act ("NZIA"), Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures to strengthen the European ecosystem for the production of carbon-neutral technologies and amending Regulation (EU) 2018/1724), aimed at supporting European industry and reducing the EU's technological dependence on third countries, may be the immediate cause of such changes. With the NZIA, however, it is possible that the definition of local content will evolve towards "European content". The NZIA implies the implementation of mandatory non-price criteria in RES auctions with a total weighting of 15 to 30 % (both pre-qualification criteria and non-price award criteria). Criteria such as responsible business conduct, certification in terms of data security and cyber-security, the ability to execute the project comprehensively and on time and – importantly in the context of local content – the project's contribution to sustainability and resilience will have to be taken into account. According to the NZIA regulations, RES auctions should contribute to resilience by taking into account the percentage of a specific technology (or its main specific components) that originates from a third country accounting for more than 50% of the supply for that specific technology or components in the EU. The regulation provides that EU Member States will have to apply non-price criteria to RES projects for at least 30% of the auctioned volume per year, or alternatively at least 6 GW per year. The non-price criteria are to be further clarified by the EU by 30 March 2025 in an implementing regulation to harmonise the solutions adopted and make them more predictable, including for the supply chain. In turn, they are to be implemented in the Member States by 30 December 2025.

Including local content in Polish offshore projects not only supports economic development, but also shapes a long-term approach to contracting. It enables flexible adaptation of contracts and contract models to the needs of local resources, which strengthens the competence of local companies and integrates them into international standards in the offshore sector. In the context of local content, a multi-contract strategy is particularly advantageous as it allows the project to be broken down into smaller packages and directly involve national or regional suppliers and subcontractors. For example, separate contracts for the supply of cables, foundations or logistical support can be concluded with local companies, which increases national participation and supports the development of regional competence.

6. Financing offshore projects. Requirements imposed by offshore project financing institutions

The main financing formula for OWF projects is project finance. The provision of financing to special purpose entities created for the implementation of projects (SPVs) is based on the future projected financial flows of the OWF projects and its current and future assets as collateral for the financing.

Project finance enables investors to use funds efficiently, covering only part of the investment costs with their own capital and supplementing the remainder with credit. Such a financing model is conducive to rational risk management, as it allows this risk to be shared in agreed proportions with the financial institution. One of the key elements of project finance is the lack of recourse to the investor in the event of project failure, meaning that its liability to the financial institution for the project company's debts is limited to the amount of contributed capital.

Financing of offshore projects under the project finance formula is linked to the fulfilment of a number of the following requirements by the offshore project, as reflected in offshore contracts:

- Neutrality/transparency of the SPV and the OWF project in the area of project risks. Project risks should be appropriately allocated by the SPV, between key counterparties of the OWF project such as the turbine supplier, earthworks contractor, electrical infrastructure contractor, insurers or the power purchaser.
- Risks for which neither party can be held responsible or which, by their nature, are beyond the responsibility of the counterparties, should be covered by insurance. Examples include risks related to force majeure or issues relating to required permits (e.g., the risk of their being challenged).
- Collateral. In order to ensure that a project meets the investor's specific requirements on time and to guarantee the revenue stream at the assumed level, financing institutions often require counterparties to require certain collateral, such as performance bonds or the submission of quality guarantees, a pledge of assets.
- Prohibition of assignment (transfer). OWFs contracts should contain exceptions to the prohibition on assignment (transfer) to financing institutions. Since, project finance is based on all cash flow streams related to the OWF project (including future and contingent) and the assets of the OWF project, offshore contracts should allow all assets belonging to the SPV, including movable, immovable, rights and cash flows to be subject to security (pledges, mortgages or assignments of claims) in favour of financing institutions. While doing so, any assets and cash flows belonging to the SPV must instead remain free of any encumbrances (pledges, assignments, mortgages in favour of third parties (i.e., entities other than the financing institutions of the OWF project).

- Direct agreement. Financing institutions usually require that the SPV concludes a so-called direct agreement, i.e., a tripartite agreement between the SPV, the financing institution and the key counterparty/contractor (most often with the turbine supplier, the earthworks contractor or the energy buyer on the basis of the cPPA). By entering into a direct agreement, the SPV ensures the continuity of the OWF and, in doing so, the completion of the OWF within the stipulated timeframe. Such an agreement contains provisions protecting the financing institution against premature termination of a given agreement with a key contractor in the event of the occurrence of grounds entitling to terminate for reasons attributable to the SPV.
- In order to ensure the continuity of the OWF project and its timely execution, financing institutions may also require that offshore contracts contain the most limited catalogue of grounds entitling the SPV counterparty to terminate a given contract early and the possibility of contractual penalties.
- Provisions to safeguard against extraordinary circumstances, mechanisms to adapt the project to changing circumstances, such as an event of force majeure, a change in the law.
- Clear wording in the contract in the offshore sector of the investor's requirements in both the execution and operational phases. It also happens that financing institutions require authority in terms of being able to monitor the progress of the work.
- Change of control. The potential assertion of claims by the financing institutions against the SPV (including the assumption of control of the SPV by the banks or their designated entities following enforcement proceedings) will not constitute an independent basis for the early termination of the contract in question.

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It is good practice to involve financial institutions early in the negotiation of key offshore contracts to enable the banks' requirements to be reflected in the contract and to ensure the bankability (i.e., ability to raise finance) of the OWF project. In addition, a template of the direct contract agreed with the counterparty and the financial institution should be annexed to the contract with the counterparty. Pre-agreeing key project agreements with counterparties and then attempting to conclude direct agreements at the request of the financing institutions may cause additional difficulties, protracted negotiations and delays in the OWF project's implementation.

7. International contractual models in offshore investments

In offshore wind energy investments, in addition to the contracting model, the selection of appropriate contract forms is also crucial for the successful implementation of projects. Wind farm operators have to decide whether to use tailor-made contracts or available international contract templates that offer market-recognised principles for risk allocation and project management. Due to the nature of offshore projects, which are typically complex, technically demanding and subject to many variables, specialised contracts covering different work packages are often necessary.

7.1. FIDIC and LOGIC - the most commonly standard forms of contract

FIDIC (International Federation of Consulting Engineers) and LOGIC (Leading Offshore Energy Industry Competitiveness) contract frameworks are most commonly used in international offshore investments, alongside the oil & gas sector, particularly in the offshore wind sector. Both contract forms are widely accepted by market participants, including suppliers, banks, insurers and consultants. They are well known and facilitate the contract preparation and negotiation process and provide a flexible approach to risk management.

FIDIC is a set of standard forms of contracts developed for international construction projects, particularly those related to energy and infrastructure. These contracts are based on the standard forms of Anglo-Saxon contract law and offer a wide range of solutions adapted to different types of projects. Among the most commonly used FIDIC forms for offshore projects are:

- Red Book – for typical construction projects where the design is provided by the developer,
- Yellow Book – for design-build projects where the contractor is responsible for the design and execution of the construction works,
- Silver Book – for turnkey contracts (EPCI), where the contractor takes full responsibility for design, delivery, installation and commissioning,
- Green Book – for smaller investments or simpler works,
- White Book – for consultancy contracts.

