



*MASIN QUANTUM EDGE 2025*  
A COMPLETE GUIDE -

# Understanding Legal Risks in the Data Centre Sector



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## CHAPTER 1

In today's interconnected world, digital infrastructure is the core of global economic growth.

At the heart of this infrastructure lies the data centre sector, a critical component that facilitates everything from artificial intelligence (AI) to cloud services and the ever-increasing generation of data. The demand for high-performance and scalable data centres is surging, so much so that governments worldwide are increasingly designating them as critical national infrastructure.

However, this rapid expansion also brings forth a wide range of challenges, particularly in disputes & claims. These disputes often arise during both the construction and operational phases of data centre facilities.

**This e-book will talk about the risks associated with data centres, drawing on expert insights and practical experiences to provide a clear and informative guide.**



## CHAPTER II

# The Complex Contractual Web of Data Centres

Data centre projects are characterized by a highly intricate contractual matrix. Understanding the relationships between various parties, such as owner-operators, developers, professional teams, and hyperscaler tenants, is crucial to understanding the potential for legal issues.

## 2.1 The Disconnect Between Agreements

A significant source of risk for owner-operators stems from the disconnect between tenancy agreements with hyperscalers and development agreements (or construction contracts) with developers. This misalignment is often compounded by the third-party rights that typically exist between the owner-operator and the professional team (e.g., architects, engineers).

## 2.2 The Power of Hyperscalers:

Hyperscalers are the major players in the market, and hold considerable influence and bargaining power. Their tenancy agreements are often tailored and contain very tedious terms, including:

- Significant Liquidated Damages: For delays to access, service level breaches, rent credits, and even consequential damages for lost profits or business interruption.
- Tedious Termination Rights: These can be triggered more readily than in typical commercial or construction contracts.

This creates a substantial risk for owner-operators, as they may suffer significant losses under these agreements, but struggle to recover those losses from the developer or professional team due to contractual limitations.



## 2.3 Recoverability and Insurance Considerations

Owner-operators often struggle to recover losses caused by problems that originate higher up in the contractual chain. This is particularly true when dealing with defects detected late in the day, often after the relevant warranty period has expired.

In such scenarios, the developer may no longer have liability, leaving the owner-operator to rely on potentially more limited third-party rights against the professional team. Adequate insurance coverage for the professional team is therefore paramount.

## CHAPTER III

# The Peril of Structural Defects

Structural defects in a data centre can have far-reaching and severe consequences for owner-operators. While issues with cooling systems, power supply, and fit-out are common, structural problems often pose the most significant threat.

## 3.1 Outsized Consequences

Structural defects, especially if identified late, can lead to:

- Risk to Critical Infrastructure: Jeopardizing the sensitive equipment housed within the data centre.
- Risk to Human Life: Potential for safety hazards.
- Downtime and Regulatory Issues: Causing operational interruptions and breaches of regulatory compliance.
- Complex and Costly Resolutions: Investigations and remedies are typically time-consuming and expensive.

## 3.2 The Challenge of Late Detection

The subtle nature of structural defects often means they are only discovered after the expiry of developer liability. This forces owner-operators to pursue recourse through more limited third-party rights against the professional team, whose liability might be less extensive than the developer's.

## 3.3 The "Market Norm" Dilemma

While some argue that the current market scenarios, driven by high demand and the influence of hyperscalers, necessitate owner-operators accepting more risk, experts suggest that a more careful consideration of contractual alignment is possible. Even if negotiating extensively more owner-operator friendly terms in tenancy agreements is difficult, greater effort can be made to align these agreements with development agreements and third-party rights. The goal is to achieve a pass-through scenario for liabilities or, be fully aware of potential challenges before a dispute arises, avoiding costly surprises.

## CHAPTER IV: : DEALING WITH DISPUTES FROM A CONTRACTOR'S PERSPECTIVE

Understanding the common causes of disputes from a contractor's viewpoint can help all parties avoid them. Data centre construction projects, while sharing commonalities with other complex infrastructure, are distinct due to their inherent complexity.

