

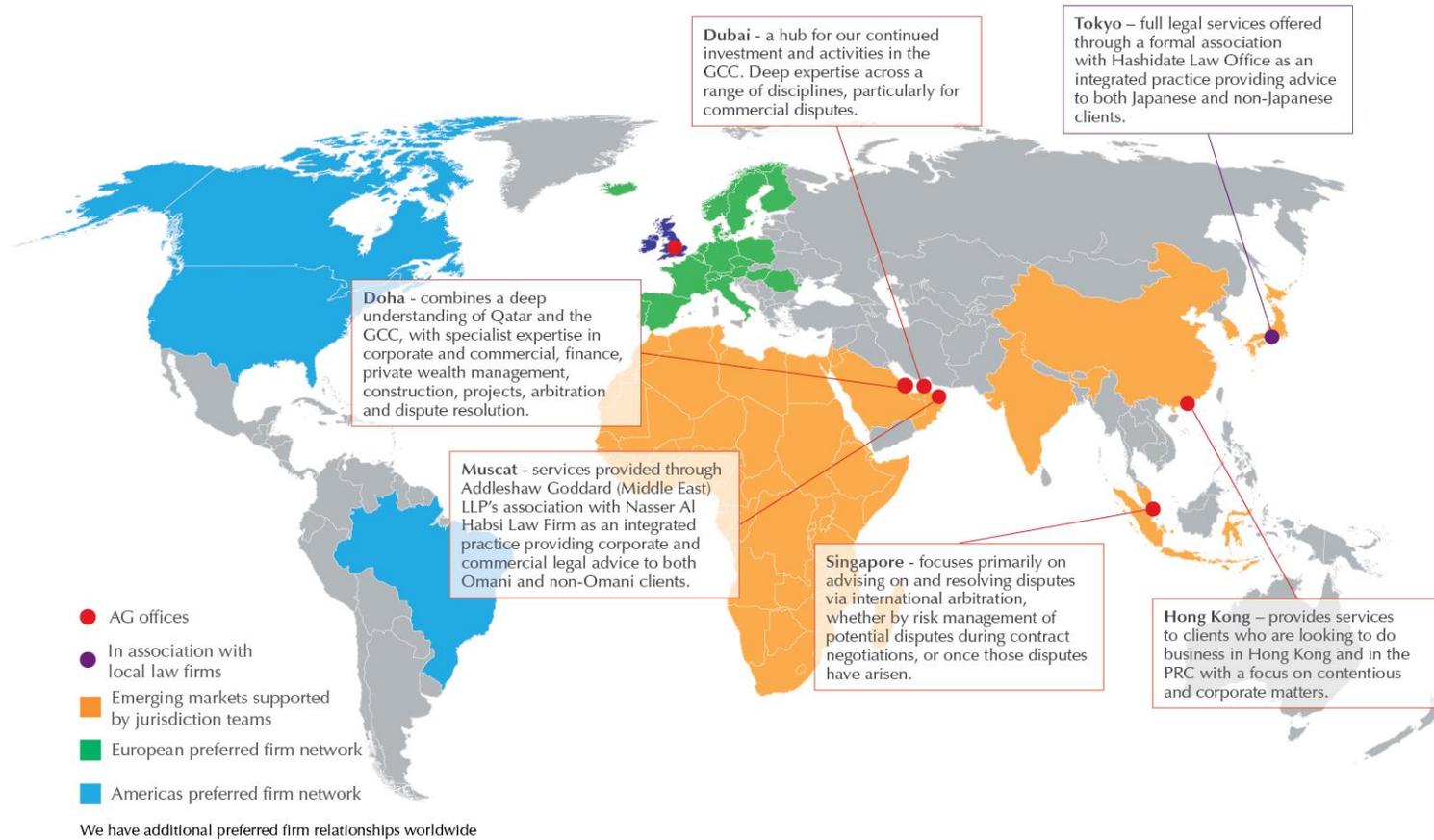
CONSTRUCTION CLAIMS MASTERCLASS

28 October 2016

Grand Hyatt, Muscat



International capability



Addleshaw Goddard: An overview

OUR SERVICE LINES



Corporate Litigation Real Estate Finance Commercial

OUR SECTORS



Financial Services Retail & Consumer Real Estate Industrials Energy & Utilities



Transport Digital Health

Key Facts

Our size and strength

170 Partners

700+ Other legal staff

The breadth and quality of our practice areas

37

Practice areas ranked in the top tier across the UK (Legal 500 Directory 2015)

