Briefing

A-Z of issues in renewable energy projects: E-H

In this series of articles, Burges Salmon's Energy team provides an "A-Z" of key legal and practical issues in renewable energy projects. This second instalment covers "E to H" and sets out a number of issues that our construction, health and safety, real estate and environment teams regularly encounter.

Exporting RDF

The sourcing of biomass fuel is a global market. International transport networks continue to develop, and the ever wealthier societies of developed countries present more and more resource management challenges and opportunities as fuel producers and handlers seek out the most favourable destination for materials. This has given rise to a growing trade in refuse derived fuel ("**RDF**") for energy recovery, apparent both globally and within Europe, with regulation becoming increasingly widespread and stringent in response.

Within the UK there are a number of factors which have given rise to the growth in RDF exports at a European level. These include excess shipping capacity due to economic downturn (resulting in lower costs), rising landfill tax rates (which, for active waste, reached £80 per tonne as of 1 April 2014 and is not expected to drop below this rate before 2020) and excess treatment capacity in a number of European jurisdictions.

At a European level, the EU Waste Shipments Regulation[1] (the "**EU Regulation**") establishes procedures and control regimes dependent upon the origin, destination and route of shipment, the type of waste fuel shipped and the type of treatment to be applied at destination. The EU Regulation applies to all shipments between Member States, imported into or exported from the EU or in transit through the EU.

UK legislative framework

In the UK, the Transfrontier Shipment of Waste Regulations 2007 (the "**UK Regulations**") supplement the EU Regulation and create a procedural framework allowing for the safe shipment of RDF, as well as prohibiting export of RDF to and import of RDF from certain countries.

There are two different procedures which apply to shipment of waste within the EU: a "green listed" procedure which applies to non-hazardous waste intended for recovery, and a notification procedure which applies to all hazardous waste and to non-hazardous waste intended for disposal (in the limited circumstances where this is not prohibited). It is the latter which should be of concern to those in the waste and transport industries.

The notification procedure requires:

- prior notification of a proposed shipment to the competent authority of dispatch[2] and provision of related information;
- the making of a written contract with the consignee for the recovery or disposal of the notified RDF, effective from the time of notification and for the duration of the shipment;
- the provision of a financial guarantee or equivalent insurance covering the costs of transport, recovery or disposal and storage for 90 days;

[1] EU Regulation 1013/2006

[2] the Environment Agency in England, the Scottish Environment Protection Agency in Scotland and Natural Resources Wales in Wales.

- the imposition of conditions for consent by the competent authorities of dispatch, transit and destination on specified grounds such as the planned shipment not being in accordance with environmental protection legislation;
- the keeping of documents for at least three years following commencement of shipment;
- the take-back of shipments that cannot be completed and of illegal shipments;
- supervision and control throughout the process by the competent authorities; and
- no mixing of waste during shipment.

Imports of waste intended for disposal or energy recovery from non-EU countries are largely prohibited, as are exports from EU countries of any hazardous wastes or waste intended for disposal.

On 1 May 2014, new legislation[3] came into force in the UK which amends the UK Regulations, improving enforcement by authorising HMRC to disclose relevant export data to the UK competent authorities.

Recent prosecutions

A series of recent prosecutions by the EA has led to the emergence of new case law[4] on how to interpret the UK Regulations. There are some key points that all exporters of RDF should be aware of:

- the breadth of the activities caught by the transfrontier shipment of waste regime is wide – anyone involved in the transport of RDF (by any form of transport) from the point of origin where the RDF is collected/stored to the point of delivery is subject to the regime;
- the criminal offence of transporting RDF containing hazardous waste to a non-EU country is a strict liability offence and is not disproportionate - the onus is on those consigning and transporting to be vigilant and fully investigate the materials they are carrying;
- RDF can be destined for recovery in a non-EU country long before it reaches the point of physically leaving the EU.

Those in the RDF export industry should be aware that the national and supra-national authorities are cracking down on the exporting of waste (including RDF). This is evidenced by the new legislation recently implemented both in the UK (see above) and by the EU[5]. The latter provides strengthened measures to ensure more uniform implementation of the EU Regulation. RDF export is very much a live issue, and it is crucial to follow the development of relevant legislation carefully.

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[3] The Transfrontier Shipment of Waste (Amendment) Regulations 2014 (SI 2014/861)

[4] In particular, *R v V & Others [2011] EWCA Crim 2342; R v Ideal Waste Paper Company Limited & Others* [2011] EWCA Crim 3237; and *R v Ezeemo & Others* [2012] EWCA Crim 2064

[5] EU Regulation (9400/14), adopted on 6 May 2014

Farm Tenancies - Vacant Possession

Renewables projects often require a lease of and rights over agricultural land. This land is often subject to a lease to a tenant who may have farmed the land for years or even generations.