### 4.1 Defining the Contractor's Role

In data centre construction, the term "contractor" often refers to two main entities:

- Shell and Core (Base Build) Contractor: Responsible for the building's exterior and basic electrical connections.
- Fit-out Contractor: Installs the intricate electrical systems, cooling, lighting, and building management systems.

The owner-operator typically installs the computer hardware (servers and racks), and tenants may also install their own hardware.

### 4.2 Common Causes of Contractor Disputes

Common categories of contractor disputes in data centre projects are:

- **Delay:**
  - Supply Chain Disruption: Particularly for specialized equipment like transformers and generators.
  - Scope Changes: Driven by evolving technology (e.g., the shift from storage to machine learning in data centres, leading to different power and infrastructure requirements for Tensor Processing Units (TPUs) compared to Graphics Processing Units (GPUs) or Central Processing Units (CPUs)).
  - Regulatory Changes: New compliance requirements.
  - Unforeseen Site Conditions: Unexpected ground conditions or existing infrastructure.
  - Permitting Delays: Slow approval processes.
  - Design Changes: Modifications requested during construction.
  - Resource Availability: Shortages of skilled labor or materials.
- **Quality and Defect Issues:**
  - Substandard Workmanship: Poor execution during construction.
  - Deleterious or Substandard Materials: Use of inappropriate or low-quality materials.
  - Specification Non-Compliance: Failure to meet agreed-upon technical requirements.



### 3. Precise Specification

A notable legal case highlights the importance of precise specifications. In this wind farm case, an error in a technical formula within the specification led to faulty foundations. The Supreme Court ruled that where two provisions impose different or inconsistent standards, the more rigorous or demanding standard prevails, even if it means uncovering errors in the specification itself. This principle is highly relevant to data centre contracts with their layers of interconnected standards.

### 4. Cost Overruns

Cost overruns in a project simply mean that the actual expenses incurred during the project end up being higher than the amount that was originally budgeted or planned for. In the context of data centers or any large construction project, cost overruns are a significant risk because they can severely impact profitability, cash flow, and even the viability of the entire project.

### 5. Scope Creep:

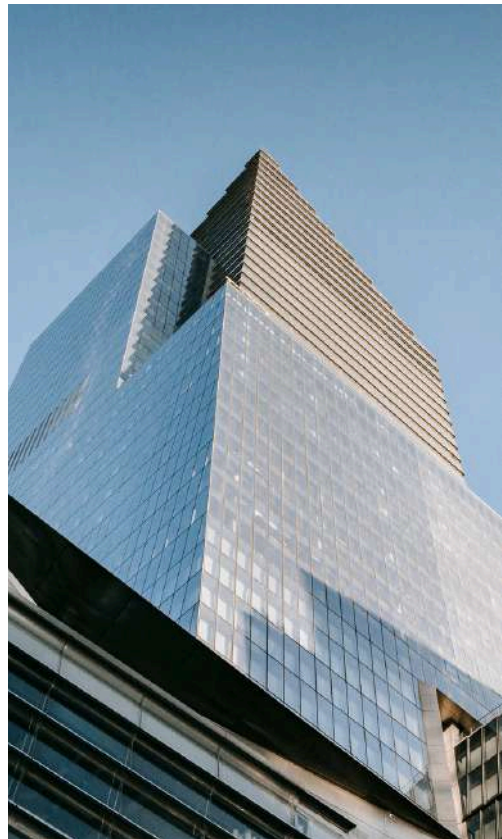
1. Scope creep is a common problem in projects, especially large and complex ones like building data centers. It essentially means that the original plan for what the project will deliver starts to grow and expand in an uncontrolled way, adding features, tasks, or requirements that weren't part of the initial agreement.

