Focus on the Middle East
Contributions from leading construction practitioners from the region, including Israel, Lebanon, Oman, Qatar, Saudi Arabia and the United Arab Emirates

Richard Harding QC asks, is arbitration in the Gulf anything new?

Construction contract dispute resolution in the Sultanate of Oman

The concept of ‘time at large’ in the United Arab Emirates
A conference co-presented by the IBA International Construction Projects Committee of the Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) and the IBA Young Lawyers’ Committee, supported by the IBA European Regional Forum.

6th Construction Projects from Conception to Completion Conference

14–16 September 2017
Hilton Brussels Grand Place, Brussels, Belgium

Topics include:
• Are FIDIC forms worth their popularity?
• Drafting extension of time clauses: specifying delay methodologies and providing for ‘concurrency’
• ‘US’ construction law: the most important and useful things we should know
• Assessing disruption: different methods and do they matter?
• ‘My top tips for the best awards’
• Solving disputes under different arbitration rules: does it matter and why? Is there a ‘best choice’?

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FEATURE ARTICLES

Arbitration in the Gulf: anything new?
Richard Harding QC considers the history of arbitration in the Gulf and how it has developed over time.

Construction contract dispute resolution in the Sultanate of Oman
David Thomas QC gives an overview of construction contracts, arbitration and dispute resolution in Oman.

The concept of ‘time at large’ in the United Arab Emirates
Samantha Lord Hill explains the concept of ‘time at large’ from the English perspective and considers the various principles of UAE law that a contractor may rely upon.

Contracting in the Middle East: risk management and dispute avoidance in the present market
Raid Abu-Manneh and Joseph Otoo give an overview of the legal and contractual landscape of contracting in the Middle East.

Productivity-based disruption claims in the Middle East
Paul Thornton and Faisal Attia consider disruption claims in the construction industry, and how to make them in the Middle East.
Dear readers,

For this edition we focus on the Middle East, a hotbed of construction and construction law. With thanks to the International Construction Projects Committee members working across the Middle East, we have a broad selection of articles, including a number of contributions from never previously featured jurisdictions.

We start with a long list of country updates from the region. Claudine Helou, a partner at Helou Saade Law Firm, outlines the key features of construction law and disputes in Lebanon. Then, we move to the United Arab Emirates, with Claire Miller and Nadir Hassan of Beale & Company (Middle East) discussing the proposals for a new construction court with the Dubai International Financial Centre. Still in the UAE, Roger ter Haar QC, the new Chair of the CLInt Editorial Group and an experienced arbitrator in the region, addresses the recent change in UAE penal law regarding arbitrators and experts. Thereafter, we move to Qatar, currently one of the most dynamic jurisdictions in the region from the perspective of international contracting, and hear about the steps the country is taking to modernise its arbitration law from Ghada M Darwish. We then hear from Henry Quinlan, Amer Al-Amr and Hannah O’Donovan of DLA Piper Middle East on the enforcement of awards in Saudi Arabia. Finally, we head north to Israel, from where Sharon Adler of Harpaz Oren Adler & Co discusses rail projects in the country.

We are delighted to present our lead feature article by Richard Harding QC: ‘Arbitration in the Gulf – anything new?’ Richard has set the bar very high for future contributors, traversing more than 13 centuries of arbitration in the region. Richard’s article is followed by a feature on construction law in Oman by David Thomas QC. Reflecting the importance of the UAE market, we return to Dubai for an article by Samantha Lord Hill of Freshfields Bruckhaus Deringer, addressing the perennial question of ‘time at large’. We finish with two regional feature articles: Raid Abu-Manneh and Joseph Otoo of Mayer Brown discuss risk management and dispute avoidance in the region, and Faisal Attia of DWF in Dubai and Paul Thornton (a civil engineer and delay expert) address disruption claims in the Middle East.

Looking forward, our September 2017 edition will be focusing on the Pacific Rim (and Sydney 2017). The September edition is nearly full but, if you are quick, you may beat the print deadline. The December edition will include a report back from Sydney plus our normal contributions from around the world, and in March 2018 we will be focusing on the energy sector.

We are, as always, indebted to our contributors for their insightful articles. From country updates to full articles, FIDIC updates or a 13-century review, if this edition has inspired you to put pen to paper, please get in touch. Please note that we now have a new email address for contributions: clint.submissions@int-bar.org.

We look forward to hearing from you.

Jane Davies Evans, Managing Editor
Dear ICP Members,

At the time of writing, the fortunate among us are greatly looking forward to this year’s ICP Working Weekend, taking place from 5–7 May at the Sheraton Grand Hotel in Edinburgh, by kind arrangement of Shona Frame, Co-Chair of the Project Execution Sub-Committee (and our most active member in Scotland), strongly supported by her assistant, Muriel Kidd.

The business at the Weekend will centre around sessions organised by our three Sub-Committees. Session I, organised by the Project Execution Sub-Committee, is titled ‘Mind the Gap: an interjurisdictional approach to penalties and liquidated damages in construction contracts – differences, similarities and red flags for the unwary’. Session II, organised by the Project Establishment Sub-Committee, is on delay analysis, including a presentation by programming/scheduling expert, Mr Charley Long, on a particular set of analysis software that he has developed. We will also hear from Murray Armes on the Dispute Board arrangements for the ITER Energy project in the South of France. Session III, organised by the Dispute Resolution Sub-Committee, is to be an interactive session on ‘Construction in Conflict Zones’. The social highlight of the weekend will be a dinner in Edinburgh Castle on the Saturday evening.

Papers and/or slides prepared for the Working Weekend sessions will find their way onto the ICP webpages. We have been and continue to work with those at the IBA responsible for the website on the ease of accessibility of ICP work products (eg, the various excellent papers prepared for the Washington conference).

Places at the Working Weekend are now ‘like gold dust’, such is its popularity. Holding this point together with the fact that contributions to and support for Construction Law International have dwindled, it may be that in future years one factor to be taken into account in awarding places at the Working Weekend will be the extent of the contribution a member applying for a place is making to CLInt.

The Brussels Construction Law Conference for young construction lawyers will take place on 15–16 September 2017. Organisation is in the hands of Rouven Bodenheimer and Rupert Choat, as on the last occasion.

Then, looking ahead to the IBA Annual Conference in Sydney (8–13 October), work is already well underway among the panel members who will lead our five sessions there. Our dinner on the Wednesday evening is expected to be at George’s Mediterranean Bar & Grill on Darling Harbour. Our plan for the ICP Excursion on the Friday includes a visit to a major development site on the waterside, a guided tour of the Sydney Opera House and a harbour cruise. So do join us in Sydney if you can!

We continue to encourage members to communicate via ICP-net – instructions on how to use it appeared in our ‘From the Co-Chairs’ message in the March 2017 issue of CLInt. We are also on the lookout for additional editors for CLInt and, of course, contributions – please consider whether you could take on a role here and if so let our Publications Officer Virginie Colaiuta know on virginie.colaiuta@gmail.com. And please note that any contribution for CLInt must now be sent to this email address: clint.submissions@int-bar.org.

With our very best wishes,

Your Co-Chairs,

Tony and Claus
**International Construction Projects Committee sessions**

**Monday 0930 – 1230**

**The ever-increasing challenges to infrastructure development and financing in the resource and energy sectors**

*Presented by the Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL), the Environment, Health and Safety Law Committee, the International Construction Projects Committee, the Oil and Gas Committee, the Mining Law Committee, the Power Law Committee and the Water Law Committee*

This panel will address the increasingly common issues and pitfalls associated with the development and financing of resource and infrastructure projects. The resource sector (mining, oil and gas, water and power) and the large infrastructure sector (transportation, pipelines, transmission, water treatment and port facilities) have faced many challenges over the past decade. The challenges span the waterfront – from securing needed development rights, developing value chain contracts, obtaining environmental and other regulatory approvals, to seeking community understanding and acceptance. Each of these elements must come together in a coordinated and integrated fashion to have a successful development and financeable project.

Join this session and hear how these legal and other experts have overcome the issues and pitfalls that they faced in the successful development and financing of their projects.

**Tuesday 1430 – 1730**

**Construction management: a path to a good outcome, or a sure way to blow the budget?**

*Presented by the International Construction Projects Committee*

Major construction and infrastructure projects are ultimately about balancing quality, cost and timely delivery. This session will explore the benefits of construction management as a contracting technique, its pitfalls and how to properly secure successful project outcomes through proactive project management, the use of risk registers, early warning mechanisms, claims management and dispute avoidance. The underlying issue will be balancing apparent contract certainty of the traditional model against active construction management to deal with the uncertainty inherent in major construction projects. The session will also explore why, on occasion, this model has failed so badly.