While the project site is under option a developer may be happy to have the land still actively farmed. Even after the project has been installed some farming may be possible (e.g. grazing sheep between solar panels or planting crops between wind turbines).

However, it is usual for an option for a lease for a renewables project to require the landowner to give vacant possession before the lease is granted. It is therefore important to be aware of agricultural tenancies or other occupational interests early in project life, so that notice can be given and surrender or tenancy arrangements can be agreed as appropriate.

Timescales and procedural limitations

Agricultural tenancies have timing and procedural limitations on termination that may not be obvious from the wording in a tenancy document. They may apply even where a tenant has an oral tenancy (without a written agreement), or if the written agreement says that the term has already ended.

For Agricultural Holdings Act (**"AHA"**) tenancies (broadly speaking those granted before 1 September 1995 or replacement tenancies later granted to the same tenant or a successor), there are very specific ways of terminating the tenancy that apply in particular situations. The most relevant for development purposes (known as "Case B") has its own process and requires that: planning permission has been obtained; the use of the land proposed is non-agricultural; there is real intention and prospect of development; and the notice does not relate to any land outside the planning permission area.

For Farm Business Tenancies (**"FBTs"**) (broadly speaking granted after 1 September 1995), there are no special provisions allowing regaining of possession so there needs to be a contractual provision in the tenancy if the landlord is to be entitled to terminate the lease, and there are limitations on the length of notice that needs to be given. For example, an FBT with a fixed term of more than two years needs the notice period to be at least 12 months expiring at any time. FBTs with a fixed term of more than two years do not end automatically on the term date and require notice to terminate. An FBT for a fixed term of two years or less can have any contractual break provision that the parties can agree.

If termination within the terms of the tenancy and the legislation does not fit with the timescales for the project, a surrender may need to be negotiated from the tenant, potentially at a significant cost.

Compensation and costs

Compensation will often be paid to a tenant who is giving up possession of land, whether on a statutory or negotiated basis. Potential costs include:

- a surrender payment for the termination of all or part of the tenancy if the surrender is negotiated and/or a statutory 'disturbance' payment of potentially 5 or 6 times the rent for the relevant land for older tenancies where notice to quit is served on the tenant; and
- compensation for crop loss and/or improvements the tenant has made to the land.

The tenant may want to be compensated for payments to Natural England or alternative environmental provision as a result of the termination of the tenancy if they have entered the land into environmental schemes (for example a five year Entry or Higher Level Stewardship Scheme).

The renewables project may have an impact on the farmer's entitlement to farm support payments under the Common Agricultural Policy. Farmers are currently being encouraged to plan for the need to meet new environmental ("greening") rules in order to qualify for farm support under the new Basic Payments Scheme. Though this officially begins on 1 January 2015, whatever farmers put in the ground this autumn needs to be greening-compliant. Arable farmers must set aside 5% of their land as an ecological focus area (by leaving it fallow, buffer strips, growing cover crops for game birds or nitrogen-fixing crops such as peas or maintaining hedges) in order to receive payments.

There may also be tax consequences for landlord and tenant on surrender of the land from the tenancy and change in use of the land.

Potential mitigating steps

Sometimes new arrangements with existing tenants are entered into before an option is finalised to deal with allowing the necessary notice to be given. If so, points to consider include:

- The length of the tenancy term (because FBTs granted for a term of more than two years cannot have shorter termination provisions than 12 months).
- Including a clause allowing resumption of possession of part only of the land.
- What rights the landowner will need to reserve (for example to carry out intrusive surveys) or what restrictions they will need to impose (for example limitations on tree planting or construction that could shade the land if solar PV is proposed).
- Letting land in separate parcels rather than one large tenancy, particularly if stages of development are proposed or only part of a much larger area would be used.

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Guaranteed Performance

One of the key commercial drivers for any developer of a renewable energy project is to ensure that the finished product generates a sufficient revenue level to make the project financially viable.

Any technical, commercial and financial due diligence undertaken will help verify that the solution offered by the contractor will deliver the required rate of return. However, appropriate contract mechanics will need to be considered to further mitigate this risk and an appropriate performance guarantee regime will need to be introduced into the construction contract(s).

Pre-contract discussions will often see contractors at pains to emphasise the quality, reliability and proven track-record of their technology and/or service. However, contractors are often (unsurprisingly) more reticent when it comes to providing any forms of performance guarantees and contractual remedies for a developer.

