

WATSON FARLEY  
&  
WILLIAMS

OFFSHORE WIND CONSTRUCTION



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## WATSON FARLEY & WILLIAMS: KEY FACTS

140+  
PARTNERS

FOUNDED  
1982

14  
OFFICES

500+  
LAWYERS

11  
JURISDICTIONS

20+  
LANGUAGES SPOKEN

## OUR OFFSHORE WIND CONSTRUCTION PRACTICE



### Extensive offshore experience

Our construction specialists have had many years of experience in advising on EPC, O&M, BOP and related contracts in the Energy Sector. We work extensively in the offshore wind sector and support clients in developing, constructing and/or operating and maintaining offshore wind farms in Europe, the US and Asia.

The team has advised on and negotiated turbine supply agreements, service and warranty agreements and balance of plant contracts (including framework agreements) for numerous offshore wind projects in the UK, Belgium and Germany. We have advised on eight of the twelve OFTO projects in the UK, which has given us an unrivalled knowledge of the market for supply and construction contracts in the offshore wind sector. Across the Atlantic we have

advised the developers of two of the front runners in the US offshore wind market, including Cape Wind.

### Offering support throughout the development process...

We advise on the full range of construction matters that can arise on a project, covering design, tendering and bidding, financing and award, throughout the construction phase and after completion (including the operation and maintenance phase). Our comprehensive advice also covers ancillary documentation (such as performance security documents, direct agreements), health and safety and insurance. We also work very closely with our colleagues in our planning and consenting team to ensure that the construction documentation is aligned with any planning or consenting restrictions.

### ...and with any issues that may arise along the way

As well as involvement with the contractual and commercial issues in the development and construction phase, our construction team are currently advising on many disputes and contentious matters in the offshore wind sector, particularly relating to project delays, cost overruns and defects claims.

### "Bankable" and "investable" deals

It is evident that wholly owned, balance sheet financed projects are becoming much less common and this trend is likely to continue. In order to make projects bankable (and to attract a wider range of potential investors in the offshore wind sector), the supply and construction contracts must be structured in such a way as to facilitate raising limited recourse finance at the project or investor level and attracting additional equity during the construction phase.

We understand what banks and investors will look for in order to invest and the depth of our experience gives us a balanced perspective as to what is achievable in the supplier market, and the various options to mitigate risk, either through technology, insurance or ultimately through contingencies.

## TURBINE SUPPLY/INSTALLATION AND OPERATION/MAINTENANCE

With the significant number of offshore wind transactions in which we have been engaged, our construction team is fully versed on the terms, conditions and negotiating parameters applicable to the turbine supply and service and warranty agreements.

We have negotiated extensively with all leading turbine suppliers on turbine supply contracts, framework agreements and services and ancillary agreements. In recent years, we have also dealt with EPC Contracts for the world's largest EPC Contractors. Regardless of the procurement strategy (EPC or multi-contracting) the following issues commonly require consideration and negotiation in turbine supply contracts (and related documentation):

- Vessel requirements and the extent to which the turbine supplier will take the risk on vessels and allow programme float for vessel unavailability.
- The treatment of risk of adverse weather which impacts upon, amongst other things, the turbine supplier's ability to lift turbines and the ability of the vessels to jack-up due to adverse wave heights, including the turbine supplier's programme float for adverse weather.
- The interface, and potential for conflict between project owner, turbine supplier and vessel owner, particularly during erection.
- The turbine supplier's responsibility for obtaining and maintaining contractor permits, and for complying with employer permits obtained after the contract base date.
- Force majeure relief events, which are often wider in turbine supply contracts as compared with other BOP contracts.
- Turbine performance and how this is measured, given the practical difficulties of performing power curve tests unless the project company has installed significant costly infrastructure, including met mast(s). If levels of performance are very low, but the power curve tests have not been performed, the turbine supplier will not be liable for liquidated damages for failure to meet or exceed the power curve guarantee (except to the extent of any protection available under an availability warranty). This may be a particular concern if new, or less proven technology is employed.
- The testing, completion and handover mechanics for each turbine or group of turbines, and the point at which ownership in each turbine passes to the project company.



