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**CONSTRUCTION ARBITRATION IN THE MIDDLE EAST**

# Winning Construction Arbitration in the Gulf: Some Strategic Considerations

Adrian Cole*

ABSTRACT

*The construction industry regularly uses arbitration to resolve the technically and legally complex disputes that projects frequently generate. There is good reason for this. Construction projects are often international in nature, with parties wishing to avoid vagaries of local courts and difficulties of enforcing court judgments overseas. Even domestic parties often contract out of state courts in order to obtain the flexibility and confidentiality that arbitration can offer. Working through key principles and having regard to the typical disputes that construction projects generate, this article offers insight into the numerous issues likely to arise in construction arbitrations and guidance on how to deal effectively with them in order to maximize one's chances of success.*

Arbitration is generally considered to be the dispute resolution mechanism of choice for those engaged in construction projects, be they developers, contractors, suppliers or consultants. There is good reason for this. Arbitration provides parties with a large degree of privacy, can accommodate rules and procedures to reflect the particular needs of a dispute or of the parties, and allows disputes to be decided by specialists with experience of the construction industry and construction law.

## 1 ARBITRATION VERSUS LITIGATION

These qualities of privacy, flexibility and industry expertise distinguish arbitration from national courts, which operate in public and are often staffed by judges who may have little experience of how the construction industry operates or of the technical issues that arise in disputes. The binding and final nature of most arbitration awards may be compared to the potential cost, delay and uncertainty caused by successive appeals in state courts. Furthermore, court procedures are often inflexible and inappropriate for the specific needs of complex construction disputes in which time, cost and quality are key issues.

* Partner at King & Spalding, Abu Dhabi. The article is based on the author's experience of arbitration in Gulf Cooperation Council (GCC) countries, with particular reference to the United Arab Emirates (UAE), Qatar and Bahrain, where many regional arbitrations take place.

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These distinctions are accentuated in the Middle East due to language differences. The contractual and operational language for most construction projects is English, as the language common to the numerous nationalities involved in large projects. National courts mostly operate in Arabic, however.[1] The time, cost and ability to translate project documents from English or another language to Arabic, as would be necessary in court proceedings, is another reason why arbitration is the preferred dispute resolution option for such projects.

However, perhaps the greatest advantage of arbitration over national courts in matters of an international nature is that arbitration awards are generally more easily enforceable overseas than court judgments. Whilst arrangements – both formal[2] and informal[3] – for enforcing court judgments within and outside the Middle East are becoming more common, there is some way to go before they can compete with the New York Convention,[4] which facilitates the recognition and enforcement of arbitral awards in the 157 countries that are today parties to the Convention.[5]

All six GCC members[6] are contracting parties to the New York Convention, which has simplified the process for enforcing foreign arbitral awards in the Gulf. This is not to say that enforcement is assured. Local court rules can derail successful recovery, as happened in *CCI v. Ministry of Irrigation of the Democratic Republic of the Sudan* (Case No. 156/2013), in which the Dubai Court of Cassation rejected an appeal to enforce two ICC arbitral awards, rendered in Paris, under the New York Convention and the Convention on Judicial Cooperation between the UAE and France. The court reasoned that both treaties require the UAE courts to apply domestic civil procedure rules to enforcement actions and refused enforcement on the grounds that the UAE courts lacked jurisdiction under those rules. The case has attracted much critical comment.

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1 An increasing number of courts operate in freezones which conduct business in English. These include those of the Dubai International Financial Centre (DIFC), the Abu Dhabi Global Market (ADGM), the Qatar International Financial Centre (QIFC), and Bahrain's Free Arbitration Zone.

2 For example, treaties such as the Riyadh Convention on Judicial Cooperation between States of the Arab League (1983) and the GCC Convention on the Execution of Judgments, Delegations and Judicial Notifications (1987).

3 For example, Memorandum of Guidance between DIFC Courts and United States District Court for the Southern District of New York (29 March 2015); Memorandum of Guidance as to Enforcement between the High Court of the Hong Kong Special Administrative Region of the People's Republic of China and Abu Dhabi Global Market Courts (5 May 2017).

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

5 *See* http://www.uncitral.org; http://www.newyorkconvention.org (accessed 23 September 2017).

6 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.

## 2 EFFECTIVE ARBITRATION CLAUSES

The first step towards winning construction disputes in the Middle East is an effective arbitration agreement that will allow the parties to enjoy the benefits mentioned above. However, it is at this first hurdle that many parties fall. Failure to make an effective arbitration agreement can result in expensive disappointment for at least one of the parties.

Whilst pathological – or defective – arbitration agreements can be cured by agreement, practitioners will know that it may be difficult, if not impossible, to reach agreement on anything once a dispute has arisen, especially if the parties are not represented by professional and capable counsel whose job is to further the dispute resolution process, not frustrate it.

In the event of a dispute, parties typically marshal whatever arguments they can to further their case. In the Middle East, where the principles of apparent or ostensible authority are rarely recognized, a common strategy employed by parties is to challenge the validity of the arbitration agreement on the grounds that it was executed by persons not duly authorized to do so, thereby nullifying the parties' consent to opt out of the national courts. Although parties making such a challenge have sometimes scored an own goal and ended up with less attractive litigation, the strategy has on other occasions forced an early compromise. As a result, care should be taken to ensure that persons executing arbitration agreements have been duly authorized to do so. In many Middle Eastern jurisdictions, the level of authority required to execute an arbitration agreement will be higher than that required to execute the construction contract in which the arbitration agreement usually sits. For example, the Abu Dhabi Court of Cassation (Case No. 873 of 2009) confirmed Article 203(4) of the UAE's Civil Procedure Law, according to which only a person who has the capacity to dispose of a right in dispute may validly agree to arbitration. Unless the person authorised to sign the contract is also authorised to enter into the arbitration agreement, then the arbitration agreement may be deemed void for want of authority. The burden of checking the authority of the signatory usually rests with the party that seeks to rely upon the arbitration agreement.

