WHITE PAPER

IP and Transnational cooperation contracts in the offshore wind energy sector

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Content

I. Introduction

There are a lot of different kinds of undertakings active in the offshore wind energy sector ranging from dredging companies to wind farm operators and everything in between. One thing all these undertakings will always have in common is the presence of valuable intellectual property and knowhow required to carry out their activities.

Intellectual property rights come in various forms and with differing sets of governing rules in each country. Even though a good deal of harmonization between the rights has already happened both on an EU and international level, differences remain important and can have a serious impact on your rights, especially when venturing outside of the European Economic Area. These different sets of rules can lead to uncertainty and reluctance when contracting in a transnational context.

The purpose of this White paper is to address the main issues and pitfalls when contracting about IP and when contracting in general, particularly in a transnational context.

A. Intellectual property rights

The basic rule that governs commerce is the freedom of trade. This freedom also entails the freedom to compete with others and the freedom to copy what they are doing. When one undertaking manufactures rotor blades, it cannot forbid – at least in principle - another from doing the same thing. However, when everyone can copy what you are doing, you have very little incentive to invent anything yourself. You might as well go see what your competitors are up to and copy what they are doing. Logically this would stifle technological progress.

To protect this progress and the creators that contribute to it, the legislator gradually started introducing intellectual property rights. These rights grant the owner a monopoly on the use and/or the commercialization of their creations.

Intellectual property rights thus limit the freedom to copy. It is important to realize that intellectual property was meant to be an exception to this freedom and not the other way around. Intellectual property rights will not grant eternal rights and are subject to several restrictions.

Intellectual property rights are not automatically granted to just every creation and are subject to material requirements. Copyright protection will for instance require the creative and free choices of the author. Some of these rights are also subject to formal requirements such as registration, the payment of certain fees and publication.

In other words, in order to protect your creations and to stop your competitors from copying your creations, the conditions to enjoy intellectual property rights must be met.

B. Types of IP

There are many different intellectual Property rights, each made to fit a different purpose. The different intellectual property rights seek to protect different types of creations and serve slightly different functions. Some intellectual property rights such as copyright will seek to protect the personality of the creator and not only grant economical, but also personality rights. Other rights such as database rights seek to protect the investment made to accomplish the database and offer solely economical rights. When contracting about copyright it will therefore be essential to also address the personality rights and not just the economic rights of the creator.

In order to build out an effective IP protection strategy, it is therefore essential to know which types of intellectual property are out there and what you can protect under each type.

Hereunder we will give you a brief overview of the most important IP rights for companies active in the offshore wind energy sector. This overview is however not exhaustive and is not in any way meant to serve as a comprehensive overview of the rights.

Intellectual Property Right	**What does it protect?**	**Examples of protected works**
Copyright	Original creations of the human mind insofar as they are expressed	Manuals, presentations, brochures, sculptures, original 3D works… (not mere ideas)
Patents	Inventions in all fields of technology that are new, involve an inventive step and are susceptible of industrial application	Engines, generators, artificial intelligence… but also production methods (regardless of whether the produced product is new or not)
Models	Appearance of the whole or a part of a product	Shape of a fuselage, packaging…
Database rights	Systematic collection of data	Database with monitoring data
Software Protection	Object code, source code and all preparatory works concerning the code	Any type of computer program or application.
Trademarks	any signs that are capable of: distinguishing the goods or services of one undertaking from those of other undertakings	Your company name, product names, logo's, but also colours, the shape of goods or of the packaging of goods…
Trade Secrets	Any secret information of any kind that has economical value because of its secrecy and is kept secret through appropriate measures.	Any kind of data you collect, business methods, certain know-how regarding a production method or process, recipes (e.g. for concrete), any inventions that are not patented…

C. Registration and maintaining your rights

Beware that some intellectual property rights require a registration before you actually receive them. These rights include patents, models and trademarks. Other intellectual property rights require no prior formalities, such as copyright or sui generis rights on data bases.

i. No registration, no effort?

So you automatically enjoy copyright, software and database protection, is that it then? Is that all you have to do? Well yes and no. Yes you need to do nothing else to get the intellectual property rights protection legally speaking, however proving that you own these rights in case you need to enforce them can prove to be a challenge.

When it comes to databases you could include within your database some minor errors or dummy data. This could be purposefully messing up the spelling of a couple of words here and there or certain senseless datasets that will not affect the users in any way as they will never really be accessed or used. When an infringer copies these mistakes, it proves that the infringer did not create the database through his own efforts, as he would not have made the same mistakes or recreate the dummy data if he had.

For all the other rights (and also for databases), fixed date registrations are a great option to prove that at a certain time you were in fact in possession of certain IP. Proving that you have the earlier right can be a pain in the neck, but a fixed date registration makes the process much easier. Hereunder there are some options that all have their own advantages and downsides:

- **Escrow**: through an escrow agreement with an neutral an independent escrow agent, you can deposit all your works with a third party. The escrow agent will verify that which he has received and then store the deposit safely.
  - \+ Flexibility of the escrow agreement.
  - − No fixed date in the legal sense, can still be disputed.
- **Timestamping**: you put a fixed and immovable date and time on all documents to indicate when you last made changes to them.
  - \+ Usually relatively cheap.
  - \+ Require no "middle man".
  - − Only irrefutable if a Trusted Service (under the eIDAS regulation) has provided it, which is not the case for most timestamping services.
- **I-DEPOT**: the Benelux Office for Intellectual Property offers an i-DEPOT service that allows you to deposit files up to 100 Mb in various file extensions including without limitation: pdf, docx, pptx, and zip.
  - \+ Relatively low cost.
  - \+ Infinitely renewable.
  - \+ Irrefutable and tested proof of the date of the deposit in a court of law.
  - − Updates or additions require new deposits.
  - − Limited to 100 Mb per deposit.
- Sending a **registered email to yourself**: Belgian law now allows you to send registered emails that have the same probative value as regular registered letters. In order to do this, you need to register with a Trusted Service Provider (under the eIDAS-regulation).
  - \+ Send as many registered emails as you like without being bound to a deposit.
  - \+ Low cost.
  - \+ Irrefutable as integrity is guaranteed under the eIDAS regulation.
  - − Registering with the service means that you will also accept registered letters from third parties via email. This practice has to be incorporated into your company.
  - − Relatively new and untested.

- Deposit with a **notary under minutes**: a notary will draft a minute proving the existence of the deposit, after which he will keep your deposit in his safe indefinitely.
  - \+ Fixed date in the legal sense and are absolutely irrefutable and indisputable in front of a court of law.
  - \+ The deposit will be kept indefinitely and there is no need for a renewal.
  - \+ Notaries can offer flexibility.
  - − You can only deposit material carriers of information (like paper).
  - − A deposit of an electronic data carrier only proves the existence of the carrier and not the content.
  - − The storage method of the notary might not be well-suited or even that safe. (e.g. no protection against magnetic fields, storage in a cupboard instead of a vault, etc.)
- **Registration**: you can register your documents at the registrar's office as well. He will stamp the documents which shows where and when the documents have been registered.
  - \+ The stamp is irrefutable.
  - \+ No need for a renewal.
  - − You can only have material carriers of information (like paper) stamped.
  - − Registering an electronic data carrier only proves the existence of the carrier and not the content.
- **Bailiff:** you can let a bailiff note the existence of a creation. He will note the existence of the creation in his minutes (*proces-verbaal*) and send the minutes with the documents to the registrar's office.
  - \+ The minutes are irrefutable.
  - − A costly solution, especially when it needs to be done regularly.

Conclusion: There are various options to choose from, but you need not be limited to only one choice. You can choose to obtain a fixed date for different documents in different ways. Depending on the sort of document and the volume that requires a fixed date, another option might be preferable.

ii. Focus: Patents

Patents are limited in scope, time and territory. The problem here is that patents are costly to obtain and maintain and you will not have the budget to patent every invention you make everywhere in the world. This means you will have to devise a strategy to protect your inventions as effectively as possible.

It is important to stress that anywhere that you do not get a patent, everyone will have the right to copy your invention <u>legally</u>. What's more is that they'll have all the information available to do exactly that as your patent will have to describe how to make or execute your invention.

a. When should you file a patent?

A patent can only be granted to new inventions. When you publish or start commercializing your intention before filing for a patent, you will take away your own invention's novelty. When this happens, you can no longer obtain patent protection for your invention.

That is why it's important to file for a patent prior to commercializing your invention unless such commercialization won't reasonably lead to public knowledge of the invention (for instance a production method that is only internally used can be kept a secret, whereas a newly developed generator will lose its secrecy when you start commercializing it).

b. Quo Vadis? or: where to get a patent?

There is no patent that will grant you protection in the entire EU. You will have to evaluate for country whether you think it's worth investing in a patent there, but how do you choose?

- The first choice will go to **countries where you are active** with the product or process that you want to patent or where you seek to become active in the future.
- The EU internal market allows a free circulation of goods within the EU borders. You can try to **block the entry points** by for instance getting a patent in every country that has a major port.
  By patenting your invention in the Netherlands, Germany, Spain and Belgium, you will cover the five biggest ports in the EU. Suddenly the foreign copies will have a much harder time even getting to the internal market.
- It is best to also cover all **countries with the necessary infrastructure and know-how** to recreate your invention.

This you will also apply on an international scale,

c. What don't you protect?

You will have to prioritize what you will protect as protecting everything will not be an option. Here you need to evaluate whether a patent will even be preferable?

Certain inventions will be much easier to hide from your competitors than others. Your processes will for instance most likely not be supplied to others.

Sometimes opting for **trade secrets protection** (which must be kept confidential instead of published) is sufficient as it will still allow you to act against corporate espionage.

Your custom software to operate your dredger will not only be difficult to recreate - as you would need the source code - you will also enjoy software protection as subsidiary right and the source code can additionally enjoy trade secret protection.

In other words, sometimes keeping something a secret is sufficient for your purposes. Sometimes keeping something secret will even be preferable, as it cannot be legally protected or that protection could do even more harm than good.

Common pitfalls: • Patenting your invention without a strategy • Making your invention public before filing a patent application

iii. Focus: trade secrets

Trade secrets are a special category of protection rights. Not an intellectual property right in the strict sense, trade secrets do not technically grant you a monopoly. They merely protect you against someone steeling your trade secrets. Trade secrets can be cumulated with "classic" intellectual rights, insofar they do not require publication.

So trade secrets will protection you against corporate espionage, but not against your competitors coming up with the ideas all on their own.

To enjoy trade secret protection, you have to keep the trade secrets a secret. This means that you have to take appropriate measures to achieve this. The more valuable a trade secret, the higher the standards for "appropriate measures" are.

a. Legal aspect

The legal aspect of trade secret protection is that whoever can access the trade secrets must be bound by a confidentiality obligation. If you are not bound by one, you can by rights disclose all this information. This means you have to include confidentiality obligations in your contracts with all employees, contractors, third parties you supply the trade secrets to such as your clients, partners etc.

