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Insights

DISPUTE RESOLUTION IN DATA CENTRE PROJECTS: PROACTIVE STRATEGIES FOR A HIGH-STAKES ENVIRONMENT

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SUMMARY

The lifecycle of a data centre, from land acquisition to operation, brings together significant capital investment, complex technical systems and layered contractual relationships. While earlier articles in this Insight Series have explored development, financing and transactional execution, an equally critical dimension is the proactive management and resolution of disputes.

In a sector defined by high-stakes investments, tight delivery timelines and zero tolerance for operational failure, disputes can have far-reaching consequences. A disagreement over construction delays or a service level failure is not just a commercial issue. It can disrupt delivery schedules, undermine revenue projections, strain key commercial relationships and ultimately threaten the investment's financial performance.

For investors, developers and operators, effective dispute management begins long before any disagreement arises.It requires anticipating potential points of conflict, structuring contracts to allocate risk clearly, and embedding mechanisms that enable issues to be resolved quickly and commercially. The most successful projects are not those that avoid every challenge, but those structured to manage issues efficiently without escalating into formal disputes.

IDENTIFYING THE PRIMARY FLASHPOINTS FOR DISPUTES

The technical complexity and commercial pressures of data centre projects create a fertile ground for disputes. These conflicts typically arise at predictable points of stress within the project's lifecycle, where financial, technical and contractual obligations intersect. A strategic approach to risk management requires a clear understanding of these key flashpoints.

The construction phase is the most common source of high-value disputes. In most cases the parties will use one of the commonly used standard forms of construction contract such as FIDIC,

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NEC or JCT but adapt them using bespoke amendments to reflect the risk allocation agreed by the parties. In addition, for project in the UK, most construction contracts will need to include the mandatory payment certification (and adjudication) terms required under the the Housing Grants, Construction and Regeneration Act 1996 (the Construction Act). Similar security of payment legislation has been introduced in other jurisdictions such as Ireland, Canada, Australia, Singapore and Hong Kong.

It is therefore necessary for parties to understand what the negotiated terms mean as well as any applicable legislation or regulatory measures. Common construction disputes frequently focus on:

- **Delays and extensions of time:** Disagreements over the cause of a delay are endemic. A contractor may claim an extension of time due to matters such as developer change instructions and unforeseen circumstances (e.g. extreme weather or site conditions), while the developer may argue the delay is due to the contractor's own poor performance. The analysis of the actual causes of delay and what has caused critical delay, as well as the potential for mitigation, are frequent areas of contention which often require specialist advice.

- **Cost overruns and variation claims:** Technical specifications can evolve during construction due to both developer change and design development, so the valuation and approval of variations and design responsibility is a significant source of friction. Disputes often arise over whether a particular piece of work constitutes a variation to the original scope or is work that the contractor should have allowed for in its price. To this can be added disputes as to the financial impact of the delays to the completion of the works. Further complexity is added by the need to strictly follow the payment certification provided for unde the Construction Act.

- **Defects and performance failures:** The highly specialised nature of Mechanical & Electrical (M&E) systems, particularly power and cooling infrastructure, means that defects can have profound consequences. This is exacerbated by the fast evolving technologies being used, which will often result in the design being developed as the works progress, as well as the innovative, and often untested, nature of such technologies. A dispute over whether a system has been commissioned correctly or is failing to meet its specified performance criteria (e.g., the target PUE) can be technically complex and financially significant. It will usually require expert technical evidence.

- **Contractual procedures**: construction contracts include detailed procedures designed to provide certainty based on timely notification of claims and issues affecting the works, as well as the valuation process. Non compliance with such procedures can sometimes prevent claims from being made and this is a common source of disputes. In addition, the complexity of the projects mean that comprehensive and consistent record keeping is essential to allow parties to support any claims being made.

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Securing a grid connection adds another layer of risk. Disputes in this area often involve the Distribution Network Operators (DNOs) or the National Electricity Systems Operator (NESO). They can relate to the allocation of costs for wider network reinforcements, challenges to the timelines provided for connection, or disagreements over the technical requirements for connection, which can have a material impact on the project's design and cost. Similarly, the need to obtain planning permission and the responsibility for obtaining such permission and discharging any conditions imposed can also be a source of delay and additional costs, leading to disputes.

Once a facility becomes operational, landlord-tenant relationships can be a further flashpoint. These are governed by a complex set of agreements, creating three potential areas for dispute:

- **The Agreement for Lease (AFL):** Disputes can arise over the completion of the "Landlord's Works." A tenant may argue that the shell and core has not been completed to the contractually agreed specification, entitling them to delay taking the lease and commencing rent payments.
- **Service Level Agreement (SLA) failures:** Once operational, the most common source of conflict is an alleged breach of the SLA. A dispute may arise over the measurement of uptime, the calculation of service credits, or whether a particular outage constitutes an "excused event" under the contract.
- **Fit-out and reinstatement:** Disagreements are common regarding the tenant's fit-out, particularly where the landlord alleges the works have compromised the base building systems. At the end of the lease term, the scope of the tenant's reinstatement obligations is a classic and often costly source of disputes.

PROACTIVE LEGAL STRATEGIES FOR DISPUTE MITIGATION

The most effective way to manage disputes is to minimise the probability of them arising in the first place. This is achieved through robust, clear and forward-looking legal drafting that provides a contractual framework for good project management and effective risk management e.g. regular progress reports and anticipates potential areas of conflict and provides mechanisms for their early resolution.

