

An aerial photograph of a power plant. Several large, white, cylindrical cooling towers are visible, each emitting thick plumes of white steam that rise into the sky. The towers are connected by a network of pipes and walkways. In the foreground, there are various industrial buildings, including a long, low structure with a flat roof. The surrounding area is a mix of green grass and some rocky terrain. The overall scene is captured from a high angle, looking down at the facility.

Hogan  
Lovells

Contract and claim  
dispute management  
in the infrastructure  
and energy sector





# Contents

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Be a future-ready leader	4
Role of digitalization	6
Key activities in contract management to benefit from digitization	8
Getting ready for project execution	9
Managing claims	10
Taking stock during the project 'work-out' phase	12
How to resolve disputes	14
Leading the way	16



# Be a future-ready leader

## Importance of contract, claim and dispute management

Rapid urbanisation and growing demand mean that the construction industry is one of the largest industry sectors in the world, consistently poised to outpace the world GDP<sup>1</sup>. However it is also one of the most sluggish in terms of adapting to change to match its productivity growth as compared to demand.<sup>2</sup>

Productivity gap = **\$1.63 trillion**



Average value added by employees per hour worked<sup>1</sup>

<sup>1</sup>2015 data in real 2005 dollars

This can be attributed to a variety of challenges affecting the industry productivity, profitability and sustainability. We are witnessing that delivery of projects on time and within budget remains a major point of concern for both the market players intent on retaining their profit margins and the contracting parties which need timely delivery of the construction project. Looking at some of the more global industry trends of the last 5 years, in 2016, a major survey concluded that large projects typically take 20% longer to finish than scheduled and are up to 80% over budget,<sup>3</sup> and according to another

survey from 2019, the problems of cost and time overruns continue to plague the industry with as many as 6 out of 10 construction projects failing to meet the cost and schedule projections.<sup>4</sup>

The global Covid-19 pandemic of 2020 exacerbated this problem, with project suspensions and remobilisations, not to mention considerable supply-chain delays and reduced availability of on-site manpower, potentially leading to mega disputes. The sub-optimal construction productivity levels are estimated to result in a loss to the global economy approximating around USD 1.63 trillion annually. A critique heard often is that there exists a 'perceived lack of urgency' in adopting necessary changes required to arrest the spread of uncertainty in contract disputes.

<sup>1</sup> GCP Global/Oxford Economics, Global Construction 2030: A global forecast for the construction industry to 2030.

<sup>2</sup> McKinsey, Reinvention Construction through a productivity revolution, February 2017, <https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/reinventing-construction-through-a-productivity-revolution>.

<sup>3</sup> McKinsey, Imagining Construction's Digital Future, June 2016, <https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/imagining-construction-digital-future>.

<sup>4</sup> Compass International, Construction Project Cost Overruns, 25 July 2019, <https://compassinternational.net/construction-project-cost-overruns-part-two/>.

There are several factors contributing to such time and cost overruns. The industry comes with inherent risks of activity - both physical and financial, including unforeseen risks. There are regulatory compliances which need to be periodically checked and maintained comprising labour laws, health and safety, operating permits or sustainability etc. Complexity increases as projects expand in scope and size and new technologies are used. This complexity poses management hurdles in the form of additional interface requirements between the parties and the project teams, staggering amounts of documentation, and scheduling and supply errors. The resulting lack of productivity can be analysed from the shrinking profit margins of construction companies.

The overall forecast for the industry remains positive. Governments, recognizing the importance of the industry as a powerful driver for economic growth including increased GDP and employment rates, as well as supporting complementary businesses are already providing incentives to create an enabling environment to boost the construction sector leading to the scaling up of both the market as well as the market players.<sup>5</sup> In this background, with already slim margins, construction firms must look to adopt measures to increase productivity and maintain profitability, or risk being left behind.