Balancing the parties' competing interests will always be a key point for commercial negotiation. However, a clear and unequivocal guaranteed performance level regime (with associated remedies) is the only way for a developer to truly ensure that the project will be, and remains, financially viable.

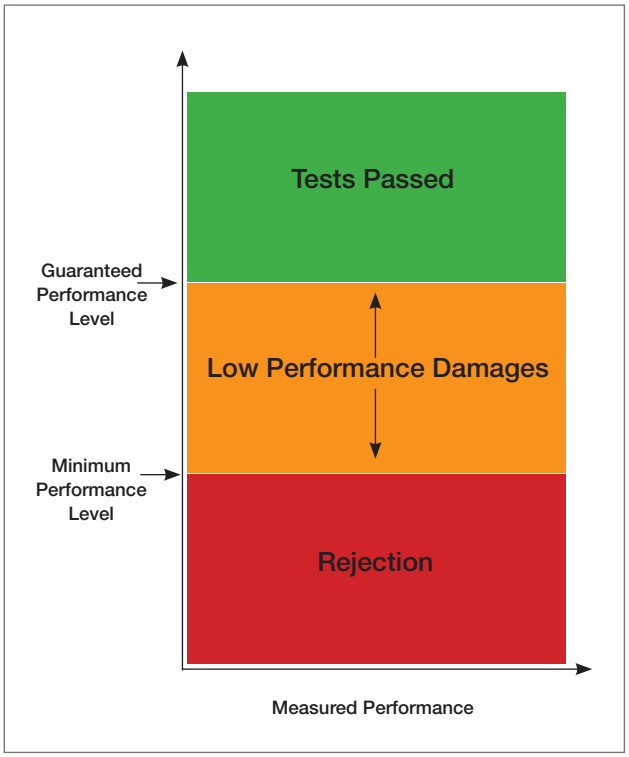
These regimes will be heavily influenced by the commercial background to the project and the technology in question. A number of key questions will need consideration, including:

- Is there an absolute minimum performance level needed from the plant (in terms of output and/or availability etc.) for the project to be viable (**"minimum performance level"**)?
- What is the optimum performance level for the plant that the contractor is being asked to deliver (**"guaranteed performance level"**) in order to generate appropriate revenue and return for the developer?
- How can the contractor be motivated to ensure that the plant meets the guaranteed performance level?
- What recompense will the developer need should the plant fail to reach the guaranteed performance level?

EPC and Construction Contracts

Choosing an appropriate form of construction contract will be absolutely key for renewable energy projects utilising process, plant and complex engineering solutions. There are a range of contracts available, with IChemE and FIDIC in particular being standard form contracts of choice for projects that require a sophisticated testing and commissioning regime.

Regardless of your starting point, the contract in question will inevitably require bespoke amendments and suitable commercial, legal and technical input to ensure that it is shaped to the demands of the project in question.



In our experience, a well-crafted and sophisticated contract will include (or the parties will have at least considered):

- a series of tests to include pre-Take Over tests and post Take Over tests (which may include a whole range of measurements such as availability or stable/increased performance of the plant over a prolonged period of time);
- a right for the developer to receive some form of pre-agreed level of performance damages (or a suitable reduction in contract price) where the plant meets the minimum performance level, but fails to achieve the guaranteed performance level. These performance damages are most usually in the form of a one off payment, which has been calculated to compensate the developer for the loss of revenue suffered over the lifetime of the project; and
- a right for the developer to "reject" the plant should it fail to meet the minimum performance level. Rejection assumes that the plant is operating at such a level that the project is no longer financially viable even where the developer receives the agreed form of recompense (e.g. performance liquidated damages) from the contractor. Here, the developer will essentially walk away from the project and be returned to his original position.

Considering which (or if all) of the above remedies are appropriate will require consideration of a number of important factors, such as:

- should the testing regime include both pre and post Take Over tests?;

- how are the performance liquidated damages to be calculated and what limit on liability should apply to these damages? Any developer will need to ensure that these are a genuine pre-estimate of his likely losses as any excessive damages regime may be viewed as a penalty and therefore be rendered unenforceable by the courts;
- whether the developer has sufficient performance security (such as bonds or parent company guarantees) in place to meet any liabilities; and
- whether there should be an opportunity for the contractor to improve performance and, in the event of subsequent performance, a reconciliation of the performance liquidated damages to be paid.