- Contractual clarity is the foundation of avoiding disputes, because ambiguity is the primary fuel for legal conflict. All key project documents – from the primary construction contract and professional appointments to the JV agreement and tenant leases – must be drafted with a view to minimising uncertainty. It is however equally important that the operational site teams are familiar with the contractual requirements and procedures and appreciate their impact. This often requires early training and the creation of contractual manuals as well as legal

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support in ensuring that the agreed contractual procedures are followed. This also includes:

1. **Precise scopes of work:** Clearly and granularly defining the scope of work and the technical specifications to be achieved.

2. **Objective performance metrics:** Tying obligations to clear, measurable, and objective Key Performance Indicators (KPIs) rather than subjective standards.

3. **Clear risk allocation:** Explicitly stating which party bears the risk for specific events (e.g., unforeseen ground conditions, changes in law, or supply chain delays).

4. **Pro-active risk management**: Including contractual mechanisms to require parties to identify and notify risk early e.g. use of risk registers, so that where possible steps can be taken to avoid or reduce the impact of such risk, together with effective and contemporaneous programme management for the works.

- Equally important is how contracts deal with disputes when they arise. A sophisticated, multi-tiered dispute resolution clause is an essential tool for encouraging commercial solutions. Instead of allowing parties to immediately resort to formal proceedings, these clauses create a mandatory, structured process for escalation. A typical structure would be as follows:
  1. **Project-level negotiation:** An initial period for the parties' project managers to resolve the issue.

  2. **Senior executive escalation:** If unresolved, the dispute is formally escalated to senior executives (e.g., C-level) from each organisation for a time-limited period of negotiation.

  3. **Formal mediation:** If the senior executives cannot find a solution, the parties are required to engage in a formal, confidential mediation with a neutral third-party mediator before any formal proceedings can be commenced. This structured process ensures that all avenues for a commercial settlement are exhausted.

For highly technical disputes, traditional legal forums can be slow and expensive. A more efficient mechanism is to provide for expert determination in the contract. This allows the parties to refer a specific technical question (e.g. "what was the root cause of the chiller unit failure?") to a pre-agreed independent industry expert.

1. The expert's decision can be contractually binding, providing a swift and cost-effective resolution.

2. On large-scale projects, the use of a Dispute Avoidance/ Adjudication Board is common and standard forms of construction contracts include clauses allowing their use. This is based on a panel of impartial experts appointed at the start of the project or when a specific issue arises, who will then provide no binding recommendation or a binding decision. The involvement of such an independent body can be highly effective in identifying the potential for issues to

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escalate and resolve them at an early stage before they escalate and lead to more formal dispute resolution proceedings. This however does not affect a party's right in the UK to refer disputes to adjudication.

NAVIGATING FORMAL DISPUTE RESOLUTION PROCESSES

When disputes cannot be resolved through negotiation, the choice of formal resolution process becomes critical. The appropriate forum will depend on both the nature of the dispute and the contractual framework governing the project..

For construction-related disputes, adjudication is often the first and most effective step. Under the Construction Act 1996,almost all contract must allow a party to refer a dispute to adjudication, where a decision should be reached within 28 days although for complex disputes it is common for that period to be extended to 2 or 3 months. This is therefore a quick process that can catch a party unware and it may have a very short period (often 2-3 weeks) to respond to what may be a complex claim supported by extensive factual and expert evidence. Any decision is temporarily binding and a party that fails to pay will face enforcement proceedings in the specialist Construction and Technology Court that will usually result in a court judgment within 2-3 months via a specialised court procedure. The principle is 'pay now argue later' which means payment must be made before a party can seek to overturn such a decision by subsequent litigation or arbitration. In practice, few parties proceed to challenge a decision and adjudication provides a swift mechanism for resolving issues and, for contractors, maintaining cash flow, which is critical during the construction phase. Where parties choose not to adjudicate, disputes will usually often be determined by the specialised Technology and Construction Court or arbitration. In general, construction disputes are noted for having to manage large amounts of records relating to all aspects of the project, as well as the extensive use of expert witnesses need to address quantum, delay and technical issues. For major commercial disputes, particularly those involving landlord-tenant relationships or JV partners, arbitration or expert determination? is often the preferred forum over public court proceedings. The key advantages of arbitration are:

- **Confidentiality:** The proceedings are private, protecting commercially sensitive information and avoiding adverse publicity.
- **Expertise:** The parties can select an arbitrator or a tribunal with deep, specialist knowledge of the data centre industry.
- **Flexibility and finality:** The parties have greater control over the procedure, and the grounds for appealing an arbitral award are extremely limited, providing greater finality.
- **Enforceability:** Arbitral awards are readily enforceable internationally under the New York Convention, a critical advantage for cross-border contracts and investments.

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- **Litigation in the Technology and Construction Court (TCC):** Where a dispute is not subject to an arbitration clause, the appropriate venue in the English courts is typically the Technology and Construction Court (TCC), a specialist division of the High Court. The TCC is equipped with judges who have significant expertise in handling complex, high-value construction and technology disputes, making it a highly respected and effective forum.

A STRATEGIC APPROACH TO CONFLICT MANAGEMENT

In the high-stakes world of data centre investment and development, disputes are a statistical probability. The challenge is therefore not to avoid conflict at all costs, but to manage it intelligently, proactively and commercially. Projects that embed robust legal and contractual frameworks from the outset are better positioned to prevent disagreements from escalating. Clear risk allocation, defined procedures for resolving issues and built-in mechanisms for escalation act as a form of insurance. They protect asset value, preserve critical relationships and keep management focused on delivery rather than litigation.

RELATED CAPABILITIES

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MEET THE TEAM

Shy Jackson

Partner, London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998

Akhil Markanday

Partner and Global Practice Group Leader - Arbitration, Real Estate and Construction Disputes (ARC), London

akhil.markanday@bclplaw.com
+44 (0) 20 3400 4344

Jeremy Bark

Counsel, London

jeremy.bark@bclplaw.com

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+44 (0) 20 3400 2122

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