

# Constructing a defence

Building projects in the region are booming, so for the time being there is little desire to litigate disputes. But forward planning is still worthwhile

**For the past** few years, construction growth in the UAE has been so extraordinary that contractors are not generally keen to engage in heated legal proceedings. There are far too many projects to bid for and far too much profit to reap for any time to be expended on fully fledged legal battles.

However, construction lawyers agree that the earlier one prepares for the potential of a legal action, the more likely one is to come out of it a winner. And preparation should start at the contract itself. Far too many contractors, in an effort to clinch a deal, sign off on contracts with deadly clauses or proceed with the works for months with no contract signed at all.

An example is a 10-year liability clause for any defects (as opposed to just those that may affect stability or safety), used invariably by some Dubai government bodies, which if signed, amount effectively to a 10-year maintenance guarantee. Other examples, seen usually too late to provide any effective remedy, include clear ignorance of specific emirate (as opposed to federal) laws that would be applicable and can have grave consequences on the contractor's budget.

Another common error is the making of references to back-to-back contracts, which may not always have the desired effect for all aspects of a contract. Some rather convoluted, impractical and often incomprehensible arbitration clauses, which can make it difficult even to consider making a claim in the first place, are also typical of a hasty desire just to wrap up the paper work and push on with the work.

Getting a contract to make sense is something that requires familiarity with the local legal scene. That is not something that can be achieved by haphazardly cutting and pasting clauses drafted in

the familiar language of international contracts. Such a habit can lull parties into a sense of false security when they are later set against local law and practice.

Additionally, in any construction contract, events will give rise to delay claims and dealing with those claims can only be achieved with efficient documentary management. Getting contract administration systems right is of benefit for both the employer and the contractor. Faithfully following contractual claim provisions and regularly managing documentation updated with contemporary evidence is vital to securing an unassailable claim submission. In fact, it is the strength of a claim in the way it is presented that may avert the possibility of a legal action in the first place. Therefore, effective documentary management is closely linked to the elimination of legal battles, rather than to a legal victory.

Unfortunately, not all contractors see this as the way forward to dealing with those pressure points that any project is likely to produce. When it comes to significant amounts being unduly withheld from them, they consult their lawyers at a late stage. Singled-out clauses carefully taken from a contract are often put before lawyers for an autopsy, which cannot of course, in isolation, adequately illustrate contractual rights or obligations, let alone provide the canvas for an educated legal opinion to be formed. Needless to say, the legal fees escalate as a result of an endless struggle between clients and lawyers in delving into the contract and also foraging in a forest of contemporaneous correspondence that has often been thrown in randomly.

In relation to correspondence, actively flagging expected delays and attaching itemised lists of potential costs could form a body of convincing





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evidence before an arbitrary tribunal. By contrast, heated correspondence reactively generated in defence to a liquidated damages application may be perceived as disingenuous.

It seems that even when clients have decided to go down the legal route, some still fall for the temptation to generate their own correspondence of supposed legal significance. For example, a notice to refer matters to arbitration is fired off by clients. Then the case is sent to lawyers for them to get on with it. No opportunity for a prior legal evaluation of the claim is afforded. No consultation as to whether arbitration is the right form of dispute resolution. Inadequate wording is used and time bars are breached.

Nothing illustrates more how much some clients can throw good money after bad than when lawyers are asked to review and advise on the risks found in contracts after they have already been signed or executed – often just a few days before they land on a lawyer’s desk.

No matter how creative the wording of such contracts and supportive of the interests of his client a lawyer wishes to be, the fact is that whatever one says or writes to one’s client under those circumstances it is inevitably too little, too late.

That said, the construction industry in the UAE is steadily becoming more regimented, organised and document-focused.

And it is fair to say that the claim process aspect of this dynamic sector is increasingly mirroring the growth and professionalism witnessed in the area as a whole. ●

#### CONTRIBUTOR

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