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Engineering projects in the 21st century

The disputes that subsea contractors should expect and how to win those they can't avoid

SUBSEA EXPO
Aberdeen, 12 February 2020

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Background – from where disputes can come

- Poor planning and failure to consider/identify risks
- Performance of assets or equipment
- Pricing/payment provisions
- Responsibility amongst multiple parties
- Market conditions?

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Important note

- Arbitration / litigation is expensive, time consuming, uncertain and damages future relationships
- Most disputes resolve by negotiation
- Be open to compromise
- **BUT** "**if you want peace, prepare for war**"

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Pre-contract

- Consideration the possibility of a dispute from the outset
- The jurisdiction clause – it will govern how disputes between the parties are to be resolved
- Often a choice between court proceedings and arbitration proceedings
- Key point: ensure the clause works
- International projects use contracts that are commonly subject to arbitration
- However there are some key components to an effective arbitration clause – if the arbitration clause is poorly drafted problems arise before you even get started

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Systems / organisation

- **Three goals**
  1. **Make future disclosure quicker and easier.** So, whether we win or lose, we do so more cheaply
  2. **Minimise creation of unhelpful disclosable documents (maximise creation of helpful ones)**
  3. **Makes sure we can give any lawyers whom we instruct a clear, complete picture right away**. Many advantages:
     - more accurate advice, sooner;
     - reduce wasted work / rework / duplication;
     - **reduce/eliminate nasty surprises/U-turns (very important – telling a consistent story)**

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Basic (but often overlooked)

- Consistently use the same (short!) email subject identifier preface for every email concerning any project/transaction
- File every email which relates to the project in a separate inbox folder
- Maintain up-to date organograms with email addresses and job titles
- If someone leaves the team, retain their documents / mailboxes and contact details
- Time / cost recording
- Clear intra-group arrangements (finance)

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Think dispute

- Make sure that personnel know that:
  - every email you send, note you take and everything else you ever write down is potentially going to be available to the other side in the event of a dispute; and
  - judges/arbitrators (almost) always believe contemporaneous documents over a witness's recollection of what was said / happened.

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So…

- Keep notes of meetings / phone calls that are not minuted
- Send follow up emails “at our meeting this afternoon we discussed … you said ….”
- Avoid internal emails suggesting the other side’s position might be justified / merited or your own position might be unjustified / unmerited

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Privilege

- A complex topic, often underestimated or misunderstood (or both) – including potentially by external lawyers advising you
- From an English law perspective, (in essence) documents are privileged (i.e. do not have to be disclosed) if they are:

1. Confidential communications between lawyer and client for purpose of obtaining legal advice.

2. Confidential communications between client and lawyer, client and 3rd party or lawyer and 3rd party for dominant purpose of litigation/arbitration which is existing, pending or reasonably in contemplation.

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Obtain and retain privilege (1)

- Include you, the internal lawyers, in sensitive internal emails / documents discussing:
  - merits of your claim / prospective claim / your version of events / the other side's version of events;
  - settlement strategy.

- But, ensure such emails / documents include request for the internal lawyers to advise on the same. E.g. "[lawyer's name] please advise how this might affect the legal position?"

- Mark emails from/to lawyers "*legally privileged and confidential*"

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Obtain and retain privilege (2)

- Don’t let the lawyers ‘drop off’ the circulation list
- Don’t distribute such documents / emails too widely / include people who don’t need to be included
- As soon as a dispute is on the horizon, circulate an email to relevant personnel, informing them that arbitration / litigation is in contemplation, reminding them to copy correspondence regarding this matter to internal lawyers

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Obtain and retain privilege (3)

- Be careful seeking advice/information for a dual purpose
  - from external consultants; or
  - internally from specialist employees.
- Be clear that dominant purpose is contemplated arbitration / litigation
- For example, engineer – what's caused this problem / was it foreseeable / how do we change things to overcome this problem?

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Telling a consistent story

- Be measured and realistic in any claims
- Exercise caution regarding whether / to what extent to rely upon non-lawyer consultants when preparing claims
- Get legal advice early

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Deciding whether to pursue or defend a claim

- Some “bad” reasons:
  - Sunk cost fallacy
  - Principle
  - Cover up an error
  - Ego
  - …?

- Absent strategic reasons for pursuing or defending claims you know to be weak, one “good”* reason might be…
  - Expected value of outcome > present settlement value

(assuming you are risk neutral)*

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What do you want from your lawyers

- Is it –
  - To win at all costs?

  OR
  - To advise accurately about your chance of winning, what will it cost, how long will it take and fight this case for you if justified?

- What to look for in your lawyers:
  - Initial pitch / questions – are they talking more about their firm / experience or trying to find out the salient facts to understand how best they could help you?
  - Clarity around pricing / budgets and staffing (e.g. who will be giving the substantive advice)
  - Initial advice – is it clear, reasoned and realistic / conservative (but not so qualified as to be useless)?

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Anything else?

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