There is no "one size fits all" standard contract form and each contract will need to be tailored to include drafting and mechanisms which meet the parties' concerns for the project in question. By way of an example the following provisions (which are common in standard form contracts) can operate to hinder a developer exercising those rights he believed were available to him:

- exclusion of any loss of all (both direct and indirect) profits etc. can not only hinder recovery of liquidated damages but drastically reduce amounts payable to the developer in the event the contract is terminated; and
- a 100% cap on liability. This is often viewed as normal or "market". However, in the case of the developer exercising a right of rejection, this cap may operate to bar a claim to all recoverable heads of loss (such as financing and dismantling costs).

The issue of guaranteed performance is a thorny one and is often a key area for negotiation and drafting. Early and detailed consideration of the make-up of any testing and commissioning regime will be absolutely key in understanding which contractual protections need to be incorporated, and will operate not only as a means to mitigate against the risk of under performance in the plant but also as a way of incentivising a contractor.

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Health and Safety in the Supply Chain

Contractors are both a blessing and a curse. They allow a business to obtain specialist support, achieve cost efficiencies and explore new business opportunities without full financial commitment. Nonetheless, sometimes this comes with a loss of control and retaining developers, contractors and suppliers may not achieve all the risk transfer that might be imagined or hoped for.

Whilst on the face of it, Health and Safety Law is neutral on whether an organisation can contract out parts of its business, when something goes wrong, a relevant decision or a party's conduct, and how a project or incident was managed, comes under a great deal of scrutiny. In the worst case it can lead to a criminal investigation for corporate manslaughter and/or the breach of the Health and Safety at Work Act 1974 (HSWA) and/or a civil claim for personal injury or property damage.

Scope of Undertaking

A business often reasonably asks why it should be responsible for an accident where it has contracted the works to a specialist. Surely, that is the end of it?

Not so. The general duties under the HSWA require a duty holder to control all risks emerging from its undertaking. Effectively, it means controlling all risks emerging from the business. That seems fairly straightforward but there is often a misunderstanding of whether work done by a contractor is work that emerges from a business.

The law on this question was dealt with by the House of Lords in Associated Octel[1]. This involved a worker for a small firm of specialist contactors (RPG) repairing the lining of an industrial

[1] [1996] 1 W.L.R. 1543

tank belonging to Octel using acetone by the light of an electric light bulb. Whilst applying the acetone, the light bulb broke and the acetone vapour ignited badly burning the employee.

RPG worked almost exclusively for Octel, and like other contractors operated under a permit to work scheme which involved it describing how the work would be done. The permit did not make any mention of acetone.

Octel was prosecuted for a breach of its Section 3 obligations[2]. Octel argued that it could not be vicariously liable (i.e. the assumption of someone else's duty), because it did not and could not tell RPG how to do the work and consequently the injury was not caused by the way it had conducted its undertaking. RPG were independent contractors, Octel had no control over them and control was essential to liability.

The House of Lords said Octel were wrong. The general duties of the HSWA put the duty directly on Octel, because it was part of Octel's business to have the tank repaired. Additionally, the Court said if it is part of the undertaking then the duty holder *"must stipulate for whatever conditions are needed to avoid those risks and are* ***reasonably practicable****".*

What this means is that a business needs to put in place supervision and monitoring arrangements for the parts of the business it contracts out. It will also need to have verification/ challenge processes in place for the procurement of specialist services, but in each case the extent of those supervision processes will be based on what is physically **practicable** and in proportion to the risk (i.e. **reasonably**).

So for example, the degree of scrutiny of contracted out operation and maintenance work should be far higher than the scrutiny of the purchase of a turbine.

Much of the work contracted out in the renewables sector will be governed by the Construction (Design and Management) Regulations 2007[3] (CDM), as construction is broadly defined. However, the key duties placed on businesses acting as Clients under CDM (including checking both during the procurement and delivery stages that the organisations it contracts with are competent (with relevant expertise), sufficiently resourced, and structured to manage the work), are only part of the legal requirements. Activities such as inspection, testing, minor maintenance and in particular the general operation of the renewables site (including managing the interfaces between non-construction contractors) are covered by the very broad obligations under the HSWA.

This means that businesses contracting out non-construction work should, in addition, consider the contractor's risk assessments and check that the contractor is doing the work as agreed taking corrective action if necessary. However, regardless of whether or not the work involves construction, a business must consider the risk assessments and method statements and check that they do not create risks for its operations and public/visitor safety.

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[2] Section 3 HSWA: It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

[3] These regulations are set to be revised in 2015.

For futher information on Burges Salmon's renewables and wider experience please go to http://www.burges-salmon.com/Sectors/energy_and_utilities/default.aspx