The FIDIC documentation includes a full set of documents such as (i) the main contract, (ii) the general conditions of the contract, (iii) the special conditions of the contract, (iv) the technical specifications and (v) the schedules, which allows for a precise regulation of the rights and obligations of the parties, especially in the context of extensive and complex OWF projects. FIDIC contracts are distinguished by their flexibility in terms of project time management and the ability to modify the schedule based on factors such as weather conditions or delays related to equipment availability. The standard FIDIC contract allows the contractor to seek an extension of the completion date for specific reasons and provides for liquidated damages for delays, which is an important mechanism for enforcing timeliness in offshore wind projects.

LOGIC, on the other hand, is a set of contracts originally used in the oil & gas sector, particularly for offshore infrastructure projects such as drilling platforms, pipelines or subsea installations. LOGIC

7 Organisation's website: https://www.fidic.org/

8 Organisation's website: https://oeuk.org.uk/who-we-are/logic/

offers a range of contracts tailored to different types of offshore work, such as:

- "General Conditions of Contracts for Construction Works" – dedicated to large-scale construction works, including the installation and modification of offshore platforms,
- "General Terms and Conditions of Maritime Works Contracts" – for subsea installations, pipeline laying and infrastructure maintenance using specialised vessels.

Standard LOGIC contracts provide for accurate risk allocation, e.g., using the knock-for-knock principle, which minimises financial liability between parties for unforeseen events, but their adaptation requires additions specific to the renewables industry. Other forms of LOGIC contracts include onshore and offshore service agreements, well engineering services and offshore infrastructure decommissioning agreements. While LOGIC is widely used in oil & gas projects, its application to renewable energy projects such as offshore wind farms require some modifications, particularly with regard to pollution risks and environmental liability.

7.2. Adjusting standard forms of contract to the specificities of offshore projects

For offshore projects, FIDIC contracts are particularly preferred due to their flexibility and adaptability to specific local conditions such as local laws, environmental regulations and weather conditions. Given the complexity of offshore projects, non-standard contract packages are often required, especially when suppliers of specialised equipment, such as turbines or installation vessels, insist on their own standard contract terms. Nevertheless, in practice, standard forms based (even if loosely) on FIDIC and LOGIC are often used, which offer proven solutions for risk management in highly complex projects.

FIDIC has announced that it plans to publish a new standard form of contract for OWF projects at the end of 2025. The form is intended to address the growing demand for specialised contracts in the renewables sector, particularly in the context of global decarbonisation and the increasing number of offshore wind projects. Work on the template is being led by a group of experts, including engineers, lawyers and energy project specialists, who aim to create a contract that is flexible and tailored to the specific challenges of OWFs. Key tenets of the new contract include fair allocation of risk, ensuring proper management of the relationship between prime contracts and subcontractors and facilitating an efficient procurement process[9].

7.3. Risk management and specificity of offshore projects

One of the unique aspects of offshore projects is their dependence on weather conditions and the availability of specialised equipment, which has a direct impact on the work schedule. FIDIC and LOGIC contracts, in their standard forms, provide mechanisms to modify the schedule and manage the risks associated with delays due to unpredictable offshore conditions. For example, the FIDIC contracts provide for the possibility of extending the project time due to adverse weather conditions, and also specify detailed rules for final testing and acceptance procedures, which is key to ensuring that the project complies with technical requirements.

It is also worth noting that FIDIC contracts, in particular the Silver Book, fit into EPCI (Engineering, Procurement, Construction, and Installation) type contracts, where the contractor is responsible for the entire process of design, supply and installation of key infrastructure elements, which is typical of offshore wind farm projects.

7.4. Importance of the contract engineer in FIDIC contracts

Another important element in FIDIC contracts is the role of the contract engineer, who generally acts as an independent facilitator and supervisor. The contract

9 Source: https://www.fidic.org/node/41494

engineer is responsible for monitoring the progress of the works, resolving scheduling disputes, as well as for the acceptance of the works and overseeing the compliance of the project's performance with its technical specifications. His or her role is crucial in ensuring the smooth execution of the project and minimising the risk of delays and technical problems.

7.5. Is it better to use tailor made contract or to use international standard forms?

ZBoth the FIDIC and LOGIC standard forms of contract provide a solid foundation for managing offshore projects, offering proven risk allocation mechanisms and flexibility to adapt to changing implementation conditions. The use of these framework allows for the effective management of complex projects such as offshore wind farms, while ensuring adequate legal protection for all parties involved in the investment. Nevertheless, the application of foreign contractual forms, i.e., FIDIC or LOGIC, in Poland may also face several significant obstacles due to differences between international standards and national legal regulations and market practice. In particular, it should be noted that FIDIC is a model contract based on the Anglo-Saxon legal tradition, whereas Poland has a continental legal system, which may lead to conflicts in the interpretation of provisions. For example, there are specific provisions in the Polish Civil Code regarding a contractor's liability, warranty, contractual penalties and indemnity claims, which may not be in line with the provisions of FIDIC. In particular, the differences relate to liability for delays, where in Polish law liability is strictly linked to the contractor's fault, whereas FIDIC may provide for a more flexible approach to managing the risk of delays. Furthermore, in Polish construction practice, the contract engineer (Engineer) has a specific role, which may be interpreted differently in FIDIC. The FIDIC forms assumes that the contract engineer acts as an independent arbitrator, which may be difficult to accept in Polish practice, as he often only acts as a representative of the investor. Conflicts may arise when the Engineer makes decisions on extending the completion date or financial claims, which may be contrary to the expectations of investors in Poland. Polish law also provides for detailed regulations concerning warranty and guarantee for defects in the work, which differ from the solutions proposed by FIDIC. The issue of the length of the period of liability for defects, the manner of their removal and the possibility of withdrawal from the contract may require adaptation of the FIDIC contract to local legal

requirements. Of course, some of these issues can be addressed by modifying the general conditions of the contracts in the special conditions of the contracts, but recent practice shows that these modifications are often so far-reaching that the final contract deviates significantly from the principles behind the FIDIC contract forms.

The choice between using tailor-made contracts or using international model contracts such as FIDIC or LOGIC for offshore projects depends on the specifics of the project and the expectations of investors and contractors. Both options have their advantages and disadvantages, which are worth considering in the context of the nature of the investment in question.

International standard forms		Tailor made contract	
Advantages	Disadvantages	Advantages	Disadvantages
Proven structure and international recognition Risk balance Flexibility Facilitated management of multiple contracts	Need to comply with local regulations Lack of full compliance with offshore realities Lack of full investor control Discrepancies in the application of contractual mechanisms	Project-specific adaptation Even more flexibility for the investor Adaptable to local regulations Compliance with local laws	Higher preparation costs Lack of international recognition Less experience in the market Longer negotiation time

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When adapting international standard forms of contract, it is crucial to align them with local regulations while preserving the integrity of their original principles. Excessive modifications can disrupt the balance of risk allocation, distorting the essence of the template. The practice of making only the minimum necessary adjustments allows for compliance with legal requirements while maintaining the coherence of the contract.

8. Specifics of offshore contracts. Risks and key risks

OWF projects are complex undertakings in many respects, including many actors, logistics or technical, with a high level of risk, which require specific contractual solutions and effective mechanisms to manage them. The specifics around the implementation of these projects in Poland additionally requires the adaptation of contracts to local regulations and environmental and infrastructure conditions, as well as taking into account requirements related to local involvement (local content).