This also means that before you start sharing your trade secrets in a negotiation, you first have to execute an NDA (see also *infra*).

b. Organizational aspect

Make sure that only the people who really need to be able to access the trade secrets, can actually access them ("need-to-know"). The marketing department will for instance not have any business accessing the exact ratios and mixing methods for your company's innovative concrete.

c. Information security aspect

Lastly, you will want to secure your trade secrets physically and electronically. The recipe for coca cola lies in a vault for a reason. Examples are encryption, passwords, badges to access certain sites or rooms, data rooms with no internet access etc.

Common pitfalls:

- Signing no NDA or one-sided NDA that does not protect you
- Insufficient data security measures
- Insufficient awareness employees

D. Other sources

As this white paper is not-exhaustive, it can be interesting to consult other sources as well in order to familiarize yourself with intellectual property rights. Hereunder we've included some interesting sources that can further help you on your way:

- If you want to know more about trademarks and designs, a good place to start is the official website of the European Union Intellectual Property Office. It contains a lot of practical information on the subject matter that will help you better understand the respective rights, as well as the registration process: https://euipo.europa.eu/ohimportal/en.

- For a more general overview, you can also consult the website of the Belgian Federal Public Service Economics which contains a handy overview of the different intellectual property rights and the applicable rules: https://economie.fgov.be/en/themes/intellectual-property.
- You can also find a more detailed overview of the most relevant intellectual property rights in "Ons Patent Boekje", a guide that was created specifically for entrepreneurs by IFORI for Flanders Innovation & Entrepreneurship which is freely available here: https://www.vlaio.be/nl/begeleiding-advies/groei-innovatie/intellectuele-eigendom/ons-patentboekje.

II. Cooperation

When working together with another undertaking in a national or transnational context, there are several key points that have to be considered when contracting. A lack of care could result in the loss of rights and the amounting of liabilities that could damage or even prove fatal for your undertaking. In this part we will go over the main issues commonly encountered when contracting[1].

A. Covering your bases: what rights do you have?

Even before negotiating with a third party, you should ask yourself the question "What rights do I have?" It is a simple enough question, yet many undertakings have only a general idea on what rights they have and often they have many assumptions that are wrong.

Intellectual property rights are an extremely valuable asset to your company and for some companies those rights will be more valuable than all other assets put together.

> *Everything from your brand, know-how to the products and the methods you use to deliver services has value. A first order of business should be to map out those IP rights and asses their worth. Only when you know which rights you have and what they are worth to you, can you meaningfully contract about them.*

i. Employees and contractors

You might start out a company as a one-person enterprise, but sooner or later everyone needs help. Virtually every company will at some point hire employees and contractors, yet too few pay much if any heed to intellectual property rights when executing those contracts. Many assume that if you pay to have something made, you will automatically become the owner, yet this is not always true. Undertakings need to realize that the intellectual property right to what their employees and contractors create for them are not always automatically transferred to them.

[1] Of course this list is not exhaustive, and serves as an illustration. It does not constitute or replace personal legal advice.

To complicate matters more, every country - yes even within the European Union - has a different ruleset dealing with the allocation of IP rights.

> *Where for instance a Dutch employee is assumed to transfer his copyright to his employer, a Belgian employee is not. In other words, it is essential for every undertaking - and especially multinationals - to familiarize themselves with the applicable rules concerning intellectual property rights.*

To illustrate the complexity of the situation, we've set out the allocation of various intellectual property rights under Belgian law:

IP right	**Employment contract**	**Independent contractor**
Copyright	No automatic transfer IP	No automatic transfer IP
Software	Automatic transfer IP	No automatic transfer IP
Patents	Courts usually accept automatic transfer IP (but not always)	Courts usually accept automatic transfer IP (but not always)
Model rights BX	Automatic transfer IP	Automatic transfer IP
Model rights EU	Automatic transfer IP	No automatic transfer IP
Database rights	Vests in investor	Vests in investor
Trade Marks	Vests in registrant	Vests in registrant
Trade secrets	No automatic transfer IP	No automatic transfer IP

As mentioned, this overview is only applicable to Belgian law. Other jurisdictions will have different systems. The main takeaway here is that contracting about IP with your employee and contactor is important, the same goes for contracting with directors.

Still, merely putting a general clause in the contract might be insufficient. Some jurisdictions will have stricter rules on contracting about certain intellectual property rights. Belgium for instance has very strict rules regarding copyright contracts. In order to prevent any unwanted surprises, we highly recommend you consult with a local IP-specialist when drafting your employment and professional services agreement templates.

Common pitfalls:

- Neglecting to provide IP transfer clauses
- Wording that is too general

ii. Suppliers

Logically your company will not produce all that is necessary to either produce your end-product or supply your services yourself. A machine will often contain parts from third party manufacturers, your software might contain licensed third party software and your maintenance works might require the know-how or licenses to the products you're performing maintenance on.

In law there is an adage that says "*Nemo plus iuris ad alium transferre potest quam ipse habet*", which means "No one can grant more rights to a third party than he himself possesses". This basic principle should be kept in mind when one works with suppliers (or requires their client to supply something). You cannot grant more rights to something that was supplied to you than the supplier has granted to you.

Hereunder we set out a few of the clauses you need to pay special attention to:

a. Granted rights

The supplier will try to protect his own intellectual property rights as well as possible. This is why you should always pay attention to licensing or IP transfer clauses in the supplier's general terms and conditions, as well as in any custom contract you execute with him (which also includes accepted orders).

You may want to secure following rights(insofar as is needed):

- the right to do with the supplied goods what you need to do with them (license acquisition) and
- the right to grant the rights to your customer that you want to grant (right to transfer and/or sublicense). In other words what you are looking for is the right license or transfer of rights to you and the right to sublicense to your client.

b. So you have the rights, but do you have the info?

Make sure you get all the documentation and information you will need to effectively use the supplied goods for your own purposes. Essential information or documentation can be attached to your contract with your supplier prior to execution. This can be used as evidence in the event the provided goods and services do not meet the promises made by the supplier or if the supplier failed to advice your properly prior to the agreement.

Alternatively, it can be useful to establish a specific obligation for the supplier to provide information during or after the performance of the agreement.

c. Representations and warranties

Do you get a warranty from your supplier? Does he promise you a certain service level? Why is this important to check? If you want to grant a certain warranty on your whole product to the customer, you want to make sure that your supplier follows up on those promises too. Otherwise you alone will be left to bear responsibility for not meeting the warranted quality of your product.

Say you are making a turbine with a capacity of 7MW. For this you need a part made by a third party. You order the part and you put it in your turbine. After you install the turbine, your customer complains the output is not satisfactory. The problem? The part supplied by the third party supplier is not up to the task and cannot handle the capacity. You complain to your supplier, but what do you base your claim on?

To avoid that you are left hanging out to dry, you need to make sure that the parts you order can handle exactly what you need your end-product to do. This you do by writing it into the contract and letting the supplier warrant that the product he supplies will be up to the task. Do not settle for a simple oral promise, put it in writing! Though an oral promise could be a binding warranty, proving it can be painstakingly difficult.

Other warranties that might need to be included in a contract are:

- Warranties that the contract has duly be entered and that the companies are duly represented
- Warranties that the products shall be compliant with regulation of a specific country or the rules of a specific country
- Warranties that the products are free to use and do not infringe a third party's rights
- Warranties with regard the availability (e.g. Service License agreements) or the continuity (aftersales, updates, …) of the products

Each Warranty should also be very clear as for the supplier will be hold the achievement of a specific result (deliver a product with specific and defined characteristics) or whether he should only take all reasonable steps to achieve a result (e.g. take all steps to ensure 99,9% availability of its services).

d. Watch out for the small print and prior conditions!

The conditions your supplier wishes to impose on you may often be stringent and may cause issues for your contractual framework. One example of an often seen clause that is anything but harmless is the so-called copyleft clause.

The copyleft clause is a recurring clause in open source software licenses that imposes a peculiar duty. It obligates the user of the open source software to license its own software under the same license terms as the open source software. The result could be that you would for instance be contractually obligated to make the source code of whole parts of your software available to your own licensees and to allow them to freely use and reuse those parts of your software. Incorporating third party software into your own software that contains a copyleft clause in its license is best avoided.

The simplest way of dealing with purchase terms and conditions is by protesting and taking them out of the equation. The buying power of the client can of course make a huge difference. If you cannot rule them out entirely, it is important to substitute the parts that are incompatible with the goods or services you offer or to specifically rule those out, regardless of whether you do this through a separate specific agreement with the client or by reviewing their terms and conditions.

Common pitfalls:

- Not reviewing general terms of clients
- Accepting terms because you believe they are “non-negotiable”

e. Take a look at the bigger picture

For starters, you will need to look at entire framework of binding documents, this may include the general terms and conditions of your supplier. These will as a rule be drafted to the supplier’s advantage and thus extremely one-sided. Sometimes, they may even forbid or go against the whole purpose of the contracts they apply to. In other events, you might be deprived of all rights relating to the products, which also means that you can in principle not do anything with the supplied goods.

If you also execute a custom agreement, you will have to pay attention to the hierarchy between contractual documents, which dictates which document will take priority in case of conflict. You must make sure the priority is given to the document that actually grants you the necessary rights, less it could be taken out by the document that does not.

Lastly there may be other documents that can have an impact on the granted rights. An order form may for instance be adapted to include an IP clause for instance.

f. Beware of custom-made or home-made templates

A tricky or unfit contractual clause does not necessarily arise from the other party’s bad faith or intent to bereave you of the ability to usefully exploit the supplied goods or services. Many templates of general terms and conditions and templates for contracts (so-called boiler plates) will have been drafted for general purposes and maybe not even with the suppliers activity in mind (e.g. if the supplier has purchased or copied a few templates just to make sure there was a legal framework without actually seeking counsel on the matter). Sometimes the supplier won’t even know exactly what their legal texts actually say and what their effect or scope is.

> *Keep in mind that in such cases, the easy solution is not always the good solution. Saving on a few hours of legal revision might result in years of judicial proceedings. It is always easier to tackle an issue prior to its actual occurrence.*

The key take away is that you need to invest the necessary time or resources to review all the legal documents to make sure that they fit your expectations and secure your rights. If this is not the case, don’t be afraid to negotiate! Mind that your supplier will also gain from the contract and is not just doing you a favour. Any terms you find will most likely not be a “take it or leave it” offer. If you are not satisfied with the terms: push back, if their response is not satisfactory: push back harder.