- Caps on liability for delay and performance liquidated damages and overall caps (and exceptions therefrom) must reflect market conditions.
- Credit support in the form of parent company guarantee, performance bonds and letters of credit.
- Payment schedule and security, particularly in respect of advance payments.
- Price re-openers and extension of time provisions generally.
- Collateral warranties and the ability of owners to preserve sub-contracts where there been main contractor failings.
- Provisions for a direct agreement.



## BALANCE OF PLANT

Our construction team has substantial experience with the complexities of modern day turnkey contracting. We have drafted, reviewed and negotiated EPC contracts for large assets across all sectors, including power generation, petrochemical complexes and general infrastructure. We have advised on 8 of the 12 OFTOs to date in the UK, giving us unrivalled experience of the market for BOP contracts. We have also advised a leading offshore wind farm developer on the framework agreement (and associated call off agreements) for the supply of cables and foundations and a contract for vessel and port facility sharing arrangements.

We advise on the forms of procurement and contracting strategies available to wind farm developers, ranging from full EPC wraps, multi contracting, EPCM contracting as well as associated contracts, and we have many years of experience of the major FIDIC forms, particularly the Silver Book and the Yellow Book, and the LOGIC forms.

Issues that need to be carefully considered include:

- Geotechnical/site conditions and the extent to which the contractor will take any site condition risks based on the accuracy, sufficiency or completeness of data provided to the contractor (and the consequential extension of time and cost issues).
- “Dependency dates” (being obligations of the project company) and ensuring, as far as possible, that these are backed off by the project company through the inclusion of interface milestones in other relevant BOP contracts.
- As with turbine supply agreements, vessel requirements and the extent to which contractors will take the risk on vessels and adverse weather will be significant.
- Liquidated damages recoverability, and the risk that even though a contractor under one BOP contract may be obliged to pay liquidated damages for its failure to achieve an event by an interface milestone, the project company’s obligation to pay costs to another BOP contractor that suffers as a result of this is not capped and so may exceed the amounts recovered.
- Other than in respect of the turbine supplier’s liquidated damages which are generally sized by reference to lost revenue, the remainder of the liquidated damages in the BOP contracts are intended to mitigate only a proportion of the interface risks rather than as revenue replacement. This is generally consistent with the legal principle that liquidated damages must be commercially justified and not extravagant or oppressive. The project company would risk a challenge that the provision was penal if it sought to impose liquidated damages which were not commercially justified.
- Overall design interface/integration risk, and if this is ultimately the responsibility of the project company, the need to carefully control any changes in design by a BOP contractor, which have a consequential effect on other BOP contractor’s design, which could give rise to time and cost consequences.
- Inclusion of “joinder of disputes” provisions in the various BOP contracts, which allow for disputes under two or more BOP contracts in relation to the same matter to be joined and adjudicated by a single adjudicator. Joinder disputes, whilst minimising the risk of inconsistent determination, are generally difficult to implement and require the project company to be closely involved in the adjudication process which may be a drain on management time, usually at a crucial stage of the project.

## OPERATION AND MAINTENANCE

One of the biggest challenges facing an offshore wind farm developer is the major cost involved in repairs and maintenance at sea. A developer will seek to manage the operation of its project within prudent operating parameters, by maximising availability and accessibility and minimising operation and maintenance costs in a lifecycle perspective.

Turbine suppliers usually enter into a service and warranty agreement (“SWA”) with the relevant project company. The SWA would include availability guarantees which are becoming longer in duration, e.g. up to 10 years, and should be considered in conjunction with performance guarantees through the power curve and any yield guarantees.