### 6. Payment Disputes:

There could be several disagreements that arise between parties in a contract (like an owner-operator and a contractor in a data center project) specifically concerning money owed or expected.

### 7. Contractual Ambiguity:

There are situations where the language used in a contract is unclear, vague, or can reasonably be interpreted in more than one way by different parties. This lack of precision creates uncertainty about what each party is obliged to do or what rights they have.



## CHAPTER V : STRATEGIES FOR DISPUTE AVOIDANCE AND RESOLUTION

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In the dynamic and high-stakes world of data centre development and operation, preventing disputes is paramount to project success. While the inherent complexity of these projects can give rise to numerous challenges, a proactive and well-structured approach to contract management and relationship building can significantly mitigate legal risks.

### 5.1 Proactive Dispute Resolution

- **Early Engagement of Experts:** Bringing in technical experts at an early stage can help identify and mitigate potential issues before they escalate.
- **Informal Dispute Indications:** Employing a neutral party to provide non-binding assessments of grievances can de-escalate tensions and facilitate early resolution, as seen in projects like The Shard and Hinkley Point C.

### 5.2 Understanding Delays: Insights for Owner-Operators

For owner-operators, understanding delays during the construction phase requires a multi-faceted approach:

- **Document Everything:** Maintain meticulous records of all communications, notices, and progress. Ensure notices related to delay, disruption, and extension of time are issued precisely and promptly, as contractual requirements often dictate strict timelines.
- **Contract the Programme:** Engage programming experts to monitor progress and identify any deviations. This allows for prompt implementation of accelerative measures if needed, as opportunities to mitigate delays can be time-sensitive.
- **Collaborative Engagement:** While not waiving contractual rights, owner-operators should actively seek to resolve delay drivers collaboratively. This includes consenting to re-sequencing of works or increased resources if it helps the contractor expedite the project. Making the contractor's life easier ultimately benefits the project's completion.
- **Parallel Dispute Resolution:** When disputes arise, resolve them in parallel with project progress rather than allowing them to halt work. Consider interim arrangements, such as 50/50 cost sharing, to maintain cash flow and keep the project moving forward.
- **Strategic Use of Step-in Rights:** Owner-operator step-in rights, while a powerful leverage tool, should be used sparingly and with caution. Incorrect use can be considered repudiatory, potentially leading to the owner-operator being liable for damages. Replacing a contractor can also be a lengthy and expensive process.

### 5.3 Standard Form Contracts

Standard form contracts (e.g., JCT, NEC, FIDIC) are often used for construction contracts in data centre projects. While convenient, they are not specifically designed for the unique complexities of data centres, which can introduce difficulties.

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### 5.4 Back-to-Back Contracting: Theory vs. Practice

In theory, back-to-back contracting, where the contractor assumes similar liabilities to those the owner-operator faces from the tenant, seems ideal. However, in practice, this is rarely achieved for several reasons:

- **Unquantifiable Exposure:** Contractors struggle to fully understand tenant requirements and the associated risks (e.g., Service Level Agreements (SLAs)), making it difficult to price that risk effectively.
- **Lack of Control and Interface:** Contractors often lack visibility or control over the tenant's fit-out, IT load profiles, and operational commissioning.
- **Uninsurability:** Insurers may be unwilling to cover uncapped risks that deviate significantly from industry standard risk allocations.
- **Market Norms and Risk Appetite:** Contractors generally prefer to operate within established industry standards for risk allocation, which aligns with their insurance arrangements.

### 5.5 Construction vs. Technology Disputes

The distinction between a construction dispute and a technology dispute in a data centre context can be blurry. In many jurisdictions (e.g., England, where the court system has a "Technology and Construction Court"), these fields are closely linked.

- **Construction Disputes:** Typically involve design, workmanship, materials, delay, and delivery of physical works.
- **Technology Disputes:** Generally relate to software, systems integration, commissioning failures, operational performance, and IT infrastructure.