Increased complexity of the projects has also led to a noticeable rise in disputes and 'claim culture'. In 2020, the average value and length of disputes has decreased slightly to 15 months, however, the overall number of

As per latest reports, the global average value of construction disputes is USD 33 million and the global average length of disputes increased to 17 months.<sup>6</sup>

The top players in the engineering and construction industry widely considered to be 'future-ready' are the ones implementing soft controls such as training programs, formal communication of project status, organised working statements and importantly, implementation of innovative technology. The top 20% are the innovative leaders who are significantly ahead when it comes to governance and controls- and most of them have integrated project management systems.<sup>8</sup>

disputes has increased.<sup>7</sup> Although the exact effects still need to be determined The COVID-19 pandemic affected works and had a part to play as companies turned to their contracts for risk management and protection. However, consistent with past years, other reasons which have been identified as primary contributors to the inefficiencies and disputes include poor contract management such as badly drafted contracts, ignorance by the project managers of the relevant contractual provisions, failures to comply with contractual requirements and deadlines and insufficient record keeping of relevant project documentation. There is also a tendency to postpone the resolution of project disputes. In order for a construction firm to increase chances of market survival and productivity, a proactive approach should be adopted right from the beginning of the project itself. To this end, a good contract management system implemented at the earliest ensures that the rights of the parties are protected and enforced throughout the project life cycle.

5 McKinsey, *Reinvention Construction through a productivity revolution*, February 2017, <https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/reinventing-construction-through-a-productivity-revolution>.

6 Arcadis, Report on Global Construction Disputes 2019, [https://www.arcadis.com/media/5/D/1/%7B5D16141D-B883-4398-BB35-218023E1F4F6%7DRP\\_GCDR\\_AL20190620\\_Final.pdf](https://www.arcadis.com/media/5/D/1/%7B5D16141D-B883-4398-BB35-218023E1F4F6%7DRP_GCDR_AL20190620_Final.pdf).

7 Arcadis, Report on Global Construction Disputes 2020 Global Construction Disputes Report 2020, <https://www.arcadis.com/media/B/2/3/%7BB233AA1F-3A1A-4F85-B187-DEA56F67365F%7DFinal-2020-GCDR-Report-Spreads-Layout.pdf>.

8 Arcadis, Report on Global Construction Disputes 2019, [https://www.arcadis.com/media/5/D/1/%7B5D16141D-B883-4398-BB35-218023E1F4F6%7DRP\\_GCDR\\_AL20190620\\_Final.pdf](https://www.arcadis.com/media/5/D/1/%7B5D16141D-B883-4398-BB35-218023E1F4F6%7DRP_GCDR_AL20190620_Final.pdf), and KPMG, Global Construction Survey 2019: The Future-Ready Index: Leaders and followers in the engineering and construction industry, <https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/04/global-construction-survey-2019.pdf>.

## Role of digitalization

A golden rule of disputes in major projects is to “cut through the noise” and present the most compelling evidence in the simplest manner possible. This not only makes for a more coherent claim, but also increases the chances of a win! Thus, a key question before companies now is how to organise their contract management processes in the most cost efficient way.

For instance, if we look at 2020, we can see that critical infrastructure and construction were classified by most countries as a ‘critical activity’ during the COVID-19 pandemic and allowed to continue operations, albeit with increased rules and unavoidable disruptions. Several other projects were suspended due to financial issues and other woes, and were already, or may be restarted. This situation only serves to highlight the importance of going digital as the quantity and quality of documentation will play a key role in how the disputes in these projects are resolved. It is imperative that a system is adopted which can segregate issues arising directly from the pandemic and those not related.

The broader learning however, is that for any company to survive and compete long-term, adopting a system which enables good contract management should now be the standard, as opposed to an emergency measure.

This is where the use of digital tools comes in, helping to create centralized structures which facilitate streamlining of not only the contract but also claim management. Used properly, digital tools can help with properly archiving project documents, monitoring of contract provisions and deadlines, as well as standardising project correspondence in line with contractual requirements.