8.1. Limited availability of vessels and key support infrastructure

One of the significant risks in OWF projects is the limited availability of specialised installation vessels and the equipment required to install the turbines and supporting infrastructure of the OWF. Due to global demand and the seasonal nature of such projects, it is necessary to book vessels early and enter into dedicated charter agreements to guarantee the availability of these resources. In practice, framework agreements are used that include reservation and exclusivity clauses, which minimises the risk of delays due to lack of suitable units. Polish OWF regulations require additional arrangements with port institutions and port access management authorities, which further emphasises the need for comprehensive logistical planning at an early stage of the project.

8.2. Difficulties in assessing sea and seabed conditions

Seabed conditions and geological features of open waters, including the Baltic Sea, are crucial, in particular for the stability and durability of foundations, cable laying and for installation units. The assessment of seabed conditions is crucial prior to the start of a project, but it has its limitations and does not lead to complete elimination of risks. This, in turn, increases the risks associated with unpredictable project costs and timescales. For this reason, contracts in the offshore wind sector often contain provisions that allow for an extension of the project execution time and a change in the financial conditions if the seabed conditions turn out to be unfavourably different from those predicted in the preliminary studies. In Poland, the use of specialised engineering contracts is recommended, which include mechanisms for reviewing and adjusting the contract based on actual seabed conditions, which provides additional protection against claims by the parties.

8.3. Weather risks

Offshore weather conditions are one of the biggest risk factors for OWF projects. Installation operations, such as transportation of components and offshore installation are highly dependent on seasonal weather windows. Unpredictable conditions can result in project delays and increased costs, particularly due to the need to demobilise and remobilise resources. It is crucial to include specific clauses in contracts to regulate the distribution of risks between the parties related to the occurrence of unpredictable and adverse weather conditions based on local weather data, which will allow the time and cost of contract execution to be adjusted in specific cases (work undertaken by the contractor outside weather windows should not be subject to such clauses). In Poland, where there are specific weather

conditions in the Baltic Sea, a good solution is to introduce seasonal weather reserves, which allow the risk in question to be managed more effectively.

8.4. Risks of changes in legislation and costs

Due to the long-term nature of offshore projects, unpredictable changes in the law may affect the manner, time and cost of project implementation. It is standard practice to include so-called 'change of law' clauses in contracts and to assign the risk of changes in the law to the investor, which may lead to a change in the way the contract is executed, an increase in the contractor's remuneration and an increase in the project's duration. These clauses are intended to ensure that the project, at the time of completion, complies with the applicable law, e.g., in terms of environmental regulations, tax or other legal requirements, which directly translates into the ability to operate the project upon completion.

8.5. Multi-contract strategy and management of interfaces between contracts

Due to the scale of OWF projects, investors often opt for a multi-contract strategy in which individual work packages are subcontracted to different contractors. Such a strategy increases the risk of problems arising from interfaces between contracts, including the risk of technical incompatibility or the risk of delays, and the risk of lack of cooperation between contractors. Preventing the materialisation of such risks should be so-called clauses specifying the division of responsibility for interfaces (including responsibility for the risk of technical incompatibility and the risk of delays) and clauses establishing coordination obligations on the part of the investor and the contractors. In the case of a multi-contract strategy, it is also crucial to introduce into each project-related contract a regulation appointing a project manager or coordination committee to coordinate and supervise the cooperation between contractors and to quickly and effectively resolve conflicts between contractors.

8.6. Mutual safeguards and risk of damage

Due to the high risks in IMF projects, the principle of mutual security (knock-for-knock) is commonly applied. Each party to the contract is liable for its own damage and losses (which in turn are covered by that party's insurer), without investigating through whose fault the said damages and losses arose. This eliminates the need to inquire each time through whose fault the damage or loss arose and reduces the risk of having to conduct lengthy and costly court or arbitration proceedings to resolve a dispute between the parties. The use of such a principle for the liability of the parties is due to the low effectiveness of the classic principle of liability based on the fault of the party for the damage or loss caused. In projects implemented in Poland, such solutions are used mainly for large offshore investments, but it is necessary to take into account local regulations on civil liability and insurance to ensure full compliance with generally applicable law. Otherwise, such contractual provisions may prove ineffective or even invalide.

8.7. Occupational health and safety (OHS)

The implementation of projects in the offshore sector is characterised by increased occupational health and safety (OHS) risks for workers performing offshore work in particular. Failure to properly manage health and safety issues can lead to serious accidents, which will not only result in negative legal consequences, but also in a negative public perception of the project. The investor must make sure that not only do the contracts entered into with the contractors contain adequate provisions for health and safety requirements, including those required by local legislation, but should also carry out continuous monitoring of the compliance of the contractors and their subcontractors with these requirements, which the investor should be entitled to do by the contract itself.

9. Effective sharing of legal and financial risks between the investor and the contractor

The effective allocation of legal and financial risks is one of the key factors in the success of OWF projects.

Once an appropriate investment delivery model and form of contract has been selected, it is necessary to thoughtfully allocate risks between the investor and contractors and suppliers, enabling effective project management and minimising costs and disputes. Due to the nature of the offshore industry, offshore wind projects are exposed to the unique risks outlined above, requiring explicit contractual provisions and appropriate mitigation mechanisms. Key mitigation mechanisms include:

- Push-down and flow-down of risks: risk sharing is not just limited to the investor-contractor relationship; delegating risks to the relevant subcontractors is also key. Push-down clauses (i.e., 'pushing' risks down the supply chain) allow contractors to delegate risks associated with particular work packages to the relevant parties. An example is transport risk, which can be delegated to a subcontractor specialising in logistics.
- Mutual indemnities and the knock-for-knock principle: offshore projects often use mutual indemnity clauses that minimise financial liability by agreeing that each party is responsible for its own damages. This principle is beneficial in the offshore sector, where damages can have a multifaceted impact. In Polish offshore projects, especially those implemented in a multi-contract model, the knock-for-knock principle enables risk management throughout the contractual chain.
- Schedule and penalty clauses: to ensure that the project is delivered on schedule, offshore project contracts contain contractual penalty clauses for delays to mobilise contractors to meet their obligations on time. Penalties for delays are particularly relevant in Poland, where offshore projects have to meet strict deadline requirements under the construction permit and resource delivery schedule.

The effective sharing of legal and financial risks between investor and contractor in OWF projects brings significant benefits, i.e.:

Minimising cost and delay risks: assigning risks to the relevant parties, e.g., weather risks to the contractor and regulatory risks to the investor, allows costs to be optimised and unforeseen expenses to be minimised.

Reduction of disputes: a clear allocation of risks avoids disputes between the parties, as duties and responsibilities are clearly defined in the contract.

Compliance with local regulations: alignment of contract templates with Polish law and environmental and local content requirements strengthens the investor's position in the market and reduces regulatory risks.

The effective allocation of legal and financial risks in OWF projects requires not only the selection of an appropriate contractual model, but also the precise tailoring of clauses to the specifics of the Polish market. With appropriate mitigation mechanisms, such as mutual safeguards, contractual penalties and compliance provisions, investors and contractors can manage risks optimally and contribute to project success.