While the industry focus differs, the legal principles applied to resolve these disputes often share significant commonalities, and legal professionals specializing in construction are often well-equipped to handle technology-related claims.



# Aligning Liabilities and Future Considerations

The core challenge in data centre disputes often revolves around the misalignment of liabilities across the contractual chain.

## 6.1 The Push for Limited Liability:

During contract negotiations, all parties, particularly contractors and developers, will naturally struggle to limit and exclude their liability as much as possible. While complete back-to-back contracting is difficult due to the reasons already mentioned (including confidentiality issues specific to data centres), there is still scope for improvement.

## 6.2 Strategic Alignment and Risk Analysis

Owner-operators should proactively analyze the full risk profile of a data centre project and develop a clear commercial objective for their negotiations. This involves:

- **Understanding the Risk Profile:** Recognizing the unique risks associated with data centres at the outset.
- **Strategic Planning:** Avoiding siloed negotiations for different agreements (e.g., development, construction, tenancy). Instead, have a comprehensive plan to achieve the best possible alignment of liabilities across all contracts.
- **Careful Drafting of Third-Party Rights Notices:** Ensuring these notices do not unnecessarily limit the owner-operator's ability to recover significant losses suffered downstream.



### 6.3 Timing of Agreements

While it's impractical to create downstream tenancy contracts simultaneously with upstream construction agreements, the key is to ensure the construction contract has the flexibility to accommodate future tenant requirements.

Subsequently, the tenancy agreement should be reviewed in light of the construction contract to avoid imposing obligations on the landlord that cannot be enforced on the contractor. The ultimate goal is to achieve alignment, even if the agreements are sequenced.

### 6.4 Avoiding Complacency in Long-Term Relationships

Owner-operators often engage in long-term relationships with the same tenants, leading to the temptation to reuse existing agreements without thorough review. However, each data centre project has its own unique risk allocation and liability profile. It is crucial to treat each project as distinct, paying close attention to the details of every agreement to ensure optimal protection.



CHAPTER VII

## Conclusion

The data centre sector is a vital engine of global economic growth, but its rapid expansion and inherent complexity present significant legal challenges. By understanding the intricate contractual landscape, the unique risks posed by structural defects, and the common causes of disputes from a contractor's perspective, stakeholders can adopt proactive strategies for dispute avoidance and effective resolution.

The key lies in strategic planning, careful contract drafting, and a commitment to aligning liabilities across the entire project lifecycle, ensuring the continued, robust growth of this critical infrastructure.

**You can watch the entire discussion happening in videos here:**



The image shows a video player interface for a masterclass. At the top, a purple rounded rectangle contains the word "MASTERCLASSES" in white. Below this, the title "Data Centre Disputes: Delays, Defects & Damages" is displayed in large white font. Underneath the title, the date "15 April 2025" and the time "11:30 - 12:30 UTC" are listed. A large white play button icon is centered over the text. At the bottom left, it says "In association with" above a white curved shape. The bottom of the player features a green progress bar with a white play button icon on the right side.

## How Masin can Help:

Masin is global consultancy specializing in expert witness services for complex engineering and construction disputes. With over 200 experts across eleven countries, Masin has provided expert testimony in 200+ arbitrations at leading forums like ICC, LCIA, and SIAC, influencing disputes worth over \$30 billion.

Recognized as a top-tier firm in construction arbitration, Masin delivers independent assessments in delay analysis, quantum evaluation, and forensic technical analysis.

Masin was ranked #6 in the prestigious GAR 100 Expert Witness List for Construction Arbitrations and our experts are individually ranked in Lexology Index, Chambers & Partners, and The Legal 500, reinforcing Masin's reputation as a trusted authority in dispute resolution.



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"I say at once that I prefer and accept the evidence of Masin's expert given in their first report and in support thereof in the oral testimony on the critical delays affecting the completion of the project."

- DIFC TCD Court Judge, Dubai