In short, digital processes can be used to:

- Create, assign, prioritize tasks
- Immediate notifications
- Check real time status of work progress, updates, revisions and plan changes
- Monitor crew deployment
- Update and track compliance checklists
- Maintain updated records, which are easily accessible, of all project related communications
- Upload, create standardized documentation
- Claims Management

It is now accepted that today, a digitalized and efficient project management system is a key driver for successful project execution. Use of electronic document management software not only helps streamline the contract processes and maintain a chronology of events, especially for claim management, it facilitates early review and filtering and analysis of documents to prepare the best possible narrative for a party for making or defending a claim. As the leading innovative law firm in Europe and a standout for its expertise in dispute resolution,<sup>9</sup> Hogan Lovells offers complete legal support to contract management and dispute resolution through all of the stages of a project from inception to completion. This service is based on use of digital project management tools integrated with legal functions to craft an effective way forward for contract and claims management in the construction industry.

<sup>9</sup> Hogan Lovells once again named one of the most innovative law firms in Europe by the Financial times; 13 September 2019; <https://www.hoganlovells.com/en/news/hogan-lovells-once-again-named-one-of-the-most-innovative-law-firms-in-europe-by-the-financial-times>.





## Key activities in contract management to benefit from digitalization

Contract management should ideally start at the negotiating table itself when the project agreement is being finalised by the parties, and continue till the project is finally completed including settlement of disputes which arise under the contract. Efficiency in all these stages can be brought about by combining digitalization and legal expertise.

### Concluding contracts

A common challenge during contract negotiation and drafting can be a lack of coordination between the different functional teams such as design, finance and legal. This could pertain to delay in approvals, conflicting positions on timelines or existence of multiple current versions of the contract. Underestimating the importance of legal contract management at this phase can be potentially damaging — it is not uncommon for such procedural inefficiencies to result in the signing

of an incomplete or ill-defined contract with vague references and generic language which is not specific to the agreement between the parties. Due regard must also be given to use of industry specific terms and the law applicable to the contract, especially where cross border deals are negotiated.

The involvement of legal professionals can be extremely beneficial at this stage to fully understand the intricacies of the project and build it into the contract, so that the position of the parties is protected as envisaged.

### How can we help:



Negotiating the contract/bid to the best possible extent



Setting clearly defined risk allocation, manageable timelines and scope of work specific to the project



Streamlining processes for contract approvals and easy accessibility to all project teams at one place. This also reduces versioning errors and ensures that changes suggested by all team members are taken into account



Smart digital archiving of correspondence, drafts and other important documents for future reference and use, if any



Tailored workshop for project management to facilitate understanding of key contract terms and processes and making the contract manageable





## Getting ready for project execution

The execution phase of the project is a crucial phase for contract management. As the work progresses, changes to the contract must be effected based on real-time situations and events during the project implementation. At this point, all contract documentation should be kept up-to-date and consistent so all parties have a common view of potential and agreed changes to avoid the unnecessary errors which often give rise to disputes. It is common for disputes to arise on the field and correspondence on the same must be duly preserved to avoid future complications. This is also the stage when typically, new members are introduced to the project

team, who may not always be familiar with the specific provisions and timelines of the project contract. This can lead to unclear demarcation of roles and responsibilities of key personnel and workers involved in the contract. From a legal perspective, it is important that the project personnel have the legal know-how of the terms of the contract and any related consequences. We are aware that in addition to use of current technology, enhancing the technological capabilities of personnel and integrating innovative processes into the overall project culture have a huge impact on the successful outcomes in any project.

### How can we help:



Workshop contract/claims management for personnel involved in project



Legal tailoring of the contract management software tool to the contract which includes standard format for contractual communication, deadline reminders, creation of templates for standard notices, and setting up digitalized channels for approvals and feedback, thus reducing errors and delays



Guideline on how to document claims on project level



Providing legal oversight of all important correspondence and documentation, which is also automatically archived and saved throughout project execution



## Managing claims

Claims management is an important part of contract management and involves logging of issues, maintenance of records and claims from the beginning of the dispute itself. Over 2019-2020, it has emerged, globally, that '*poorly drafted, incomplete or unsubstantiated claims*' is the number one cause of construction disputes.

Major challenges in claim management have been identified as i) collection and retrieval of key information and documents ii) knowledge and adherence to contractual and statutory time limits and conditions iii) managing claims under foreign law iv) gathering key witnesses and experts v) presentation vi) deciding whether to settle a claim or initiate formal procedures such as arbitration or court litigation.