BEST MARKET PRACTICE

Proportionality

Assigning risks to the party best equipped to manage them. The investor should not transfer risks that they can manage more effectively than the contractor.

Timing Coordination

Key offshore contracts should be signed within a similar timeframe to facilitate consistent risk allocation between the investor and all contractors.

Transparency

Risks must be fully identified and precisely defined to avoid ambiguity regarding their scope and assignment to specific parties.

Flexibility

Offshore contracts should include provisions for extraordinary circumstances, such as force majeure, to enable appropriate responses to unforeseen events.

10. Financial safeguards in offshore contracts

Offshore projects are among some of the most complex and costly investments in the renewable energy sector.

Due to their specific conditions – both technical and environmental – these projects involve an exceptionally high level of risk at every stage of development, from design and construction to the delivery of key components and long-term operation and maintenance. In addition, these projects often require the involvement of many different stakeholders, including investors, contractors, suppliers, operators and subcontractors, further adding to the complexity of risk and liability management.

The use of adequate contractual safeguards is crucial to ensure the financial security of all parties involved in a project. These safeguards not only serve to protect investors from potential losses resulting from contractual default, but also protect contractors and suppliers from risks associated with late payments or changes to a project. With precise hedging mechanisms in place, the contracting parties can manage risks in a controlled manner, which increases the financial stability and predictability of the entire project.

For investors, a key aspect of hedging is protection against delays, faulty workmanship or the failure of suppliers or subcontractors to fulfil their contracts. For contractors and suppliers, on the other hand, it is important to protect against the risk of non-payment for work performed or materials supplied, especially in projects with long lead times. The use of collateral, such as bank guarantees, guarantee deposits or construction and assembly insurance, effectively mitigates these risks and secures the interests of all parties. In addition, appropriately selected collateral makes it possible to manage risks when the project encounters unforeseen difficulties, such as technical failures, difficult weather conditions or delays in the delivery of materials. This allows the parties to focus on delivering the project on schedule, confident that potential financial issues are adequately covered.

The following section outlines the most common types of contractual safeguards used in offshore projects and their key importance in minimising risk and ensuring a project's financial stability.

10.1. Types of safeguards commonly used in offshore contracts

Liquidated Damages

Liquidated damages are a commonly used safeguard in offshore contracts, especially in agreements for construction, supply, or service delivery. These damages can be stipulated in case of non-performance or improper performance of non-monetary obligations, which is particularly critical in the event of project delays or failure to meet agreed technical standards.

Operational Performance Guarantee

In offshore wind energy contracts, operational performance guarantees are also employed to ensure that specific operational parameters, such as turbine efficiency, are met. These securities protect the investor if the installation fails to operate in line with the specified standards.

Retention money

Retention money, also known as a retention bond, is one of the more traditional but still widely used forms of security. Despite doctrinal differences between the two mechanisms, their fundamental premise is similar: the investor withholds part of the payment due to the contractor or requires a deposit as security for contractual obligations. A common approach is to partially release these funds, e.g., 50% upon final acceptance of the works and the remaining 50% after the warranty period. For the investor, the key advantage of this solution is direct control over the financial resources, which enhances the contract's security.

Advance Payment Guarantee

An advance payment guarantee protects the investor in cases where the contractor receives an advance but fails to perform the agreed work. This security allows the investor to recover the funds if the work does not proceed according to the contract.

CAR – Contractors All Risk Insurance

This type of insurance covers a wide range of risks, from damage during the transportation and installation of wind farm components to losses caused by technical failures. It is essential for offshore projects, where work is carried out under challenging conditions.

Maintenance Bonds

Maintenance bonds secure the investor during the post-construction phase, ensuring that the contractor is responsible for rectifying defects or faults that may arise during the warranty period for the completed works.

Performance Bonds

Performance bonds are one of the most frequently used financial securities. Typically, they include a performance bond that protects the investor against the risk of contractor non-compliance. The value of the bond usually amounts to 5–15% of the contract value.

Environmental and Decommissioning Bonds

In offshore projects that have significant impact on the environment, safeguards related to the obligation to dismantle installations at the end of their life cycle are often applied, which protects the investor from having to bear the costs.

BEST MARKET PRACTICE

In contracts with long execution timelines, it is recommended to provide security in stages, aligned with the progress of work. The contractor should maintain an appropriate level of security throughout the contract's execution period.

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If the contract timeline is extended due to reasons attributable to the employer, they should bear the additional costs associated with extending the security.

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The performance bond should be released proportionally to the completed and accepted stages of work, which helps improve the contractor's financial liquidity.

10.2. Contractual penalty (liquidated damages) as the most common mechanism for securing contracts

Contractual penalties (liquidated damages) are most commonly used for delays in the completion of a particular stage of work or services, but in more complex contracts they can also apply to other non-monetary obligations, such as the delivery of certain materials on time or meeting the quality parameters of the installation. The advantage of a contractual penalty is that it does not require proof of damage – which simplifies the claims process. In the event of delays or breaches of contract, the aggrieved party has the right to claim payment of the contractual penalty agreed in the contract.

However, although a contractual penalty is an effective tool to safeguard the interests of the parties, it does not ensure automatic payment. If the obliged party refuses to pay, it may be necessary to enforce its rights in court, with the risk of lengthy proceedings. In Poland, claims for liquidated damages are exempted from the need to prove damage, which means that the aggrieved party does not have to demonstrate actual financial losses resulting from the non-performance of the contract. In order to mitigate the risks associated with lengthy litigation, additional financial security is often used from which contractual penalties can be easily enforced, i.e., bank and insurance guarantees or retention amounts.

The most relevant issues governing contractual penalties in Poland:

- A contractual penalty may only be reserved for non-performance or improper performance of a non-monetary obligation. This means that it cannot be applied, for example, in the case of late payment.
- The amount of the liquidated damages should be clearly set out in the contract – usually as a specific monetary amount or percentage of the contract value.
- Reduction of the contractual penalty (mitigation): according to Article 484 § 2 of the Civil Code, the court may reduce the amount of the contractual penalty if it considers it to be grossly excessive in relation to the actual losses incurred.
- The contractual penalty has a compensatory function, which means that the aggrieved party can claim its payment without having to prove the actual damage that has been caused by the other party's non-performance.

Contractual penalties are therefore a popular and effective tool in Polish offshore project contracts, but it should be borne in mind that in the event of a dispute it may be necessary to pursue claims in court, and the amount of the penalty may be subject to review and possible reduction by the court.

BEST MARKET PRACTICE

Liquidated damages should be set to protect the proper execution of the contract without placing an excessive burden on the contractor. It is essential to maintain a balance between the interests of both parties.

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The contract should clearly define the maximum amount of liquidated damages and liability limits for each party to ensure predictability and mitigate the risk of excessive burdens.