The SWA is likely to work alongside an operation and maintenance agreement which may be longer in duration than the SWA, and will cover at least the following:

- General services
- Maintenance services, which may include turbine maintenance after expiry of the SWA
- Management of contracts with third party contractors
- Offtake and trading management
- Strategic advice
- Health, safety and environmental services
- Public relations services
- Logistics services
- Onshore facility services and security services
- Spares administration
- Other services, including reporting, notifications and document control.

The primary objectives of the operation and maintenance service provider, which will be measured through the reporting of key performance indicators, will be to achieve zero lost time accidents, zero environmental breaches, maximum wind farm availability, to maintain the long-term asset integrity and to achieve optimum costs.



## INSURANCE

We have in-depth expertise and experience of the legal issues applicable to insurance of offshore wind farms. WFW has advised certain specialist renewables underwriting syndicates on such insurance policies. As a result, we have gained insight into issues typically addressed by other advisors and understand how such issues interrelate with legal issues, particularly the need to dovetail the insurance package into the supply documentation and financing agreements.



Some issues to consider include:

- Allocation of risk of loss and damage generally under the turbine supply and BOP contracts, and the breadth and scope of the insurance package backing up the project company's risks and responsibilities.
- Interface between force majeure and insurance, specifically how the definition of force majeure in each supply contract relates to the insurance package for material damage and business interruption.
- The point at which the risk of loss and damage passes from contractors to project company.
- Project company insurance deductibles and time deductibles under the DSU insurance.
- Availability and limitations on defective design cover, particularly in relation to new technology.
- Limitations on the response in DSU insurance and Business Interruption Insurance, e.g. in response to bad weather or failures, losses due to grid unavailability, unavailability of vessel.
- If project finance is to be utilised, whether the insurance package to be obtained for the construction period and the O&M period conforms to the customs and practices of limited recourse financing and is sufficient to fund project company's debt service.
- If project finance is to be utilised, the extent of finance parties clauses, and insurance claims in response to defects claims and LEG 1, 2 and 3 coverage.

## BANKABILITY

Many of the offshore wind projects we have worked on have involved project financing. We have acted as lender's counsel on renewables financings for the European Investment Bank, Bank of Scotland, BNP Paribas, Commerzbank, Dexia, KBC, Rabobank, Société Generale, IPEXBank, HSBC, Commerzbank, Dexia, ASN Bank, ING, Investec, NIB Capital, Nord LB, KfW, LLBW, HSH Nordbank together with export credit agencies Euler-Hermes and EKF.

In addition, we have advised on de-risking strategies to attract additional equity during the construction phase of the project as well as structuring the project in order to facilitate raising limited recourse finance at the investor level.

This range of experience gives us a balanced perspective as to what is achievable or not in the supplier market and the various options available to mitigate risk, either through technology, insurance or ultimately through contingencies.

In terms of bankability, we understand first-hand what banks will look for in order to invest: matters such as interface risk and the management and responsibility thereof, credit support from suppliers, performance guarantees, enforceability of damages provisions and liability caps. We are used to the early involvement of banks, and working with them and their other advisors, and their requirements for a risk allocation matrix for known risks, expected risks and worse case scenarios.

Banks will want to see amongst others things:

- Strong design, management and engineering for the project, as validated by independent advisers.
- Detailed planning of the operational phase, including precise estimates of needs for spare parts, number of interventions, vessel and crane requirements, all in view of turbine design, sea conditions and health and safety requirements.
- Worst case scenario analysis, with back-up solutions available, possibly in the form of contingent debt and equity in pre-identified, and pre-committed amounts.



We are aware of borrowers' concerns over contingencies. Any proposed contract structure would seek to minimise the risks through an effective risk mitigation strategy. Naturally, that strategy would be tested by the banks and its advisers (legal, insurance and technical) and legal advisers are frequently called upon to help the banks get comfortable with the borrower's strategy.

