

How to reduce risks and manage claims for supply contracts in the UK

German International Construction Law
Committee - 18 November 2021

For what comes next
tltsolicitors.com



Contact details



Jahanara Hussain

Partner

Projects, Infrastructure and Construction

- T: +44 (0)333 006 1666
- M: +44(0)7717 802 497
- Jahanara.Hussain@TLTsolicitors.com



Sean McCay

Partner

Projects, Infrastructure and Construction

- T: +44 (0)333 006 0892
- M: +44(0)7931 542 948
- Sean.McCay@TLTsolicitors.com



Reducing the Risks

Introduction

- Understanding the risks
- Reducing the risks
- Managing the risks



Understanding the Risks

- What is the subject matter of the contract?
- What are the client concerns?
- What is the client's appetite for risk?

Becomes the procurement strategy/risk profile



Reducing the Risks

- Subject matter of the contract
- Payment and additional costs
- Time for delivery/completion
- Testing and completion



Reducing the Risks continued

- Defects
- Limitations
- Statutory implied terms

Standard in the market place



Managing the Risks

Know and understand the contract



Managing Claims and Disputes

Introduction and Overview

- Importance of robust procurement, risk allocation and 'capture'.
- Risks and Claims/Disputes
- Disputes 'landscape' in UK and legal processes
- Management of Claims/Disputes
- Q & A



Risks and Claims/Disputes

- Typically include issues concerning:
 - Quality / Performance
 - Delivery/Time
 - Payment/Money
 - Health and Safety
 - Others (?) e.g. Title



Disputes 'landscape' in UK and Legal processes

- Historical position
- More 'modern' approach
- Standard and 'bespoke' forms of Contract (including Supply Contracts)
- Typical legal processes [e.g. arbitration, litigation, potentially adjudication]
- Adjudication [contractual / statutory]
- Statutory adjudication [Refer to Part II Housing Grants, Construction and Regeneration Act 1996 (as amended) 'Construction Act' and 'excluded operations']

S105 (2) (d) ['excluded operation' but note 'exception']

Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant and Waste Management Ltd [2019] EWHC 2360 (TCC)

Fahstone Ltd v Biesse Group UK Ltd [2015] EWHC 3650 (TCC)



Claims/Disputes Management

- Proactive engagement and management of disputes
- Good record keeping: evidence and potential disclosure obligations
- Importance of informed 'negotiations' when appropriate
- Dual strategies : (1) contract compliance and 'escalation' if required and (2) without prejudice negotiations/offers
- Adherence to contractual requirements e.g. notification of 'events', entitlements, claims, compliance with conditions precedent avoiding contractual time bar, limitation issues

e.g. clause 20.1 of FIDIC:

See *Obrascon Huarte Lain SA v Gibraltar [2014] EWHC 1028 (TCC)* (para 311 - 313).

Other examples in the UK where condition precedents have been strictly enforced:

WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)



Claims/Disputes Management cont.

- Early warning and ‘collaboration’ [Caution: ‘Variation’/’Change’/’Compensation Event’ or ‘agreement on terms’]
- Engineer’s (or equivalent) decision : final and binding if not challenged within specified period? Tribunal’s power to ‘*open up , review and revise*’ decisions or certificates of ‘Engineer’ or equivalent.

ICI v Merit Merrell Technology Limited [2018] EWHC 1577 (TCC)

(see dicta at paras 55 -75)



Claims/Disputes Management cont.

- Adjudication :
 - right to refer a dispute 'at any time' or, if different, as provided for by Contract
 - fast-track process : typically an Adjudicator provides their Decision within 28/42 days of referral of dispute
 - usually binding on an interim basis only and subject to final decision by Court or Arbitrator or further agreement by parties
 - however, Contract may provide Adjudicator's Decision is final and binding if not challenged within a specified period or dispute has not been referred to agreed tribunal (e.g. Court or Arbitration) within a specified period. [Check your Contract!]
- Final Tribunal:
 - e.g Court or Arbitration



Questions?

