Connected and protected
Our Data Centre construction and engineering project capabilities
Introduction

The management of the construction of data centres is a fast paced environment with challenges which are unique to its sector. The pool of contractors is limited, with very few willing to take on EPC risk, leaving developers to procure and manage their suppliers and contractors downstream and their customers upstream. Customers are extremely sophisticated and demand that centres are delivered within tight timeframes, and impose heavy penalties for any delays.

As a result, it is common for formal contracting processes to be left behind in the drive to get projects up and running, and for projects to be managed without reference to the contract agreements. Risk is often leveraged by contractors, leaving developers seeking speed in difficult situations. Delays and cost overruns which are not properly distributed between the parties can create difficulties as projects near completion, and parties seek to close out the final account. In extreme circumstance (such as contractor liquidation), it can result in chaos.

At Eversheds Sutherland we regularly advise the developers of and investors in data centres, and so are very familiar with the challenges you are facing. We can provide you with legal advice and support during the procurement and construction phase of a project, on an ongoing basis once the project is live and in the event of a dispute arising.

Why work with us?

Global reach: as a global top 10 law practice, working out of 70+ offices worldwide offices, we can support your business wherever you need us. Our outstanding global coverage means we understand the local market conditions and pressures which may be relevant to a project.

Sectors: all of our lawyers are experienced in their respective fields, with many having worked in-house, gaining years of industry-specific experience and qualifications.

Services: we have 70+ data-centre legal specialists globally working across real estate, construction data privacy, M&A, energy, environmental, finance, tax, commercial and telecoms.

In 2021 we acted for:
- 134 of the Fortune 200
- 79 of the Fortune 100
- 65 of the FTSE 100
- 40 of the Fortune 50
Full lifecycle service

We have one of the largest teams of Construction and Engineering lawyers in the world. Our team has extensive knowledge of the full range of legal issues connected to data centre projects across a wide variety of jurisdictions and sectors.

We advise on the full range of legal issues arising on Data Centre projects, from drafting and negotiating construction contracts and financing documentation, to providing live project advisory and dispute avoidance services, to advising on dispute resolution through ADR methods and, if necessary, in local courts and international arbitration.
Depth of resource is critical to being able to deliver a project on time, and with sufficient negotiating firepower to secure favourable positions across the work packages. We can draw resources at any time from our 200+ lawyer Construction team to ensure that we are able to meet the workload peaks that arise during the procurement of complex data centre packages with multiple bidders, whilst providing close coordination between the work packages, to ensure project risks are consistently managed. We can also draw on specialist advice from colleagues including for Intellectual Property and data privacy queries.

Our advisors are familiar with the negotiating positions of the main suppliers in key sectors, including the positions they are prepared to concede in negotiations, particularly in the context of a financed project. We can quickly draw on precedents, contract forms, and schedules of amendments to all the major British and European forms (in particular the FIDIC, JCT, VOB and SIA contracts) that are adapted to the leading developer positions in these sectors and which the supply chain will be familiar with.

We are cognisant of the issues facing the data centre market globally, including the sustainability and net-carbon requirements and responsibilities facing colocation providers, both legally and driven by downward pressures from hyperscaler and can have sensible conversations with contractors and include required drafting. Similarly, questions regarding reducing water consumption in the generation of megawatts and the mitigation of power-usage by data centres are frequently picked up by our energy sub-team, who are adept at contracting with alternative, clean energy providers.

We have experience working with a range of British and European construction contracts throughout the life of your project. During construction and beyond, we continue to advise on issues and engage with the supply chain, banks and other project stakeholders to administer the contracts and financing documents. We have seen how the final negotiated contracts have worked in practice, and we know which provisions are critical to include to ensure fair, forward looking, and workable contracts in the future.

We also recognise that it is imperative to your long term operations to maintain your relationship with your subcontractors and suppliers. We are also cognisant of your upstream obligations, and the need to mitigate the risk of exposure to your customer, both in terms of financial penalties and reputational damage.

We assist our data centre clients to assess and respond to contractor claims. This includes adhering to the applicable contractual notice provisions, and also assessing the potential time and cost impact.

We regularly prepare written communications on behalf of our clients, to remove this burden from you and to put you in the strongest position to resolve contractor claims before they escalate into a formal dispute.

Success on a project is usually measured in terms of time, money and performance. Delivering a successful project means ensuring that it is set up well, that it is effectively managed and executed and ensuring that claims or differences are resolved quickly and cost effectively.

Case study

We have recently been advising a data centre client faced with an insolvent main contractor responsible for the construction of multiple data centres across Europe (in London, Dublin, Paris and Frankfurt). We have helped our client to terminate all of its contractual arrangements and enter into new supply contracts with almost no impact on the construction programmes; and have put in place measures to protect our client from actions from liquidators and third party creditors in multiple jurisdictions.
Project advisory services

We understand that you may not need all of our services but may wish to ‘pick and mix’ from the following:

- Contract teach-ins – we run a series of talks and workshops with the project team with a view to up skilling the team on how that specific contract should be run, what to expect from the contracting party and the way in which the relevant risks may be managed.
- Dealing with disputes when they arise – ensuring matters are dealt with early and, if possible, resolved swiftly.
- Hotline – a dedicated route to skilled advisors who can provide ad hoc advice as and when issues or queries arise.
- Monthly reviews – we run diagnostics and reviews alongside progress meeting reports and valuations, making recommendations as the project progresses.