**Wednesday 0930 – 1230**

**Civil and common law approaches to contract interpretation: a comparison – and do good faith obligations make any difference?**

*Presented by the International Construction Projects Committee*

Drafters of complex construction contracts (and other commercial agreements) often insert clauses that shift risks from one party to another, and this panel will explore different ways in which some of these clauses are enforced in common law and civil law jurisdictions. Examples include, but are not limited to, clauses relating to changes, delays, differing site conditions, claim notice and indemnity. The session will be useful both to construction practitioners and anyone drafting or arbitrating/litigating complex commercial contracts in the global marketplace.
Australasia’s mega projects: the curate’s egg
Presented by the International Construction Projects Committee

Australia and New Zealand have been undertaking a significant volume of major projects: renewing ageing infrastructure, catching up on a backlog of constrained delivery of infrastructure for many decades and responding to the effects of natural disasters. Such projects consume significant resources and have long delivery times. They are often launched with fanfare and excitement. But are the objectives of building this infrastructure achieved? Does the community get real value for money? Are we improving in our delivery of such projects or do we learn the same lessons over and over again? The panellists will speak to their own experiences of many of these projects and share their insights as to how we can improve the delivery of major infrastructure.

Projects under pressure: is there any escape?
Presented by the International Construction Projects Committee

This will be an interactive session concerning a project that is in distress due to the development of severely adverse conditions unanticipated by the parties (e.g., unexpected price falls or rises, labour shortages epidemic). It will begin with a look at relief that may be available in such circumstances, viewed from both a civil and common law standpoint – suspension, termination, force majeure arguments, and concepts of fairness and equity (including the ‘teoría de la imprevisión’, good faith, unjust enrichment and economic equilibrium).

David and Goliath: contracting with powerful entities that refuse to negotiate terms and/or impose subcontractors/suppliers – can anything be done?
Presented by the International Construction Projects Committee

All too often, contract terms and scope are said to be non-negotiable. This may be a reflection of market conditions and unequal bargaining power or a consequence of procurement rules or laws. This session will explore the imposed terms that commonly give rise to difficulties for the supply chain and project. It will consider the extent to which the procuring entity may be able to adopt a more flexible stance, and how it may be persuaded to do so. Where there is no scope for negotiation, difficult decisions will need to be made on whether to bid, how to price the risks imposed and how those risks can be mitigated or passed to others. How are these decisions to be approached?
A new initiative – FIDIC around the world

At Construction Law International, we often receive articles addressing the use of FIDIC in different jurisdictions, and thought it would be interesting to run a series in which local practitioners answer standard questions about how FIDIC works in their country. Our aim is to print two or three responses per edition, and gradually build up a database of answers to which members can refer easily.

Please send any contributions to clint.submissions@int-bar.org in the normal way. If we receive multiple contributions from the same jurisdiction, we will contact the authors as to the best way to combine contributions.

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<th>Question</th>
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<tr>
<td>1. What is your jurisdiction?</td>
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<td>2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction?</td>
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<tr>
<td>If yes, which of the FIDIC forms are used, and for what types of projects?</td>
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<td>3. Do FIDIC produce their forms of contract in the language of your jurisdiction?</td>
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<td>If no, what language do you use?</td>
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<td>4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?</td>
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<td>If yes, what amendments are required?</td>
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<td>5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction?</td>
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<td>If yes, what (non-essential) amendments are common in your jurisdiction?</td>
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<td>6. Does your jurisdiction treat sub-clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to employer claims (save for those expressly mentioned in the sub-clause)?</td>
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<td>7. Does your jurisdiction treat sub-clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money (not including Variations)?</td>
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<td>8. Does your jurisdiction treat sub-clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to contractor claims for additional time and/or money arising from variations?</td>
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<td>9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction?</td>
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<td>If yes, how are dispute board decisions enforced in your jurisdiction?</td>
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<td>10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction?</td>
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<td>If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?</td>
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<tr>
<td>11. Are there any notable local court decisions interpreting FIDIC contracts?</td>
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These changes played a vital role in promoting the real-estate boom and the burgeoning of high-rises in Beirut. Lebanon is a former French colony, and its laws and jurisprudence borrowed largely from the French legal system. In procuring public works, however, the Lebanese state continues to use standard forms of contracts and practices that require improvement to satisfy the needs of the construction industry in general and those of Lebanese contractors in particular.

This article will highlight the reasons for Lebanese contractors’ dissatisfaction with current standard forms and procedures, the common causes of construction disputes in Lebanon and the mechanisms used for their resolution, as well as the draft laws and decrees that remain pending, concluding that legal reform is urgently needed to satisfy the needs of Lebanese contractors and the local construction industry.

Introduction

Lying at the crossroads of Asia, Africa and Europe, Lebanon is highly attractive to local and foreign investors, and thus plays a major role in the global construction industry. Although Lebanon imports the major part of its construction equipment and building materials, investments in construction and real estate comprise a significant portion of the country’s gross domestic product. Indeed, the construction industry remains one of the most prosperous and promising sectors in the country’s economy despite political and economic turmoil in the region. In fact, the real estate industry has witnessed an increase in demand due to the large influx of Syrians fleeing the conflict in that country.

The Construction Law of 2004 allowed a greater volume of construction and maximised permitted land development. These changes played a vital role is outdated and neither satisfies the contemporary requirements of public procurement nor safeguards contractors’ rights.

On the other hand, the Council for Development and Reconstruction (CDR), which is an autonomous public entity, adopts certain forms of FIDIC contracts depending on the sources of funding because international organisations often refuse to adopt the 1942 Book. Either the fourth edition of the FIDIC Red Book or the 1999 suite of FIDIC contracts is typically used, particularly where international funding sources are involved. The CDR still uses the 1942 Book for small, locally-funded projects, which tends to be more advantageous to the employer than the contractor. This discrepancy in contract forms creates an obvious inequity between local and foreign contractors.

In short, and as will be further explained below, the absence of a modernised, uniform Specifications’ Book and general conditions to be used by all public entities, as well as the use of outdated legal provisions and practices, has led to negative consequences for contractors dealing with the public sector.

Dispute Adjudication Boards are seldom used

Dispute Adjudication Boards (DABs) are rarely used in the Lebanese construction industry. This is regrettable since these dispute boards would expedite the resolution of disputes and thus reduce time and expenses. Under clause 67 of the 1987 FIDIC Red Book, the engineer handles claims and disputes and is to render a fair and impartial decision which is binding on the parties. Either party dissatisfied with that decision may finally resort to arbitration. On the other hand, the newer FIDIC editions provide for the referral to a DAB as an interim dispute resolution mechanism before resorting to arbitration.

It is worth noting in this respect that dispute boards are appointed
by both the employer and the contractor, while the engineer who attempts to settle the dispute under the FIDIC Red Book is appointed solely by the employer, which makes its impartiality questionable.

Inequality between the employer and the contractor

Lebanese contractors must abide by construction contracts that exclude provisions safeguarding their rights, thus exposing them to significant risks.

The driving force is the tremendous competition between contracting companies for business in the real estate market. In the local market, employers are the most powerful party to the construction contract.

Consequently, contractual provisions typically guarantee the employers’ rights while depriving contractors of much protection, thus triggering an imbalance between the parties’ mutual rights and obligations. Indeed, clause 69 of the FIDIC Conditions 1987 on the ‘default of the employer’ is frequently deleted altogether. That clause entitles the contractor to terminate the contract where the employer is in default in certain respects, including where the employer fails to pay the contractor. Moreover, where contractors submit Variation Order Requests or Extension of Time claims arising from delays attributable to the employer, the engineer frequently rejects such requests and claims regardless of their validity.

In a similar vein, public works contractors are compelled to adhere to the standard Book of Specifications of 1942 which disregards the contractors’ rights and safeguards those of the state. It would be therefore wiser to use the suite of 1999 FIDIC contracts where risk sharing is balanced between the employer and the contractor, and DABs are used instead of the engineer’s determination.

Risk of material price increase and shortages

With respect to materials, Lebanese contractors usually bear the risk of price escalation and shortages. Indeed, sub-clause 70.1 of the FIDIC Red Book is frequently amended to deprive the contractor of any compensation due to a rise in the cost of materials or labour. Nevertheless, contractors may attempt to negotiate these provisions to set forth means for compensation due to an increase in the cost of construction materials. In fact, the Lebanese government has sometimes issued special decrees enlisting contractors to compensation where rise in material prices was massive and unforeseeable.

Other financial burdens

The use of the FIDIC Red Book – as amended by employers – and other standard forms of contracts imposed by the Lebanese government, results in Lebanese contractors encountering significant risks and financial burdens. For example, employers frequently require irrevocable, first-demand performance bonds (commonly set at ten per cent of the contract price), combined with retention (generally amounting to ten per cent of the contract price).

Against this backdrop, contractors sometimes endeavour to negotiate interim payment certificates and other forms of payment security at the outset of the project. As the president of the Lebanese Contractors’ Syndicate has stated, huge amounts of fees from public works projects executed ten years ago remain unpaid by the government.8 Certainly, the latest political and constitutional turmoil due to vacancy in the state’s presidency has triggered years of delays in the adoption of a public budget.