40

Practice areas ranked in the top tier across the UK (Chambers Directory 2016)

Our client base

Our key clients cover a broad spectrum of markets and include:

- ▶ Multiplex
- ▶ BEC
- ▶ Laing O'Rourke
- ▶ Hitachi
- ▶ Qatar Rail
- ▶ Al Turki
- ▶ SGRF

CSR

With a designated CSR partner in every UK office, our Corporate Social Responsibilities focus on the following:

- ▶ **People:** diversity and inclusion, nurturing talent and development, employee benefits and health, safety and welfare;
- ▶ **Marketplace:** our practice management and Client Development Centre;
- ▶ **Community:** community projects, fundraising and charities of the year; and
- ▶ **Environment:** climate change, waste and travel.

Defending Construction Claims

Agenda

- ▶ What are the parties' objectives at the outset of the Project?
- ▶ Why do things go wrong?
- ▶ Initial considerations for claims avoidance
- ▶ Overview of Contractor claims
- ▶ Overview of Defence strategy
- ▶ Relevant event and risk allocation
- ▶ Challenging the claims and procedures
- ▶ Delaying tactics and considerations

What are the objectives at the outset?

- ▶ Quality building
- ▶ Built on time
- ▶ With minimal defects and accidents
- ▶ Delivered on budget
- ▶ No claims, no disputes
- ▶ Anything else?

Are these objectives ever achieved?

So what are we doing wrong?

Why do claims arise?

- ▶ Flawed procurement processes
- ▶ Lowest price wins mentality
- ▶ Lack of contractor supply chain engagement at design development stage
- ▶ Early commencement on site with insufficient design development and price certainty
- ▶ Constant changes
- ▶ Cash flow problems
- ▶ Cultural mindset – the project does not come first!

Initial Considerations (1)

- ▶ At the outset, choosing the right form of contract is clearly an important part of the strategy.
- ▶ Majority of construction projects worldwide are administered in accordance with the FIDIC forms of contracts.
- ▶ Oman has its own standard form building and civil engineering form of contract that is popular and widely used.
- ▶ Both forms of contract recognise and deal with the effects of change and both contracts set out claims and dispute resolution procedures.
- ▶ Whilst both contracts are good masters, are they the correct servant for (i) the project and (ii) achieving the objectives?

Initial Considerations (2)

- ▶ One of the questions to be addressed at the outset of any procurement process should be this:

“What is the objective and policy for administering and resolving claims?”

- ▶ The answer to the question is likely to differ if you are the Employer or the Contractor.
- ▶ With a ‘project comes first mindset’, the following concepts should apply:
 - ▶ balanced and fair terms of engagement;
 - ▶ early warning of problems/claims with sufficient detail;
 - ▶ thereafter, ‘team’ based assessment of claims/problems;
 - ▶ with a ‘solution’ driven approach to be adopted, recognising the timetable and budgetary constraints and the over arching objectives of the parties;
 - ▶ agreed solutions formally and promptly administered through a change/variation instruction.

Initial Considerations (3)

- ▶ The reality, however, is somewhat different. We either see heavily amended terms of engagement or the manipulation of what would otherwise be sensible claim settlement mechanisms in order to avoid liability for claims.
- ▶ Examples include:
 - ▶ Shortened 'notification' periods that are practically impossible to comply with
 - ▶ robust time bar mechanisms, seeking to defeat entitlements and waive liability for claims
 - ▶ complex dispute resolution mechanisms and tiers which are deliberately intended to be time consuming, costly and bureaucratic to comply with before a binding determination is received
 - ▶ non-administration by the client representative/engineer
 - ▶ clever pricing by the contractor
 - ▶ ambushes by the contractor
 - ▶ back-to-back payment entitlements
 - ▶ paid when paid
 - ▶ calls on performance bands

Contractor Claims (1)

From an Employer's perspective, claims may arise during a project due to the occurrence of various "relevant events"