Common pitfalls

- Blind acceptance of terms
- No back to back provisions
- No warranties
- Text does not comply with the practical execution

iii. Awareness

It is important that the company and its relevant personnel is aware of its own intellectual property, yet this awareness is too often missing in undertakings.

A company is however quite often vaguely aware of what should be present in the company's IP portfolio, yet more often than not there is no catalogue of rights present. The company doesn't know exactly what is protected and what is not or which IP is theirs and which is not.

Leading under an assumption of what you have and what not can lead to devastating effects if later on in a conflict it is revealed that the assumption is wrong. Such wrong assumptions can lead to liabilities that could take down the whole organization with them.

a. Audit your organization

An IP audit, either carried out by the organization itself or a third party (such as legal counsels) will map out what valuable immaterial assets are present within the organization. This information is gathered via an audit of all relevant resources, such as contracts, protocols and through interviews with relevant stakeholders. A good audit should not only reveal what IP is present, but also lay bare the potential assets and the gaps in the contractual framework .

The findings of the audit will be converted into an audit report for the company, summarizing the findings and issues as well as determining priorities and value. Reading such an audit report can oftentimes be very sobering for the companies involved. The identified shortcomings will expose risks that might even threaten the company itself.

> *Example: a compliance support company whose profit wholly relies on the copyright and know-how vested in its content. An audit could reveal that the company neglected to transfer the intellectual property rights from its employees and contractors. In this case, the company would technically not own any of the rights to the content it provides, meaning that it technically speaking has no assets. The timely identification of this issue will permit to enter into additional agreements if needed, prior to any conflict*

A common finding in IP audits is that the name or logo the company uses and perhaps has used for many years is not registered or registered properly as a trademark. Moreover the trademark portfolio can often times encompass a patchwork of different trademarks that were registered by different people in different departments at different times. The diversity of stakeholders (different departments, different attorneys) often leads to an inconsistent – and sometimes – contradictory IP-Portfolio scenarios, which affect the overall value of the assets.

When a company does not even know at a central level which intellectual property is present, there is hardly any chance of the employees and contractors being aware, which may lead to behaviour that unknowingly puts the company at risk, such as a sales department granting licenses on intellectual property that is simply not theirs.

Another element that will be revealed is what third party intellectual property is present and the terms and conditions of its use. The company may even be in breach of those terms opening it up to liability.

b. Take action

With the issues identified, the company should map out a plan of action to take action. You should identify what need is most pressing and requires immediate attention, e.g. setting your contractual framework in order.

The next step would be to make the necessary budget available and to start tackling the existing issues in order of priority.

One of these steps that is often overlooked, but vitally important for many companies, especially those who have valuable trade secrets, is the awareness of employees and contractors. The people on the ground need to be made aware of the importance of intellectual property and how to deal with it. E.g., when a data breach is detected, who should the employee report to? How do you access sensitive files, how to handle them, how to maintain security (e.g. not accessing files from your home computer), what to do when you accidentally gain access to something that should be impossible to access?

Firstly there need to be proper protocols and guidelines in place. When measures need to be implemented to guarantee e.g. data security, these should be taken and incorporated in the protocols and guidelines. These protocols and guidelines also need to be made available to the relevant personnel.

Specific procedures should be made as for who takes decisions regarding IP-protection. Ideally, employees likely to deal with IP-issues should also have a single point of contact to ask for advice or report issues to that they might encounter. The personnel should also be trained when necessary to teach them how to deal with intellectual property and trade secrets in practice.

This also means setting up an internal reporting system and structure that allows the employees to report any issues they discover.

c. Monitor & keep up to date

A last, but crucial step is monitoring your intellectual property and trade secrets.

A first element of the monitoring is monitoring third parties for possible infringements (e.g.: third parties selling counterfeit products with your logo).

> *A rival company might for instance start using a similar name to the name of your most popular product. The question must be asked whether you have a trademark for that product and whether you can or should take action. If the product is not trademarked, this needs to be assessed as well: should it be trademarked, why was it not trademarked, do we need to change our protocols and guidelines?*

Even though, customs and police are usually competent to enforce and secure your rights, they often do not have the resources to detect and prosecute all infringements.

Besides the external monitoring, you should also implement internal monitoring. Setting up a good system only lasts a little while. You need to actively maintain the overview of your IP portfolio and on the measures taken to protect your intellectual property. The status of the IP protection should be regularly evaluated and adapted as necessary.

Any licenses granted by third parties need to be monitored as well. The company must maintain overview of what rights it has granted to third parties. In order to facilitate this monitoring, it is advisable to implement reporting duties in the agreements with third parties.

Common pitfalls:

- No inventory of IP present
- No follow up on audit report
- No long term strategy
- No enforcement of IP rights

B. Contracting

We have provided hereunder a summary of the most pertinent clauses that need to figure in your commercial and labour contracts.[2]

i. Non-disclosure

The purpose of a non-disclosure or confidentiality agreement or clause is to keep sensitive information, exchanged in the framework of the negotiation or the agreement, secret, based on a contractual and freely agreed obligation.

As a consequence, this should first reflex of companies before negotiating, and in any event, before exchanging commercial sensitive information.

Beware that just any NDA or confidentiality clause is not allowed. If poorly drafted or drafted in accordance with common law (e.g. English or American law), it might not be unenforceable in European countries. You will then loose the entire benefit of the clause.

a. What exactly is confidential information?

It is important that you take a second to define confidential information. You cannot simply say: it's all confidential, because it is not. Clauses that are way to broad will run a chance of being so unclear that a judge will limit its interpretation, perhaps more narrowly so than you would like.

b. What do we include?

There is no legal requirement of how confidential information should be detailed.

A global description of what nature of information (e.g.: product pricing) or the circumstance of their exchange (e.g.: data exchanged with regard to stability study) is in most cases sufficient.

[2] This list is not exhaustive and is based on the most recent legal texts and recommendations, as well as the current state of judicial decisions. This list may vary form time to time and needs, in all cases, to be tailored to the specific needs of each contract.

For instance trade secrets, business methods, financial data etc. are the usual suspects. To avoid discussions most NDAs and confidentiality clauses will add that all information marked as confidential, later on confirmed in writing as confidential or that by its very nature reasonably needs to be seen as confidential will constitute confidential information. All other things, whatever may be left, are free game.

Sometimes situations will call for a detailed list of all that is confidential. The parties could for instance add documents to the list whenever they share them. The plus side to this approach is that it leaves no room for discussion, the downside is that it requires a lot of administration and mistakes are bound to be made.

If specific information will be shared, for instance the contents of a pending patent application or an i-DEPOT, it is best to include that information explicitly in the definition or to add a non-exhaustive list of specific information that in any case needs to be considered confidential information.

c. What are the exceptions?

Leaving it there is a big mistake. You have just created a very broad definition and you need to tone it down, for your own sake as well as your partner's. Several things need to be taken out before you commit to keeping things a secret that make no sense to keep a secret, among others:

- information that is publicly known, and/or
- information that you already have in your possession, develop completely independently or that you receive from a third party,
- information that was publicly disclosed by the owner after entering the NDA;
- Information that should be disclosed following a court order or the injunctions by a governmental agency In this case you have no choice but to comply, so this situation should not be considered a breach of contract either.

d. Does the blade cut both ways?

What one often sees are NDAs that only protect one party, namely the party that has drafted it. If you are asked to sign a NDA, make sure you check it for reciprocity. Otherwise your confidential information will be free game for the other party!

e. So we keep it confidential, but for how long?

NDAs are often not subject to a fixed term. After all why put a term on something you could keep confidential indefinitely? In civil law countries and in more and more common law countries such perpetual obligations are forbidden. Every party has the right to unilaterally terminate a contract upon reasonable notice if no term or an unreasonably long term is agreed upon.

In order to avoid such a situation it is advised to always foresee specific ending-terms that lets the confidentiality obligation survive a few years after the NDA is terminated.

f. So, are you just going to leave it lying there?

The contract is over, the parties have shared their confidential obligation, but now they are going their separate ways. Once this happens, you will have no regard over what your partner does with you information, especially if he decides to use it after several years.

To avoid that you partner just keeps all confidential information and starts using it after the confidentiality obligation has ended, you should provide an obligation to either return or destroy all confidential information the parties have left of each other.

g. Be dissuasive

Agreements are only as stringent as their enforceability. The only way to secure your partner's adherence and commitment to its obligation is to make sure there is absolutely no financial incentive for him to disclose the information. Hence NDA's and confidentiality obligations should foresee a lumpsum indemnification for each breach that can be proven.

This lumpsum indemnification should be both indemnificatory (meaning that it should compensate the damage following the breach) but also dissuasive (without however being punitive).

In order to make sure that you can prove breaches, if there are any, NDA's should also provide the faculty (and the modalities) of conducting audits (if need be by third parties).

Common pitfalls:

- NDA is not suited to the applicable law
- One sided contracts leave confidential information exposed
- No exceptions to an a very broad definition
- Confidential information is never properly destroyed or returned

ii. Back to back contracting

As mentioned hereabove, you should never grant your own clients more rights than those you have received yourself from your supplier. What you can do however is make more promises than your supplier has.

If for instance your supplier warrants that the machine part he supplies will function when submerged up until 10 meters, you could promise to your client that the machine you build will function when submerged up until 20 meters. If the client then uses the machine at 15 meters and it breaks down because the machine part that was supplied by a third party has failed, your client will be able to call upon you for repairs, but you won't be able to call upon your supplier.

It is for this reason that all promises made by you should aligned with the promises your supplier has made to you. This is called the "Back to Back" principle.

This may seem simple enough, but the problem is that ultimately what you deliver, be it services or goods, will be much more complex and will exist of multiple elements, themselves built up from elements supplied by multiple third party suppliers. It is easy to lose track of the chain of supply warranties. Moreover, always choosing the lowest common denominator may lead to a race to the bottom where you end up promising nothing at all to your client.

Many suppliers will in fact do just that by stipulating that the supplier doesn't guarantee that the supplied goods will be fit for any purpose and that they disclaim any warranty whatsoever. This is not a wise solution since most of the regulation on sales contract forbid for the seller to exclude his warranty of his main obligation (i.e. to deliver a product meeting the specifications set out in the agreement with the buyer).

Possible alternative solutions would be to draft a specific clause with regard to product specifications or to explain the expectation of the parties in the preamble on the agreement.

> *To get back to our example, there are two ways to avoid being the party that ultimately bears the risk of the supplied part failing. Either you could promise that your machine only functions when submerged up until 10 meters or you could get your supplier to promise that his part will function up until 20 meters. In some cases the former may be necessary, for instance when you simply cannot find a supplier that can produce the required machine part that will function at that depth. In other cases the latter will be the only option when your customers require those depths, less they would take their business elsewhere. It may be required that you negotiate the creation of a custom made part in that instance and further going warranties may end up costing you more. Still risking liability can result in far worse.*

Most of the time, a contract specifies that goods or services are supplied "as is", reducing significantly the possible actions against the providers and suppliers. In such cases, you always should revert the same limitation on your own customers.