We have provided some further detail about these services below.

Contract teach-ins

Project teams have a tendency to run projects in a similar way, irrespective of specific contract terms or of the risks which may be unique to a particular project. Having identified the risks and likely strategies to be deployed by the counter-party, we run various workshops with the project team to deliver a strategy in line with your contract terms. Illustrations include:

- teach-ins related to the definition of ‘cost’ in cost reimbursable contracts;
- the correct application of payment procedures, including pay less notices;
- the need for the rigorous application of available sanctions for the failure to provide oversight documents and information;
- the need to strictly apply contractual procedures (for example relating to notifications, early warnings and defects) and the importance of protecting and preserving your position where the contractor has not fully complied with these procedures;
- programme monitoring including the right resourcing and skilled teams from the outset;
- specific traps in the project administration of standard form contracts;
- change management procedures;
- dispute avoidance and resolution strategy including identifying what, in our experience, are the likely trigger points for disputes and offering guidance on how to minimise the risks presented by those triggers.

Dispute resolution

A mark of success of our project advisory service is that formal litigation or arbitration is averted, issues are resolved as the project progresses on a well-informed and strategic basis and the progressive deals struck are achieved at a sensible commercial level.

If a dispute occurs, we understand that you need focused and proactive legal counsel of the very highest quality.

We have a proven track record of successfully resolving disputes. Our lawyers work on the entire range of dispute resolution methods, including mediation, expert determination, litigation and arbitration.

We advise on the following:

- do I have a good case? a ‘cold towel’ assessment as to whether the case is sufficiently strong to formalise a dispute;
- is it worth it? an assessment of whether there is a benefit (financial or otherwise) to referring the dispute to formal dispute resolution versus the cost of doing so;
- what method of dispute resolution should I use? there is usually a choice and advantages and disadvantages to these choices;
- who do I involve and are they available? assembling the right team to assist with the dispute process is paramount. Whether and to what extent it is necessary to involve external solicitors, barristers and expert witnesses in addition to internal management, legal counsel and members of the project team familiar with the issues will always depend on the nature, scale and value of the dispute;
- is the ‘dispute’ all it seems? are there different options?

Hotline

We make key members of our team available to address ad-hoc queries as the project progresses. Those queries often come in various shapes and sizes but we find short, pragmatic and immediate interventions can often sort out a problem quickly and keep the project on track.

The Hotlines we currently operate adopt the following guidelines:

- covered jurisdictions and laws: the Hotline covers our clients’ hub jurisdictions, and wherever we have expertise in those jurisdictions;
- authorised users: the client users of the Hotline will include the in-house lawyers and other individuals specifically authorised by the client’s legal department;
- hotline issue: the user may request information or enquire about any construction law issue that an experienced construction lawyer would be able to address in a phone call or a succinct email;
- lawyer-client privilege: all Hotline and related communications between the users and our lawyers will be subject to legal privilege.

Monthly reviews

Contractors and owners often produce progress reports on a monthly basis which may tie-in with monthly progress payments. Independent review of those reports is often required because of the inadequacy of that reporting. Issues which often arise, and which we can help you identify and address, include:

- poor progress reporting which is inadequate in terms of detail, accuracy and data sets. This often covers up significant delays to progress, meaning the employer cannot address the delays, nor does he have clear evidence of them in a delay claim later;
- poor and inaccurate programming with little attention paid to resource levels and key activities needed to unlock a project for future progress;
- poor visibility over design and procurement – where many problems often arise;
- poor record keeping and organisation – ensuring that progress, change and omissions are captured in the right way.

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Giving you global support

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Europe
- Austria - Vienna
- Belgium - Brussels
- Czech Republic - Prague
- Estonia - Tallinn
- Finland - Helsinki
- Hungary - Budapest
- Ireland - Dublin
- Italy - Milan
- Latvia - Riga
- Lithuania - Vilnius
- Luxembourg
- Nederland - Amsterdam
- Norway - Oslo
- Poland - Warsaw
- Portugal - Faro
- Sweden - Stockholm
- Switzerland - Berne
- United Kingdom - Edinburgh
- United States - New York

US
- Atlanta
- Austin
- Chicago
- Houston
- New York
- Sacramento
- San Diego
- San Francisco
- Washington DC

Africa
- Angola - Luanda
- Mozambique - Maputo
- South Africa - Durban
- Tunisia
- Mauritius - Port Louis

Middle East
- Iraq
- Iran
- Jordan
- Kuwait - Kuwait
- Lebanon - Beirut
- Oman - Muscat
- Qatar - Doha
- Saudi Arabia - Riyadh
- United Arab Emirates - Dubai

Asia
- China - Beijing
- Hong Kong
- Japan
- Korea
- Malaysia
- Singapore
- Thailand
- Turkey
- United Kingdom - Edinburgh
- United States - New York

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