DISCOMBOBULATED CONTRACTUAL COMMUNICATIONS? LET US BE CLEAR!

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INTRODUCTION

Imagine you are on a construction site somewhere in the Middle East. On-site you will likely hear the following phrases and mutations thereof: “Are you going to answer me?” and “Why are you telling me this now?"

Contracting parties have to strike a balance between what and when something must be said and to whom. Parties also have to consider what has not been said and whether or not they have to say anything at all. The message itself is important, but it can sometimes be the tone of the message that creates unnecessary tension. In our experience, both as external disputes counsel and also as former in-house counsel ourselves, we know that if there is one message above all others that an in-house lawyer wants to convey to his “internal clients” in the project teams, it is: Please tell me before you send (or do not send) that letter! So, even though it is not as tangible as a ton of rebar or as attractive as an architect's drawing, how a company crafts its correspondence can be an equally important—or costly—component of a building project.

Good communication can be even more important, and yet more complex at the coal face of the project, where parties juggle between ensuring compliance with the specifications, employer's requirements and laws, updating programs, dealing with variations, delays and disruptions, preparing cost projections, and last but not least, working side by side with many different nationalities and cultures.

This article aims to highlight the importance of the contractual communications clauses, highlight the risks of noncompliance, and provide you with a few practical considerations to draft more clearly.

TECHNOLOGY AND COMMUNICATION

The means and speed of communication have improved exponentially over time. In the not-so-distant past (considering the age of our planet), we used to send smoke signals.

Have these developments improved our ability to articulate and communicate clearly and effectively? Let us put it this way, if the answer to this question was positive, then this article would not have seen the light of day.

The communications clause will usually prescribe whom correspondence should be addressed to and the *method* of transmittal. Surprisingly, and with all the modern means of communication available, parties in the Gulf Cooperation Council region often still include fax numbers in their contracts—perhaps reflecting the fact that in many procedural codes, the fax remains a valid means of service because it provides a delivery receipt once sent. One obvious solution is to ensure that a contractual protocol is set up whereby all correspondence is

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exchanged via email, especially where that correspondence can be uploaded through sophisticated document portals and stored on a shared server. That said, even if correspondence and documents are shared via such a platform, a prudent contractor or sub-contractor will keep his or her own copy of all such correspondence shared with or received from the owner and his or her team. This is because the shared server is often held and maintained by the owner—so a contractor would not want to lose access to that server if he or she ever got into a dispute with the owner.

LEGAL AND COMMERCIAL DRIVERS FOR CONTRACTUAL CORRESPONDENCE

There are several legal and commercial drivers that underscore the importance and necessity of contractual correspondence. The terms and conditions governing communication will have been agreed upon between the parties and will therefore likely be enforceable. The starting point is that parties must therefore always ensure that any contractual notice is validly served.

As a general rule, you should always read the contract carefully and ensure that any notice is served in the correct way and on the correct people. This can be particularly important in some jurisdictions, where the form of the notice might be just as important as its contents. This is particularly the case in English law, if that applies to your contract. Perhaps one of the most famous instances of this requirement to follow form as well as content is the judgment of the House of Lords in *Mannai v Eagle Star* (HL, 1997), which has the wonderfully English dicta:

> …if the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear [the contents of the notice] might have been….

So, contracts (and often the laws) prescribe when specific issues must be raised, the consequences of failing to do so, what information must be conveyed, and the actions the responding party has to or may take. Most contracts have stand-alone communications clauses that can sometimes be the most overlooked clauses in the contract, that is until a contract lands on the lawyers' desks, seeking their urgent advice in which they are requested to address the engineers or employers directly.

In the State of Qatar, the following is a cornerstone provision in their Civil Code[1], which requires that:

1. *The contract shall be executed according to its provisions* and in a way compatible with the requirements of *good faith*.
2. *The contract shall not be confined to committing the contracting party to its contents*, but shall also deal with its requisites pursuant to the law, customs and justice according to the nature of the obligation.

Article 172 of the Qatari Civil Code makes it clear that all the terms and conditions of a contract must be complied with. A contract is interpreted and applied holistically, taking account of any rights or obligations that are inextricably linked to the primary purpose expressed by the parties. This legal provision eliminates the element of surprise, anticipates and addresses future issues, and states what the consequences are if such a notice is not provided.

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COMMUNICATION AND LEGAL LIABILITY

Whenever a dispute between parties to a contract has escalated to the extent that external counsel (e.g., K&L Gates) has become involved, we usually look for gaps in the correspondence between the parties. These gaps often become the focal point arbitral or court proceedings. It is therefore of vital importance that issues are raised clearly, timeously, and notified correctly.[2]

For context, we need to remember that a party may attract liability *not only* for *acting* negligently but also for its *failures* to act. Sometimes, formulating after-the-fact legal arguments to explain noncompliance and to overcome/mitigate its negative effects is often more difficult than it is to deal with the actual content of a letter or notice at the time. Indeed, in our experience, proactive management usually attracts less criticism than trying to "cover" any missing notices after the fact.