To minimize errors, the following key considerations should be kept in mind:

- Preparation for and seeking opportunities to avoid litigation even prior to the loss emergency response, business resumption and disaster recovery.
- Gathering information related to the claim – this should be an ongoing process. Ensuring thorough, detailed and streamlined communication between the necessary partners and teams and providing continuous feedback, factoring in issues relating to applicability of foreign law in cross border transactions which often involve application of different laws from different jurisdictions and different judicial practices.
- Acting quickly – One of the many reasons why claims fail is because they are not raised at quickly or at the appropriate time. Once a claim is delayed, it becomes more onerous to pursue and/ or defend the same. This can be attributed to factors such as factual distortion over a period of time, oral or verbal agreements made in urgency on the field,





non-availability of key personnel involved with the claim or the project, claims being barred by contractual or statutory time limitations or generally prolonged negotiations and loss of motivation.


Proper claims management procedure which combines the benefit of expert legal advice with technology can help address the challenges outlined above.


It is evident that claims management involves inculcation of a better understanding of the key functions of project management at different contract stages (as outlined earlier) and integrating them. With a deep rooted understanding of the industry processes and the working environment, lawyers especially are equipped with the necessary skills to act as integrators and provide a system which will make project and claims management tasks simpler and time efficient.

Claim management, at its core, is a legal exercise which spans the breadth of a project. Having legal oversight of claims management is useful in many instances. For example, companies have to observe more caution while communicating with the other party, as all emails, documents, meetings and exchanges between the parties are open to examination during the dispute procedure. There have been countless instances wherein the different teams send separate communications to the other party without having consulted with each other, or without knowledge that a dispute has arisen, which can have the unintended effect of weakening a parties position in a dispute.


## How can we help:

-  Provision of continuous legal guidance throughout the project, including in case of anticipated or actual delay
-  Preventing breach of contractually agreed upon deadlines for claims
-  Assessing and providing developed legal opinion at early stage of the dispute for early resolution of the dispute or to prevent escalation and minimize costs
-  In-depth claims analysis including investigation and appraisal of claims

-  Management of the entire claims management procedure from the first early warning/letter before formal claim to the resolution

-  As an international law firm we are proficient at handling cross border matters with ease from initial claim to enforcement issues

-  Post dispute analysis of contract and claims for the future

-  Use of digital tools for document review





## Taking stock during the project 'work-out' phase

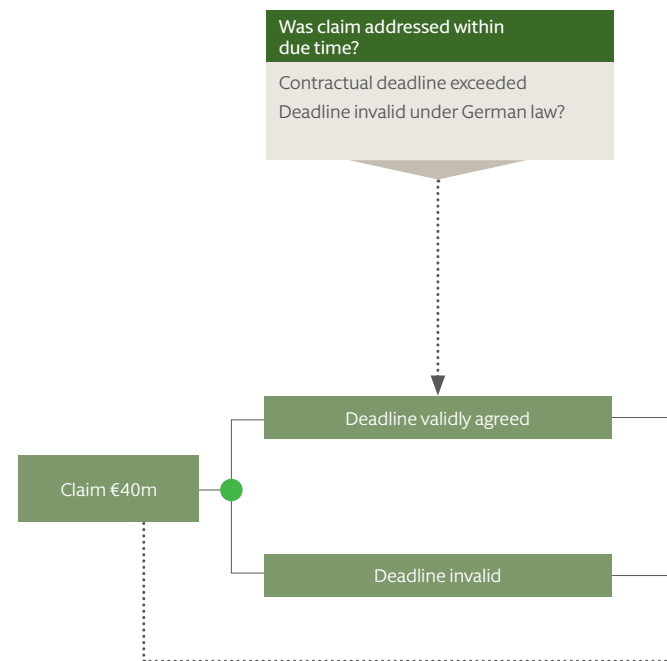
A typical 'work-out phase' of a project cycle is all about assessment of deliverables, checking whether all loose- ends are tied-up and getting a final evaluation of the project. Thus, once the project nears completion, in this phase the parties often raise claims from disputed variation orders, time extensions, or open punch list items. It is also not rare for parties to raise inflated claims to get leverage in settlement negotiations and to avoid any potential limitation issues. The downside to this of course is that a higher gap between the mutual claims makes it more difficult it is to reach a settlement. Escalation of disputes leads to retention of payments, and invocation of guarantees which potentially trigger emergency court proceedings. Again, a key driver of this is the improper contract management by the project parties, disabling them to fully assess the substance of their claims.