- ▶ Late possession of site
- ▶ Late or defective engineering, design and specifications
- ▶ Unforeseen ground conditions
- ▶ Late or defective Employer equipment
- ▶ Impact of other contractors or consultants
- ▶ Late Approval of contractor submittals
- ▶ Late response to RFIs
- ▶ Unreasonable obligations during work inspections
- ▶ Non-administration of change or interim payments
- ▶ Conduct of government departments and contractors
- ▶ Multiple variations

Contractor Claims (2)

The occurrence of a 'relevant event' or 'special circumstance' is likely to lead to a Contractor's claim for:

- ▶ Extensions of time
- ▶ Loss and expense
 - ▶ site overheads / preliminaries
 - ▶ manpower
 - ▶ materials
 - ▶ equipment
- ▶ Indirect loss and expense
 - ▶ finance changes
 - ▶ loss of profit / additional profit
 - ▶ central office overheads
 - ▶ cost escalation

The defense approach to be adopted (1)

At outset of the project, consider the following practical measures:

- ▶ make sure you appoint the right team with the right mindset and capability;
- ▶ early engagement of contractors to contribute to buildability of designs and development of price;
- ▶ condition commencement of the project, to the achievement of defined gateways and milestones i.e. sufficient design development; price build-up; completion of site surveys; receipt of necessary approvals; development of a risk register with clearly defined risk management task allocation;
- ▶ all party sign off to project programmes and readiness for commencement;
- ▶ post work commencement, ongoing review and risk management meetings with all key players;
- ▶ proactive change and claim management; and
- ▶ the selection of the right contract form, with risk allocated appropriately

The defense approach to be adopted (2)

If a claim materialises post work commencement:

- ▶ take a deep breath;
- ▶ review the contract and understand who has taken the contractual responsibility for the alleged event or special circumstance;
- ▶ identify the contractual claims mechanism procedure and establish:
 1. whether any pre-conditions to entitlement have been satisfied; and
 2. compliance with the agreed claims procedure;
- ▶ consider the claim and assess whether 'cause and effect' has been established by the contractor;
- ▶ assess potential defences, counterclaims and claims mitigation mechanisms; and
- ▶ appoint good consultants and most importantly of all, appoint a good lawyer.

Who bears the risk of relevant events?

- ▶ The onus is on the Contractor to prove his claim.
- ▶ This starts with demonstrating the ‘occurrence’ of a ‘relevant event’ or ‘special circumstance’ and proof that the Employer contractually bears the time and or cost impact of the relevant event.
- ▶ By way of example:
 - ▶ Sub-clause 4.12 and 8.4 (FIDIC 1999 Edition)
 - ▶ Clause 44 and 51 (Oman Standard Form of Contract – Fourth Edition)
- ▶ Question for the Employer – do you amend the contractual risk allocation to reduce the number of ‘relevant events’ or ‘special circumstances’ for which you are liable?

Examples of risk reallocation

- ▶ Contractor takes risk for unforeseen ground conditions.
- ▶ Contractor takes risk in errors and inconsistencies in the designs and specifications and the site and subsurface conditions.
- ▶ Contractor takes complete time and cost responsibility for the receipt of all necessary approvals and permits and for the installation of utilities.
- ▶ Contractor liable for programming, coordination and timetabling and risk of employer's contractors and consultants.
- ▶ Force majeure and extensions of time entitlement conditional on:
 - ▶ 'impossibility' of performance / completion within agreed time frame
 - ▶ 'critical' delay after use of 'float' – contractor to prove
 - ▶ a requirement for the contractor to do 'everything' at 'its own cost' to mitigate the effects of a relevant event

Claim Process (1)

- ▶ Contractor must give ‘notice’ to the ‘engineer’ of time and money claims.
- ▶ ‘Notice’ to be given ‘as soon as practicable’ and ‘no later than 28 days’.
- ▶ Notice to contain correct details and information.
- ▶ The time period for serving the ‘notice’ runs from the date the employer ‘became aware’ or ‘should have become aware’ of the relevant event.