Common pitfalls:
• Warranties to clients are not aligned with warranties from suppliers • Not negotiating with suppliers for better warranties

iii. Supplier Codes of Conduct

Many companies will push a supplier code of conduct onto you, arguing they are a standard practice. Some codes of conduct will impose hard obligations where others will only require you to try your best. Most will have a combination of both. Keep in mind that a code of conduct is part of the contract and will be binding on you.

a. Just you or your suppliers as well?

The first thing you should watch out for is the extent of the code of conduct's reach. A code of conduct could simply just bind you, but most codes of conduct will obligate you to impose on your own suppliers the same or a similar code of conduct.

> *Say you are a consultant on compliance with environmental laws. Does this mean that you would suddenly have to impose the code of conduct on the supplier of the online legislation database you have a subscription with? Technically yes, though most likely no one will ever check. If however a serious dispute were to arise between the consultant and his client, the client can use the code of conduct as extra ammunition.*

Unless you yourself have a code of conduct or you are active within a sector where codes of conduct are a best practice, it may be best to push back and take out the obligation to impose a code of conduct upon your own suppliers.

b. The law is the law!

There are certain provisions that are present in almost any supplier code of conduct that will be simple reiterations of what the law has already prescribed. These should pose no issue.

However, some codes of conduct will refer to foreign laws. In these cases you should push back and limit the scope to the laws actually applicable to you.

c. Follow our lead

One of the more problematic provisions are provisions that require you to model yourself on someone' else's conduct (business processes, accounting workflow). These conducts are not often published or specified and can be far reaching. Binding yourself to carry them out is mostly a bad idea. Even though the enforceability such clauses can be questioned, they will certainly be invoked if a dispute arises from a disturbance in the business flow (e.g.: a contradiction in accounting documents).

d. Wait, which code was yours again?

When supplying to multiple clients, you will probably amass multiple supplier codes of conduct that all impose different rules. It can be hard to keep an overview. Perhaps the best course of action is to create a list of acceptable clauses and check every code of conduct you receive. By pushing back in accordance with the list, you will hopefully be able to keep a somewhat coherent framework of codes that apply.

Common pitfalls:

- Ignoring codes of conduct or blindly accepting them
- Amassing different applicable codes of conduct that may contradict each other
- Provisions that undo the negotiated contract

iv. Termination clauses

The grounds for termination will be one of those parts of the contract to which the parties pay particular attention. For instance in case of simple breach, you want the option to cure the breach before your client can terminate the contract.

Keep in mind that :

- No one can held forever in a contract, hence you should always foresee a way to freely terminate the contract. This possibility should however be subject to a reasonable termination time and/or termination indemnity.
- Specific termination grounds can be provided when one of the partners commits gross negligence or wilful misconduct, which would result in a breach of mutual trust and terminate the contract automatically. As the exact extent of the severity of the breach is often subject to discussion, it might be wise to

foresee a non-exhaustive list of circumstances. Further, it is usual to specify a lumpsum indemnification fee that the breaching party will have to pay.

- Finally it might be useful to provide specific circumstances where the contract will automatically come to an end without any specific fault of a party (insolvency procedures, force majeure…)

It is also advisable to specify which obligation shall outlive the termination of the agreement (confidentiality, liability, non-compete).

Beware that termination clauses can be hidden in codes of conduct or in terms and conditions, in which case they may conflict and/or complete the termination clause in the main agreement.

v. Taxes

All kinds of taxes may be applicable. You have your standard VAT, your income taxes, withholding taxes, import taxes etc. Tax law is by default a complex business, add transnational elements and a slew of tax treaties to the mix and it is enough to make even a seasoned tax lawyer sweat.

a. Make sure your contract party makes an effort

It is common for suppliers to offer everything at a price exclusive of all taxation and to shift the burden of taxes onto the buyer. However, one should bear in mind that the taxable party is in most cases the only one who can apply for exceptions. There may be no incentive at all for the taxable party to apply for those exceptions as he can simply bill the other party anyway.

It is for this reason that you may want to stipulate that the taxable party will put in every reasonable effort to apply for tax exemptions or tax reductions under applicable law, which may include tax treaties.

b. To shift or not to shift? That's the question!

In the inverse situation, when confronted with a client from a faraway country that is subject to foreign taxation regimes that may even be written in a foreign language that you don't understand, you may want to shift the tax burden to that foreign client.

Be sure to list all the kinds of taxes that you transfer the burden of to your partner and make sure to write a complete and comprehensive clause. Ambiguities will most likely be interpreted against the favour of the taxable party.

Common pitfalls:

- Not forcing the taxable party to assist in obtaining exceptions or reductions
- No right to charge back taxes

vi. The supply of goods

a. Incoterms

One of the most commonly used standards in supply contracts must be the Incoterms. These are a set of simple indications that govern the transfer of risk, the place of delivery, where the obligations of the supplier end, where those of the buyer begin, the insurance of the goods, who has to take care of customs formalities…

Incoterms are supposed to be standalone terms that shouldn't be modified any further. The whole idea is to create legal certainty reduce transaction costs by using international standards that everyone knows and understands. Yet it is one of the most commonly encountered "sins" that companies start to adapt and amend those standard terms.

> *For instance, a supplier will very often offer ex works (EXW) delivery and charge additional fees for shipment, however when the supplier offers shipment, the contract shouldn't be called an EXW delivery at all (instead CPT would be the more suitable incoterm).*

b. Just goods or services as well?

Goods can be delivered "as is", though you could also provide the service of installing the delivered product. Having the goods installed will usually be the best option, though there may be a variety of reasons why a customer would not opt for this.

> *He may for instance have the necessary personnel at hand to do the installation and the extra costs of installation may not outweigh the advantage of having it installed or the supplier may not have the necessary know-how to incorporate their product into your setup. Yet one should watch out for other clauses impacted by this choice.*

If a party decides to install or implement a good by itself or a third party, he might lose certain guarantees and be held liable for damages resulting for faulty installation.

When having goods installed, you should keep in mind that the supplier adheres to all safety protocols in place. It is important to alert them of these protocols in advance so that they can be communicated in time to the workers.

c. Retention of title

A much used protection of the supplier of goods is the retention of title clause. This clause will basically allow you to retain ownership over the delivered good until the good is fully paid-up for. This is especially interesting if your client enters in an insolvency procedure, since you can claim your goods back directly with the curator.

> *Say you sell rotor blades to a developer, deliver them and the day after delivery your client goes bankrupt and you still haven't been paid. If you retained the title of ownership, you can simply go and collect the rotor blades again.*

Do note that retention of ownership will in most jurisdictions only be open to moving goods. Once it is installed and becomes part of an immovable good, it will become immovable by incorporation, which means you can no longer recover it. Any rotor blades lying around can in other words still be collected whereas those that have already been installed cannot.

d. What to do when there is a lack of trust?

Lack of trust is a classic issue in high commercial value contract entered between parties who have never met.

> *Say you get an order for a highly specialized and expensive product from a client that you have never heard of in a country somewhere in Asia. The sale will bring in a lot of money, yet you do not know if you are ever going to see any of that money, so you ask to be paid up front. Your potential client may be thinking the same thing. Who's to say you will deliver the product at all? So the client refuses to pay until the product is shipped. This whole situation of mistrust may be what's preventing a lucrative contract from being executed.*

One technique to tackle trust-issues is the escrow agreement. Here the parties enter into a parallel agreement to the sales contract. This parallel agreement is called an escrow agreement and it is executed by the parties to the sales contract and a neutral third party, the escrow agent. The buyer will pay the sums due to the escrow agent who will hold it until the conditions of the escrow agreement are fulfilled. These conditions can be anything, but could for instance be a clean bill of lading by the carrier of the good. In this case, the escrow agent would release the money and the seller would get paid. If the seller cannot meet these conditions, the money will be returned to the buyer.

Alternative solutions to bridge the trust-gap are among others: documentary credit or specific insurances.

Common pitfalls:
- Modifying Incoterms
- Not obtaining the necessary know-how
- Warranties that do not take changing conditions into account
- Automatically not contracting because of a lack of trust

vii. Services

a. Who is the service provider to you?

The range of service providers you might call upon is wide, going from the "one-shot" independent contractor to more lasting situation like a commercial agency. Most of the time the internal qualification of the parties will be sufficient to determine the exact nature of the contractual relationship.

Beware that specific mission or contractual obligation are susceptible to induce the existence of a specific distributorship, agency or employment relationship. Even if you exclude the application of the specific regimes by contract you cannot prevent requalification by a court at a later stage. Requalification by a court of law can also not be contractually excluded.

b. Maintenance

Maintenance services will quite often be offered by the manufacturers of the equipment that needs maintaining. This also means that there is somewhat of a conflict of interest between the manufacturer-service provider and his client. The manufacturer will want to bind the client to him and the client will want to get the best terms on the market, which may very well not be offered by the manufacturer.

Good documentation and a duty of collaboration is primordial if you want to rely on third party maintenance. It is also wise to provide an incentive to respect this duty. Especially when working with fixed price contracts, it is important to stipulate that extra work or costs resulting from an absence of the necessary documentation falls outside the fixed price.

As a supplier of goods, you may want to bind the client to you for future maintenance services to the goods you've delivered. All the things the client needs to watch out for, are also all the tricks up your sleave to make sure you are the first choice for providing maintenance.

An obvious advantage you will have is that you have all the intellectual property and know-how. You know how the system works better than anyone else does. When you share technical information it is best not to share it all. After all over-sharing will take out your competitive advantage.

To tie in to the question of warranties, a good way of incentivizing your client to choose you for maintenance services is by making your warranties conditional upon your continued maintenance. After all, you cannot predict what a third party might do to your goods, but you do have full control over your own maintenance services. Even if your services are more expensive, a client may be swayed by a warranty you offer in return.

c. Service level

What service level is offered? This question will be of vital importance for the client and constitutes as a vital component of the services.

> *Say you hire a contractor to fix broken brakes for your windmills. A broken brake might result in catastrophic damage to the wind turbine and must be handled as soon as possible. Your contractor may have the right expertise, tools and know-how at his disposal, in fact he might be the best in the business, yet time is of the essence, how fast can he get there? Within 24 hours? A week? Does he deliver his services in the weekends and on holidays?*

The more important the services to the integrity of your operation, the higher the service level will have to be. Time is only one aspect of this. Who will your contractor send for instance? Are there different priority levels and who decides these? Is fixing your turbine an obligation of means or result? What responsibilities does your service provider have? Is he liable for failure? Does he provide a guarantee for his work? What guarantees does the service provider give regarding business continuity? What will the service provider do to prevent that they go out of business?

d. Access to the site or specific information

If is access to the site is required for the services, rules regarding safety of the workers, guarantees and appropriate access have to be included in the contract.

