Offshore Wind Joint Ventures - Structuring Considerations

The U.S. offshore wind industry has been a source of much excitement in the shipping community of late. The Biden administration has set an ambitious goal of reaching 30 gigawatts of offshore wind capacity by 2030, and accordingly, there is projected to be a substantial demand for the various types of purpose-built vessels that will be needed to serve the U.S. offshore wind industry.

The offshore wind industry in the U.S. has had a delayed start. Europe (as well as East Asia) has already had large-scale wind farms in operation and obtained the know-how running and maintaining these sites. Naturally, a non-U.S. vessel operator that has accumulated substantial experience would be eyeing opportunities in the U.S. However, as many of these vessels will need to comply with the U.S. legal requirements, which limit non-U.S. ownership and control of vessels that engage in the U.S. coastwise trade, such involvement by a non-U.S. operator is complicated.

An elegant solution to this mismatch is a contractual project-based collaboration or a joint venture between an experienced non-U.S. operator and a U.S.-based company that qualifies for Jones Act purposes. For example, in December 2020, Dominion Energy announced that the keel had been laid on its offshore wind turbine installation vessel, the first such Jones Act-compliant vessel under construction. Dominion is being assisted in this project by Seajacks UK, an experienced non-U.S. owner and operator of offshore wind installation units. Even more recently, U.S. shipowner Crowley and Danish offshore wind specialist ESVAGT have announced plans to form a joint venture to offer Jones Act-compliant vessels in the U.S. offshore wind sector.

Attorneys at Seward & Kissel have for years assisted clients in the maritime and investment communities in connection with joint ventures relating to shipping assets. This article discusses some of the considerations that need to be kept in mind when forming a joint venture in the shipping space, with a particular focus on issues relating to offshore wind assets.

75 Percent Citizenship Requirement

As many readers may be familiar, a U.S. federal statute commonly known as the Jones Act requires that vessels engaged in the U.S. coastwise trade must meet certain requirements. Such requirements are discussed in detail in this previous posting here. Because an offshore wind turbine located in U.S. waters is considered a "point" in the U.S., supplies or people cannot be carried directly to it from another point in the U.S. except on a Jones Act-compliant vessel. While it is possible to construct or service an offshore wind turbine utilizing non-Jones Act-compliant vessels (for example, a wind turbine installation vessel may employ a so-called "two-step" method), for a variety of different reasons, there may be a preference to deliver those services directly by utilizing a Jones Act-compliant vessel.

The most relevant of the requirements relating to a joint venture involving a non-U.S. operator is the citizenship test which requires the vessel owner to be at least 75% owned and controlled by U.S. citizens at each level in the ownership chain. The stringent requirements prescribed by the Jones Act can present challenges when involving non-U.S. investors who may not be keen on limiting their economic investment to the 25% threshold. There are a couple of established structuring options that can be employed to overcome such limitations, including tiering and the use of warrants (with the caveat that individual circumstances always need to be considered carefully in light of the statutory requirements and specific U.S. Coast Guard guidance on point).

Tiering – The Jones Act citizenship requirement has generally been interpreted to allow for economic dilution through tiers of ownership, in that 25% equity ownership in different tiers of the ownership chain may be permitted, so long as the non-citizen economic ownership does not exceed in the aggregate 49.9% of the vessel owner.

Warrants – The use of warrants which has been generally blessed by the U.S. Coast Guard (who oversees the issuance of certificates of documentation with coastwise endorsements) and fine-tuned over the years is another option. As detailed in our prior posting here, the economic value of the warrants can approximate the value of the equity stake that the joint venture would have received but without actually exceeding the 25% equity threshold. Other equity-linked instruments, such as options and convertible debt, may also be employed to achieve the same result.

Governance Issues

The 75 percent ownership requirement is, however, only one part of the Jones Act requirements. The "control" prong of the Jones Act requirements can also be a challenge, particularly where non-U.S. citizens have significant aggregate economic ownership percentages and expect to have an equivalent stake in management decisions. In these situations, the parties need to ensure that only limited control over the vessel is transferred to a non-U.S. citizen (especially as it relates to crew and vessel maintenance). The statutory language on this requirement is intentionally vague. Depending on the types of decisions the non-U.S. citizen would like to have approval rights over, the parties may be well-advised to obtain a private letter ruling from the U.S. Coast Guard that such approval rights are permissible.

Purpose and Duration

Depending on the type of vessels employed, the duration of a charterparty involved in an offshore wind farm project can vary. For example, a wind turbine installation vessel may only be in need, naturally, during the construction phase of the project, but crew transfer vessels or offshore service vessels may be needed for the entire life cycle of the wind farm, including during the decommissioning phase. A wind farm is designed to operate for 25-30 years, generally speaking, and the joint venture documents should be drafted with a specific purpose and duration in mind to clearly set forth the different rights and obligations between joint venture parties. The length of a joint venture or contractual relationship, which may affect the role played by the non-U.S. citizen joint venture party, may need to be analyzed in light of the "control" issue mentioned above.

Exit Strategy and Limitation on Transfers

In a similar vein, the parties should consider, especially if the joint venture is of a substantial duration, under what scenarios ownership changes are permitted (and to whom) and what the endgame of the joint venture should be. This may be a thorny issue in light of the Jones Act citizenship requirements. Typical contractual provisions in a joint venture agreement, such as right of first refusal and tag-along/drag-along rights, all need to be carefully considered in light of the particular circumstances. Similarly, dividends before the exit may or may not be possible – for example, interim dividends (before the exit) generally can be made to all equity owners in a Jones Act-compliant structure which is tiered, whereas in a structure that utilizes warrants, dividends could not generally be paid to the warrant holders, whose only significant option to exit, and receive a return on its investment, is upon the sale of the warrants.

The above merely represents some of the structuring issues to be considered; our prior posting on issues arising from shipping joint ventures generally can be found here.

As the preeminent U.S. maritime and offshore energy firm with extensive experience in all areas of capital formation, finance and Jones Act regulatory compliance, Seward & Kissel is able to assist new and established entrants into this area. If you have any questions, please contact your Seward & Kissel relationship partner.