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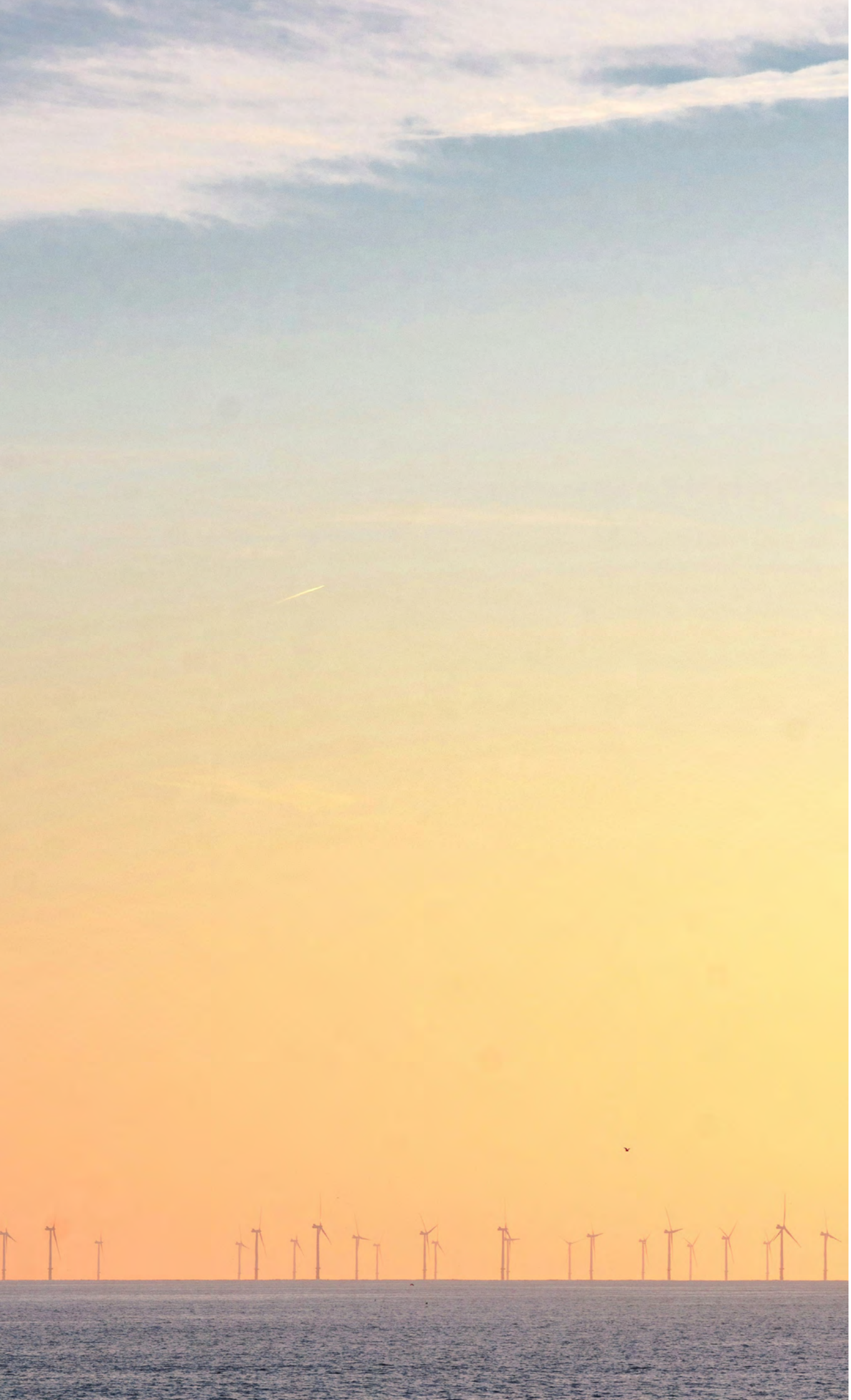
In the event of disputes, it is advisable to include the possibility of reducing liquidated damages under Article 484 § 2 of the Civil Code, particularly in cases where the penalties are grossly disproportionate.



11. Contractual and statutory tools for responding to ordinary and extraordinary changes in circumstances

OWF projects are characterised by long lead times and complex logistics, so it is crucial to ensure that appropriate contractual adaptation mechanisms are in place to allow the contracts themselves to adapt to changing circumstances.

Recent years, in particular the COVID-19 pandemic and Russia's aggression against Ukraine and other armed conflicts around the world, have shown how quickly and how drastically reality can change (including economically and politically) both locally and globally. In addition, the fact that the construction of offshore wind farms and associated infrastructure itself is fraught with a number of high risks related to, among other things, weather, seabed conditions and the availability of vessels fit for the task at hand is not insignificant. Therefore, it is necessary to structure contracts in such a way that they adapt to changing realities or, at least, allow for such adaptations.

Contracts in the OWF sector typically use contractual adaptation mechanisms that allow the parties to flexibly adapt the concluded contract to changing circumstances. Among the most commonly used adaptation clauses are:

- A force majeure clause releases a party from liability for delay (e.g., excluding the possibility of contractual penalties) in the event of a force majeure event (generally defined as an external, extraordinary and unforeseeable event, the consequences of which cannot be avoided, and which makes it difficult or impossible for a party to perform an obligation). In most cases, it includes events such as natural disasters, wars and other armed actions, epidemics and pandemics. It usually allows for an extension of the time limit for the performance of an obligation or the entire contract, and less frequently allows for the renegotiation of financial terms.
- A hardship clause regulates the distribution of risks between the parties to a given contract in situations where unforeseeable circumstances lead to undue hardship in the performance of an obligation by one of the parties. A hardship clause customarily allows for the extension of the time limit for the performance of the obligation or the contract itself and the modification of the financial terms.
- A change of law clause allows the contract to be adapted to changing or new laws and regulations (e.g., environmental or local content) and technical norms or standards (e.g., industry' codes of conduct). A change of law clause customarily allows for the extension of the time limit for the performance of an obligation or contract and the modification of financial terms (in particular in view of the need to change the way the contract is performed).
- Indexation clause allows for adjusting the value of the lump-sum remuneration or cost estimate to changing market conditions and is used in order to neutralise the risk related to the increase in the costs of realising a given contract

resulting from, inter alia, inflation, changes in the prices of raw materials or labour costs. It is particularly important in the execution of long-term contracts as encountered in the OWF sector, where the volatility of prices of raw materials, materials and services can have a direct impact on the profitability of the executed project.

- Other contractual adaptation clauses should describe the distribution of risks between the contracting parties in terms of key areas for the contract, such as, for example, delays in obtaining permits, weather conditions, seabed conditions or vessel availability. Any deviation in these key areas should provide an opportunity to renegotiate the commitment date and financial terms.

However, the adaptive features of a given contract may not only originate in the contractual provisions, but also in generally applicable law. Particular attention must be paid to this, not only in the event that there are no relevant adaptation clauses in the contract, but also because the law may extend the rights of the parties in a way that the parties did not originally foresee.

The legal basis in the Polish legal system for the adaptation of contracts is the rebus sic stantibus clause (Article 3571 of the Civil Code). It allows a court to modify the contractual relationship between the parties in the event of an extraordinary change of relations causing excessive difficulty in fulfilling the service or threatening one of the parties with a gross loss. An example of a situation where it may apply is a significant change in material prices or unexpected regulatory restrictions. In the case of certain types of contracts, such as a works contract or a construction contract, which provide for lump sum remuneration, the so-called "small rebus sic stantibus clause" (Article 632 § 2 of the Civil Code) will apply. This is a clause that allows for judicial indexation of the monetary consideration (or termination of the contract itself) in the event of an unforeseeable change in relations threatening one of the parties with a gross loss.