Likewise, given that governmental departments are often the procuring entities in construction projects, it is important to ensure that any necessary pre-contract approvals for agreeing to arbitration are obtained.

In a similar vein, parties wishing to opt for DIFC-LCIA arbitration seated in the Dubai International Financial Centre (DIFC) should take care to specify the DIFC as the seat and not simply Dubai. To the surprise of many, an arbitration seated in Dubai will fall within the jurisdiction of the Arabic-speaking national

courts rather than the courts of the DIFC financial freezone, which use English and operate within a common law framework.

## 3 MULTIPLE PARTIES, JOINDER AND CONSOLIDATION

A characteristic of construction projects is the large number of parties that may be involved. However, the underlying contracts and the arbitration agreements they contain rarely have more than a single entity or joint venture on either side. This creates challenges for multiparty actions in arbitration. For example, joining the engineer under a FIDIC contract into a dispute between the employer and the contractor, or consolidating two concurrent disputes into one common proceeding before the same tribunal, is less straightforward in arbitration than in litigation before the courts.

In the absence of a project-wide agreement binding all parties to a common arbitration, parties may choose rules[7] that provide for joinder and/or consolidation. Yet, even if they do, such rules will invariably require consent, which may not be forthcoming once a dispute has arisen.

Careful consideration must be given to whether it is in a party's best interests to join one or more third parties to proceedings (to the extent that this is possible), or whether it is better to avoid the damage this might cause to the party's primary case, albeit at the risk of inconsistent outcomes. For example, a contractor's claims against an employer may not be best served by the contractor's designer being joined to proceedings and revealed as the cause of the contractor's difficulties.

## 4 APPLICABLE LAW

Legal practice in the Gulf is cosmopolitan in nature. Local laws are fundamentally inspired by the civil law system. On the other hand, practitioners, whether legal or technical (e.g. contract and commercial managers, quantity surveyors, claims consultants, expert witnesses) hail, for the most part, from jurisdictions with a common law tradition. It is not uncommon for an arbitration in the Middle East to involve a tribunal, counsel and supporting expert witnesses originating from common law countries (e.g. USA, UK, Australia) and for common law rather than civil law principles to be applied to both the conduct of the proceedings and the merits. However, such an approach is potentially dangerous, save where there is express agreement amongst all concerned.

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7 *See e.g.* 2017 ICC Arbitration Rules, Articles 7–10.

Care should be taken to ensure that, when conducting and presenting a case, due regard is given to the applicable law of the contract and of the seat in order to forestall unwelcome challenges from disgruntled losers against an eventual award. It is good practice to obtain agreement on any particular requirements of law that are to apply to the arbitration, including any formalities relating to the award. Mandatory rules will nevertheless apply, such as the requirement in the UAE that awards be rendered by tribunals that are physically present in the jurisdiction and that they be signed (not initialled) on each page.[8] Fortunately, the unusual requirement that awards issued in Qatar be issued in the name of the Ruler has now been dropped.

## 5 NOTICES OF CLAIM

In construction disputes, one of the more discernible differences between civil and common law practice relates to the giving of notices or submission of detailed particulars by contractors claiming additional time and cost under the contract. In contracts based upon the FIDIC[9] general conditions, which are common in the Middle East, the giving of such notices and detailed particulars within the prescribed time period (usually 28 days, but often shorter) is stated to be a pre-condition, with failure to meet that prerequisite amounting to a waiver of entitlement to claim. Although both the common law and civil law systems prohibit courts and tribunals from interfering in the contractual bargain between the parties, there are differences between the two systems in practice. For example, recent English common law cases have shown courts applying time bars strictly, thereby depriving the contractor of the right to claim for time and cost relief.

By contrast, time bars are not necessarily applied so strictly in the Middle East, where there are a number of mitigation measures available to parties that have failed to give the required notices. For example, the Shari'a principle that a 'just claim never dies' and the civil law requirement of good faith are but two examples that can mitigate the harshness of the common law approach to time bars. The law of Saudi Arabia is based upon Shari'a and the principles of Shari'a are incorporated into the laws of many other Gulf states.[10]

Claimants who have not given the required notices or particulars often seek to argue that contractual time bars conflict with statutory limitation periods, which may not be shortened under applicable laws. They may also seek to rely on

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8 *See e.g.* Dubai Court of Appeal, Case No. 371-203, in which an award was annulled on the grounds that it failed to fully comply with, amongst others, Article 212 of the UAE Civil Code, which sets forth certain requirements for arbitral awards.

9 *Fédération Internationale des Ingénieurs-Conseils* (International Federation of Consulting Engineers).

10 For example, Article 7 of the UAE Constitution, which provides that the Islamic Shari'a is a main source of legislation in the UAE.

statutory provisions such as Article 106 of the UAE Civil Code,[11] for example, which protects against the abuse of rights, as when the interest claimed is disproportionate to the harm suffered or the exercise of a right exceeds the bounds of usage and custom. For example, where additional work has been carried out at the employer's request, contractors often argue that it is an abuse of a contractual right to then deny the contractor's entitlement simply because a notice was not given as prescribed in the contract. The merit of such arguments generally turns on the facts, but it goes without saying that contractors wishing to successfully claim in construction arbitrations should take special care to ensure that all contractual obligations are fully satisfied, so as to avoid the need to rely upon the uncertain application of statutory protections.