In any case, it is preferable for contractors to use the suite of 1999 FIDIC contracts because the contractor has some financial protection to a certain extent that it can request evidence from the employer on the availability of funds to pay the estimated contract price. The contractor therefore is entitled to terminate the contract if the employer fails to adduce such evidence within a certain time limit. In consequence, the contractor’s exposure to further damages and losses is limited.

No standard criteria for pre-qualification and bidding

Decree No 3688 dated 25 January 1966 specified the conditions for inclusion on the list of prequalified contractors for public works. In addition, Decree No 9333 was promulgated on 26 December 2002 which set new criteria for classifications.

Nevertheless, procurement methods and bidding documents differ from one public entity to another, leading to confusion and inequality in public procurement practices. Each entity issues its own prequalification conditions which leads to unfairness towards the contractors and bidders.

To address inequities between bidders for procurement of works, the Council of Ministers approved a draft decree setting forth a standard prequalification document. The draft decree contemplates the establishment of a sole authority for prequalification of contractors that would apply uniform criteria in all public entities. This solution is crucial to limit waste of public resources and corruption, but it has not yet come into force.

Dispute resolution mechanisms

Main causes of disputes

Construction projects are prone to conflicts8 due to the wide spectrum of hazards and risks inherent in performance of such long-term contracts.9 The causes of disputes are as varied as delays in delivery and manufacture, shortages of
materials and labour, increase of prices and wages, lack of
financing during construction, the relationship between different
subcontractors’ schedules, poor construction management,
incomplete design information or employer requirements, changes
imposed by the employer, failure to grant extensions of time and
compensation and, most importantly, the unrealistic risk
transfer from the employer to contractors.

However, many potential disputes might be avoided, for instance, by
performing a risk assessment procedure before the conclusion
of the contract, negotiating the contract’s terms including choice
of law, a fair risk allocation and an alternative dispute resolution
method including arbitration or mediation-arbitration (‘Med-Arb’)
clauses.

Dispute resolution

While court litigation was the only resort in construction disputes for
a long time, arbitration has become the favoured dispute resolution
method in construction disputes – to the point that litigation turned
out to be the alternative dispute resolution mechanism. Mediation
is rarely used in Lebanon, although some attempts have been made in
construction disputes.

The most popular construction contracts, based on the fourth
edition of the FIDIC Red Book, involve a two-tier dispute resolution
mechanism: (1) the engineer who plays the role of a quasi-adjudicator;
and (2) ultimately the arbitral tribunal. FIDIC contracts concluded
by the Council for Development and Reconstruction and the private
construction sector normally include arbitration clauses
incorporating either the International Criminal Court (ICC)
or the United Nations Commission
on International Trade Law (UNCITRAL) rules.

On the other hand, disputes arising from construction contracts
concluded with the public works’
ministry based on the 1942 Book are typically subject to litigation
before the administrative courts (‘le Conseil D’état’), which are
competent to rule on disputes arising out of or in relation to public
works contracts.

To promote economic growth, Lebanon adopted various measures
to protect investments by providing a legal framework tailored to suit
international transactions and the disputes resulting therefrom. To
that end, Law No 440 of 29 July 2002 amended and complemented
some arbitration provisions set out in the Lebanese Code of Civil
Procedure (LCCP). Accordingly, disputes arising from administrative
contracts may now be referred to both domestic and international
arbitration. In fact, the LCCP
recognises the right of the state and other public entities to have recourse to both domestic and international arbitration.

Still, arbitration clauses in administrative contracts are subject
to prior approval, either by decree from the Lebanese Council of
Ministers upon a recommendation of the relevant Minister for
contracts with the state, or from
The model was inspired by the
new FIDIC contracts as regards to
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contractor receives
compensation for any increase of
prices. The contractor is also
entitled to request the termination
of the contract in case of the
employer’s failure to finance the
project or if the employer fails to
issue the commencement order
within 90 days starting from the
contract signature.

Moreover, the contractor is
entitled to extensions of time and
price variations in case of the
occurrence of additional works.

To improve the law governing
public works procurement, several
laws and decrees have been drafted
but not yet promulgated. Indeed,
a draft law on public procurement
provides for new contracting
mechanisms and conditions, such as
imposing performance guarantees
on the successful bidder, revising
the procedure for cancelling
contracts and revoking of bids,
determining the contract value
and reforming the procedure for
resolving disputes. The aim of these
changes is to unify the procedures
applicable to procurement before all
public entities. An additional
draft law establishing the Public
Procurement Management Agency
was also approved.

Similarly – 65 years after the 1942
Book was adopted – the Council of
Ministers approved a decree
establishing a uniform bidding
document of general conditions
for procurement contracts before
all public entities. This decree was
at the initiative of the Lebanese
Contractors’ Syndicate (with the
collaboration of legal and technical
experts in the construction field)
and is designed to streamline
procurement procedures, promote
transparency during the execution
of the project and encourage
prompt work delivery.

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Moreover, the contractor is
entitled to extensions of time and
price variations in case of the
occurrence of additional works.
Finally, the decree provides for arbitration seated in Lebanon as the dispute resolution mechanism regardless of the nationality of the funder or the contractor. Although this decree and draft laws were supposed to be promulgated, nothing has been done so far, despite their high significance in support of the reform of the public procurement legal framework.

Conclusion

A review of the various procurement regulations adopted by public entities is required with the aim to promulgate a new law on the procurement of public works, a Specifications Book and general conditions to replace the 1942 outdated one and to adopt a uniform standard for the prequalification of contractors.

It is also necessary to promote the adoption of the most recent editions of FIDIC contracts in the Lebanese construction industry rather than the FIDIC 1987 and, subsequently, the use of DABs to ensure more fairness towards contractors than the engineer’s decisions and to avoid resort to arbitration.

Lebanese contractors urge re-establishing the balance of risks between the employer and the contractor in construction contracts by maintaining the original standard form of the FIDIC contracts without encroaching on the contractors’ rights, such as the exclusion of the employer’s default provisions. Doing so, they believe, will absolutely avoid a variety of disputes by specifically reducing the contractors’ heavy financial burdens. Thus, it is of utmost importance that the Lebanese government enacts full-fledged legal reform to address gaps in construction laws, contracts and practices, especially those relating to the contracts concluded with the Lebanese state and public entities.

Claudine Helou is a partner of Helou Saade Law Firm (HSLF), Beirut, Lebanon. She may be reached at c.helou@hslf-law.com

Notes


4 Whenever the Lebanese law is applicable to the dispute, any gap is filled by the French law. See M Fatha, ‘Legal aspects of a FIDIC contract in arbitration’ (2014) 21 JIA 103.

5 The Council for Development and Reconstruction was established through Decree No 5 dated 31 January 1977 to carry out the task of the reconstruction of Lebanon after the civil war. See: www.cdr.gov.lb, accessed 18 May 2017.

6 The World Bank normally imposes its own conditions of contract.

7 Usually less than US$1m worth.


12 One of the main amendments is the recognition of the right of the state and entities of public law to enter into arbitration in any contract of whatsoever nature, subject to authorisation (Art 762 LCCP).

13 LCCP, Art 762(2) (3) (domestic arbitration) and Art 809(2) (international arbitration). See also Art 77 which confirms the possibility to refer to arbitration disputes relating to concessions or build-operate-transfers (BOTs), following the amendments made by Law 440/2002.

14 LCCP, Art 762.

15 LCCP, Art 767 (domestic arbitration) and Art 815 (international arbitration).

16 LCCP, Art 795(4).

UNITED ARAB EMIRATES

DIFC Courts: proposed new technology and construction division

Claire Miller & Nadir Hasan

On 20 March 2017, the Courts of the Dubai International Financial Centre (DIFC) issued, for public consultation, a draft of a new set of rules that propose the establishment of a specialist division of the DIFC Courts to be known as the Technology and Construction Division. The proposed division is closely modelled on the Technology and Construction Court, a specialist sub-division of the High Court of England and Wales that principally deals with complex construction disputes.

The DIFC Courts

The DIFC is a ‘free zone’ that was set up in Dubai in 2004 with the aim of establishing Dubai as a hub for regional and international business. As part of the development of the DIFC, it was recognised that the domestic legislation of Dubai and the United Arab Emirates might not be best suited to deal with the sorts of commercial and financial matters generated within the DIFC.

The establishment of a separate jurisdiction within the DIFC dealt with this challenge. This included the enactment of laws that were specifically designed to reflect the nature of business being carried out there. In order to administer this separate jurisdiction, a new court system, known as the DIFC Courts,
was introduced. The law and procedure of the DIFC Courts are based on the common law tradition. The proceedings are conducted in English and deal with the resolution of civil and commercial disputes.