Sometimes, project teams need help in understanding how far-reaching the consequences of poor communication can be. First, where a party consistently fails to abide by the terms of the contractual communication, it may very well find its positive claim value dwindle significantly. Indeed, it may very well find itself on the receiving end of counterclaims. Where a party does not proactively manage the communications during the execution of a contract, any adversarial process that may commence at the end of the project will focus itself on the reasons for this behavior and whether or not the issue in question could have been anticipated or avoided altogether.

Nevertheless, it is an oft-repeated truism that it takes two people to have an argument—and so it is important to be aware of the employer's/employer's representative's role in escalating or mitigating differences that arise during the project. In this regard, we have observed that a high-handed approach in meetings and correspondence, taken by the employer or the employer's representatives, often provides "fertilizer" for the contractors' claims to increase. Such may result in a vicious cycle, in that it increases the tensions, provokes the contractor into raising more claims, and provides no incentive for the contractor to settle claims that could easily have been settled. Arbitrators often take a dim view of this type of attitude from both employers and contractors in our experience.

COMMUNICATIONS GUIDELINES

Parties should ensure proper procedures are in place to monitor all contractual communications. Care must be taken by both parties to ensure that those working at the place to which communications are to be sent are also aware of this. For example, there is little point in giving a formal registered office address if that registered office is not used regularly—because this may mean that the notices and the like are not dealt with within either the contractually required or a reasonable time frame, if they are dealt with at all.[3]

Having highlighted the legal and commercial dynamics that sits within contractual communications clauses, let us turn to a few practicalities when compiling contractual communications. The following may be considered when compiling a notice:

- Are you required to submit a notice to make a claim/alert the counterparty of an event? Be aware the minutes of meetings may not necessarily constitute proper notice for the purpose of the contract.

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- Where preemptive action is required, i.e., where you need a drawing or access by a certain date, make sure that the notice goes out in a timely manner. Follow up on the date that the action is required.
- If so, are you under a time limit? If you have missed the time limit, are you able to sufficiently explain why the notice could not be submitted in a timely manner?
- Does the notice require supporting evidence to be submitted simultaneously? If not, does it specify a time limit by which "follow-up" particulars should be provided?
- To whom must the notice be addressed, and what is the contractually prescribed method of communication (email, courier, fax, hand delivery)?
- Schedule the date when the claim (and updates) must be submitted.

Thought should also be given to the following points when drafting:

- Is the notice/claim clearly marked as such?
- When you are in doubt with phraseology, it may be a good idea to paraphrase the contractual wording.
- Be consistent when using terminology.
- Draft and edit at different times.
- If there are allegations made against you, did you answer them, or did you at least reserve the right to do so? If you reserved the right to do so, then gather evidence to enable you to fully answer at the appropriate time.
- It is preferable not to mix topics in a letter/notice—if this is unavoidable, deal with each topic under a different heading in the communication.
- Be careful to make commitments in writing—if they need to be qualified, then these must be clearly and explicitly spelt out.
- Use the active tense and read it out loud to yourself to check whether or not it makes sense.
- Unless a term is defined, capital letters are used for proper nouns.
- Keep the content cold and clinical and stick to the facts.
- Do you have the contemporaneous evidence available to support your claim?
- Avoid emotive language as far as possible and consider your audience—it may be a judge or arbitrator a few years down the line. By all means, draft the letter when emotions are running high…but do not send it. Pause and send it when you have clarity of thought. If you have access to a printer, print it out and read it the next morning, before you send it.

Communicate in a polite and courteous manner. Most importantly, seek legal advice as early as possible.

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CONCLUSION

Letters and notices can be delivered instantly, with the click of a button, but it is the contract that should be viewed and used as a risk management tool from the outset. Parties tend to think that the net obligation of a construction contract is the completion of the project that meets the specifications or employer's requirements, is on time, and is within budget. That is one aspect of it. Communicating to get the project completed with as few misunderstandings as possible, and hopefully without having to resort to arbitration or courts, is another important aspect. Legal disputes are costly and time consuming to resolve and can drag on for many years after the project was delivered.

Proactive and timeous contractual communication is sensible and greatly reduces the element of surprise, reduces tensions and risks, enables parties to proactively manage risks when they arise, and allows parties to anticipate and deal with future issues. The net effect may be fewer misunderstandings, delays, claims, and disputes—and that is better for current and future business for everyone involved in the built environment.

FOOTNOTES

[1] Article 172.

[2] Legal advisors may also have to consider the issue where notices (or other contractual communications) are served (or exchanged) by means of an electronic contract management system (such as Asite), and how this needs to interface with the contract in terms of what constitutes proper notice (or proper contractual communication).

[3] The same holds true for communications by fax.

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