## 6 PROTECTING A PARTY'S POSITION DURING THE CONTRACT

Construction disputes typically have a long gestation period. Often, it is not until late in the project or even after its conclusion, when a final account cannot be settled, that the parties crystallize their positions into formal disputes. In the interim, however, parties can significantly damage their chances of ultimate success through carelessness.

Many disputes arise out of delays in completion. The contractor may claim for an extension of time, or the employer[12] may claim damages for delay, also known as liquidated damages. Such claims are often founded upon claims and submissions (which may include construction time schedules or programmes) made by one party to the other during the course of a project. If these documents are not prepared with the care they demand, it will be difficult for a party later to distance itself from such contemporaneous documentation on the grounds of its inaccuracy.

The laws of the Gulf states[13] do not recognise the common law concepts of privilege and 'without prejudice' correspondence as such. This potentially allows an opposing party to rely upon documents which elsewhere might be withheld from disclosure to a court on grounds of legal privilege. Whilst Gulf states have laws that require lawyers to maintain confidentiality[14] and arbitration rules[15] that may uphold privilege under applicable laws, care should be taken to avoid

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11 Federal Law No. 1 of 1987 (Civil Transactions Law of the UAE), as amended.

12 Sometimes referred to as the 'owner'.

13 With limited exceptions such as the DIFC and the ADGM.

14 For example, Bahrain Law of Evidence, Article 67.

15 For example, 2017 BCDR-AAA Arbitration Rules, Article 23.10 ('The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any evidence.') and Article 24 ('The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between lawyer and client. When the parties, their counsel, or their documents would be subject to different rules of privilege, the arbitral tribunal shall, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.').

producing documents that contain unintended admissions or waiving any applicable privilege over them. Engaging expert legal counsel to advise on such matters early in a project can help to avoid creating material that might prove damaging or at least restrict its disclosure or lessen the risk of making inappropriate admissions.

Construction projects are often carried out under considerable time and cost constraints. The resulting pressure can cause normally well-mannered and professional personnel to write abusive or otherwise embarrassing emails. Project teams should be counselled in order to avoid the risk of such behaviour, as the credibility of witnesses can be severely damaged when such emails are adduced as evidence.

## 7 CONDITIONS PRECEDENT

Construction contracts[16] commonly contain tiered dispute resolution clauses. The purpose of such clauses is to deal with disputes in a proportional way, avoiding unnecessary expense and delay. They often provide for senior executives first to meet to seek an amicable resolution of the dispute, followed perhaps by mediation and or adjudication. Only if a dispute cannot be resolved by those means will it be referred to litigation or arbitration. Courts in the region,[17] like those elsewhere,[18] have ruled that contractually prescribed amicable dispute resolution procedures must be completed before arbitration can be commenced. Parties often disregard those rulings by commencing arbitration without having satisfied such preconditions, which may lead to objections that the arbitral tribunal lacks jurisdiction for having been seized prematurely, thereby jeopardizing the validity and enforceability of an eventual award.

The same problem can arise, even more acutely, in construction contracts that prohibit the commencement of arbitration until the completion or taking-over of the works has occurred. Sometimes, poor contract drafting leaves it uncertain as to whether the prohibition is intended to apply even where a contract has been terminated and whether a contracting party must wait until all works have been concluded before commencing arbitration. Care when drafting contracts can avoid such uncertainties and potential roadblocks.

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16 In the present context, this term covers the various types of contracts used in the construction sphere, including main contracts, subcontracts, supply agreements, professional appointments, etc.

17 For example, Dubai Court of Cassation in Case No. 204/2008.

18 For example, English High Court in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104; New South Wales Court of Appeal in *United Group Rail Services v. Rail Corporation New South Wales* [2009] NSWCA 177.

## 8 THRESHOLD DISPUTES

Threshold disputes can arise out of a myriad of issues, significant or trivial, but all of which have the potential to derail an arbitration. Such issues range from whether a tribunal's independence and impartiality is compromised by a past relationship, to the validity of powers of attorney authorizing legal counsel to represent a party in the arbitration. Procedural regularity is perhaps given more weight in the Middle East than elsewhere. It is thus prudent to ensure compliance with all procedural requirements to avoid the risk of any non-compliance being exploited by a losing party at the enforcement stage. Particular care should be taken to comply with statutes of limitations. In parts of the Middle East it can be difficult determining which of several applicable limitation periods is to apply and claimants would be well advised to commence arbitration in good time, so as to avoid any risk of statutory time bars being raised as a defence.

## 9 TERMS OF REFERENCE

One way of reducing the risk of threshold disputes is for comprehensive terms of reference to be agreed at the outset of an arbitration. Whilst this is a mandatory requirement in ICC arbitrations (save those subject to ICC's expedited procedure), no similar requirement appears in the rules of regional arbitral institutions such as the Bahrain Chamber for Dispute Resolution, the Dubai International Arbitration Centre, or the Abu Dhabi Commercial Conciliation and Arbitration Centre, although some regional arbitration laws do require 'an arbitration document' to be entered into.[19] Whilst it is normal to set out a summary of the parties' respective claims and relief sought, well-drafted terms of reference will, amongst other things, recite the arbitration agreement. If duly signed by authorized representatives, this may amount to a new arbitration agreement or evidence a waiver of any deficiency in the arbitration agreement in the construction contract.

The terms of reference might also usefully confirm the agreement of the parties as to when the arbitration award is to be issued or confirm the tribunal's powers to extend such time limit, to the extent permitted by the arbitration rules or national law. Many national laws[20] and institutional arbitral rules require arbitral awards to be issued within a limited time frame. Failure to comply may render the award unenforceable. However, such restrictions are often unrealistic for complex construction disputes with extensive pleadings and evidential phases. Where parties

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[19] For example, UAE Civil Procedure Law, Article 216.