*In our experience, there is a desire among the banks to validate rather than to reject a borrower's risk mitigation strategy but they rely heavily on their advisers to get them comfortable, or if possible, to find the lowest cost alternative solution.*



## DEFECTS

Defects claims are becoming increasingly prevalent on offshore wind farms, and something which our construction team has advised on frequently. We are currently advising on a number of defects claims in the UK affecting turbines, cables, electrical equipment and grid code compliance.

In order to bring a successful defects claim the developer must prove that the works are defective and that the contractor is responsible for the defective works, as well as also establishing that the defective works have caused the loss claimed and that the developer has mitigated its loss as much as possible. Our construction team can help identify the best expert to give evidence, which can often prove vital in defects disputes, as well as helping to pull together key factual evidence and contemporaneous records and advising on the relevant case law.

In our experience the following issues can often arise on defects claims:

- Interface risks and allocation of responsibility for defect, particularly when cables or other components are supplied by one party and installed by another.
- Inadequately defined testing obligations in the interface/risk register, again where there is a split responsibility between supply and installation.
- If defect rectification is the exclusive remedy, then there could be a lack of an effective remedy if the contractor does not proceed to remedy the defect diligently or at all.
- Difficulties with limited supply base and proprietary technology in the event that the developer is forced to engage a third party to remedy a defect, and the effect on original contractor's warranties.
- Understanding the full extent of a contractor or supplier's obligations in terms of providing documentation and other information to show how a defect will be repaired.
- Understanding the full extent of a contractor or supplier's obligations in terms of repairing defects, including the extent of the repair.
- Performance bonds expiring before the end of the defects period.
- The extent to which the developer can prescribe how a particular defect should be remedied, or specify an alternative repair if it is not satisfied with the proposed (or actual) repair.

We have also seen first-hand the value of joint periodic inspections during the defects period, to identify a defect before it adversely impacts operation, and the significance of final inspections at the end of defects periods in order to assess the existence of patent defects. This experience of the disputes side of the offshore wind development process informs our drafting on the contractual side, so that we guard against these risks in our contracts.



## ASSET STRATEGY

We recognise the importance of creating long-term financial value for shareholders in offshore wind farm projects. Consequently a strong and well-constructed asset strategy is vital.