At inception, the DIFC Courts had jurisdiction only over matters connected with the DIFC (for example, contracts to be performed within the DIFC). However, in November 2011, amendments to DIFC and Dubai law permitted the DIFC Courts to hear any dispute, whether or not it was connected with the DIFC, provided that the parties had accepted the jurisdiction of the DIFC Courts. This step aimed to increase the prominence of the DIFC Courts as a regional and international centre for dispute resolution.

As with many other things in Dubai, the DIFC Courts remain innovative and flexible. They will, where appropriate, adopt best practice and procedure from other common law systems, while steadily building up their own body of precedent.

The Technology and Construction Court

As has been said, the DIFC Courts have recently issued, for consultation, a set of draft rules that envisage the establishment of a Technology and Construction Division. These proposed rules closely follow those of the Technology and Construction Court (TCC), a specialist division of the High Court of England and Wales. The TCC can trace its roots back to 1873 when the office of Official Referee was established to hear cases in the High Court raising technical issues that could not, due to their complexity, be satisfactorily tried by a judge and jury. The bulk of their work soon proved to comprise construction and engineering disputes.

The TCC, as it exists today, was formed in October 1998 out of the office of Official Referee. Its remit was initially limited exclusively to construction, engineering and technology cases. The TCC prides itself on procedural innovation. This has meant that while the disputes before it are often more complex and technical than those before other courts, it has gained a reputation for bringing such disputes to swift and cost-effective conclusions. It often does this significantly quicker and cheaper than would have been achieved through arbitration, the previously preferred forum for resolving such disputes. Much of this was achieved through efficient case and cost management. The TCC is also prepared to pilot schemes in its attempts to become more efficient. Its procedures are closely watched and often adopted by other courts.

As a result of the TCC’s experience with complex technical disputes and its reputation for innovation, its remit has steadily expanded over the years. From initially dealing solely with construction, engineering and technology disputes, it now deals with a wide and increasing variety of cases that are factually or technically complex. These include procurement disputes, professional negligence claims against solicitors arising out of technical issues, and personal injury group actions.

The DIFC’S proposed technology and construction division

The new proposed rules of the DIFC Courts (proposed as Part 56 of the Court Rules) that cover the establishment of the Technology and Construction Division (TCD) are clearly based on Part 60 of the English Civil Procedure Rules, which governs proceedings in the TCC. The proposed new TCD’s remit is very similar to that of the TCC and the non-exhaustive list of examples in Part 56 list claims arising from disputes relating to building, engineering, technology, fire and challenges to decisions of arbitrators in construction and engineering disputes.

Part 56 and Part 60 contain similar jurisdictional, procedural and case management provisions, with the TCD aiming to adopt (and be seen to adopt) the TCC’s well-regarded approach to case and costs management. For example, Part 56 provides for case management conferences and pre-trial reviews similar to those held in the TCC, with the parties completing similar case management information sheets and pre-trial review questionnaires. In addition, Part 56 contains provisions pertaining to court-appointed experts and Scott Schedules, emphasising the DIFC’s progressive approach.

The TCC and the DIFC Courts are both generally considered ‘success stories’ in promoting dispute resolution in their jurisdictions. Both have seen an expansion in jurisdiction and a significant increase in the number and variety of disputes before them, including disputes with no connection to their jurisdictions. The DIFC Courts are clearly keen to capitalise on their success to date by adopting the specialist approach first taken by the English courts in 1873.

The introduction of a TCD to the DIFC Courts should represent a major step in dispute resolution in the Middle East for cases concerning construction, engineering and technology. It is worth noting the number of complex construction and engineering projects and the inevitable disputes that abound in the region. However, whether parties will be willing to submit to the jurisdiction of such a court remains to be seen. Domestic arbitration, albeit administered by international arbitrators and institutions, remains the choice for resolving construction disputes in the region. History tells us that in the Gulf, as elsewhere in the world, people often like to stay with what they know.

It remains to be seen to what extent the proposed TCD remit
or procedure will differ, if at all, from the TCC following the DIFC’s consideration of any comments received during the consultation process, which closed on 22 April 2017.

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The UAE’s criminal code and the position of arbitrators
Roger ter Haar QC*

The United Arab Emirate’s position as a centre for arbitration has grown substantially since 2008, but the codified law has been slow to catch up. More accurately, the first sentence should refer to the growing number of ‘centres’ for arbitration in the UAE. In Abu Dhabi, there is the ‘on-shore’ Abu Dhabi Commercial Conciliation and Arbitration Centre and the ‘off-shore’ Abu Dhabi Global Market, while in Dubai there is the (‘on-shore’) Dubai International Arbitration Centre (DIAC) and the (‘off-shore’) DIFC-LCIA Arbitration Centre. There are also other UAE centres including the Emirates Maritime Arbitration Centre and the Sharjah International Commercial Centre. Between these institutions there is a substantial volume of disputes referred and resolved each year.

Unlike many other jurisdictions, the UAE does not have a standalone arbitration law relating to ‘on-shore’ arbitrations. The principal legislative provisions governing arbitrations seated in the UAE are Articles 203 to 218 of the UAE Civil Procedure Code. These provisions have provided happy hunting grounds for unsuccessful parties attempting to avoid or at least slow down enforcement of arbitration awards before the domestic courts, particularly in Dubai (similar attempts to avoid or slow down enforcement in the Dubai International Financial Centre (DIFC) Courts have been markedly less successful: the DIFC Courts have a track record of being arbitration friendly). Experience in the local courts has shown a considerable level of ingenuity, and some success, on the part of parties seeking to put off the day of judgment.3

These enforcement problems have taken the shine off what has generally been a welcome and successful establishment of the UAE arbitral institutions. Gradually, however, the courts have become familiar with arbitration in a way that was not the case a decade ago and problems with enforcement are on the decline.

The propensities of parties to seek to disrupt the arbitration process is important background to a significant change to the law of the UAE introduced late in 2016. The government has amended Article 257 of the UAE Penal Code to apply it to arbitrators in on-shore arbitrations. As amended, it now reads (translations vary):

‘An expert, arbitrator, translator or investigator who is appointed by a judicial or an administrative authority or elected by the parties, and who issues a decision or expresses an opinion or submits a report or presents a cause or proves an incident in favour of a person or against him contrary to the obligation of fairness and impartiality shall be punished by temporary imprisonment. The aforementioned shall be precluded from performing the duties they were charged with in the future.’

In its unamended form (that is, without the underlined words), the purpose of this provision is natural support for the judicial process in a civil law jurisdiction with a tradition of the use of court appointed experts. However, the extension of the provision to arbitrators may have unintended consequences.

While as a UK-based barrister I am not qualified in respect of the law of the UAE, I understand that the criminal law of the UAE probably incorporates what in the common law would be referred to as mens rea, that is, that a criminal provision such as this is interpreted as incorporating a requirement that, in order to constitute an offence, there must be an element of intention on the part of the alleged perpetrator. Thus, an arbitrator would probably not be guilty of any offence unless they intended to express an opinion contrary to the arbitrator’s obligation of fairness and impartiality. Thus, it can be said that the penal code now does no more than to reflect in the criminal law the obligation accepted by any arbitrator under institutional rules.2

In those circumstances, any arbitrator complying with the standards of a modern arbitrator acting under institutional rules has little reason to fear conviction under Article 257 of the Penal Code.

However, many practitioners fear the mere possibility of a disgruntled party referring matters to the prosecution authorities. I have had personal experience as counsel of a substantial case in one of the Emirates in which the Respondent took substantial (and to an extent successful) steps to slow down and disrupt arbitral proceedings by making complaints to the criminal authorities about the alleged conduct of the arbitrators and by bringing civil proceedings against the arbitrators. While the complaints were ill-founded and ultimately rejected, these antics slowed down the arbitration and
were unpleasant for the tribunal.

The absence of statutory provisions expressly conferring immunity upon arbitrators in the UAE, as in other jurisdictions (see, for example, section 29 of the UK Arbitration Act 1996), has allowed unscrupulous parties to cause disruption to due process of arbitral proceedings. There is a real fear that Article 257 as amended may provide an additional weapon to the unscrupulous.

Time will tell. In the meantime, there is some anecdotal evidence of potential arbitrators declining to accept appointments until the position becomes clearer; some arbitrators have resigned their appointments; and some tribunals have sought to move hearings out of Dubai (there are also reported cases where party-appointed experts not previously the subject of the criminal provisions have resigned, resulting in wasted costs and delays). It is understood that representations have been made to the legislative authorities, which may lead to changes to the legislation.

Notes

1. I express my gratitude to two distinguished practitioners in Dubai, Mr Ali Al Hashimi of Global Advocates and Mr Alec Emmerson of Clyde & Co, for comments on a draft of this article.

2. See, for example, Art 9.1 of the DIAC Arbitration Rules; Art 18(1) of the DIFC-LCIA Arbitration Law of 2008; Art 5.3 of the 2016 DIFC-LCIA Arbitration Rules; and Art 11.1 of 2012 IFC Arbitration Rules.