[20] For example, *ibid*., Article 210, which requires the award to be issued within six months of the date of the first arbitration session. This period may be extended by agreement of the parties or by the tribunal, if so authorised. Saudi Arbitration Regulation, Article 40 provides that the award is to be issued within twelve months of the start of the arbitration procedure, unless it is agreed otherwise.

are from different legal backgrounds, the terms of reference can be invaluable in clarifying the procedural requirements to be followed and conferring any necessary authority on the tribunal to extend time periods for issuing awards.

## 10 TRIBUNAL SELECTION

One of the commonly recognized advantages of arbitration over litigation is the ability to select the tribunal that will decide the dispute. The selection of the tribunal will invariably be subject to the applicable arbitration rules, although agreements between the parties as to the particular qualities the arbitrators should possess are becoming more common in the Middle East. Although it is wise not to be too specific over the required qualities, the appointment of tribunal members who are not only arbitration practitioners but also understand and are experienced in construction law and the construction industry as a whole will avoid losing time 'educating' non-expert tribunals and reduce the risk of important evidence being misunderstood.

## 11 PROCEDURAL CONSIDERATIONS

Most arbitration rules afford the parties and the tribunal considerable flexibility in shaping the procedure to be adopted, which can be particularly advantageous when arbitrating construction disputes. Careful consideration of how the rules might be tailored to the needs of a particular dispute can save much time and cost, as well as create tactical advantages for well-advised parties.

The BCDR-AAA Arbitration Rules require that the parties be 'treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case'.[21] The ICC Arbitration Rules similarly require that 'the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case'.[22] In contrast, the DIAC Arbitration Rules require that 'the Tribunal shall act fairly and impartially and ensure that each party is given a full opportunity to present its case'.[23]

Whether the parties are to be afforded a 'fair opportunity' or a 'full opportunity' to present their case, an essential means to that end, for both the tribunal and the parties, will be a realistic, achievable procedural timetable that is in accordance with the applicable rules. Respondents often go for an extended timetable that will delay the date of the hearing and the final award as long as possible. However, a shrewd and well-prepared respondent might do better to

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21 2017 BCDR-AAA Arbitration Rules, Article 16.1.
22 2017 ICC Arbitration Rules, Article 22.4.
23 2007 DIAC Arbitration Rules, Article 17.

request a shorter, condensed timetable that would put a hasty and poorly prepared claimant under pressure.

## 12 SCOTT SCHEDULES

Many construction disputes are multifaceted, with many different causes of action and heads of claim. Agreeing procedures at the outset of a case can assist enormously in the effective handling of such claims. In construction disputes, prudent use may be made of Scott Schedules or other tabular means of recording the positions of the parties and even the decisions of the tribunal.

A Scott Schedule is a table in which the claimant will typically set out in the first column after the item number a description of its complaint. In the next column, the claimant will identify the loss complained of. The respondent, in the following columns, states whether it accepts or opposes the claimed item and its assessment (if any) of any loss caused. The tribunal then sets out in the remaining columns its reasoning and the decision made on each line item. Scott Schedules rarely replace formal pleadings or statements of case, but they can form a helpful summary of claims and, where appropriate, can even be extended to include the opinions of experts appointed by each of the parties.

## 13 WITNESS EVIDENCE

Evidence in construction disputes is often presented in the form of witness statements, expert reports and the documents relied upon.[24] Sometimes, tangible evidence such as defective material is produced.

Evidence serves the obvious purpose of helping a party to prove its case and disprove that of its opponent. It should therefore be credible and persuasive with regard to the issues in contention.

It is common practice in the Middle East, as in many other regions, for witness evidence to be given in a written statement, which avoids, or at least reduces, the need for oral evidence-in-chief. In the Middle East, regard must be had to laws relating to the giving of witness evidence. Each jurisdiction has its own practices and ignoring them would imperil an eventual award. Examples of such practices are the need for witnesses to give an oath in a prescribed form, and the sequestration of witnesses.

It goes without saying that any witness called by a party in support of its case should be credible. Witnesses' evidence should be based upon their own

[24] The IBA Rules on the Taking of Evidence in International Arbitration defines a document as 'a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means'.

experiences, not on hearsay and, to the extent possible, should be consistent with the documentary record. Coaching of witnesses, although unlawful, is unfortunately common. In practice, coaching is rarely done well and will be apparent to tribunals, which will weigh the evidence accordingly.

## 14 DOCUMENTARY EVIDENCE

It is often said that success in construction cases depends on three things: 'records, records and records'. This reflects the importance of quality contemporaneous information in proving the existence of a state of affairs at the relevant time in the past. Without such evidence, assertions are merely conjecture, which will undermine the credibility of a party's case.

In construction projects it is therefore very important to keep contemporaneous records accessible and ready for use as evidence should the need arise. In an increasingly technological age, this will entail keeping all supporting data, including metadata of emails and other electronic documentation, which evidence their authenticity.

Document production and disclosure procedures are highly relevant to construction disputes as construction projects can generate enormous amounts of documentation. Much of this (e.g. designs, specifications, schedules, reports, correspondence) the parties share with each other during the course of the project. However, there will also be many documents exchanged between only one of the parties and a third party, and these may be important to the other party in the dispute. For example, in a dispute over the engineer's evaluation of the contractor's entitlement to an extension of time, the contractor is likely to be interested in communications between the employer and the engineer concerning that evaluation. In addition, there are likely to be hundreds, if not thousands, of emails generated by key players that may be relevant to the issues in dispute, as well as important information contained in internal reports, etc.

Parties generally agree to adopt or be guided by the IBA Rules on the Taking of Evidence in International Arbitration (the 'IBA Rules'), which require the tribunal to consult with the parties early in the proceedings 'with a view to agreeing on an efficient, economical and fair process for the taking of evidence'.[25] This consultation is intended to cover, amongst other things, the requirements, procedure and format applicable to the production of documents.[26] The use of predictive coding or other protocols for dealing with electronically stored information may be discussed, for example.