Timeliness is the need of the hour. To be able to conduct settlement discussion on reliable grounds and to weight the alternatives to proceed with the dispute, it is imperative for the project parties to get quickly an overview on its rights and obligation. To this end, we offer an Early Case Assessment analysing the legal issues of highest relevance and give recommendations on how to proceed. Early Case Assessment is typically conducted within a few weeks and at modest costs.

A typical Early Case Assessment process commences with identifying and defining the legal hypothesis for actual and potential claims vis-a- vis the contractual terms and conditions and available facts. A set of core documents are selected and examined at this stage to assess the chances and risks of the case. If required, initial interviews of key members of the project team are conducted to assess the facts further. Tools such as process charts and decision trees may be used to simplify and visualize the findings, which will be beneficial for the

management's briefing as well as for subsequent briefings if new findings necessitate changes to the chances and risk assessment.

### Decision tree analysis diagram:



## How can we help:



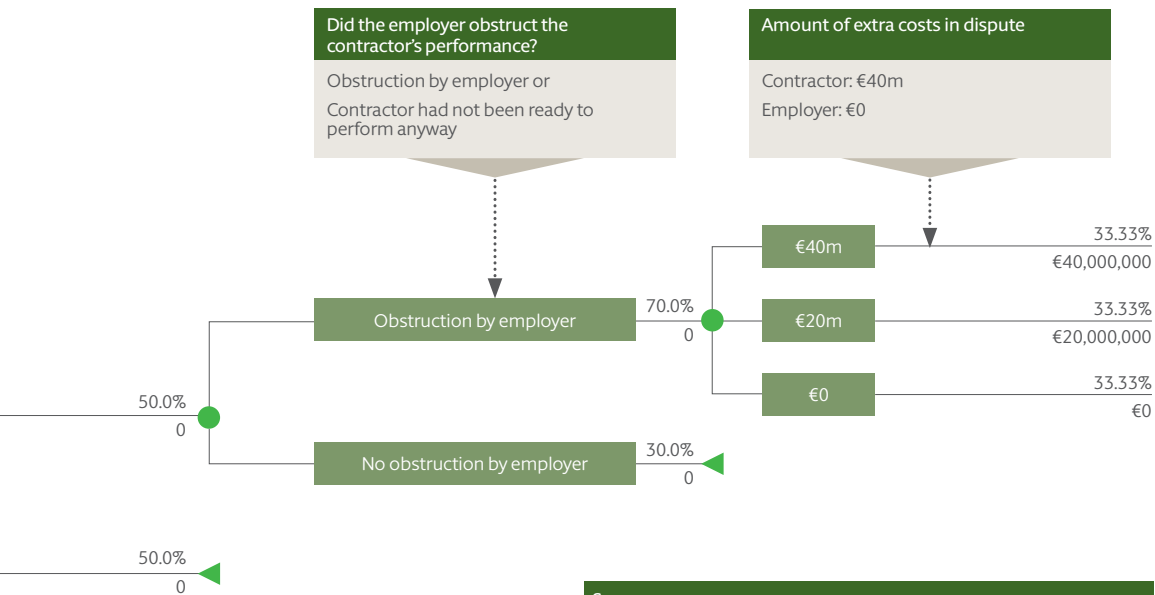
Legal overview of key documentation and correspondence.



Quick retrieval of past communication and details of the project for negotiation or settlement of clear cut disputes or minor disputes before the final adjustment or payment.



Carrying out an Early Case Assessment of potential and existing disputes which aids the claims management process. Based on the assessment, suggestions are made for the way forward, including whether or not and with which objective to negotiate an out-of-court settlement if advisable and at the same time prepare for arbitration or court litigation.