QATAR

The new Arbitration Law of Qatar

Ghada M Darwish

Qatar is currently experiencing a construction boom; The Hamad International Airport, the infrastructure for the 2022 Fédération Internationale de Football Association (FIFA) football world cup and the extensive development of the city have seen many international contractors working in the jurisdiction.

The highly anticipated new Arbitration Law in Civil and Commercial Matters (Law No 2 of 2017) (the ‘Qatari Arbitration Law’) finally came into force in March 2017, and was welcomed by both the business and legal community of Qatar. The new law, which is largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, will undoubtedly aid in solving commercial and civil disputes, especially those disputes that involve international parties, including the many international contractors currently working in the jurisdiction.

Given that there are a number of construction disputes currently in, or heading for, arbitration in Qatar, it is important to note that the Qatari Arbitration Law applies both to ongoing arbitrations commenced before the law came into force, as well as matters that may be referred to arbitration in the future.

As an introduction, the Qatari Arbitration Law states that arbitration shall be considered commercial in nature if the dispute arose out of a legal relation of an economic nature, which would, of course, include construction projects and related commercial contracts, investments, banking, insurance, etc.

Of relevance to international contractors, the parties to an arbitration can agree whether the supervisory court will be the Qatar Court of Appeal (the domestic Qatari court) or the Qatar Financial Centre (QFC) Civil and Commercial Court of First Instance. The QFC Civil and Commercial Court consists of experienced international (mainly common law) judges, with proceedings usually conducted in English unless the parties agree to conduct the proceedings in Arabic.

Non-arbitrability of certain disputes

Of particular note, the Qatari Arbitration Law specifies that disputes between public entities are not arbitrable, and that arbitration in relation to administrative contracts require the approval of the Qatari Prime Minister (or their appointed delegates). Concerns have been raised as to whether these provisions will affect the validity of arbitration agreements, ongoing arbitration proceedings and the enforcement of arbitration awards involving the Qatari government.
**The arbitration agreement**

In common with many jurisdictions, the Qatari Arbitration Law provides that an arbitration agreement, first and foremost, should be in writing without which any recourse to arbitration would be considered void. However, the arbitration agreement does not need to be signed; the exchange of written consent can be sufficient.

The arbitration agreement must contain an express agreement to refer disputes that may arise between the parties in the course of their contract or legal relationship to arbitration.

The arbitration agreement may be part of the main contract, in the form of an arbitration clause, or may be contained in a separate agreement.

**Primacy of arbitration**

If there is a valid arbitration agreement and one party seeks to avoid arbitration and refers the dispute to court for determination, the Qatari Arbitration Law confirms that the Qatari courts will dismiss the case provided that the failure to arbitrate is pleaded before the purported defendant raises any defence or petitions in the court proceedings. In addition, the Qatari Arbitration Law provides that the existence of legal proceedings before the Qatari courts does not prevent the commencement or continuation of arbitration procedures.

That said, if during the course of the arbitration, criminal proceedings or matters outside the jurisdiction of the tribunal are presented to the Qatari courts, the arbitration may be suspended until final judgment in the courts. However, the arbitration may continue if the matter that is before the Qatari courts does not affect, or is unrelated to, the subject of dispute in the arbitration.

**Appointment of the arbitral tribunal**

The Qatari Arbitration Law provides for a three-member tribunal by default. However, the parties can agree to appoint a sole arbitrator or more than three arbitrators, but the number of arbitrators must always be an odd number otherwise the arbitration will be considered void.

One area that will require clarification is the extent to which the arbitrators must be accredited by the Qatar Ministry of Justice. The Qatari Arbitration Law makes reference to a selection of arbitrators from a list of accredited arbitrators listed on the Arbitrators Register at the Qatar Ministry of Justice. However, the Qatari Arbitration Law also states that the arbitrators may be any person (male or female) subject to the following conditions:

- the arbitrator must have full capacity;
- the arbitrator must not have been convicted by final judgement in libel, misdemeanor or dishonesty suits; and
- the arbitrator must be of good reputation.

It is, therefore, unclear if accreditation is a pre-requisite to appointment or if the parties have a choice between an accredited arbitrator and an arbitrator who meets the separately stated requirements.

The parties may agree to additional qualifications in the arbitration agreement.

An arbitrator may only be recused if they do not perform their duties with neutrality or independence, or if they do not satisfy the specific qualifications agreed upon by the parties. The procedures for recusal may be agreed upon by the parties and, in the absence of such, the parties may request recusal of the arbitrator to the arbitral tribunal. Such request must be in writing and must indicate the causes of recusal.

The request must be made within 15 days of the requesting party having knowledge of the appointment of the arbitrator, or the circumstances that justify recusal.

It is important to note that if the arbitrator to be recused refuses to step down or if the parties do not agree on the request of recusal, a petition for recusal may be brought to the courts of jurisdiction.

Of note, the Qatari Arbitration Law has not followed the UAE approach in relation to penal sanctions for arbitrators. However, the Qatari Arbitration Law provides that an arbitrator can be liable (albeit not on a criminal basis) if they perform their duties as arbitrator in bad faith, collusion or gross negligence.

**Questions of jurisdiction, severability and nullity/invalidity of the arbitration agreement**

The Qatari Arbitration Law recognises the authority of the arbitral tribunal to decide on its own jurisdiction and also to determine any type of defence that questions the nullity or invalidity of the arbitration agreement.

Further, the Qatari Arbitration Law confirms that the arbitration agreement is independent of the contract. Thus, nullity or termination of the contract will not affect the validity of the arbitration agreement. This principle of severability is important as it allows the arbitral agreement to survive despite the nullity or invalidity of the main agreement.

The Qatari Arbitration Law maintains the Model Law approach, whereby a party is deemed to have waived its right to object to the commencement or continuation of an arbitration where the party failed to raise an objection within a reasonable period of time.

**Interim measures**

The Qatari Arbitration Law authorises the arbitral tribunal to order interim measures and awards, including measures requiring the parties to maintain the condition...
of the subject matter of the dispute until the arbitration is finalised, as well as order measures to prevent any imminent damage or prejudice to any party to the arbitration.

After obtaining written permission from the arbitral tribunal, any party to the arbitration may then bring the interim award or order to the Qatari courts and ask the judge to order enforcement. The judge may refuse to enforce such interim award or order only if the interim award or order violates Qatari Law or public policy.

**Arbitration procedure**

The Qatari Arbitration Law provides the parties to the arbitration agreement with the independence and freedom to agree on the arbitration procedures, which include the rules of proof, subject only to the mandatory provisions of the Qatari Arbitration Law. For example, parties may choose to have the location of the arbitration proceedings in a state other than Qatar, notwithstanding that the arbitration is seated in Qatar.

**Applicable Law**

The Qatari Arbitration Law permits parties to agree an applicable law other than Qatari Law. If there is such an agreement, the law of that jurisdiction will apply and not the Qatari rules on conflict of laws. This is important because it highlights the freedom of the parties to decide what rules and laws would govern their arbitration proceeding.

**Practicalities**

The Qatari Arbitration Law no longer requires that witnesses testify under oath. Further, the Qatari Arbitration Law empowers tribunals to request proof that counsel are duly authorised to appear for their party, but does not stipulate the form or otherwise of the authorisation. In practice, a power of attorney should be provided.

**The arbitral award**

The Qatari Arbitration Law specifies that decisions of an arbitral tribunal with more than one arbitrator shall be arrived at through a majority. The arbitral award should be in writing and signed by the arbitrators, and must contain the reasoning and the legal rules applied to the dispute. The award must also include a summary of the petitions, arguments and documents submitted by the parties in the arbitration, the names and addresses of the parties, the names and nationalities of the arbitrators, and the place and date of the judgment. The costs of the arbitration and the party bound to pay them must also be specified in the award. The arbitral award must be rendered within the timeframe agreed upon by the parties, and in the absence of such timeframe the judgment should be rendered within one month from the date of closure of pleading.

The arbitral award must be given to the parties within 15 days of rendering the judgment. In addition, the Qatari Arbitration Law requires that the arbitral tribunal submits an electronic copy of the award to the Qatari Ministry of Justice within two weeks of the date of the award. This is an unusual provision which may catch international tribunals unawares. As at the time of writing, it is not clear whether the copy submitted to the Qatari Ministry of Justice must be translated into Arabic (if the original is written in another language). The consequences of the tribunal not complying with this requirement are also not clear.

**Corrections, challenges and enforcement of awards**

The Qatari Arbitration Law permits just seven days from receipt of the award for corrections or amendments (in comparison, the Model Law allows 30 days), and only 30 days for applications to challenge the award (in comparison, the Model Law allows three months).