Claim Process (2)

So:

- ▶ Written Notice to be provided
- ▶ Notice to be in correct format
- ▶ Notice to be ‘served’ in accordance with agreed methodology
- ▶ Notice to be served in accordance with agreed timetable
- ▶ Notice to contain agreed details and information:
 - “...describing the event or circumstance giving rise to the claim...”
(Sub-clause 20.1 FIDIC)
 - “...full and detailed particulars of any extension of time...”
(Clause 44 Oman Standard Form of Contract)
 - “...detailed particulars of the claim...”
(Clause 52.5 Oman Standard Form of Contract)

Claim Process (3)

What if the Notice does not comply with contractual requirements?

- ▶ Engineer prevented from undertaking assessment?
- ▶ Claim time-barred, with no entitlement to relief?
- ▶ Employer released from liability for the event and its effects?

Unforeseen Consequences to be considered:

- ▶ Contract or exposed to further delay and LADs?
- ▶ Time at large (does contract expressly release Employer from liability from the event and its effects)?
- ▶ Does Employer lose entitlement to levy delay damages?

Claim Process (4)

Post initial Notice:

- ▶ Contractor to maintain contemporary records to substantiate claims
- ▶ Contractor to submit fully particularised claims after 42 days
- ▶ Further interim and updated claims to be submitted monthly
- ▶ Final claims 28 days after the end of the effects of the event

Oman Standard Form Contract:

- ▶ Monthly updates to be provided to support 'money' claims
- ▶ No express ongoing obligation to update EOT claims

Claim Process (5)

Note:

- ▶ Neither contract stipulates what constitutes fully particularised claims
- ▶ Neither contract stipulates the programming methodology to be applied and submitted in support of extension and money claims
- ▶ Contracts do not state what must be demonstrated by the programme
- ▶ Contracts do not state what evidence must be adduced in support of money claims
- ▶ No time bar impact under FIDIC, potential time bar consequences under Oman Standard Form Contract, with Engineer discretion to overrule

Claim Process (6)

Issues to consider:

- ▶ Be more prescriptive as to the supporting information to be provided?
- ▶ Impose a defined programming methodology to be advanced in support?
- ▶ Place a positive obligation on the Contractor to take corrective action and mitigate effects of the delay – at no cost to the Employer?
- ▶ Waive the right to an EOT and money for:
 - ▶ failing to comply with the above obligations
 - ▶ failure to demonstrate critical delay
 - ▶ concurrent delay/failure to demonstrate material causation

Claim Process (7)

Money Claims:

- ▶ What is recoverable?
- ▶ Cost, cost plus overheads or cost plus overheads and profit?
- ▶ Current trend is to limit recovery to direct costs only
- ▶ Current trend is also to exclude consequential losses and loss of profit
- ▶ Expressly excluding liability for cost of validating, administering or otherwise establishing the values of the claims and variations is not uncommon
- ▶ Recovery is always almost conditional on mitigation and documentary proof of costs

Claim Process (8)

Determination:

- ▶ Usually by Engineers
- ▶ Is he independent or partial – expressly exclude his independence?
- ▶ What is the scope of his authority? Does he need employer approval to extend time or increase contract price?
- ▶ Can't vary contract, meaning he can't release contractor from failures and non-compliance with conditional aspects of claims process
- ▶ Determination will be invalid if Contractor has not submitted valid claim notice etc.
- ▶ Is determination final and binding? In Oman Standard Form of Contract – yes!

Claim Process (9)

Final Claims Process:

- ▶ Multi-tiered dispute mechanisms
- ▶ Aim is to resolve disputes early, arbitration is last resort
- ▶ Process in FIDIC
 - ▶ claim notification during progress of the project
 - ▶ interim/final determination of claims by the Engineer
 - ▶ dispute adjudication board?
 - ▶ amicable settlement negotiations?
 - ▶ Arbitration
 - ▶ Cost
- ▶ As a matter of practice, the Employer can add to this process to increase the time and cost of achieving a settlement
- ▶ Adding cost and time can remove or mitigate exposure – Claimants become war weary!

Claim Process (10)

Arbitration:

Same considerations:

- ▶ The seat – Oman or abroad?
- ▶ The Rules – Adhoc or ICC?
- ▶ The governing laws of the Arbitration?
- ▶ The nature of arbitration
- ▶ The skills and experience of the Arbitrators?
- ▶ Are costs recoverable?

Thank you