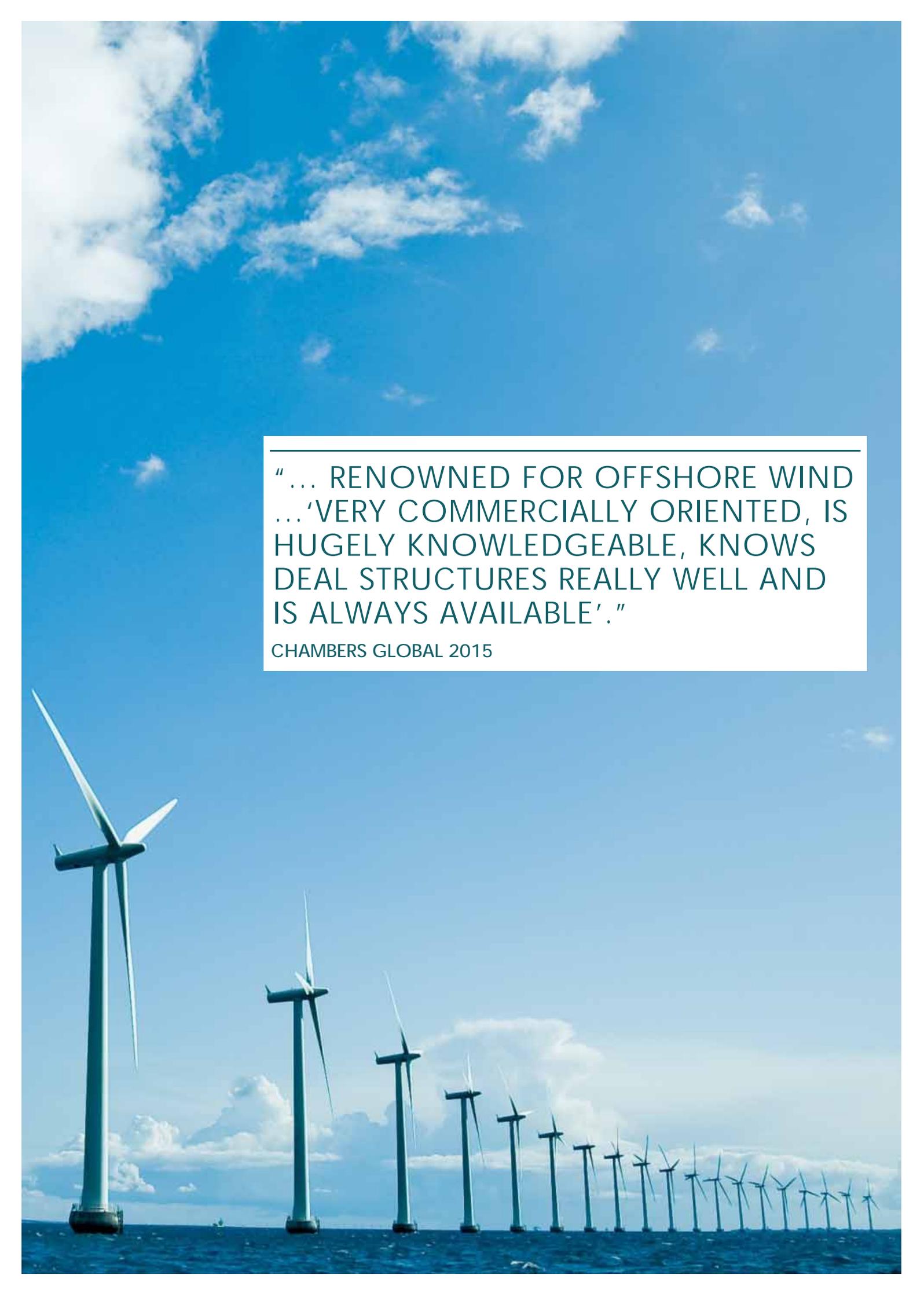
In order to achieve this, supplier contracts should include the following:

- The delivery of performance targets for reliability and availability.
  - Monitoring on-going noise and vibration throughout the operation period and ensuring that planning or consenting restrictions are observed.
  - Carrying out ecological surveys, such as ornithological and fish monitoring.
  - Continuing to develop performance monitoring processes and supporting systems.
  - Preparation of asset management plans using the framework of asset management systems, detailing planned maintenance, overhaul and asset management procedures throughout the project's life, updated annually and in accordance with experience and external input where appropriate.
  - Preparation of technical "asset status" reports, at least on a yearly basis, based on analysis of available data from the third party contractors, information on warranty work, defects analysis, remediation work and other relevant data sources carried out by third parties.
- Ensuring that a programme of compliance with all licences and consents is developed and implemented.
  - Addressing, in a timely manner, corrective actions and improvements arising from audits, incidents and near misses.
  - Undertaking a plant status review of assets as they move out of warranty and implementing recommendations where appropriate.
- Improving and developing the plant history in order to predict the incidence of failure more effectively and to optimise costs.
  - Developing a spares purchase and refurbishment strategy.
  - Implementing appropriate engineering practices to reduce the incidence of plant failure.
  - Reviewing and controlling engineering change through appropriate processes.