The Qatari Arbitration Law removed the right to appeal awards on the basis of errors of fact and/or law, providing that arbitral awards may not be contested by any means of appeal except through cassation of nullification, and must be based on the grounds specified in the Qatari Arbitration Law. The grounds are limited to the following:

- incapacity of a party under the arbitration agreement;
- invalidity of the arbitration agreement under the applicable law or, in the absence of a separate applicable law, the Qatari Arbitration Law;
- failure to give proper notice of the appointment of an arbitrator or the arbitral proceedings;
- the inability of a party to present its case for reasons beyond its control;
- the award dealing with matters not contemplated by or falling outside the scope of the arbitration agreement; or
- the composition of the tribunal, appointment of the arbitrators or the arbitration proceedings not being in accordance with Qatari Arbitration Law (unless agreed to by the parties).

Cases requesting a declaration of nullity must be instituted before the Qatari courts within one month from the date the arbitral award is issued, unless otherwise agreed by the parties. Arbitral awards are void at its initiation if the matter under dispute is a matter that is prohibited to be arbitrated under the laws of Qatar or if the arbitral award violates the public order of the state of Qatar.

All arbitral awards have the effect of *res judicata* and are enforceable regardless of the state where they were rendered. Petition for the enforcement of the judgment should be submitted in writing to a competent judge with the copy of the arbitration agreement, original award and certified translation of the award. Where the award is being challenged before the courts of the seat of the arbitration, the...
Qatari courts are empowered to stay enforcement of the award. Where a stay is granted, the party seeking enforcement can request that the party resisting enforcement provides adequate security pending resolution of the annulment proceedings.

Comment and conclusions
In conclusion, the Qatari Arbitration Law is a major step forward for Qatar-seated arbitrations. In parallel, but outside the scope of this article, Qatar has been developing a new Procurement Law and an Engineering Law. Taken together, these laws should give international contractors substantial confidence in concluding Qatari-based construction contracts and agreeing to arbitrate construction disputes in Qatar.

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Note
1 The Qatari Arbitration Law does not provide any guidance as to how costs are to be awarded by the arbitral tribunal.

SAUDI ARABIA

Enforcement of arbitration awards in the Kingdom of Saudi Arabia
Henry Quinlan, Amer Al-Amr & Hannah O'Donovan

This article focuses on some recent cases, which have been decided in light of the new Arbitration Law and Enforcement Law enacted a few years ago in the Kingdom of Saudi Arabia (KSA).

Problems with the old arbitration and enforcement regime in KSA
The recognition and enforcement of foreign arbitral awards in the Kingdom of Saudi Arabia (KSA) have been fraught with difficulty for some time. While foreign arbitral awards have been recognised and enforced in the KSA sporadically in the past, the process has generally been very difficult and the KSA has long been regarded as one of the most problematic New York Convention signatory countries. As a result, contracting with Saudi parties with no identifiable assets outside of the KSA has always involved an added layer of risk.

The problems surrounding arbitration and enforcement in the KSA were largely attributed to the 1983 Saudi Arbitration Law, which was lacking in detail and did not contain limits on the scope of judicial review of awards. Under the old regime, parties had to bring applications for the enforcement of foreign judgments and arbitral awards before the Board of Grievances (the ‘Board’). The Board would undertake a full review of the merits of each award to ensure compliance with Shari’ah principles and public policy, as well as reciprocity between the KSA and the country where the award was rendered. As a result, enforcement of foreign judgments or awards could be lengthy and there would be a risk of an effective retrial of the dispute by the Board.

This was demonstrated in the case of Jadawel International v Emaar Property, a case in which Jadawel started arbitration proceedings before a tribunal seated in the KSA claiming US$1.2bn in damages for a breach of a joint venture agreement by Emaar. The arbitral tribunal dismissed Jadawel’s claim and ordered them to pay Emaar’s legal costs. However, when the award was submitted to the Board for enforcement, the Board re-examined the merits of the case to ensure compliance with Shari’ah principles and reversed the award, ordering Emaar to pay more than US$250m in damages to Jadawel. However, the new arbitration and enforcement laws in the KSA reduce the risk of such scenario being repeated in the future.

The new arbitration and enforcement laws
The KSA has revamped its arbitration and enforcement laws to more closely reflect international standards via the passing of the new Law of Arbitration (‘Arbitration Law’), which came into force on 9 July 2012, and the new Enforcement Law, which came into force on 27 February 2013.

The introduction of these new laws and the changes that they implement has prompted the hope that the KSA might become a more arbitration-friendly jurisdiction as it seeks to diversify its economy and encourage more foreign investment. These developments should be of significant interest to those in the construction industry.

UPDATES FROM AROUND THE WORLD

This article focuses on some recent cases, which have been decided in light of the new Arbitration Law and Enforcement Law enacted a few years ago in the Kingdom of Saudi Arabia (KSA).
who do business in the KSA or with KSA entities and who typically will have arbitration clauses in their contracts.

Arbitration Law

The Arbitration Law applies to arbitrations (both domestic and international) conducted in the KSA and is largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which has received global recognition as model legislation and arbitration best practice. In accordance with the Arbitration Law, parties are free (subject to mandatory provisions) to choose the institutional rules that will apply to their arbitration such as the International Criminal Court or London Court of International Arbitration (LCIA) Rules. The parties can also nominate the arbitrators to determine their dispute.

The procedural requirements for making an enforcement application for a domestic award are set out in Article 53 of the Arbitration Law, and include: (1) providing the original award (or an attested version); (2) a true copy of the arbitration agreement; (3) an accredited Arabic translation of the award; and (4) proof of the deposit of the award with the competent court within 15 days from its issuance.

Article 55(2) of the Arbitration Law mandates that before an order for the enforcement of the domestic award will be issued, the court must be satisfied that the award:

- is not in conflict with a judgment issued by a court, committee or commission that had jurisdiction to decide the dispute;
- does not violate Shari’ah law or public policy; and
- has been properly notified to the party against whom it is sought to be enforced.

Enforcement Law

The enforcement of arbitral awards now comes under the provisions in the new Enforcement Law. Enforcement proceedings must now be brought before the Enforcement Court (where special enforcement or execution judges have been appointed for this purpose), rather than the Board. This legislative change is very advantageous to award creditors, as Article 6 of the Enforcement Law provides that the decision of the enforcement judge is deemed to be final (except for judgments on execution disputes and claims on insolvency).

In order to confirm the enforceability of an award, an enforcement judge has to satisfy himself of the conditions specified in Article 11 of the Enforcement Law, namely that:

- in relation to foreign awards, the country in which the award was rendered will reciprocate in enforcing awards rendered in the KSA (for example, by reference to the award-rendering country’s accession to the New York Convention);
- the Saudi courts do not have jurisdiction to hear the underlying dispute (which will be the case where this is a valid arbitration clause in the relevant contract);
- the award was rendered following proceedings which complied with due process;
- the award is in final form according to the law of the seat of the arbitration;
- the award is not inconsistent with a judgment or order issued in relation to the same subject by a judicial authority of competent jurisdiction in the KSA; and
- the award does not contain anything that contradicts Saudi public policy (and in particular Saudi law).

The powers of the Enforcement Court under Articles 46 and 47 of the Enforcement Law are significant. If the award debtor fails to pay the sum owed or fails to disclose property sufficient to satisfy the award within five days of notification of the execution order, it is deemed to be procrastinating and the enforcement judge can:

- ban the award debtor from travel (in the case of a company, its general manager or board of directors);
- suspend the award debtor’s ability to issue powers of attorney either directly or indirectly in relation to its assets;
- order disclosure of the existing assets of the debtor and any future revenues in an amount sufficient to satisfy the award, seize such assets and take all actions permitted by the law to execute the award against them;
- order disclosure of the licences and records of the commercial and professional activities of the award debtor; and/or
- notify credit agencies and similar organisations that the award debtor has failed to satisfy an award, which will result in them being added to a credit blacklist.

Landmark enforcement decision of 2016

In 2016, in the first decision of its kind that the authors are aware of, the Enforcement Court in Riyadh confirmed that a US$18.5m ICC award rendered in London will be enforced in the KSA against a Saudi-domiciled award debtor. This is a decision that has brought much cause for optimism in relation to the development of the arbitration landscape in KSA.

The key facts, in summary, are that, in late 2011, a UAE subsidiary of a Greek telecommunications company (the ‘Claimant’) obtained an ICC arbitral award totalling circa US$18.5m from a London-seated tribunal of three experienced arbitrators. The Claimant (for whom DLA Piper acted) succeeded in its claims against a Saudi data communications service provider, and was also successful in defending counterclaims totalling circa US$350m. The Claimant then
sought recognition and enforcement of the award in the Saudi courts.

During the course of the enforcement proceedings, the KSA passed the Arbitration Law and the Enforcement Law. As a result of this change, the Claimant transferred its proceedings from the Board to the Enforcement Courts. Just three months later, the enforcement judge stamped the award (thereby confirming that the award is recognised and will be enforced in the KSA and also effectively converting the award into an executable Saudi court judgment). As stated above, there is no possibility of appeal against this decision.