A dimension to this that has in recent years been the hot-topic in contract law is personal data. You cannot just require a list of names and addresses with all kinds of other information that you do not need. The client has to carefully consider: what information do I need, why do I need it and for how long do I need it for. You will be processing this information, so it is important that the processing is done legitimately in accordance with the rules set out by the GDPR and other data protection legislation that may be applicable.

> *When workers come on site several things might be important to know such as the name and photograph of the worker to check whether or not he is who he claims he is. Other data may be good to know, but not absolutely required, such as what language the worker speaks. Other data you will have no business knowing, such as what hobbies the worker has. Every processing activity needs to be examined in casu.*

A basic rule of thumb is that if you cannot find a good reason to ask the information, you shouldn't be asking it. But even if you do have a good reason and a legitimate basis for processing the personal data, you cannot store that data on your servers forever. Remember to determine a period during which you will keep the data and after which you will delete it.

e. Data silos

A lot of the operations of a wind farm can be left to others, to the point where even the windmill itself is not operated by the owner of the farm.

> *For instance in some exploitation models the wind farm owners will not actually buy windmills, but buy gigawatts instead and they leave it to the supplier to build the windmill and operate the actual turbine. This is where we risk falling into data silos which can have catastrophic failures as a result.*

An open and free flow of information where all information is processed at a central level can prevent the data silos that might arise because of this. In practice it turns out that preventing data silos is much harder than it looks as the individual stakeholders may be unwilling to share all data or because the operator is simply not aware of the very real risks data silos may hold.

Increasing the efficiency of a windmill's turbine will for instance also increase the frequency of the oscillations created by the turbine. In turn, the concrete foundation, rotor blades, fuselage etc. could deteriorate way faster than anticipated, resulting in a shortened lifespan of the windmill and the need to decommission of the windmill much sooner than expected. When the operator of the turbine possesses the necessary data on the other parts of the windmill, this situation can be prevented, avoiding a financial disaster for the stakeholders.

It should be noted however, that data silos can be justified when protecting proprietary information. Not all information has to be shared, but critical information that potentially affects the lifespan or efficiency of the windmill should be available to the operator.

Common pitfalls:

- Including provisions that risk requalification
- Not concluding a written contract at all
- Fixed prices that do not take a lack of information into account
- Providing no incentives for the client to also choose you as a maintenance services provider
- Ill-suited service levels (or none)
- Forgetting the GDPR
- Data silos

viii. Development

Quite often there will be a combination of the supply of goods and services in the sense that services are provided to develop jointly a new and original product. The context of development however poses its own complex issues in terms of liability, property of the products & technologies, product life cycle, etc.

A specific issues is to define as from when a contractual phase starts and where it ends within the chain of subsequent obligations. It is also important to agree on specifics such as when an obligation is properly performed.

Parties are free to establish their development strategies as they see fit. However two basic types are often used.

The "waterfall" development type consist ins cutting the process up into separate parts (milestones), which are agreed on beforehand. This process is most suited to companies that know exactly what they want and the process of development can be set out from the start. The requirements of the end-product will be defined from the get-go and the entire process will be aimed at creating that. This bring great clarity and security about the obligation of each party. However milestones are not very compatible with flexibility during the contractual process.

In contrast we have the so-called agile development methods. While there are many different kinds of agile development, they do have in common that they allow for much more flexibility when developing the end-product. In this type of development, relying on close collaboration and reactivity, parties define a mutual purpose or solution. Milestones are set along the way as it will become more and more clear where we are heading

Of course there are downsides to agile development; such as the uncertainty of the final product or the estimation of the costs.

Common pitfalls: • Choosing a development style that is ill-suited for your purposes

ix. Transfer and license of intellectual property rights

Acquiring goods with embedded technologies requires, next to the purchase of the hardware, a license to use the intellectual property pertaining to said goods. Whilst, implicit licenses can in most jurisdictions be assumed based on the circumstances of the contract, it is always safer to clarify to what extend said rights are granted or transferred. Saying nothing in a contract, therefore means leaving the door wide open for all kinds of discussions.

It is also advisable to define clearly (and when possible exhaustively) what parties means with "intellectual property". They should also specify for each license:

- The material, territorial and temporal scope of the license
- The purpose of the license

- The nature of the licensed right and the good protected by the license
- The party who grants the license and the party of the benefits from it
- The conditions under which the license are can be assigned, transferred or terminated.

Whether you should use more general or more specific wording of your Intellectual property clause depends on the circumstances of your contract, the economic value of your rights and the flexibility you wish to inject in your contractual relationship.

> *When you for instance hire a contractor to develop software for you, you may want to stipulate that absolutely all intellectual property of any kind in the broadest sense possible, including any know-how developed in the process or that's even remotely useful is transferred to you. Say that you on the contrary did not specify that you wanted all intellectual property rights, but only the software rights to the software developed by the contractor. In this case you would technically speaking not get any use out of patented software, as you would need the patent rights to exploit it and the patent rights weren't transferred. The same goes for all know how related to the software that is not in itself protected by software protection. In this case, a broad definition of "intellectual property rights" is preferred.*

In other words broad definitions come in most handy when you really intend to capture all aspects.

> *When for instance clarifying that "all intellectual property rights remain the exclusive property of the parties and no rights to them are granted except for the rights specifically granted in this agreement", it is clear that the parties do not wish to limit the scope of the definition of intellectual property rights at all. It serves to eliminate any discussion regarding implicit licenses and transfers. A broad definition will actually provide legal certainty in this case.*

Still, a very broad definition of intellectual property will not exempt you from following strict contracting rules if such may exist. For instance under Belgian law, you will still need to specify the modes of exploitation that will be transferred when contracting with a natural person.

x. Allocation of intellectual property rights arising out of the performance of the contract

As mentioned above, the intellectual property rights may not transfer automatically and various intellectual property rights may operate under various rulesets. For this reason you will need to address it as comprehensively as possible in the contract.

A client will want to get the ownership to all the intellectual property rights, but the supplier may not be willing to just give this up. A first reason is that there may be some of his own IP incorporated into the product that he would rather not transfer, a second reason is that the newly developed IP may be reusable in future projects. Especially in products such as software licensing will be the rule, transfer the exception.

Even if one chooses for transfer, the question still remains when this transfer will take place? The client will want it as soon as it's created, but the supplier will want to hold back on the rights transfer until he is paid in full. A commonly found condition is that IP will only be transferred to the client upon full payment of all sums due.

One should also incorporate a duty to cooperate for the non-receiving party. This obligation of cooperation should be applied both during the registration or the obtention of the IP rights, but also in order to defend and enforce said rights. The cooperation clause should also define whether additional remuneration shall be due to the cooperating party.

a. IP supplied by the client

In some circumstances the client will provide some intellectual property either for the development of a new product, improvement on the IP or in the form of input on the basis of which new IP is created.

Usually the IP will just remain the IP of the client, yet there are several reasons why the supplier may want to obtain a license to the client's IP. The IP that is supplied by the client will after all be used to produce new IP. If the supplier wants to reuse the newly developed IP in the future, such a license will be required.

b. Granting the necessary licenses

It must be mentioned that even though protecting IP will be the supplier's main objective, the client does not want a product that he cannot use. The client needs to receive the necessary rights to use the product. For instance when selling software, the client will require a license to use that software, which in practice means a license to let his employees use the software. Standard end-user license agreements (EULA) are not necessarily suited for the buyer's needs. It is of course the client's responsibility to push back and negotiate the rights he requires.

The supplier will want to limit the scope of the license grant. An unlimited license to do anything and everything is not a good idea. Limiting the scope to what is necessary will prevent a possible loss of rights.

c. What about improvements?

Say someone who buys your product improves upon it, what becomes of the IP to the improvement? In some circumstances it will be preferable to provide a grant-back or license-back clause which will let the IP to the improvements flow back to you. This way you can prevent being cut-off from any future developments yourself.

For cases of co-development, we refer to part C. *Co-creation contracts*.

d. Keeping your IP yours

Say you have developed a new coating paint to prevent corrosion of steel structures at sea. You competitors may want to secure for themselves a sample to take it apart and see what gives you an edge over their product. Can you stop them from copying your product?

Patent protection may be an option, but as mentioned hereabove, patents are limited in time and space and require you to publish the details of your invention. However, a patent is not necessarily the only way forward.

The exact formula and production method of the paint may be protectable as a trade secret. As mentioned before this will require you to take the necessary steps to protect the secret. As the client will have access to the finished product, a confidentiality obligation should be imposed on him as well.

One other element here that needs addressing is reverse engineering. In the whole of the European Union reverse engineering of products is allowed by default, meaning that if you want to prevent anyone from learning the secrets behind your product, it is best to contractually prohibit the reverse engineering of it. This way you can prevent your clients from taking your invention apart and learning your trade secrets.

e. What after decommissioning?

Your IP is valuable and may even make up the most valuable asset in your company. While a reverse engineering prohibition may take care of competitors actively seeking out your products laden with your IP, the question is what happens after the client is done with it?

Say you have very valuable software and you forbid your client from decompiling it, what happens after a client renews his computers? The client may sell off all his old computers to whomever is still willing to pay for them. Your competitors may have a particular interest in obtaining one in order to extract the software and decompile it. You can either prevent this by only offering your software as a service (SAAS) or by contractually obligating your clients to delete the software and wipe the hard drive clean using a certain protocol.

The same thing goes for actual physical parts of the windmill. Say you have not taken a patent for your generator, and instead you've opted to simply keep the workings a secret. In this case you might want to take extra precautions and specifically stipulate in the contract that the generator you've supplied has to be destroyed upon decommissioning or returned to you instead. Not doing so could mean that your generator will find its way to your competitors after decommissioning, risking your know-how leaking out.

Simply putting all this in the contract will of course be the first step, next is enforcing it. As with confidentiality, a clause can be built in that allows you to demand the return of your product. To further incentivize your client, you could also offer a free decommissioning service where you will uninstall and collect the product yourself. This service could be offered both in the case of decommissioning of the windmill or at the end of life of your product.

In short if your IP is valuable to you, you should look ahead and think about a post-contractual stage as well as a contractual stage and pre-contractual stage. At no point do you want your competitors to get your hands on what you've worked so hard on to develop and protect. Don't allow your IP to just lie around somewhere.

xi. Ownership of the data gathered during the agreement

Any data gathered during the performance of services or when using the product will be valuable to both parties.

