

BY is a Swedish company operating in the energy sector. They own and operate a wide range of power production facilities. Given the growing electricity demand in 2021, BY's board of directors approved the initiative to build two wind turbine farms in Sweden. Having received all the necessary permits from the local authorities, BY started purchasing the necessary components.

In January 2022, BY approached SL, a German manufacturer of wind turbines. Their turbines are produced using a custom, proprietary design, and generate very little noise, even in very strong wind conditions. This was highly appealing to BY, as the lower noise levels minimized the level of noise pollution, and reduced the possibility that BY would have to pay compensation to people living in the vicinity of their wind farms.

For the wind farms to operate, they require another key component: a Supervisory Control and Data Acquisition (SCADA) computer system. SCADA systems are used to centrally monitor and control a group of wind turbines in a wind farm, as well as to ensure the safety of their operations. They are largely standardized in the industry. BY already owns two such systems and has them ready to be installed in the new wind farms.

Negotiations started in early February 2022. Prior to this, SL was alerted to the fact that their turbines, due to their custom design, are causing several SCADA systems to crash. However, they chose not to disclose this information to SL, hoping that they could fix the problem by designing a software update which could be shared with all SCADA system owners. BY did not inquire about SCADA systems during negotiations.

The contract was concluded in June 2022, and contained the following provisions:

3. Representations and Warranties

3.1 SL represents that the wind turbines to be sold under this Agreement comply with the technical specifications outlined in Exhibit A, including rated power output and noise emission levels.

3.2 SL represents that the wind turbines are designed to support integration with Supervisory Control and Data Acquisition (SCADA) systems. BY acknowledges that variations in the design and operation of SCADA systems may impact the effectiveness and performance of any such integration. SL is under no obligation to provide any assistance relating to SCADA system operation.

3.4 SL represents and warrants that the wind turbines are designed for a service life of 20 years under normal operating conditions. SL is under no obligation to perform on-site maintenance or repairs.

3.5 SL represents that it has obtained all necessary regulatory approvals for the manufacture and sale of the wind turbines.

10. Entire Agreement

This Agreement, including its appendices, constitutes the entire agreement between SL and BY and supersedes all prior agreements, understandings, and communications, both oral and written, between the parties relating to the subject matter hereof.

11. Choice of Law

This Agreement, and any dispute or claim arising out of or in connection with it, shall be governed by and construed in accordance with the laws of England and Wales.

During the negotiations, clause 3.4 was the most disputed one. Under Swedish environmental protection laws, there is a provision stating that “manufacturers of all wind turbines which are to be installed in Sweden must provide a warranty period of at least 35 years”. SL offered to significantly reduce the price, if the warranty period were to be reduced to 20 years. They advised BY that English law, chosen in the contract, contains no such provisions on warranty times. Similarly, no such provision is found in any EU legal sources. BY agreed to lower the warranty period and receive a price reduction.

When the turbines arrived, BY’s SCADA systems crashed. This made it impossible to install the turbines, and BY suffered severe financial losses. SL claims that the goods were fully conforming to the agreement. However, to preserve their business relationship and maintain their good reputation, they offered to provide free technical support to BY.

The contract was amended as follows:

Addendum to the Agreement dated June 2022:

SL hereby agrees to provide additional technical support to BY, including the provision of on-site personnel for a period of 12 months, to assist in resolving the SCADA system integration issues with the wind turbines supplied under this Agreement. Such services shall be provided at no cost.

Despite their efforts, SL did not manage to fix the underlying issue. All further negotiations have failed, and BY wants to initiate legal proceedings.

1. What are the consequences of the fact that SL knew, but failed to disclose, that the turbines are experiencing SCADA integration problems?
2. Is the contractual amendment binding on BY?
3. Assume that proceedings are brought before a Swedish court, and that it has jurisdiction to hear the dispute. Could this have any consequence for the rights and obligations of the parties under the contract?
4. Which courts would have jurisdiction to hear this dispute?
5. Assume that the contract is governed by the CISG, and that it contains no choice of law clause. The parties agree to litigate their dispute in Sweden. BY asks the court to order SL to manufacture and deliver replacement turbines, instead of paying for damages. Under which rules should the court rule on this claim?
6. Assume that this dispute was referred to arbitration in Oslo, and that the tribunal decides to apply Swedish contract law to resolve the dispute, holding that English law, chosen in the contract, is “inadequate to address this dispute”. Would the losing party have any recourse?