It must be noted that enforcement proceedings in the KSA require a deep understanding of local law. It is clear from our involvement in this case that it is crucially important for any parties involved in proceedings against Saudi entities to ensure that they obtain proper advice from the outset about the prerequisites to enforcement under Saudi law. There are particular requirements and practical steps that must be undertaken during the process which it is important for parties to understand.

In addition, the KSA is a party to a number of international arbitration treaties and conventions that should be considered in the event of any enforcement of arbitral awards. In addition to the New York Convention discussed above, the KSA is also party to the Arab League Convention (which deals with the enforcement of judgments and arbitral awards in the KSA and other members of the Arab League) and the Riyadh Convention. As international contractors often operate in the KSA through local subsidiaries who are incorporated in the region, local law advice in relation to these treaties should be sought in the event of any enforcement proceedings (whether initiating or resisting an award).

**Conclusion**

Although foreign arbitral awards have been recognised and enforced in the KSA sporadically in the past, the process has generally been a difficult one and of uncertain outcome. The above-mentioned landmark enforcement decision of 2016 was the first practical example of recognition and enforcement of a foreign award since the promulgation of the KSA’s new arbitration and enforcement laws.

While the authors are not aware of any further published case law developments from the Enforcement Court since last year’s decision, it is hoped that the Arbitration Law and the Enforcement Law will enable the recognition and enforcement of foreign awards on a more consistent basis in the future.

**ISRAEL**

**Constructing Israel’s rail infrastructure**

Sharon Adler

**Vision and reality**

The concept of having modern rail and light rail infrastructure in Israel had, for many years, been nothing more than an unrealised vision of an emerging nation. Still, the dream was very much alive. In 1936, Israeli poet Nathan Alterman put into verse the public’s notions of the unrealised and illusive dream of having a metro in Tel Aviv after the idea had been abandoned owing to a lack of financing. The ‘underground dream’ of the new city, he wrote, had ‘evaporated’.

Yet, as the nation rapidly grew, by the end of the millennia it was faced with overcrowded and congested roads and outdated public transport systems.

In the late 1990s, the Israeli government decided to give greater emphasis to the promotion of much-needed improvement to the country’s infrastructure to allow the fulfilment of growth potential in the Israeli market. The decision also called for the transfer of certain activities to the private sector, in particular those related to transport infrastructure, thus achieving greater efficiency and allowing for new sources of finance.

It was finally time to make the dream a reality.

**Realising the vision**

The first step in the materialisation of this vision was the Jerusalem Light Rail Transport (JLRT) project (Red Line), which was completed and began commercial operations in the summer of 2011. This was the first light rail transport project in Israel. It included the construction of a twin set of light rails spanning 14 kilometres, connecting the southern and northern parts of Jerusalem, and the operation of 46 LRT vehicles for a period of 27 years. It was also the first Israeli build-operate-transfer (BOT) project constructed in the heart of a busy urban environment and it involved the Ministries of Finance and Transportation as well as the Jerusalem Municipality. The project was constructed and is operated by a consortium of Israeli and foreign companies. The project integrated many cutting-edge technologies for the first time in Israel, such as a traffic signalling system with
priority for the light rail transport project and an open ticketing system that is fully integrated with other public transport providers. The project has proved a great success, currently serving approximately 145,000 passengers each day. It also transformed the landscaping of some of the main streets in Jerusalem, revitalised the city centre and contributed to the rise in the value of real estate property. An international tender for the construction and operation of a second line (Green Line) is supposed to be published during 2017.

Following the JLRT project came the Tel Aviv light rail transport project. This project, initially intended to be implemented as a BOT project, suffered from the global financial crisis of 2008. After several postponements of the date for achieving a financial close, the government finally announced in 2010 that the bid had been cancelled and that the project would be implemented by the governmental agency, NTA Metropolitan Mass Transit System Ltd, which was given the responsibility for the design and construction of a mass transit system for the Tel Aviv metropolis. Construction of the Tel Aviv light rail transport Red Line civil works commenced in 2011. The line is 24 kilometres long, 11 kilometres of which is underground, with 34 stations along its route. International tenders to select the contractors for the signalling system and the electrification system are expected to be published during 2017. The Red Line is planned to open in 2021 with additional lines to follow. Annual passenger numbers for the Red Line are expected to reach 70 million.

At the same time, Israel is expanding and modernising its underdeveloped heavy rail infrastructure.

One of the largest infrastructure projects currently being executed in Israel is the Israel railways electrification project. This is a design-build and maintenance project for Israel Railways Ltd, a governmental company that functions as Israel’s sole heavy rail operator. This NIS2bn project, the first of its kind, creates the necessary electrification infrastructure to allow the powering and operation of the national railways with electric trains instead of diesel-powered locomotives. This is a design, construction and long-term maintenance project of electrification infrastructure along 420 kilometres of rails and 13 rail lines spread throughout Israel. The performance of the project was awarded to Sociedad Española de Montajes Industriales SA (SEMI), a subsidiary of the Spanish ACS group.

Other notable projects include:
• the construction of the Tel Aviv–Jerusalem high speed railway, expected to open in 2018;
• future construction of new lines and expansion of current lines connecting the northern and southern parts of Israel with the centre of the nation, including new lines constructed in the Galilee;
• lines connecting the new seaports constructed in Haifa and Ashdod and a possible Tel Aviv–Eilat high speed line; and
• replacement of the existing signalling and communication systems and construction of train depots and train stations, with a reported overall development budget for the period up to 2020 of approximately NIS30bn.

Transaction structures and risks

For the past two decades, the BOT and private financial initiative (PFI) models have been central instruments in the advancement of construction and operation of public infrastructure projects, including transport projects. Public Private Projects (PPP) are implemented by means of an international public tender for the selection of a concessionaire that will finance, design, construct, operate and maintain, and collect and receive revenues, for a term of up to 30 years. Projects are typically administered by an implementing authority appointed by the government. The financing (non-recourse loans, secured by the project assets and paid entirely out of project funds) is generally provided by syndicates of Israeli banks and foreign banks as well as lending institutions. A design-build-operate-transfer (DBOT) model was adopted as the model for implementing the JLRT Red Line and is also the model for the upcoming Green Line.

As mentioned above, for the Tel Aviv Red Line, the government finally decided to abandon the originally chosen DBOT scheme. This project is being implemented through several separate contracts, issued by the implementing authority (NTA), for design, civil construction, supply and installation of systems, maintenance and operation. This controversial government decision was the subject of great criticism as opponents pointed out the significant budget increase and delays in the original anticipated operation that resulted. For the construction of civil works, NTA has adopted a FIDIC form of contract.

Heavy rail projects are being implemented by Israel Railways. In addition to straightforward construction projects, some projects are being carried out as design-build projects while others as design-build-operate-maintain (DBOM) projects.

While continually evolving and although not methodically regulated through specific laws, government contracts for implementing construction mega projects, including concession agreements,2 usually follow the same principles and address risk allocation in a largely similar manner. Nevertheless, certain risks deserve close attention, such as the discovery of antiquities and...
burial grounds (a fairly high risk considering the history and heritage of Israel), the treatment of public utilities, and the risks regarding the receipt of building permits including the indispensable cooperation of governmental authorities.

Challenges ahead
While Israel has made huge leaps in the implementation of mega transport projects through sophisticated financing and legal schemes, numerous challenges and considerable work lie ahead as Israel continues along this path. This applies to Israel’s construction law practice and how construction disputes are resolved, among other things.

There is not one single inclusive statutory and regulatory framework for government contracts nor for PPP transactions. The legal framework for the implementation of such projects is found in various laws and regulations: contract laws, construction laws, tender laws, planning and building laws, statutory plans, mandatory standards, etc.

Similarly, there is no one single government ministry or implementing authority authorised to deal exclusively with such projects. The Ministry of Finance, the Ministry of Transportation, local authorities and, in the case of heavy railways, Israel Railways, may and do have a say in these projects.

There are no specific courts or dispute resolution boards dealing exclusively with government construction contracts, project finance transactions or with construction law. Civil disputes regarding the implementation of projects can be brought before the authorised civil courts or, as is usually defined in the tender documents, before a panel of arbitrators appointed by the parties.3

Israel does not have a regulated adjudication mechanism nor an adjudication practice for quickly deciding disputes while projects are under construction.

Finally, there are very few court rulings that deal with such projects and with the specific legal issues they bring to the forefront.

Nevertheless, it is inevitable that with the massive and rapid development of infrastructure mega projects and the unique issues entailed in the implantation of these, Israel’s construction law practice will also develop through regulations, standard forms, public discussions, the advancement of specialised tribunals, as well as other means.