In all events, data-ownership clauses should take into account :

- The data needs to be submitted to a proper confidentiality clause.

- In some circumstances, the data provider will have to protect his data against certain use by the client, such as reverse engineering. Those clauses will of course be very hard to enforce.
- A distinction between the data and any interpretations or creations with the data by the service provider, such as graphs and databases.
- The continued use of the data by the parties after termination of the contract.

Data ownership may be something that a client will refuse to transfer, yet the live data that was gathered is a veritable goldmine for the further development of the services and tools used by the service provider such as his AI, methods or other IP. The service provider may for these reasons want to obtain a license to the gathered data, yet as a client you should limit the scope of the license to a use for strictly internal purposes and under the same confidentiality obligation as imposed by the contract.

The client will be using the supplied goods in practice, creating a whole lot of data and a lot of know-how in the process. This data and know-how is of course a genuine gold-mine for the supplier to learn of the performance of his own goods. A good course of action for any client that does share this data, is to stipulate that it may only be used for internal uses.

Common pitfalls:
- Leaving data unaddressed in your contract
- Neglecting to accurately scope your license
- Not addressing the post-contractual stage in your contract
- Insufficient measures to protect trade secrets

xii. Dispute resolution clauses

Transnational contracting will lead to discussions on what law the parties are going to apply to the contract and what court will be competent. Leaving it open will force the applicable conflict of law rules to apply, however these rules can still leave room for discussion especially when contracts aren’t limited to the European Union.

a. Applicable law

Conflict of law rules are flexible when it comes to the choice of law. In most cases the parties can freely choose whatever law they like. This principle suffers however from a few exceptions such as contracts with respect to immovable property, contracts with employees and contracts with consumers.

As an additional remark, special legislation may apply that is of international public order. This does not prevent another law from being chosen, however the specific rules of international public order that are applicable to the relation between the parties will forcibly be applied regardless of the chosen law.

An important element in picking an applicable law is not undoing your choice by allowing the chosen law’s conflict of laws rules to apply. Another important element when delivering goods is considering the Convention on Contracts for the International Sale of Goods (CISG). This convention provides material rules for the international sale of goods that apply automatically but can be opted out of. In most cases parties will choose to opt out, though it is important to remember that you have to actively opt out, otherwise the CISG will have to be applied.

b. Competent judicial or arbitration court

As with the applicable law, if no competent court is chosen, you will have to look at the conflict of law rules to check which court is competent.

Perhaps important to note is that one court will almost always be competent under the standard rules and that is the court of the other party's place of incorporation. Basically you can almost always sue the other party at his home base, though if a venue has been chosen, the other party can still deny that court's competence.

There are a variety of reasons why you want to select a competent court, not least of which is predictability. Other reasons include choosing specialized courts that have expertise in the matter at hand.

Court proceedings are public, often very slow & expensive. Moreover, judges have only legal backgrounds and are likely to lack technical background to understand the very essence of some disputes. Arbitration is a general term for alternative conflict resolution where a third party (the arbitrator or multiple arbitrators) take a binding decision on the matter. The advantage is the speed of the arbitration and that the arbitrator can in fact be an expert in the field.

If parties choose to resolve conflicts through arbitration, it is advisable to refer to an recognized arbitrational institute (such as the Court of Arbitration of the International Chamber of Commerce or the CEPANI) in order to appoint the rules of procedures, the number of judges, the place and the language of arbitration.

The usually cited downsides of arbitration are its relevant cost, the lack of predictability of the outcome and the difficulty to enforce arbitral sentences. The lack of predictability stems from the fact that arbitral procedures are confidential and that arbitrator can chose to set aside the rule of laws (e.g. to reach a more "fair" and "equitable" solution). Further, except for specific requirements imposed by the arbitration institutes, arbitrators are not subject to the same requirements of independency as judges.

One of the reasons to choose a court or a set of arbitration rules that is not linked to the place of incorporation of either party is that this venue can be considered neutral, whilst a national courts might be tempted favour their own nationals.

Parties may also opt for a cascading conflict resolution system. This means that instead of immediately going to court or arbitration, the parties agree to first negotiate a bit, perhaps even include a mediator or expert that will advise the parties without making a binding decision. This way the parties try to stay out of court and research has shown that cascading conflict resolution systems do generally work rather well, so it is definitely worth considering putting it into your own contracts.

Common pitfalls:
• Not choosing an applicable law and/or competent venue

- Not neutralizing conflict of laws rules
- Regarding court procedures as the only option to resolve conflicts

xiii. Watch out for special legislation

a. Named contracts

Many jurisdictions have special rules for certain types of contracts, those are called named contracts and specific set are rules are applicable to them.

> *A good example of this is the employment contract. When one party exercises authority and can give detailed instructions to the other, regardless of how the parties qualified the relationship, the rules of employment contracts can apply. Requalification is a very real and serious risk that one should not simply disregard.*

It is important to note that named contracts will differ between the jurisdictions.

> *For instance commercial agency is harmonized in the European Union, but through minimum harmonization, which means that the individual member states can provide additional protection to the commercial agent.*

The special rules that apply may have far-going consequences, not only on the mutual obligations of the parties under the contract (in terms of indemnification), but also regarding to tax and social security law.

> *Say you are a Danish company working with a Belgian contractor and your professional services contract is requalified to an employment contract, the consequences are enormous. You will suddenly have to pay social security contributions, if you want to terminate the contract, the rules on notice periods for employees will apply, you will even have to comply with certain language regulations! Note that the conflict of laws rules also grant the Belgian employee the option to sue you in front of Belgian courts and that you will only be able to sue him in front of Belgian courts, even if the professional services contract for instance says that the courts of Copenhagen have exclusive competence.*

More importantly, these rules cannot be dodged by simply opting for another law to apply. Judges are obligated to apply rules of so called international public order which are so important to the legal system that you apply them on top of any other chosen law. You cannot contract those away. Judges from other jurisdictions may also apply the international public order laws of the jurisdiction where the agency takes place, though the judge is not actually obligated to do this (at least not in the EU).

> *Say for instance that a Dutch company has an agent in Denmark and Dutch law applies to the contract, but the entirety of the agent's activities takes place in Denmark. In this case, if the Danish courts are competent, they will have to apply the Danish rules on agency that are of international public order on top of the Dutch rules. If the Dutch courts are competent, they may apply the Danish rules of international public order, yet they cannot be forced to do so.*

Not addressing the question whether a specific regimes should be applied is not a good strategy. Besides the fact that the specific rules will still apply between parties regardless of whether there is a written contract or not, you will create legal uncertainty and thus room for discussion and *ex post* requalification.

Instead you might want to think about how to accomplish the same or a similar result via another construction. Of course this will not always be an option, in which case it is best to just accept the application of the rules and act accordingly.

> *Take agency for instance, when you need your contractor to facilitate or even execute contracts for your, you could look into reselling to avoid the application of the rules on commercial agency, but if a commercial agent is what you need, instead of trying to avoid the application it is better to construe the contract as a commercial agency contract to begin with.*

b. Mixed contracts

It is possible that one contract has elements of multiple named contracts. For instance a contract for the development and supply of a machine part will in part be a services contract and in part be a supply contract which in essence is a sale of goods contract.

Which set of rules to apply will depend on how the applicable law deals with such contracts. Both parts of the contract can in this case be separated, so under Belgian law the rules on the hire of work and services will apply to the development aspect of the contract and the rules on the sale of goods will apply to the supply aspect of the contract. If however a part of the contract is entirely subsidiary to the rest of the contract, the rules on the primary part of the contract will apply to the entirety of the contract.

> *As an example, let's say you hire a company to develop a machine part and deliver a working prototype at the end, but not yet the supply of the result. The supply of the product could be seen as a sale of goods, however in this case the supply of the prototype is subsidiary to the development part of the contract and as a result the entirety of the contract will most likely be qualified as a hire of work and services and not a sale of goods.*

Common pitfalls:

- Wrong qualification of the contract
- Not concluding a written contract at all
- Artificial constructions to avoid special legislation

C. Co-creation contracts

i. LOIs, MOUs and the like

A Letter of Intent (LOI) or Memorandum of Understanding (MOU) or whatever you want to call it, is basically a declaration that says that the parties want to work together. There is a theoretical difference between a LOI and a MOU. A LOI is a document issued by one party that the other simply receives. A MOU is a joint document signed by both parties. In practice both terms are often used interchangeably.

Parties usually don't intend to create binding obligations through either a LOI or MOU, though quite often these documents do create binding obligations. These may seem harmless, but are potentially trojan horses. Such declarations of intention may actually already legally bind the parties to some obligations.

One thing a LOI or MOU does, is create an obligation for the issuer or signee of the document to negotiate in good faith. Once the document is issued or signed, you cannot simply walk away from the negotiations without a reason.

There are however certain elements that can create hard obligations which may or may not have been intended.

What one will often see in LOIs and MOUs are confidentiality obligations. These confidentiality obligations are purposely put in to protect the confidential information during negotiations. However, do note that such a document can only truly replace an NDA if both parties have signed it.

Parties do however sometimes inadvertently create obligations when writing LOIs or MOUs.

> *For instance, when you state what clauses you want to see in the final agreement in great detail, this could actually constitute a binding offer. The other party could technically just accept it and by doing so create a binding contract.*

Other binding obligations may stem from covenants that are put in the document by the other party, such as the obligation to exclusively negotiate with that party for the duration of the LOI or MOU. These obligations may tie your hands without you fully realizing it. To avoid being confronted with such obligations, it is best to review a LOI or MOU before accepting it.

Common pitfalls:

- LOIs and MOUs can include binding obligations

ii. The relationship between the parties

There are many possibilities on how to approach co-creation (going from total independent collaboration to the creation a new legal entity) and a lot will depend on what each party brings to the table. If the parties are more or less equals and both want to pursue a partnership, a joint venture - a form of cooperation where the parties create a new company to which the parties contribute their assets - may be the more suitable solution. If one party wants to develop a new product and merely seeks to make use of the other party's expertise, the former may just want to engage the latter as a contractor and not as a partner in the project.

It is essential that the parties accurately stipulate in the contract what they will be contributing to the co-creation project. Their contributions will e.g. be translated into participations in a new joint venture or sway the decision as to whether a party wants to hire another as a contractor.

It is however important to note that in some jurisdictions and also depending on the legal form chosen for the joint venture, an assessment by an auditor may be required of the value allotted to the contribution, e.g. the value of the IP you contribute.

Not contractually tying down what the contributions of either party may be, could lead to discussions quite fast as one party may for instance have expected the other to contribute a certain asset such as specific IP or manufacturing infrastructure to a joint venture, where the other party may have expected to merely license the IP and rent out the infrastructure or not lend those assets at all.

a. Picking your place of incorporation

A first question from a corporate law point of view will be to choose where you want to incorporate. One party may be stronger than the other and demand an incorporation at their home base. A neutral option could be to simply incorporate in a third country, though of course it is entirely possible that neither company has any experience with local corporate law and it speaks for itself that both parties will be more comfortable being confronted with their own laws of incorporation.