## WORKING IN THE MARKET

		DEVELOPMENT/ DUE DILIGENCE	CONSTRUCTION	CONNECTION/ OFTO	PPA	SHAREHOLDER AGREEMENTS	SHARE PURCHASE AGREEMENTS	FINANCING
UK	Barrow	✓		✓				
	Beatrice	✓				✓	✓	✓
	Burbo Bank	✓	✓		✓	✓	✓	
	Gunfleet Sands 1, 2 & 3	✓		✓	✓	✓	✓	
	Gwynt-y-Mor						✓	
	Lincs	✓	✓		✓	✓	✓	✓
	London Array	✓	✓	✓	✓	✓	✓	✓
	Ormonde	✓	✓	✓			✓	✓
	SeaEnergy	✓		✓		✓	✓	
	Thanet		✓	✓			✓	
	Walney 1 & 2	✓		✓	✓	✓	✓	✓
	West of Duddon Sands		✓	✓		✓	✓	
Westermost Rough	✓		✓					
BELGIUM	Belwind I				✓			✓
	Thornton Bank I, II & III		✓	✓	✓	✓		✓
DENMARK	Rodsand					✓	✓	✓
FRANCE	Courseulles	✓				✓	✓	
	Fécamp	✓				✓	✓	
	Le Tréport	✓				✓	✓	
	Ile d'Yeu Noirmoutier	✓				✓	✓	
GERMANY	Albatros						✓	
	Atlantis I – III						✓	
	Baltic 2		✓	✓	✓	✓	✓	✓
	Borkum West II – 2nd phase	✓		✓		✓		✓
	Butendiek	✓	✓	✓	✓	✓	✓	
	Dolwin 3			✓				
	Global Tech 1	✓	✓	✓				✓
	Global Tech 2						✓	
	Gode Wind I		✓			✓	✓	
	Gode Wind II		✓				✓	
	Gode Wind III						✓	
	Meerwind Sud/Ost	✓	✓					✓
	Nordergrunde		✓					✓
Veja Mate	✓	✓	✓				✓	
USA	Cape Wind				✓			✓
	NRG Bluewater		✓					
	Deepwater				✓			✓
	Offshore MW						✓	



"... RENOWNED FOR OFFSHORE WIND  
... 'VERY COMMERCIALY ORIENTED, IS  
HUGELY KNOWLEDGEABLE, KNOWS  
DEAL STRUCTURES REALLY WELL AND  
IS ALWAYS AVAILABLE'."

CHAMBERS GLOBAL 2015

## SELECTED EXPERIENCE

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### LONDON ARRAY

Advising DONG Energy on the 1,000 MW London Array offshore wind project. Particularly advising on turbine supply agreements, service and warranty agreement and O&M arrangements, also advising on amendments to the TSA for turbine modifications.




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### VATTENFALL

Advising Vattenfall on the OFTO aspects of Thanet and Ormonde offshore wind farms.

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### WALNEY OFFSHORE WIND

Advising DONG Energy on various construction, insurance and O&M issues as well as the connection agreements for Round 2.5 extensions.

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### NRG BLUEWATER

Advising on its 293 MW offshore wind project off the coast in Delaware, USA. Drafting an EPC Contract with Fluor Engineering for supply and installation of balance of plant and turbine installation and advising on contract strategy and procurement methods.

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### WEST OF DUDDON SANDS

Advising on the sale of the offshore transmission assets relating to the project to WoDS Transmission Plc. Additionally, assisting with the preparation of vessel supply framework contracts for DONG Energy in respect of this project, among others, including preparation and negotiation of the O&M contract.

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### TURBINE FRAMEWORK AGREEMENT

Advising DONG Energy on English law aspects of its framework agreement with Siemens Wind for the supply of up to 500 offshore wind turbines as well as later variations to that agreement over the last two years.

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### LINCS OFFSHORE WIND

Conducting due diligence on all supply contracts and advising on construction risk mitigation for the Lincs offshore wind farm, a joint venture between Centrica and DONG Energy.

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### VATTENFALL

Advising Vattenfall (through its subsidiary Ormonde Energy Limited) in respect of the turbine supply agreement and service and warranty agreement recently entered into with RePower for the 150 MW Ormonde Wind Farm.

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### THORNTON BANK

Advised the lenders to C-Power in respect of the supply contracts for Thornton Bank Phases 2 and 3, a 325 MW offshore wind farm which achieved financial close in December 2010.