Both of the aforementioned rebus sic stantibus clauses are dispositive, meaning that by contract the parties may exclude their application. However, the decision to exclude them should be preceded by a detailed analysis, particularly in the context of the risks of the OWF sector. The effectiveness of responding to changing circumstances in OWF sector projects depends on a thoughtful combination of contractual and statutory tools. Contractual clauses provide flexibility and allow the contract to adapt quickly to changing circumstances, while statutory tools, such as rebus sic stantibus clauses, provide additional safeguards in cases where unforeseeable changes go beyond what is regulated in the contract. The optimal combination of these tools allows for efficient management of an OWF project and the minimisation of financial and delay risks.

12. Contracts concluded under foreign law

In offshore wind projects involving international players and foreign suppliers, the choice of law applicable to the contract is one of the key negotiating issues.

In this respect, however, it is important to distinguish between the law applicable to the contract itself and the jurisdiction under which any dispute would be resolved.

In Polish OWF projects, the practice of Phase I shows that a large proportion of contracts are concluded under foreign law, primarily under English, Danish and German. Such a choice is essentially based on the predictability and stability of these legal systems, which allow for an understandable interpretation of the provisions and transparent rules for the enforcement of obligations. However, the choice of foreign law for an OWF project implemented in Poland carries a number of risks and requires an understanding of the differences between legal systems and possible conflicts of legal norms.

When deciding on foreign law, parties to a contract need to consider how the provisions in question will affect the interpretation of their rights and obligations and the effectiveness of the enforcement of particular contractual provisions. Moreover, the parties should also consider how the chosen foreign law will affect the content of their contract, in particular with respect to mandatory legal norms, i.e., those whose application cannot be excluded by the parties under the contract, and whether the implementation of those legal norms is possible in Poland. This is because it may happen that the understanding of the parties for particular contractual provisions will be different from how such provisions should be understood under foreign law, also in light of the mandatory legal norms of foreign law.

When executing projects in the offshore wind farm sector in Poland, it is not possible to completely disregard the requirements imposed on such projects by Polish law. Therefore, analysis of Polish law requirements, the application of which is absolutely necessary for the success of an OWF project, cannot be omitted either. There is a risk that, when choosing a foreign law for the contract, the implementation of the requirements under Polish law will not be possible or enforceable against the other party.

A good example here is a construction contract. The execution of a construction project in Poland requires a number of permits (e.g., an environmental decision, a building permit and, finally, an occupancy permit) and, consequently, the necessity to fulfil a number of requirements under Polish law

(e.g., environmental protection or construction law). The choice of a foreign law in such a situation for a construction contract is highly risky, as not only might the foreign law be incompatible with Polish law in this respect, or even make it impossible to fulfil the requirements under Polish law; but it may also make it difficult for investors to enforce the fulfilment of the requirements of Polish law against contractors. Ultimately, this may make it impossible to obtain an occupancy permit, which will result in the inability to start up and operate the investment. On the other hand, the introduction of modifications bringing the investment into compliance with Polish law may prove to be both time- and cost-consuming.

The choice of foreign law also requires consideration of the possibility of conflicting legal norms in relation to local law.

The variety of contracts concluded in OWF projects – from construction contracts to turbine supply and installation to long-term maintenance contracts – requires a specific approach to the choice of law applicable to the contract.

The choice of foreign law at the level of the main contracts also implies the need to align that law in subcontracts. Back-to-back practice requires that the terms of the subcontracts are consistent with those of the main contracts, which is particularly important in IMF projects where multiple companies and subcontractors are working together on a single project. If the main contract is under the law of a particular country, the consistency of subcontracts allows for easier coordination of obligations, delivery terms and schedules. If foreign law is chosen instead of Polish law, it can be difficult to achieve a solution in which all contracts are concluded under the same law. The choice of foreign law in OWF contracts also entails financial risks, mainly due to the need to engage foreign legal advisers, which generates high costs. Additional expenses may arise from the need to translate documentation, to adapt to foreign procedures that differ from Polish ones, and from the extended duration of proceedings.

BEST MARKET PRACTICE

The parties should exercise particular caution when selecting the governing law for the contract. Choosing foreign law instead of Polish law may lead to unexpected legal consequences. Each time, an analysis of the impact of the chosen law on the contractual relationship between the parties is required.

13. Dispute settlement in OWF projects

For complex projects such as OWFs, disputes are inherent in their implementation.

Thus, it is necessary to structure the dispute resolution clause in such a way that it is time – and cost-efficient, as well as tailored to the specific contractual relationship. Moreover, the dispute resolution clause should also allow for the effective management of dispute issues during the project and their resolution at an early stage, in order to avoid lengthy and costly court and arbitration proceedings where the settlement lies in the hands of third parties.

For contracts involving the implementation of such complex projects, it is popular to use tiered dispute resolution clauses, which use alternative (amicable) dispute resolution methods at earlier stages (e.g., negotiation, mediation, mediation committee, expert determination) and methods such as arbitration or litigation at later stages. The use of tiered dispute resolution clauses allows disputes to be resolved more quickly and efficiently, reducing the number and scope of disputes that ultimately go to arbitration or litigation.

The pros and cons of the different dispute resolution methods for the amicable agreement stage and the typically contentious stage are outlined below. This does not mean that multi-level dispute resolution clauses should be limited to only two levels. There can be more, e.g., in the first step the parties should try to negotiate, in the second step a decision is to be taken by a dispute resolution committee and in the last step a settlement will be obtained by arbitration.

Amicable settlement stage

	Negotiations	Mediation	Disputes Committee	Resolution by an expert
Expertise/ Evidence	The parties may not have enough time to analyse the evidence and acquire the expertise to conduct negotiations effectively	The mediator has no expertise and does not analyse evidence, as his/ her task is not to settle the dispute but only to support the process	The members of the Disputes Committee should have expert knowledge. Evidence shall be given to the Disputes Committee	The expert should have requisite knowledge. The evidence shall be given to the expert
Time	Time depends on the attitude of the parties. Prolonged talks may occur, so a contractual time limit for negotiations is necessary	Timing depends on the attitude of the parties. The mediator can support effective discussions between the parties. There is still a risk of prolonged mediation and therefore a contractual time limit for mediation is necessary	The process of appointing a dispute resolution committee extends the time for dispute resolution, so it is necessary to set contractual time limits for its appointment. The time for resolution of the committee must also be set and limited by appropriate contractual provisions	The process of appointing an expert extends the time to resolve the dispute, so it is necessary to set contractual time limits for the appointment of the expert. The time for the expert's decision must also be set and limited by appropriate contractual provisions
Cost	Low cost	Low cost (additional cost of the mediator's fees)	Average cost	Average cost
Confidentiality	Maintained	Maintained	Maintained	Maintained
Page control	Full control of the parties over the settlement	Full control of the parties over the settlement	No control by the parties, settlement is made by the Disputes Committee	No control by the parties, the decision is made by an expert
Effectiveness	It does not guarantee a settlement	It does not guarantee a settlement	Guarantees a settlement	Guarantees a settlement
Nature of the settlement	The parties decide on the nature of the settlement (it may be final or provisional)	The parties decide on the nature of the settlement (it may be final or provisional)	The award is binding, but is subject to "challenge" to arbitration or to an ordinary court	The award is binding, but is subject to "challenge" to arbitration or to an ordinary court