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[25] IBA Rules (2010), Article 2.1.
[26] *Ibid.*, Article 2.2.

A party that has planned its case properly will know what sort of disclosure is likely to be most advantageous to it. For example, those with unhelpful documentation will no doubt wish to limit or circumvent disclosure. In contrast, those who have perceived areas of weakness in the other party's case (or plan a fishing expedition to find such weaknesses) are more likely to want broader disclosure.

Tribunals, however, are alert to the time and cost consequences of overly wide disclosure, especially in the Middle East where the civil law tradition allows only very limited disclosure, if at all. In any event, a party seeking disclosure will need to present its case carefully and ensure that the tests of relevance and materiality of the evidence are satisfied if the request is not to be rejected for being overly broad.

Tribunals commonly employ Redfern Schedules to deal with contested disclosure requests. Like Scott Schedules mentioned earlier, Redfern Schedules allow each party to record its position in support of or in opposition to the disclosure of a particular document or category of documents before the tribunal enters its decision.

Parties should bear in mind that, although large construction cases can generate many hundreds of files, little more than one hundred documents are likely to be relevant to the determination of the case. The trick, of course, is to identify those documents early and present them to the tribunal in the most persuasive and helpful manner possible.

## 15 EXPERT EVIDENCE

The use of expert evidence in construction disputes is very common given that disputes invariably concern time, cost and quality issues on which the opinions of suitably qualified and experienced specialists are required. Normally, each party will appoint an expert in a particular discipline. In the Middle East, where court-appointed experts are widely used, it is not uncommon for arbitral tribunals to appoint their own experts. However, this tends to result in a proliferation of experts, as parties engage their own experts to assist in making submissions to the tribunal's expert and in analysing the technical aspects of the other party's case.

Success in construction arbitrations will depend to a large extent on the care taken in determining the matters on which expert opinions are sought and in choosing the right experts to provide those opinions.

Let us deal first with the choice of expert. Clearly, experts must have the necessary professional skills, qualifications and expertise to give them credibility in the eyes of the tribunal and to effectively perform their role. They need to be impartial and recognize that their primary duty is to the tribunal. This is not to say that there should be no consultations between the expert and those appointing

him or her, for such consultations are fundamental to the expert's role. However, experts must maintain complete independence of thought and action and should not become the advocates of those instructing them. Any weaknesses an expert may have in this respect are likely to be highlighted and exploited by any competent advocate during cross-examination. Accordingly, it is important for an expert to be just that – expert in the field and the case in question, and not unduly reliant on the work of support staff. Poorly prepared experts who seek to ad-lib under cross-examination can be expected to have a very painful experience.

Experts should also be presentable, have a pleasant demeanour and, needless to say, should avoid irritating the tribunal through over-confidence or a want of communication skills. An expert capable of simple and persuasive reasoning is to be preferred.

The selection of an unsuitable expert can be fatal to an otherwise good case. The detrimental impact poor experts can have is readily apparent from a number of English court judgments.[27] For example, in *Weatherford Global Products v. Hydropath Holdings,*[28] Akenhead J, sitting in the Technology and Construction Court, criticized the defendant's experts for their lack of experience and their demeanour in the witness box. One of those experts admitted that he had had a change of opinion 'in the shower before I got into my taxi this morning' and sought to resile from an opinion which he had jointly agreed with the opposing expert. Akenhead J. remarked as follows:

> Apart from the fact that I accept the joint opinion, this change of mind contrary to what he had consciously and presumably with forethought agreed with [the claimant's expert] and the fact that the reason for the change was not obviously clear seriously undermined his reliability.[29]

Equivalent commentary on the performance of experts in court hearings is hard to come by in the Middle East due to the limited reporting of cases, and there is generally no reporting of arbitrations due to proceedings being confidential. The writer's personal experience, supported by anecdotal evidence, is that the performance of experts is no less relevant to the outcome of cases in the Middle East than it is elsewhere.

As far as the instructions given to the expert are concerned, parties should avoid unreasonably limiting the scope of the expert's brief. Parties sometimes do this in the mistaken belief that it will save money or create a tactical advantage. However, the tribunal may, as a result, be deprived of important evidence on a particular issue and have no alternative but to accept the opinion of the opposing

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27 *See e.g. Hirtenstein v. Hill Dickinson LLP* [2014] EWHC 2711 (Comm); *Igloo Regeneration (GP) Ltd v. Powell Williams Partnership* [2013] EWHC 1859 (TCC).

28 *Weatherford Global Products Ltd v. Hydropath Holdings Ltd & Ores* [2014] EWHC 2725 (TCC).

29 *Ibid.*, § 181.

expert. For example, in disputes over delay, where competing analyses of the delay are common, a party that instructs its expert to criticize the analysis of the other expert without carrying out its own analysis may not find favour with an experienced tribunal.

Good experts can be worth their weight in gold. By fully briefing an expert as early as possible in the proceedings, a party may take advantage of the expert's opinions when preparing its case. Leaving the engagement of the expert(s) until later can be a false economy leading to wasted work and lost opportunities. Tribunals increasingly require experts in like disciplines to meet early in the proceedings, prior to preparing their reports, with a view to identifying any areas of common agreement and saving costs by limiting the scope of their reports to those areas on which there is no agreement.