### BELWIND

Acting as borrower's counsel to the Belwind 390 MW offshore wind farm project. Actively involved in the negotiation of the major project contracts and all other aspects of the sponsor's counsel role, including advising on the financing.

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### WESTERMOST ROUGH

Reviewing, supporting negotiations on and reporting on TSA and SWA with Siemens for new 6MW WTG.

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### BURBO BANK EXTENSION

Advising DONG Energy on the TSA, SWA and Spare Parts Agreement with a MHI and Vestas JV for the new generation V164 8MW WTGs. Also advising on O&M arrangement and construction agreement.

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### NIBC BANK N.V.

Advising NIBC as lender and MLA for the EnergieKontor "Nordergründe" offshore wind farm, including advice in respect of the turbine supply agreement and service and warranty agreement recently entered into with RePower.

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### OFFSHORE WIND DEVELOPER

Advising an offshore wind developer in the UK on a number of defects claims affecting cables, electrical components and grid code compliance.

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### ONSHORE WIND DEVELOPER

Advising an onshore wind developer on a defects claim affecting major components in turbines.

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## REPUTATION

"EXCELLENT REPUTATION IN THE RENEWABLE ENERGY SECTOR, PARTICULARLY FOR THE STRENGTH OF ITS OFFSHORE WIND PRACTICE."

CHAMBERS UK 2015

"ONE ENERGY SECTOR CLIENT SAYS THE TEAM IS "SECOND TO NONE WHEN IT COMES TO KNOWLEDGE OF OFFSHORE WIND"

IFLR 2015

"WITH ITS 'STRONG EXPERTISE', WATSON FARLEY & WILLIAMS IS AN OBVIOUS CHOICE FOR OFFSHORE INSTRUCTIONS..."

LEGAL 500 EMEA 2015

"WATSON FARLEY & WILLIAMS HAS A CLEAR FOCUS ON RENEWABLE ENERGY AND IS GREAT AT THIS."

CHAMBERS EUROPE 2015



"...IS PRAISED AS BEING 'VERY APPROACHABLE' AND 'HANDS-ON' BY SOURCES."

CHAMBERS UK 2015

"ONE CLIENT DESCRIBES THE TEAM AS 'VERY RESPONSIVE AND COMMERCIAL-MINDED, WHILE STAYING PRECISE ON THE LEGAL ISSUES'."

IFLR 2015

"VERY PRACTICAL PEOPLE, EXTREMELY SOUND TURNAROUND TIMES."

CHAMBERS UK 2015

"...THE FIRM HAS A 'LARGE SCOPE OF SPECIALITIES, GOOD COMPREHENSION OF THE CONTRACTUAL RISKS AND A DIPLOMATIC APPROACH WITH THE CLIENTS'."

IFLR 2015

"...THEY ARE EXTREMELY EASY TO WORK WITH AND VERY KNOWLEDGEABLE OF THE SECTOR AND OUR NEEDS; THEY TAKE GOOD CARE OF UNDERSTANDING WHAT THE CLIENTS WANT AND NEED'."

CHAMBERS UK 2015

"PARTICULARLY RENOWNED FOR ITS WORK IN RENEWABLE ENERGY, ESPECIALLY FOR ITS WORK ON WIND FARMS"

CHAMBERS EUROPE 2015



"...REPUTATION FOR BIG-TICKET OFFSHORE WIND MANDATES..."

LEGAL 500 UK 2014

"INTERVIEWEES ARE QUICK TO ACKNOWLEDGE THIS PROJECTS TEAM'S STRENGTH IN OFFSHORE WIND..."

CHAMBERS EUROPE 2013



"...UNDERSTANDS THE RISKS AND THE COMMERCIAL PART, AND PROPOSES SOLUTIONS TO SOLVE THE ISSUES."

CHAMBERS EUROPE 2015

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