As a side-note, the parties could just as well choose to incorporate somewhere else for various legal reasons such as an increased flexibility in types of companies offered by the applicable corporate law.

Once a place of incorporation is chosen, a suited company form needs to be chosen, which could be anything depending on the chosen country of incorporation. It is important to note that costs will have to be made in setting up the company, such as legal counsel and costs of incorporation which the parties will have to split or assign.

b. Joint-ventures & safeguards for each party

When opting for a joint venture, the parties can opt for a 50/50 split in the voting power to make sure that each side is equally represented in decisions. This does not require both parties to have the same amount of shares, merely that both parties can appoint as many directors as the other and/or have an equal participation of voting shares in the joint venture.

It is important to note that the parties can sometimes alter the voting power of shares such as in the Belgian private limited company or create shares without voting power. That way even though the participations in the joint venture may differ, parties can still opt for a 50/50 voting power split in the general assemble.

One risk of this is of course that the parties will reach stalemates in the decision making process. Preventing stalemates is quite important as to ensure the efficiency of the joint venture, even if one party will not get their way.

When one party has a larger representation than the other party, say a 60/40 split, the other party’s voting power becomes obsolete, though in some cases parties could still opt for such a construction where more important decisions need unanimity (or a super majority).

A possible solution is to have stalemates trigger higher level negotiations on the matter between the parties, though unless the issue is of a very high importance the costs of this will most likely not outweigh the benefits.

An easier way out of a stalemate is to opt for an uneven number of directors, one of which is a neutral director that is not tied in any way to either of the partners. When the parties then disagree, the neutral director will have the deciding vote. More important decisions can still be made subject to a super majority requiring the parties to negotiate it out.

When there are more than two parties in the joint venture, the risk of stalemates will decrease, though when in the end it is still possible to create a 50/50 stalemate because of the respective amounts of appointed directors, opting for a neutral director remains a useful tool to prevent stalemates.

c. Shoot-outs

Stalemates are often cured with conflict resolution mechanisms, but applying those can oftentimes be uncertain and requires knowledge of the conflict resolution mechanisms. One mechanism that is contractually included in a lot of joint venture contracts in one form or another is the so called shoot-out clause.

There are many types of shoot outs to choose from, but all have the same goal: removing either of the parties from the company either at their own volition or by choice of the other. In return the leaving party will get paid for the shares that he has to transfer, though the amount will depend on the type of shoot-out clause chosen. Shoot-out clauses should not be triggerable at just any time, but only in cases of conflict.

> *An example is the Russian roulette clause where a party makes a bid or offers to sell at a certain price and the other party can accept or buy/sell at the same price the former was offering. Another is the Texas shoot-out where party A offers to buy, but this offer can be countered with a higher offer by party B, which in turn can be countered by an even higher offer by party A and so on.*

Though the style of shoot-out clause is up to the parties, one thing to note is that most forms of shoot-out do favour the economically stronger party. You could for instance offer a very low price to buy in a Texas shoot-out if you know that the other party simply cannot bid higher and still not risk losing your shares as any higher offer could still be countered with an even higher offer. Other types of shoot-out clauses do try to counter this imbalance in buying power, though when one party is simply not able to buy the other out, there’s little that can be done about it.

Common pitfalls:
- Lack of clarity on asset contribution
- Division of costs
- Stalemates preventing further cooperation
- Unbalanced shoot-out clauses that clearly favor one of the parties

iii. What IP is relevant to the project?

When setting up a project, you must consider who gets what rights to what intellectual property. There are several aspects you must take into account when drafting an IP clause, only one of which will be the ownership result of the project.

a. Background

For starters, the parties partnering up will bring their own IP to the table. Their background IP is all the IP that they had before they started the contract. Other stuff that can be counted as background is all know-how of the parties that may or may not be eligible for IP protection.

The parties will usually make use of their background IP in the course of the project to develop the foreground IP (i.e. the IP that results from the project). This also means that licenses may have to be granted, or in some cases transfers of IP rights need to be made.

b. Foreground

This is the IP that will be created during the project in the context of the project and the IP that will have to be allocated. It is important to note here that the foreground will probably be based on the background of either or both parties. This means that licenses on the background will be required in order to make full use of the foreground.

An interesting question to keep in mind is that during the project foreground may be created by the parties that in the end will not be useful for the project, but that may be interesting for either or both of the parties. It is recommended that the parties consider this issue beforehand and address it accordingly in order to prevent discussions regarding the subject in the future.

The parties should also keep in mind that their project might end someday and also provide an arrangement for the foreground IP after the project ends. Who gets the IP? Are licenses given? Can you continue to use the know-how developed?

c. Sideground

Sideground is IP that is created during the project, but outside the context of the project. This could also be brought into the scope of the project through licenses, though it is usually left out. One has to be careful when licensing sideground as sideground is by definition not yet (fully) known to the parties.

d. Postground

One last element that is less frequently dealt with, but relevant nonetheless is the so called postground IP. This is relevant IP that the parties create after the project has been terminated.

Say you work together with a company to create a new type of corrosion resistant coating paint but the project does not yield the expected results. After the parties terminate the co-development project, your partner suddenly does attain the hoped results.

The postground could be based on foreground. Any failure is know-how on what not to do and on what does work. There is also the possibility that the postground incorporates some of the foreground that in and of itself is based on the background of the other party. This makes that postground IP can be a very touchy subject that is best dealt with beforehand.

e. There is no time like the present

It is important to realize that even though these questions regarding foreground, sideground, background and postground may stir serious discussion before the project has even started, there is no time like the present for sorting them out. After all the parties will not yet be in conflict - in most cases at least - when negotiating a contract. Waiting to deal with the problems when they present themselves is far worse than biting the bullet now.

Common pitfalls:

- Not addressing the IP allocation questions right away
- Inaccurate scoping that drags sideground IP into the license
- Lack of attention to the post-contractual stage of the contract

iv. Tender issues

In private one-to-one contract, nearly everything is open for negotiation (even sometimes parties fails to admit it) and parties may freely choose their contractual partners. Sometimes, a party, due to its nature (e.g. a public authority) or size (e.g. a monopoly stakeholder) may be required to enter public tenders before contracting.

Depending on the form of tender that is required and/or chosen by the party, those procedures leave no room for negotiation and often they will allocate all IP with the tendering administration.

a. IP allocation

If all intellectual property created during the project becomes the property of the tendering administration, the question remains what exactly you have transferred. The wording of the tender can be ambiguous and may even cause you to transfer not only foreground, but also background IP.

Merely transferring foreground IP will most likely result in the tendering administration being unable - at least legally speaking - to even exploit the results of the project. Most tenders will not make the distinction and demand the transfer of all IP regarding the results, which will in fact include all of your own background IP that is included in the results.

An obvious problem with this is that you inadvertently transfer all your IP that you use for the results, but another problem is that it also transfers all the third party IP you may use. This third party IP might not be your property, for instance when you use free open source software to develop software for a public project.

Tendering administrations may not realize that there is an issue and could just use general wording, however a more elegant solution would be a transfer of foreground and a license on necessary background, though this not all public tenders will make this distinction.

When co-developing a product with a public entity, it will also be important to verify if any licenses are granted to you. Preferably you will be able to also use the end result of the project.

b. Pushing back on a tender?

When confronted with general wording in a public tender, you may want to evaluate the actual risks of participating. To risk losing your IP would be bad for business, but of course there is a huge advantage to working together with a public entity because of all the know-how and the public backing they bring to the table.

When a public tender has an IP clause that works strongly against your favour, you can contact the administration and explain your issue with the wording. The administration may take your remarks into account and amend the public tender or even withdraw it completely to make the necessary amendments before issuing another public tender. Sometimes however a custom agreement with the public entity will be possible in which IP can be more accurately dealt with.

When much is at risk and the public entity is not willing to meet your concerns, you could have to abstain from participating in the tender.

Common pitfalls:
- Very broad IP transfer clauses in a tender

v. Audit rights

What is your partner up to anyway? You could just ask him and in most cases, his answer will suffice. But what if something seems off? The numbers just don't add up or are not as expected. Say for instance that you have a contract with a service provider, but you somehow sense that he has not been putting in the work he's reporting. What can you do about it?

One way to cover yourself is to provide an audit right. This will give you the right to send an auditor to your contract party's offices to go through the books and other relevant documentation to check whether what has been reported is actually correct.

a. What are you auditing?

You can provide an audit right, but what will you be looking for? Both sides risk running into trouble because of it. If you don't scope your audit right, the audited party may have to grant access to everything he has, which in most cases is not necessary. On the other hand, the party that comes to audit his partner may be buried in papers because it was not specified what he needed. It is important to note that audit clauses will generally only be triggered when tensions are already rising between the parties and mistrust is growing.

In other words, both parties have an interest in scoping as accurately as possible which documents they want to audit, though in most cases general wording might still be necessary.

b. How are you auditing?

If there is a lot of valuable IP at stake, you may want to spend some time to determine how exactly the audit will take place. You may want to provide that you can audit online through a digital data room or you can provide a physical data room, as well as a combination thereof. In some cases you may even want to restrict the time spent auditing. However, parties will generally simply stipulate that an audit may not unreasonably disturb the workings of the audited party and provide (sometimes implicitly) for a physical audit at the audited party's premises.

Whether you need to provide a very specific clause identifying how many auditors are allowed, where, what to access and whether they can take copies, notes or not etc. will largely depend on the question whether there will be regular audits or not and if the value of the contract at stakes warrants such an in-depth audit clause. If not - and if the audit clause is there just in case something goes wrong - a general clause may suffice. If regular auditing is part of the deal, working out a system is more opportune than leaving it open.

Do make sure that your auditors are in any case allowed access to the site where the data that will be audited is held. This could of course also mean on-site visits to the offshore windmills themselves.

c. Why are you auditing?

Auditing can be used as a tool for supervision, however it can also be used to resolve conflicts on certain matters through an objective establishment of fact by a neutral auditor. Auditing rights can be blank checks or instead subject to strict conditions.

d. How regular?

Auditing can be quite annoying for the party being audited and it is thus in that party's interest that his partner does not audit him every other week. You can do this by limiting the amount of audits one can do within a certain period of time. A lot of contracts will stipulate maximum one audit a year, but of course what is acceptable will depend on the specific context of the contract.

One thing to add is that in case an audit establishes certain problems in the reporting or even serious breaches of contract, you will have the right to audit again that year.

e. Announced or unannounced?