Disputed stage

	Arbitration	Common court proceedings
Expertise/ evidence	Expert knowledge is provided by experts appointed by the parties and evidence is provided by the parties	Expertise is provided by court-appointed experts and evidence is provided by the parties
Time	Proceedings can last from 1 to 3 years (depending on the timetable the parties agree with the tribunal)	The length of court proceedings is beyond the control of the parties and can take many years, even 5 to 10 years
Cost	High cost	High cost
Confidentiality	Maintained	Lack of confidentiality (risk of disclosure of sensitive information, including trade secrets)
Page control	No control by the parties, the decision is made by the arbitral tribunal	No review by the parties, the decision is made by a state court
Effectiveness	Guarantees a settlement	Guarantees a settlement
Nature of the settlement	The award is final and binding on the parties and the arbitral award may be challenged only in limited circumstances	The decision is subject to appeal to a higher court and may also be subject to cassation by the Supreme Court
Additional advantages	The ability to consolidate proceedings arising between different parties under different contracts and to add parties to existing proceedings (key for a multi-contract strategy)	n/a

A separate issue is the choice of jurisdiction in which a potential dispute would be resolved. This is particularly relevant if the parties opt for arbitration as a method to resolve their possible future disputes. For the avoidance of doubt, the law applicable to the contract need not be the same as the jurisdiction under which any dispute between the parties would be resolved. The contract itself may be concluded under Polish law and the place of arbitration may be, for example, Geneva or Paris. Before choosing the place of arbitration, it is necessary to analyse the law that would apply to the arbitration to be conducted. Here, one of the key elements is the power of the common courts of the chosen country to set aside an award of the arbitral tribunal, i.e., the stability of the arbitral award (e.g., in the English legal system, common courts can essentially rewrite the award, whereas in France or Poland, common courts generally have very limited possibilities to set aside an award of an arbitral tribunal, while at the same time they cannot simply change it), as this may give rise to additional costs of litigation (often very high) and lead to an increase in the duration of the dispute itself.

A key argument that arises when choosing a venue other than Poland as the place of arbitration is the desire to maintain the neutrality of the proceedings for both parties. It should be noted here that, in order to achieve neutrality of the proceedings for both parties, it is, however, much more important to select the arbitral institution before which a given dispute would be heard, as well as to select the arbitrators (if the two parties have different nationalities, then it is a good idea to stick to the rule that the arbitrators should come from countries other than their home countries). Thus, it is possible to choose Poland as the place where the arbitration proceedings are to be conducted (in particular, as the stability of arbitral awards in Poland is very high and situations where arbitral awards are set aside in Poland are extremely rare), but, for the sake of neutrality, to choose an international arbitral institution (e.g., the International Court of Arbitration at the International Chamber of Commerce (ICC) in Paris, France, or the Arbitral Tribunal at the Stockholm Chamber of Commerce (SCC) in Stockholm, Sweden) and arbitrators of a nationality different from that of the parties to the

dispute. It is worth noting that when deciding to submit a dispute to arbitration in Poland, the most frequently selected institutions are the Arbitration Court at the Polish Chamber of Commerce and the Lewiatan Arbitration Court.

When considering arbitration as the dispute resolution method, it is also important to draft the arbitration clause properly, as this avoids potential disputes and procedural problems that may arise during the dispute resolution stage between the parties.

14. Draft OWF code of best contracting practices

OWF projects are extremely complex undertakings, the preparation and implementation of which require the highest level of competence and the most effective cooperation and involvement of all stakeholders. Professionalism, good relations, transparent and adequate rules of cooperation between investors and service providers are the basic condition for the project to be realised within the assumed time and on budget.

Taking the above into account, as well as their contractors and representatives of the offshore industry in Poland, having in mind the good of the national programme for the development of offshore energy, but also the best understood business interests of their own companies, they should be interested in undertaking a voluntary declaration of shaping the principles of cooperation, based on a jointly agreed Code of Best Contracting Practices.

An effort to generate discussion around the need and feasibility of an OWF Code of Best Contracting Practices was undertaken in November 2023. PWEA in cooperation with Maciej Stryjecki, President of ASE Offshore, Vice President of Projmors and Member of the Wind Industry Hub Programme Board. During the Offshore Wind Poland 2023 Conference a roundtable discussion entitled: "Potential of Polish service companies – what is needed to make Polish companies strong in the OWE sector" was held, with both developers and contractors participating.

Among the issues highlighted by participants were:

- The issue of contractors' lack of adequate EXPERIENCE, which is related to the way in which investors formulate experience requirements in their procurement procedures;
- FINANCING issues of cooperation, including in particular the remuneration model for subcontractors;
- BIUROCRATISM understood as the volume of different types of documentation required each time by the contracting authorities;
- COMPLETENESS of orders and scopes of execution in the OWF, which are challenging for contractors in various dimensions;
- Lack of understanding of provisions in purchasing procedures and FORMAL ERRORS in bids that eliminate contractors;
- The need to guarantee the SUSTAINABILITY of orders to industry and transparent information on planned tenders;
- The high bar for STANDARDS of operation in the offshore industry;
- Lack of systemic, institutional or other incentives for investment on the part of contractors in advance of contracts being won (lack of adequate guarantees);
- The issue of scarcity of the TASKS and the required COMPETENCES;
- EXTENDED thinking about offshore wind projects, not as energy sources, but as complexes of plants that manage energy from SHPP to produce hydrogen or biofuels.

The discussion was very lively, and one could observe a certain amount of consternation around the contractual experience of OWF Phase I in Poland. Undeniably, however, the participants agreed that a jointly developed project is a common interest,

requiring cooperation in good faith and mutual trust. The agreement is expected to lead to the building of integrated project teams, ensuring the best possible exchange of information, experience, planning and implementation of project tasks based on best practice, and ultimately to shared pride in the successes achieved together.

With this in mind, the dialogue with the industry community continued. Another roundtable discussion was held in April 2024 on the occasion of a procurement workshop organised by the Wind Industry Hub in cooperation with PGE Baltica. The third of the workshop discussions dedicated to the Code of Best Contracting Practices took place during the PWEA Conference in Świnoujście on 6 June.

As a summary of the series of industry consultations, as well as individual interviews with representatives of offshore wind energy companies, five key areas of action were formulated, which, if voluntarily undertaken by the parties, would ensure effective cooperation between procurers and contractors in accordance with the law and best professional experience, standards and good practice.