Summary	
Claim	€40,000,000
Fictional expected value	
Expected litigation costs	€2,500,000

Fictional outcome for claimant	
Fictional award	
Fictional portion of expected litigation costs	
Zone of agreement	

## How to resolve disputes

Disputes, whether minor or substantial, can arise at any stage of the project once the contract has been executed and may relate to i) pre-contractual issues such as bid clauses ii) provisions pertaining to contract which include disputes regarding payments made under the contract, problems encountered in execution such as change in ground conditions, unforeseeable events etc., risk allocation provisions and time extension claims iii) breach of warranty, misrepresentation or negligence claims.

Good project management entails that such disputes are resolved as quickly as possible to limit exposure; however, it is often observed that disputes are postponed for resolution at a later date – this could be due to lack of understanding of procedure and follow up on claims, or other extraneous issues like change in management. The tendency to avoid dispute resolution can result in a collective bunch of claims, which end up get escalated to formal dispute resolution processes costing time and effort.

Another aspect to keep in mind is to formulate and figure out the right mechanism for resolution. One can approach the courts; however, the nature of construction disputes, especially in large and complex projects, is often very technical and involves application of several contractual provisions at the same time. Thus, in major energy and infrastructure projects, disputes usually escalate in stages: parties can choose between a myriad of options such as mediation, expert determination, adjudication boards and finally, arbitration. It is important to ensure that the forum chosen fits the needs of the parties and is appropriate with regard to the nature and size of the claim to curtail prolongation and expenses.

Moreover, as the outcome of the dispute tends to turn on facts, construction disputes are also generally very evidence heavy and involve scrutiny of vast quantities of documents ranging from communications, technical reports, records of plans and schedules etc. For large and complicated projects, this can run into tens of thousands of pages and renders document review a complicated, inefficient and exhausting process.

For complex cases involving vast quantities of documentation and evidence, digital tools for document recovery are being increasingly utilized to help minimize time and cost of dispute resolution. Such technology-assisted review (TAR) software utilizes machine learning algorithms to assess the relevance of a document. This algorithm is based upon review and ranking of a small sample of documents by a lawyer which is analyzed and incorporated by the software. Research on the subject has also revealed that a lawyer only needs to review 1.9% of the documents to get better results than a full manual review.<sup>10</sup> As a result important documents are reviewed first and are less likely to be missed and irrelevant documents can be excluded from manual review. Such technology is gaining wider acceptance even within court of laws as a credible method of document review.

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<sup>10</sup> Prof Maura R Grossman and Prof Gordon V Cormack (both University of Waterloo in Ontario) , ("TAR in eDiscovery Can Be More Effective and More Efficient Than Manual Review"), Richmond Journal of Law and Technology 2011