Depending on the situation, either announced or unannounced audits will be preferable, though the choice may also be an indicator of the relative bargaining power of both parties.

The audited party will have a particular interest in providing a reasonable term to allow himself to prepare for an audit. The party that wants to audit may instead like to have the element of surprise.

f. Who's going to pay for it?

An auditor costs money of course, and someone has to pay him. The auditing party will usually pay the auditor, but will want to send the bill to the audited party when breaches of contract are discovered that are serious enough.

In some cases however it is preferable to simply share the costs, for instance in cases where the reason for an audit lies outside of the context of a conflict. This will most likely be the preferable way to deal with the costs when audits are performed routinely.

g. When is there a breach of contract?

Audits are at their core a way to bridge the information imbalance that exists between the parties. One party will be dependent on the reporting of the other, but the former cannot be absolutely certain that the reporting is factually correct. When a discrepancy is found during an audit between the reported and the actual situation, this would be a breach of contract and there may be serious penalties involved.

The important question that remains is whether every discrepancy is to be considered a breach that warrants compensation or if there is a certain threshold that needs to be reached? Leaving this question open basically establishes a zero tolerance regime for errors. This is something the audited party will want to avoid at all costs as mistakes do happen. Establishing a margin of error will therefore be essential to him.

Common pitfalls:

- Uncapped amount of audits possible
- Question of costs is left open
- No margin of error is provided

vi. Change of control and similar covenants

When creating something together, there is a reason why you are working with that specific partner. When that partner is taken over by another company or when certain people from that party's management depart, you may just want to terminate the contract. That is where change of control and similar clauses come in. These clauses will allow you to define certain situations in which you can terminate the contract.

a. Classic change of control clauses

The classic change of control clause will forbid that a contracting party or both parties change control without the other party's permission. The difficulty however is the question as to what is understood as "control". The applicable law may however define ownership in its company code, though often it is defined to avoid uncertainty. Mostly when control is defined, a deciding majority of shares is the chosen criterion.

Change of control clauses are particularly useful when contracting with undertakings within a group. If you for instance contract with a company that is specialized in wind energy within a much larger international group within which wind energy is only a small component, the backing of the group may be a deciding factor to execute the contract. The change of control clause will prevent that the group simply sells the daughter company.

b. Special case: the intuitu personae agreement

A special case is the *intuitu personae* agreement. When an agreement is executed *intuitu personae*, the identity of one of the parties or an employee or agent is an essential consideration of one of the parties to enter into the agreement. In case the person whose identity is essential to the agreement disappears from the scene for any reason, the party to whom the identity was essential will have the right to terminate the agreement (or the agreement will automatically be terminated depending on how the parties have stipulated the clause).

Most straightforward is the agreement executed with an independent contractor. In case the agreement is executed *intuitu persona*e, the contractor will not be able to transfer any of his obligations and as a rule will not be able to subcontract any of the obligations to a third party subcontractor without permission from his contracting party.

It is however also possible to name people within a company in the contract, though this is less common. You could for instance contract with a company because you believe in the leadership of its CEO or because the head of R&D has an excellent track record. When starting a joint venture you could write into the contract that the entire project hinges on that head of R&D spearheading the project. When this person would then leave the company, the other company might lose interest in continuing the project and may want to have the option to walk away from it.

The latter kind of *intuitu personae* clause is obviously rather risky for the party that covenants that a certain employee or contractor will remain part of the project as they cannot force that person to stay with the company.

c. Asset sale covenants

One of the main reasons why you would want to collaborate with another party is because that other party possesses certain assets like specific IP, know how or production capacity. A useful clause to make sure that these assets are not transferred during the course of the project is the asset sale covenant. The essence of the covenant is that a party warrants not to transfer a certain asset (or all assets) without the permission of the contracting party. Such a clause may bridge a trust gap that can exist between two parties.

As this puts a serious restriction on the undertaking, negotiating an asset sale covenant in your favour requires significant bargaining power. On the other hand, being subjected to such a covenant may stifle your business, preventing you from optimally managing your assets and forcing you to hold on to potentially underperforming assets. In that case, asset sale covenants are best avoided.

vii. Exclusivity

Freedom of commerce and competition is a fundamental right of our legal system. Certain circumstances, however, require that a party to the contract voluntarily limit this freedom, in order to guarantee the bona fide performance of the contract and to avoid unfair trade practices . Taking action to limit that freedom opens the parties up to strict scrutiny by courts. One of the ways undertakings regularly limit this freedom is by executing non-compete and/or exclusivity clauses. These clauses will bind one or more parties to exclusively perform services or supply goods to his contract party, on one hand, and will impede the contracting party to start to conduct a similar business on the other end. Making these clauses too broad will however result in the nullity of the clause, negating the desired effect of the clause. Careful stipulation is therefore required!

Because of the precariousness of these types of clauses, especially in a transnational context, it is highly recommended to consult with an expert on this matter beforehand.

a. Non-compete during the contract

A non-compete clause in a cooperation contract can run the risk of violating the applicable competition law, which prohibits (tacit) agreements between companies that would affect effective competition.

> *Say you have a Dutch and a Danish company that execute an exclusive agreement: the exclusivity must be evaluated on the basis of article 101 of the Treaty on the Functioning of the European Union which forbids restrictions on trade such as cartels.*

This rule however has two notable exceptions: the so called *de minimis rule* and the exception of 101(3) TFEU. When in a purely national context, the national rules will apply, though in the EU these work in generally the same way.

It should also be noted that the geographic and material scope of the non-compete obligation needs to be limited the relevant domains, however we will further discuss the importance hereof under point b.

i. De minimis

The *de minimis* notice of the European Commission sets a minimum threshold for the applicability of the anti-cartel rule. If the undertakings in question hold a market share under the threshold set, the Commission assumes that competition will not be sufficiently disrupted to fall under the applicable competition law rules.

The threshold for an agreement between competitors (i.e. the so-called horizontal agreements) is a joint market share of 10% of the relevant market. If the agreement is between non-competitors, neither party can have a market share of over 15% in the relevant market.

In some cases however the threshold will be adjusted because of parallel agreements between third parties that may already exist or because a specific block exemption applies.

Specific block exemptions that are particularly relevant for cooperation agreements are the Technology Transfer Block Exemption Regulation and the General Block Exemption Regulation applicable to vertical agreements.

Beware however, a non-compete that would result in an implicit agreement to divide a relevant territory, may be considered as an hard-core restriction of competition law for which the regulations mentioned hereabove do not grant a safe harbour. Finally you could argue that any trade restrictions are indispensable to promote technical or economic progress while also allowing consumers to benefit and that trade is not completely restricted. If this is the case, a general exception applies.

The problem with the general exception that surely may apply from time to time in the offshore wind-energy is that the exception can be invoked when the parties are prosecuted, but that up until then you don't know and cannot know if the exception applies to you.

With a clear lack of predictability or the possibility to obtain a ruling, relying on the general exception is risky strategy.

Hence you should be very cautious when tying your commercial partners to a exclusivity and or a non-compete clause.

b. Non-compete after the contract.

When there may be good reasons to impose exclusivity during the performance of a contract, post-contractual non-compete obligations are harder to justify. Here it is especially important to scope the non-compete obligation to acceptable proportions, otherwise, the non-compete may be void and unenforceable.

Providing a non-compete clause is a balancing act, the legitimate interest of one party to not have the other compete against him and the other's legitimate interest to compete freely have to be weighed against one another. The geographic scope, the duration and the number of restricted activities also has to be balanced against one another. For instance: the smaller the scope of activities, the larger the geographic area and longer the duration can be.

i. Geographic scope

Generally the geographic scope of the non-compete obligation should be limited to the geographic area in which the relevant cooperation took place.

> *Say you appoint a commercial agent to act on your behalf in the UK and Ireland, the geographic scope of the non-compete should also be limited to the UK and Ireland. A non-compete obligation for these two countries is justifiable as the commercial agent will have been in contact with your clients there, allowing him to easily pick up conversations with these clients for a competitor after his contract with your company has ended. In this case you will however not have any legitimate interest in providing a broader non-compete that also covers Belgium, France and the Netherlands since he has not been active there and his previous agency activities for your company will not give him an advantage in these countries.*

ii. Temporal scope (duration)

A non-compete can last for a while, but not forever. At some point your former partner should be able to resume competitive activities, for instance cooperating with your direct competitors or even becoming one of your competitors himself. The actual duration will depend on the subject matter, however it is clear that you can impose a longer duration when concluding an asset purchase agreement in which you buy a company branch than when concluding a commercial agency agreement with a natural person.

iii. Material scope (restricted activities)

When it comes to activities, these should also be restricted to the activities that you are actually engaging in. For instance, when concluding a deal with a supplier of rotor blades, you can restrict the sale of motor blades to other companies. Should that supplier for instance be a branch of a company that also sells dredging equipment, you cannot restrict the sale of dredging equipment as well unless you also conclude a deal for the supply thereof.

In other words, you cannot stop a company from engaging in all activities if these activities do not constitute actual competition for your activities.

iv. Specific rules

It should be noted that certain activities may have specific rules regarding non-compete obligations. For instance, Belgian law prohibits non-compete obligations on commercial agents that last for longer than 6 months after termination of the contract. Providing a longer term will result in nullity of the clause, which means that the commercial agent will in this case be able to start competing against you as soon as the contract is terminated.

D. Conclusion

While there are many aspects to contracting, especially in the transnational context, that require careful attention, this should not hold you back from engaging with other undertakings.

A first step should always be mapping out your own assets and protecting them as required to ensure you have a strong position to start negotiations from.

When you then proceed to contracting, it is important to realize what exactly will constitute a contract. Don't ignore the codes of conduct and general terms that are thrown around, as they do matter and will form part of the final contract. Also make sure that the hierarchy between the documents is clear to avoid later discussions.

Even if most clauses seems natural and evident regarding the obligations of the parties, it is always advisable to put them in writing. Once things go south, you cannot rely on the words and oral agreements that were done. Hence it is important to provide specific clauses as we have discussed them.

Yet whatever the other partner throws at you, it is also important to note that in most cases no one is trying to trick you and that anything can be discussed. When confronted with for instance a contract proposal that leaves you exposed, it is important to realize that there is a third option besides taking the offer or leaving it: you can always start negotiations. However, a healthy dose of suspicion will benefit you as well. Do not blindly trust the verbal promises of the other party even when you've been cooperating for a long while. Instead get it in writing and avoid any nasty conflicts that may ensue.

There are many general rules of thumb that can be followed when approaching a contract or other legal issue, a couple of which we have set out in this with paper. However, when in doubt, it is usually best to consult with an expert. A lack of care can have huge consequences. It is better to be overly prepared than to suffer the consequences of being underprepared.