Five key areas of action identified as desirable, and which could form the basis for the formulation of provisions in the Code of Best Contracting Practices:

1. Shortening and simplifying the contractor selection procedure as much as possible, so as to optimise the involvement of the tender teams both preparing and evaluating tenders. Examples of good practice in this area are:
    a. creation and publication in advance of tender plans for periods of not less than six months;
    b. ensuring transparent and open dialogue, in order to explain the scope of the contract in question and the requirements and realities of implementation as fully as possible, in the form of meetings with potential suppliers at the stage of preparing tender documents;
    c. separation of the procedure for accrediting individual suppliers to work with the contracting authority from the procedure for selecting a supplier for a particular service;
    d. standardisation and unification of tender documentation.
2. Defining the scopes, deadlines and methodologies for the execution of the work covered by the contract, taking into account the results of the dialogue with potential bidders and providing the necessary flexibility appropriate to the specific circumstances of the contract in question. Examples of good practice in this area are:
    a. clearly defined, agreed between the parties, rules for changes to the scope and terms of performance of the contract (when can they be introduced, at whose request, what can they concern, how will they affect costs and responsibilities?);
    b. not to pass on to the contractor the consequences of the acts or omissions of the contracting authority and/or third parties;
    c. setting a timetable for implementation by defining the timing of individual milestones or tasks between milestones, rather than indicating specific dates.
3. Defining the scopes and scale of responsibilities of the parties in contracts in a way that is appropriate to the size of the assignment, its scope and impact on the project, market realities. Examples of good practice in this area are:
    a. limitation of the contractor's level of liability to 100% of the contract value;
    b. limitation of contractual penalties to 20% of the remuneration for the contract in question;
    c. the principle of resolving disputes in good faith through dialogue and, as a last resort, through arbitration within the reach of both the contracting authority and the contractor.
4. Defining procedures for the acceptance and settlement of the work performed in a way that ensures the efficiency of the executive team from the beginning to the end of the order and respect for the intellectual property of the contractors, while guaranteeing the contracting authority the tools to control the correctness and professionalism of the execution of the tasks, in accordance with the order and best industry standards. Examples of good practice in this area are:
    a. lump sum payments, spread over the duration of the contract to cover the ongoing costs of providing the services or keeping the project team ready;
    b. payments to cover the mobilisation costs of the project team and equipment, payable in time for mobilisation before the start of the contract tasks;
    c. transfer of intellectual property rights from the contractor to the client after full settlement of the respective contract;
    d. not making payments dependent on the actions, omissions or decisions of third parties over which the contractor has no direct influence;

e. a precise definition of the different stages of the assessment of services, including the scope of comments to be made at successive assessment stages and a clear definition of the final form of the service.

5. Abandoning, in all unjustifiable cases, contractual provisions that limit the possibility to provide information on and promotion associated with well-functioning cooperation, in line with the principle that the joint implementation of projects is a way to build business and gain experience for both the contracting authority and the contractor. Good practices in this area are:

   a. no standard added contractual prohibition on information on cooperation;

   b. Introducing the principle of each reference to be issued by the contracting authority to the contractor upon completion of the contract or order. A model reference to be attached to the contract, specifying the requirements upon which they will be issued;

   c. limiting non-compete provisions to areas and activities that clearly constitute a conflict of interest.

The above catalogue certainly does not exhaust the areas for action that could improve cooperation between investors and contractors in the offshore wind industry in Poland; however, in the opinion of the authors of this publication, it could certainly be considered by the parties when formulating future rules of cooperation. In many mature industries, Codes of Best Practice are an established practice designed to stabilise contractual standards and achieve a balance between the parties' interests. If you find this topic interesting and worth pursuing further, please feel free to contact us with your ideas and suggestions for cooperation: biuro@windindustry.pl

DWF Poland offers holistic legal support in the offshore wind sector, distinguishing itself as a multidisciplinary team with extensive knowledge and years of experience in the offshore industry. As a leading practice in the Polish market, DWF Poland acts as a one-stop shop for clients active in this field, providing comprehensive legal, business and regulatory support at every stage of the investment process.

Our team is composed of specialists from various fields, including energy law, public procurement, infrastructure projects, construction and financing, which allows us to take a comprehensive approach to each project. Thanks to this interdisciplinarity and an in-depth understanding of the specifics of the industry, we support clients at all stages of their investments – from initial planning, through permitting, the construction phase and contract implementation to project operation and refinancing.

The scope of DWF Poland's support includes:

- Drafting and negotiating contracts for multi-contract packages, including BoP, and advising on FIDIC, LOGIC, NEC contract templates and bespoke contracts.
- Preparation of a roadmap for the project, taking into account the key formal and legal steps for obtaining a building permit.
- Advice on all aspects of the procurement of offshore wind projects and compliance with the public procurement regulations.
- Support at every stage of tendering (including preparation of internal purchasing and procurement regulations) and in procurement and purchasing procedures.
- Full financial support for the project – from advice on the financing structure to refinancing.
- Support in the permitting process for the location of wind farms in the Baltic Sea.
- Advice on obtaining permits for the location of wind farms in the Baltic Sea and their possible modification.
- Comprehensive advice on grid connections and environmental matters, including representation of clients in complex legal and administrative proceedings.
- Regulatory and legislative advice, including support to clients in legislative process for the offshore spatial plan.
- Advice on M&A transactions, including legal and regulatory due diligence.
- Advice and support during the contractual phase in the offshore sector (contracting, supply, services, etc.) by managing day-to-day contractual issues, including claims analysis and preparation of contractual correspondence.
- Comprehensive advice on dispute resolution, with a particular emphasis on preventive action to avoid conflict. Services include settlement negotiations, mediation and support at the pre-litigation stage. DWF Poland also offers full representation of clients before Polish courts and international arbitral tribunals such as ICC, VIAC and SCC, ensuring that interests are protected at every stage of a dispute.
- Participation as speakers in internal and external seminars / congresses on offshore wind energy.

DWF Poland assists sector chambers and organizations such as, inter alia, the Polish Wind Energy Association in solving complex regulatory matters and building their position on sectoral issues and in their activities regarding the offshore energy support program in Poland and the EU. DWF Poland lawyers are also involved in the work of the Offshore Wind Energy Task Force, helping to develop proposals on regulatory considerations for the industry.

DWF Poland experts, regularly recommended in international rankings (including Chambers and Partners, the Legal500, the IFLR1000), are recognised for their individual achievements and high competence. We work with clients based on the highest standards of professionalism and transparency, which allows us to accurately identify their needs and tailor optimal legal solutions in a changing legal and market environment.

The Wind Industry Hub Foundation was established in 2023 by the Polish Wind Energy Association, which has been in existence since 1999, the largest industry organization in Poland and a member of WindEurope. The mission of the Wind Industry Hub Foundation is to develop a strong supply chain for the wind sector and support the involvement of the domestic industry in Polish and European wind investments. The Foundation aims to improve energy and economic security by ensuring an adequate industrial base in Poland.

The Wind Industry Hub, through its activities, strengthens Polish companies in their expansion into foreign markets and develops the flow of foreign investment into Poland.

The Foundation guarantees the building of strong business relations, knowledge and technology transfer, as well as support for the implementation of joint projects between domestic and foreign industrial entities operating in the wind sector. Through cooperation with government administration and support of the business and legal environment, the Foundation co-creates Poland's coherent industrial policy and the dynamic development of the Polish wind industry. The Foundation's goals also include supporting Polish companies and institutions in the implementation of the EU's policy to strengthen the European industry supplying components for investments in climate-neutral energy technologies.

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