Experts need to be good communicators. Their written reports need to be clear and concise and to address the points at issue in the case that are within the expert's scope of expertise. Good oral skills are required for cross-examination and witness conferencing. There is an increasing trend to use witness conferencing, or 'hot tubbing', in construction arbitrations, and the Middle East is no exception. There is no universal or regional approach to hot tubbing, but it generally involves each expert answering questions alongside the other side's expert. This technique can help tribunals make efficient use of experts by cutting through posturing and building a degree of consensus. Weaknesses in expertise or preparation are likely to be exposed during this process.

## 16 INTERIM MEASURES AND PRELIMINARY DETERMINATIONS

Parties should carefully consider whether or not to seek interim measures or a preliminary determination. Interim measures and preliminary determinations are available under the rules of most international and regional arbitration centres.[30]

Provisional measures are designed to safeguard parties' rights pending the outcome of the arbitration. In the construction setting, for example, it is theoretically possible to ask a tribunal to issue a decision or award preventing the employer from calling an on-demand performance bond on the grounds that the employer's right to do so has been challenged and the issue is within the scope of the arbitration. Where a tribunal has not yet been constituted, many rules[31] provide for an emergency arbitrator to be appointed to make such a determination.

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30 For example, 2017 BCDR-AAA Arbitration Rules, Article 26; 2012 Rules of the Qatar International Centre for Conciliation and Arbitration (QICCA), Article 27.

31 For example, 2017 BCDR-AAA Arbitration Rules, Article 14.

In the Middle East, however, any such decision or award in the applicant's favour is likely to be of persuasive value only. National laws in the region tend not to recognize interlocutory decisions of tribunals or enforce partial awards. In such cases, it is necessary to apply directly to the relevant court, which will grant such relief in appropriate circumstances. Other provisional relief that a court may grant includes appointing an independent expert to record the status of works where their termination is in dispute, or ordering defective material to be preserved as evidence.

Parties should also carefully consider requesting the tribunal to issue a preliminary determination on a question of law (and less frequently a question of fact) that can be decided early in the proceedings and in isolation from the rest of the case. The result can be a substantial saving of time or cost, and puts the party in whose favour the decision is made at an advantage, which may expedite the settlement of the case.

## 17 BIFURCATION

When deciding how best to conduct their case, parties should consider whether there is need to bifurcate the proceedings.

Bifurcation is where the arbitration proceeds in stages, with, for example, a jurisdictional dispute being resolved as a preliminary issue before proceeding with the substantive dispute. In other cases, especially in the construction sector, it might be beneficial to have liability determined before quantum, as this might save time or money, although it is likely to extend the duration of the case as the tribunal will be required to render one or more partial awards.

## 18 GUERRILLA TACTICS

It will not have escaped the attention of most international arbitration practitioners that the UAE last year introduced criminal liability for anyone who 'issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity as an arbitrator, expert, translator or fact finder'.[32]

Independence and impartiality are the hallmarks of arbitrators and experts, and the obligations of neutrality and integrity are inherent in those qualities.

[32] UAE Federal Penal Code Law No. 3 of 1987, as amended by Federal Decree Law No. 7 of 2016, Article 257 (unofficial translation).

Whilst most arbitration rules[33] and many arbitration laws[34] impose civil liability for intentional wrongdoing, it is feared that the introduction of criminal liability will encourage guerrilla tactics, with parties using the threat of a police report to intimidate arbitrators or experts. Furthermore, recalcitrant respondents may submit allegations of criminal wrongdoing to the police in order to disrupt or delay the arbitration while police investigations take place.[35] Even before the law was changed, some parties brought unfounded civil claims against tribunals, as illustrated in the Meydan series of court cases in the UAE. As a result of the change in the law, some arbitrators and experts have resigned their roles, while others have refused to accept new appointments or, in the case of arbitrators, to accept appointments only to three-member tribunals, where there may be some safety in numbers.

Where parties have properly agreed to arbitrate their disputes, resorting to guerrilla tactics to prevent or disrupt proceedings is both unprofessional and damaging to arbitration as a whole. Such tactics are rarely effective, serving only to increase cost and irritate tribunals, which will generally see them for what they are – a mask to hide an otherwise weak case. It would ultimately be more productive to give appropriate attention to the strengths of the case and the available evidence.

## 19 ADVOCACY AND HEARINGS

Success in a complex construction dispute will depend greatly on the quality of the advocacy. Experienced advocates are needed to clearly and succinctly present the often complex interaction of fact and law that characterizes construction disputes, both in writing and orally. That advocacy starts with the request for arbitration and the articulation of the case theory, and continues throughout the case to the closing statements and cost submissions after the completion of the evidential hearing.

Persuasive pleadings in which counsel establishes credibility with the tribunal are vital to success. Unsubstantiated assertions, irrational arguments and confused presentations of fact and law will be seen as signs of weakness.

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[33] *See e.g.* 2017 BCDR-AAA Arbitration Rules, Article 41.1, which provides that: 'None of the members of the arbitral tribunal, any secretary of the arbitral tribunal, any emergency arbitrator, any expert to the arbitral tribunal, and the Chamber (including its officers and employees) shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, except where such act or omission is shown by that party to be the consequences of conscious and deliberate wrongdoing, or to the extent that any part of this limitation of liability is shown to be prohibited by any applicable law.'

[34] For example, English Arbitration Act 1996, Section 29; DIFC Arbitration Law of 2008, as amended, Article 22.

[35] Although false complaints are themselves subject to criminal sanction.

Care should be taken to ensure that those presenting the case at the hearing are fully prepared and have read the case well. This can be an issue when external advocates are brought into a case at a late stage. Good counsel will know the factual and legal aspects of the case inside out, departing from case strategy only to the extent that this becomes necessary. Thorough knowledge will pay dividends during cross-examination, allowing fertile lines of enquiry to be exploited and helpful evidence uncovered, with the result that both the witnesses and the tribunal are guided to the conclusions necessary to prove the case.