## How can we help:



Experience in major infrastructure disputes enabling us to guide you through



Deep technical understanding to develop the best possible defense line



Extensive network of technical experts



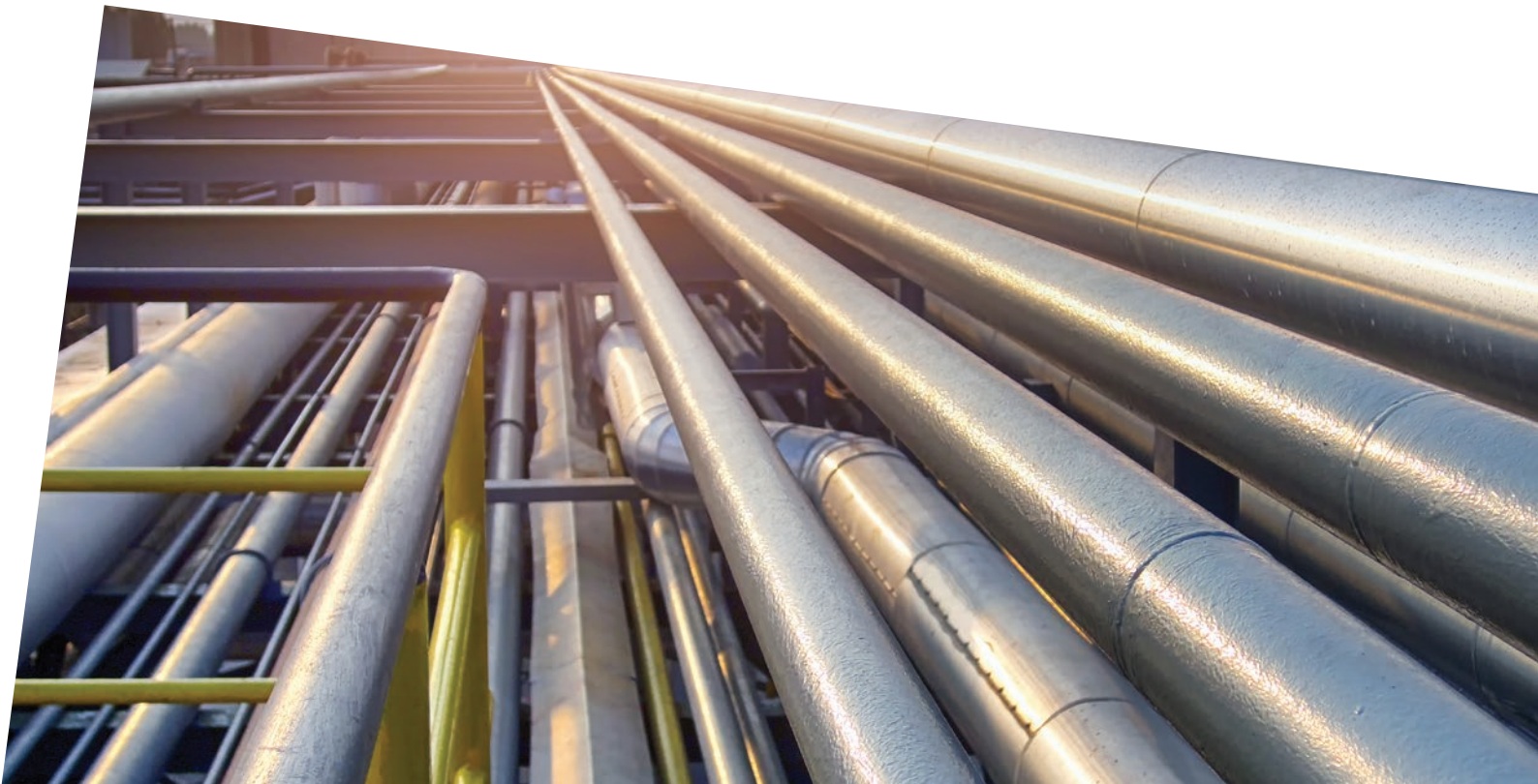
Assessing risks and chances based on decision-tree-analyses



Technology assisted document review in complex cases with vast quantities of data to help minimize time and cost of dispute resolution.



Tie-ups with leading innovative contract management softwares with integrated claim management features for a seamless start-to-finish project experience



## Leading the way

Broadly, it can be summarized that preventing inefficiencies in project management and occurrence of disputes is a three-step process.

- Adequate contractual framework that envisages potential events
- Timely risk assessment and allocation
- Fostering a more transparent and agile project culture with defined project goals

Hogan Lovells is a leader in providing support solutions on highest professional level with state of the art legal tools. We have a specialist in-house resource, part of a global firm wide team that can offer cross-border solutions. Applying our expertise and experience,

we advise on and implement advanced technology solutions for the management of information in disputes and investigations. We use our market knowledge and strong relationships with external providers to find the best technology option for our clients and help control costs.

Adopting an innovative technology driven model has multiple benefits such as enhanced productivity, resolution of disputes in a collaborative or timely manner and lower costs. By combining our industry knowledge and experience with digitalization potential, we can help you address challenges throughout the life-cycle of a project through project support, compliance analysis risk assessment and effective dispute management and resolution processes.









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Colorado Springs	Perth
Denver	Philadelphia
Dubai	Riyadh*
Dusseldorf	Rome
Frankfurt	San Francisco
Hamburg	Sao Paulo
Hanoi	Shanghai
Ho Chi Minh City	Shanghai FTZ*
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