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Question 1

The first question asks what the consequences are of the fact that SL knew, but failed to disclose, that the wind turbines are experiencing SCADA integration problems.

The question relates to the negotiations between the parties, where SL didn't disclose information to BY about their wind turbines having problems. The contract between SL and BY has several important clauses that will impact the question of contractual remedies: the entire agreement clause (EA), the choice of law clause (CoL) and the representations and warranties clause (RaW).

In short, when a law from the common law system is governing a contract, the general rule in common law is that the parties don't have to disclose information to the other party during the negotiations.[1] Additionally, the impact of the common law will usually restrict the interpretation of the contract to the literal wording set out in the contract, thus not allowing extrinsic sources to interfere when interpreting rights and obligations. These principles apply in our case because of the CoL clause choosing the laws of England and Wales.

The fact that parties under common law doesn't have to disclose information to the other party during negotiations, gives rise to the argument that SLs knowledge of the failing wind turbines doesn't not have any contractual consequences, because they were under no obligation to disclose the information. This is further strengthened by the RaW clause, which lays out in plain view what both parties represents and warranties.

But there are also arguments in the opposite direction. The first one being that the RaW clause 3.2 states that "SL represents that the wind turbines are designed to support integration with Supervisory Control and Data Acquisition (SCADA) systems". Interpreted literally, this clause states that the wind turbines sold in the contract are "designed" to "support integration" with SCADA systems. The use of the words "designed" and "support integration" states that the wind turbines are made for use with the SCADA systems. Therefore, this clause gives a clear argument to the fact that SLs failure to disclose information will have contractual consequences.

On the other hand, the second sentence of RaW clause 3.2 states that "BY acknowledges that variations in the design and operation of SCADA systems may impact the effectiveness and performance of any such integration". This acknowledgement means that variations in the

[1] Cordero-Moss, Guiditta (Editor) Boilerplate Clauses, International Commercial Contracts and the Applicable Law, (2011) page 171-172.

"design and operation" of SCADA system may impact the integration with wind turbines, thus putting the risk of SCADA system integration onto BY. This clause therefore gives rise to a *prima facie* argument that SLs failure to disclose information won't have any contractual consequences, because BY has the risk of integrating the SCADA system.

The reason this argument is only *prima facie*, but won't hold up in a common law court, is that the clause doesn't say that the SCADA system that BY provides isn't supported in SLs wind turbines. The clause simply states that the "variations" in SCADA systems may "impact the effectiveness and performance" of the integration. It doesn't state that wind turbines might not work at all because of different SCADA systems.

Furthermore, in common law, contracts can be set aside because of a representation made during negotiations which turned out to be false. Although a contract is governed by boilerplate clauses such as an entire agreement clause, an English court might have to interpret the clauses in a certain way to avoid unreasonable results.[2] And, according to Peel, "If such a representation is false, the contract may be set aside and damages may be available depending on the degree of fault of the misrepresentor…".[3] The question is therefore if SL made a contractual representation during the negotiations that can be made to interpret the RaW clause.

It is clear from the facts of the case that SL chose not to disclose the fact that SCADA systems crashed because of SLs custom designed wind turbines. Since SCADA is the industry standard, one can reasonably assume that BY thought that SCADA systems worked with SLs wind turbines. By not saying otherwise, this means that SL mislead BY into believing that the wind turbines worked well with SCADA systems. It is on this background that one must interpret the RaW clause 3.2, in line with the above-mentioned common-law principles. The clause should therefore be interpreted as SL representing that any SCADA system will work with the wind turbines, and BY acknowledging that there might be variations in performance regarding different SCADA systems, but the wind turbines will always work, nevertheless.

The conclusion is therefore that SLs withholding of information has the consequence breaching the representations and warranties clause 3.2, since the wind turbines do not "support integration with SCADA systems".

[2] Cordero-Moss, Giuditta. *International Commercial Contracts* (2014) page 92. [3] Cordero Moss (2011) page 172.

Question 2

The question asks if the contractual amendment is binding on BY.

The general rule in contract law is contractual freedom and party autonomy. This means that companies can freely choose if they want to enter into agreement, and in any way they want. But in our case, SL and BY have already entered into an agreement and now wants to make amendments to the pre-existing contract. The governing law will therefore still be common law. This gives rise to two questions. The first one being if the entire agreement clause can be interpreted to allow for contract amendments. The second one is if the contract addendum satisfies the consideration criterion and is therefore valid under English law.