The evidence collated during the proceedings and the hearings must then be presented persuasively in concise and cogent closing submissions. These should distil what is relevant, highlighting conflicting evidence, where necessary, and answering any questions asked by the tribunal. If the closing submissions address all the issues of a case in a form that will facilitate the drafting of the award, they will become the ultimate reference point for the tribunal.

## 20 COST SUBMISSIONS

Most arbitral rules[36] allow for successful parties to recover the costs of the arbitration, including legal representation.[37] Costs are usually awarded at the discretion of the tribunal. The tribunal must decide who should recover costs and how much should be recovered. It is common for tribunals to award costs on the principle that costs follow the event (the event usually being who has prevailed in the case). Sometimes tribunals may break the case into a series of 'events' and take account of success in different procedural issues (such as jurisdictional challenges, interim measure applications, preliminary determinations, etc.) as well as in significant claims. In such circumstances, the tribunal might determine that each

[36] For example, 2017 BCDR-AAA Arbitration Rules, Article 36, which provides that: '36.1 The arbitral tribunal shall fix the costs of the arbitration in its final award or, if it deems appropriate, in any other order or award. The arbitral tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case and any matter prescribed by these Rules that may affect such allocation. 36.2 Such costs may include: (a) the fees and expenses of the arbitrators and of any secretary of the arbitral tribunal; (b) the costs of assistance required by the tribunal, including its experts; (c) the fees and expenses of the Chamber; (d) the reasonable legal and other costs incurred by the parties; and (e) any costs incurred in connection with a notice for emergency or interim measures pursuant to Articles 14 or 26; (f) any costs incurred in the operation of Article 21.5; (g) any costs associated with the exchange of information pursuant to Article 23; and (h) any costs incurred in connection with an application for joinder or consolidation pursuant to Articles 28 and 29.'

[37] However, the Dubai Court of Cassation in Case No. 282/2012 found that the DIAC Arbitration Rules did not expressly provide for the recovery of legal costs, and that it is therefore necessary for the recovery of legal costs to be addressed in the arbitration agreement or by some other express agreement such as the terms of reference or by way of mutual requests in the parties' statements of case.

party has been successful in respect of certain events and apportion costs accordingly.

As regards the amount of the costs, the usual practice of tribunals is to invite parties to submit evidence of costs incurred and to receive submissions as to the reasonableness of those costs. Accordingly, parties should ensure that their costs records and submissions to the tribunal set out clearly what is being claimed and are supported by appropriate evidence. Battle fatigue at the end of an arduous case sometimes results in parties giving less attention to costs than they should, adversely impacting cost recovery.

## 21 PARTICULAR CONSIDERATIONS IN RESPECT OF DELAY CLAIMS

Claims by a contractor for an extension of time to complete the works are amongst the most frequent types of claims in construction projects. Where the contractor can demonstrate that responsibility for the cause and effect of the delay lies with the employer, the contractor will be relieved of having to pay delay damages (whether liquidated or general damages) to the employer and may even be entitled to a prolongation and attendant costs. Claims for time extensions are frequently contentious and often generate disputes that are referred to arbitration.

Disputes over delays frequently revolve around conflicting analyses prepared initially by the parties (or in the case of the employer, by its contract administrator or engineer) and subsequently by party-appointed experts. Divergent opinions are often advanced on whether the claimed event caused the delay, its alleged impact, and whether the delay arose from a matter for which the contractor was responsible, such as providing adequate resources at the appropriate time.

Delay analysis has been described as a 'dark art' as there are different ways of carrying it out – and of manipulating the results. An appropriate method of analysis must be chosen: the choice will depend upon the nature of the claim, the time and money available to prepare, and the extent of the delays for which the contractor is responsible under the contract. The analysis will commonly show the impact on the baseline schedule. Care must be taken to select the correct baseline schedule (ideally approved by the engineer / contract administrator) and not a recovery or revised schedule. Accurate 'as-built' records are also vital to showing when an activity actually started and finished. Good delay analysts and experts are able to present information clearly, concisely and without excess complication.

The Society of Construction Law (SCL) recently released its revised Delay and Disruption Protocol (the 'Protocol'),[38] which provides guidance on some of the common delay and disruption issues that arise in construction projects. The Protocol has twenty-two non-contractual core principles aimed at promoting good practice when addressing delay, disruption and acceleration claims and how they are proven. It includes a commentary on appropriate scheduling methods and means of showing delays incurred. Parties and their experts would be well advised to take note of the Protocol, not least because tribunals may treat it as being authoritative or even binding. Other bodies have produced similar guidance.[39]

Even where a contractor can show that it has been delayed by a matter for which the employer is responsible, the employer may be able to demonstrate a concurrent delay attributable to the contractor, which may forfeit, in whole or in part, its right to an extension of time and/or additional cost. It is not within the scope of this paper to explore time-related issues in detail. Suffice to say that successful claims will be founded upon good quality records, a delay analysis that takes account of those records, and a clear and concise presentation of the cause and effect of the delay. Where there are vying analyses, the one that is firmly founded in fact and readily understandable is more likely to prevail.

## 22 PARTICULAR CONSIDERATIONS IN RESPECT OF QUANTUM CLAIMS

Construction contracts generally provide that a party is entitled to financial relief when certain prescribed events take place. Such relief may include the recovery of prolongation costs for delays attributable to the employer, as referred to above.

Claims relating to prolongation costs generally comprise a number of heads, including staff costs, site accommodation and equipment remaining on site longer than envisioned. Whether the resources claimed for were actually provided and how they should be valued are often at issue. For example, are the costs of prolongation to be based on the costs at the end of project when they are low, or at the time the impact of the delay was first experienced, when they are likely to be much higher? Other related claims may be for inflation[40] or the recovery of head office and other costs, and how these are calculated and proven.

Disputes relating to the scope of the works are particularly common. These typically arise where a contractor requires extra payment for work which the

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38 Second Edition, February 2017. *See* https://www.scl.org.uk/resources/delay-disruption-protocol (accessed 23 September 2017).

39 For example, Association for the Advancement of Cost Engineering (AACE) International Recommended Practice 29R-03 *Forensic Schedule Analysis*.

40 Often referred to as 'escalation'.

employer alleges to be incumbent on the contractor under the contract. Thus, matters such as the scope of the contract, what, if any, work beyond the scope of the contract has been performed, and how that work is to be valued will need to be determined.

Another common cause of disputes are claims by the contractor that it has been disrupted[41] in the performance of its works, leading to delays (on which, see above) and/or additional cost. Demonstrating that work has been disrupted and proving the additional costs incurred can be difficult and highly contentious. It is very common for contractors to make such claims, but much less common for them to be successful.

This is primarily because contactors are unable to satisfy necessary tests of cause and effect. Frequently, contractors are unable to show that matters for which the employer is responsible have caused the contractor to deploy additional resources or re-plan its work. The contractor must also demonstrate that the original schedule was realistic and achievable with the resources originally planned. The difficulties facing the contractor are often that insufficient records have been maintained or that the sufficiency of the original schedule cannot be established. Resource loaded baseline schedules showing expected rates of production can be helpful in overcoming these evidential difficulties, coupled with reliable evidence of the production actually achieved. The guidance offered by the SCL and others[42] on disruption claims is well worth heeding.

Where the payment of sums due under the construction contract has been delayed, as in the case of non-payment or delayed payment of payment certificates, variation claims or other costs, there will usually be a corresponding claim for finance costs or interest. Such claims sometimes founder because of a lack of proof of a legal entitlement to interest, or the applicable periods and the rate of interest that is to apply. Whilst many countries in the Gulf[43] permit the recovery of interest, care should be taken not to fall foul of prohibitions on claiming compound interest.

Quantum claims typically require the assistance of suitable experts to interrogate and validate cost information held by a party and to show the causal link between the events and the additional costs claimed. Unfortunately, when making claims, parties often treat quantum with less enthusiasm or thoroughness

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41 The SCL Delay and Disruption Protocol defines disruption as: 'a disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency. Disruption claims relate to loss of productivity in the execution of particular work activities. Because of the disruption, these work activities are not able to be carried out as efficiently as reasonably planned (or as possible).' (Protocol, Guidance on Core Principles, § 18.1).

42 For example, Mechanical Contractors Association of America, *Change Orders, Productivity, Overtime – A Primer for the Construction Industry* (2011).

43 With the exception of Saudi Arabia, where the payment of interest is generally forbidden.

than liability. A failure to evidence actual loss is particularly common and can needlessly result in under-recovery of meritorious claims.

## 23 PARTICULAR CONSIDERATIONS IN RESPECT OF QUALITY CLAIMS

It is an unfortunate truth that construction projects often suffer from defects, whether relating to design, materials or workmanship – or indeed all three.

It can be difficult to determine which of these items is the cause or principal cause of a defect, yet it is important to do so as each may involve different parties. Accordingly, one of the main challenges of claims over defects is to bring all involved parties into one proceeding.[44]

Many countries in the Middle East impose on designers and contractors decennial liability to an employer for defects to the stability of a structure that may lead to a partial or complete collapse.[45] Liability is strict and the employer is not required to provide proof of fault. However, a designer or contractor seeking recourse against others who may be responsible for, or have contributed to, the fault will need to satisfy the usual burdens of proof.

Defects may be latent or patent, and may appear gradually or suddenly. When they do appear, care should be exercised to avoid damaging vital evidence or aggravating loss. Owners, for example, can seriously damage their interests by immediately reaching out to the party that carried out the design or construction. Such parties will be interested in protecting themselves and have little concern for the careful preservation of evidence. Owners would be well advised to consult appropriate experts, who, as independent third parties, can carefully record the status of the defect and take samples, as necessary, for testing or recording purposes.

An investigation, including a root cause analysis, is often required. Care should be taken to ensure that conclusions as to the cause and appropriate remedies are properly considered as these conclusions are likely to found the basis of a claim if not otherwise agreed. Investigations should take proper account of contractual requirements, including specifications. The well-known wind farm case *MT Højgaard*[46] is an interesting example of the challenges raised by conflicting contractual requirements and factual causation.

Only after essential evidence has been preserved should those responsible be notified and engaged in discussions as to remedies and compensation.

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44 *See* the discussion of multiparty actions in section 3 above.

45 For example, Qatari Civil Code, Articles 711–715; Saudi Arabia Government Tenders and Procurement Law, Article 76; UAE Civil Code, Articles 880–883.

46 *MT Højgaard A/S v. E.On Climate and Renewables UK Robin Rigg East Limited and another* [2015] BLR 55, [2014] CILL 3523, [2014] EWCA Civ 710, [2017] UKSC 59.

## 24 CONCLUSION

Construction disputes are frequently high-value cases, factually and legally complex, and ideally suited to be resolved in private by arbitration. However, even in arbitration, weak cases can prevail and good cases can be lost.

Damaging disclosure or inadvertent admissions made during the project do not help a party's prospects of success. Neither does failing to build the right legal, technical and expert team properly resourced at the outset of a case. Engagement in guerrilla tactics to make up for deficiencies is positively unproductive.

What *is* required for success is good preparation, intelligent usage of the rules and timetable, underscored by a thorough investigation of facts and law. When coupled with a compelling case theory and good evidence delivered in a persuasive manner, the credibility challenge will be won, ensuring success in a construction arbitration in the Middle East.