The EA clause states that "[t]his 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". One the one hand, the clause states that the agreement constitutes "the entire agreement" and can therefore be considered not allowing for contractual amendments. On the other hand, a more precise and literal interpretation of the clause is that it only refers to "all prior agreements" between the parties. This is the more likely intention of the parties as well, since the presumed intention of having an EA clause is to clearly state the final agreement. This interpretation means that the entire agreement clause doesn't regulate future amendments to the contract, thus allowing for an addendum such as one in our case.

This means that the EA clause allows for an addendum to the contract. The next question is therefore if the contract addendum satisfies the doctrine of consideration in common law.

For a contract to be valid and binding under common law, both parties must get something of value. This also applies to contract modifications, where the contract amendments need to have bilateral obligations on the parties to a contract.[3] In our case, the addendum to the contract does not create any obligations on BY, since all the services provided by SL shall be provided "at no cost". The criterion of consideration is therefore not satisfied.

The conclusion is therefore that the contractual amendment is not binding on BY.

[3] Cordero-Moss (2014) page 121.

Question 3

The question asks us to assume that the proceedings are brought before a Swedish court with jurisdiction to hear the dispute and make out if this could have any consequences for the rights and obligations for the parties.

In general, the rights and obligations of parties to a dispute in international commercial law may be dependent on the *lex fori*, that is, the law of the forum where the dispute takes place. The *lex fori* will usually have different types of provisions that can have an impact on contract. These are non-mandatory rules, mandatory rules or *overriding* mandatory rules. Lastly, there is also the narrow *public policy* reservation of the *lex fori*.

In our case, the proceedings will be held in Swedish courts. Sweden is a member of the EU, which means that the Rome I regulation applies. It also applies because there is a dispute about "conflict of laws" and "to contractual obligations in civil and commercial matters", see article 1.

In accordance with article 3 the parties have chosen English law to govern their contract. This means that the Swedish court, must apply this law and not Swedish. But there a provision of the *lex fori*, the Swedish environmental protection laws, stating that "manufacturers of all wind turbines which are to be installed in Sweden must provide a warranty period of at least 35 years". The question that arises is therefor what kind of rule this is, and if it will have an impact on the contract between SL and BY.

The general rule is that *overriding* mandatory rules will be applied by the court, in accordance with Rome I article 9, even when there is a choice of law clause. Mandatory rules, on the other hand, are possible to escape from by having clause choosing another law.[4] According to Cordero-Moss, it is "a matter of the interpreter's discretion" whether the rule is overriding or not, where the decision is based in the "function of the rule and the policy that underlies the regulation" and the "balancing of the various interests" involved.[6] Rome I article 9 first paragraph distinguishes overriding mandatory provision as those "which is regarded as crucial

[4] Cordero-Moss (2014) page 192.

[6] Cordero-Moss (2014) page 192.

by a country for safeguarding its public interests, such as its political, social or economic organization […]"

When applying these principles to our case, it is most likely to argue that the Swedish environmental protection laws are of an overriding character. This is because they have an important function of protecting societal and political interests in Sweden and protect the best interests of the Swedish population. What further strengthens this argument is that focus on the

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environment has become increasingly important the last decades. Lastly, the wording of the provision gives rise to an argument that it is overriding, since it states that manufacturers "must" provide a warranty period of at least 35 years. With all this in mind, it would make little sense if Swedish courts would allow for contract parties to simply derogate from the environmental protectional laws when lawmakers have clearly instructed the courts to uphold this provision.

As to the argument that there is no similar provision found in any EU legal sources: This argument doesn't mean that the provision is or is not of an overriding character. It rather means that Sweden has more restrictive environmental provisions than found in said EU legal sources.

The consequences of the Swedish environmental act being an overriding mandatory rule, is that the provision will have application to the contract between SL and BY. This means that the contract clause 3.4 will be rendered illegal in Sweden and the obligations set out in the environmental provision will have to be respected instead. SL would therefore have to respect the Swedish environmental laws and ensure a warranty period of at least 35 years.

The conclusion is therefore that the rights and obligations of the parties would be altered with the proceedings in Sweden, making it so the warranty period in the contract extended from 20 years to 35 years.

Table of reference

Cordero-Moss, Giuditta. *International Commercial Contracts.* Cambridge University Press 2014.

Cordero-Moss, Giuditta (Editor) *Boilerplate Clauses, International Commercial Contract and the Applicable Law.* Cambridge University Press, 2011