Notes
1 New Israeli Shekel (NIS).
2 Guidelines for drafting build-operate-transfer (BOT) concessions were prepared for the Israeli Ministry of Finance over a decade ago.
3 Israeli Arbitration Law 5728-1968 allows the parties to set the terms of arbitration within the scope of the arbitration agreement.

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Arbitration in the Gulf: anything new?

If there be nothing new, but that which is  
Hath been before, how are our brains beguil'd,  
Which, labouring for invention, bear amiss  
The second burden of a former child.  
[Shakespeare, Sonnet 59]

In 657CE (37AH), two armies faced each  
other near Raqqa in Syria, one led by the  
fourth Caliph, Ali bin Abi Talib, and the other  
led by Muawiya ibn Abi Sufyan. Ali’s forces  
came from Iraq, and those of his adversary  
were from Syria. These communities had  
been long-standing rivals, as the Syrians had  
fought for the Byzantines, and the Iraqis for  
the Persians, before the coming of Islam.  
Muawiya refused to support Ali as Caliph,  
ostensibly because Ali had not brought to  
justice the men from his army who had killed  
the previous Caliph, Uthman (to whom  
Muawiya was related). The Battle of Siffin  
lasted about 100 days, but only three of these  
involved serious fighting. Then, in an attempt  
to bring the conflict to an end, the two sides  
agreed to arbitration. This was not simply a  
negotiation, conciliation or mediation, but  
a reference to arbitrators who were to make  
a decision. Muawiya chose as his arbitrator  
Amr ibn al-As, and Ali’s supporters chose  
Abu Musa al-Ashari. A written and signed  
arbitration agreement was prepared. This  
statement that the arbitrators would:  
• investigate the murder of Uthman and the  
causes of the civil war;  
• make the decision within six months;  
• meet on the frontier between Iraq and Syria;  
and  
• if the decision was based on the Quran, be  
binding on both parties.  
The decision was given orally, and it was  
declared that both Ali and Muawiya should  

step down from their positions, and the Muslims should elect the Caliph. Ali refused to accept this decision. Had this been a modern arbitration, would it have been enforceable?

The simple answer is: no. There was an even number of arbitrators; neither was independent of the parties who appointed them; and their decision related to a matter which they were not asked to decide. The arbitration did not resolve the dispute, and so the civil war continued. Ali was murdered in 661CE, while praying in the Great Mosque in Kufa, Iraq and Muawiya became Caliph. This was the origin of the split between Sunni and Shi’a Islam, and not the best precedent for arbitration in the Middle East.

Arbitration nevertheless continued to be recognised as an exceptional form of dispute resolution, with state-appointed qadis (judges) being the primary means of applying the law. There were differences of opinion between the schools of Islamic law as to whether arbitration was binding. Where it was not binding, the process was more like modern conciliation than arbitration. The Ottoman codification of Hanafi Islamic law, the Majalla, contains a section on arbitration. However, it states at Article 1847 that either of the parties may dismiss the arbitrator before they have given their decision (but if the appointment had been confirmed by the court then the arbitrator was considered to be a representative of the court, and so could not be dismissed by the parties). A further problem arose with differing views as to whether it was possible only to arbitrate existing disputes, or whether a contract could include a binding agreement to arbitrate disputes that had not yet arisen.

However, when Shari’a was the only source of law, the Middle East had no need to resolve the types of disputes which arise out of modern construction projects. The great architectural and engineering wonders of the medieval Islamic world were procured on the basis of direct payments for work and materials, without the need for sophisticated contracts to share risk. The Majalla contains sections regulating various specific types of contracts, but there is no section on construction contracts (unlike the muqawala sections of modern civil codes in the region).

In the 1950s, a number of disputes arose in the Gulf region concerning oil concessions. In one, Lord Asquith provided a decision that has formed the basis for much condemnation of the imperialist attitudes of Western lawyers. In Petroleum Development (Trucial Coast) Ltd v the Sheikh of Abu Dhabi, he infamously said:

‘This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.’

Lord Asquith therefore fell back on English common law.

Similarly, in Ruler of Qatar v International Marine Oil Co Ltd, the arbitrator held that Qatar law was the proper law of the contract, but said that he would not apply it because he was ‘satisfied that [Qatari law] does not contain any principles which would be sufficient to interpret this particular contract’. He therefore applied ‘principles of justice, equity and good conscience’ instead.

Now, the vast majority of construction projects in the Gulf region are run in English.

The language used at the time was not just politically incorrect, but lacked any consideration for the Gulf parties or the law that these arbitrators were obliged to apply. However, these arbitrators did face an almost unsurmountable difficulty. As Professor William Ballantyne observed, in his ‘Essays and Addresses on Arab Laws’:

‘One of the great difficulties of the Sharia is that in the field of contract, adapted to the circumstances at the time, it did not deal with general principles, but rather with specific instances, case by case, and with a series of nominate contracts. This obviously makes it very difficult to extract principles appropriate in the modern context.’

Now, the vast majority of construction projects in the Gulf region are run in English, and a huge quantity of English language documentation is created. It is therefore all but impossible to try disputes arising out of such projects in the domestic courts, which are run solely in Arabic. Parties are
therefore reliant on arbitration as the only practical means of dispute resolution. But until relatively recently, arbitration has been regarded in the region as an exception to a party’s primary right to obtain justice in court. The old (1983) arbitration law in Saudi Arabia required close supervision by the court including registering the proceedings and the confirmation of the arbitration agreement. Many of the laws of the region demand a special power of attorney for a person to enter into an arbitration agreement, without which arbitral proceedings are void. The law of the United Arab Emirates requires arbitrators to sign domestic awards while present in the UAE, and it seems that these have to be signed on each page. Until recently, the law of Qatar arguably required awards to be deposited with the court in Doha by one of the arbitrators in person; and an award was declared void (and not remitted to the tribunal) in Qatar because it did not expressly state that it was issued ‘in the name of’ the Emir of Qatar. In short, the arbitration laws of the Gulf (and their interpretation by the courts) have been somewhere between sceptical of, and hostile to, arbitration.

But this is changing. Most notably, a number of countries in the region have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. This is an example law, prepared by the UNCITRAL and first issued in 1985. It has since been adopted by 74 states, either in full or with amendments. In the Gulf region, a number of states have passed new arbitration laws based on (or ‘inspired by’) this model law: Oman in 1997, Jordan in 2001, Egypt and Syria in 2008, Saudi Arabia in 2012, Bahrain in 2015 and, most recently, Qatar, in the spring of 2017. These new laws remove many of the uncertainties of the previous laws (which were often contained in just a few articles of the civil procedure code), and standardise the approach to matters such as:

• the definition and nature of an arbitration agreement;
• the formation of the arbitral tribunal and its powers;
• interim measures;
• the conduct of the proceedings;
• the issue of the award;
• recourse against the award; and
• the recognition and enforcement of awards.

Not only does adopting the Model Law help to avoid the pitfalls of the past, but it assists foreign investors and their lawyers to understand a country’s arbitration law, since they can simply look for what is different from the model law.

However, it is the differences from the model that cause the problems. Almost every state insists on making changes, whether to comply with principles of local law that are considered paramount, or simply to assert its independence and difference (a similar process occurred when Dr Sanhouri’s 1948 Egyptian Civil Code was adopted by other Arab countries). Difficulties then arise in interpreting a law that is different from the paradigm, but for reasons that are unknown. This can be compounded in Arabic by the extensive use of synonyms, which are an asset to literature but a hindrance to legislation.

The new Qatar arbitration law (Law 2 of 2017) provides some good examples of amendments to the UNICTRAL Model Law that detract from the clarity of the original:

• Article 11(1) adds: ‘Arbitrators are to be appointed from amongst the accredited arbitrators on the Ministry’s register of arbitrators.’ Here, ‘the Ministry’ is the Qatari Ministry of Justice. This applies to all arbitrators selected by a party (there is an exception in Article 11(10) for selections by an institution). At the time of issue of the law, no register had been established, and the requirements for registration were unknown. It is also not clear whether the non-registration of an arbitrator would affect the validity of his/her award.

• Article 13(1) deals with challenges to arbitrators, and says: ‘The Arbitral Tribunal shall stay the arbitral proceedings pending the determination of the challenge.’ (Emphasis added.) This is different from the Model Law, Article 13(5) of which says: ‘while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.’ The Qatari version provides an obvious means for unscrupulous parties to delay proceedings.
• Article 17 (with Articles 17A-J) of the Model Law sets out detailed provisions relating to interim measures and preliminary orders. However, Article 17 of the Qatar law includes only limited parts of this, raising questions as to the applicability of the principles in the deliberately omitted sections (which are generally accepted in international arbitration as the basis for such orders).

• Article 31(11) of the new Qatar law adds that: ‘The Arbitral Tribunal shall send to the administrative unit concerned with arbitration affairs at the Ministry an electronic copy of the arbitral award or the decision ending the dispute, as the case may be, within two weeks from the date of its issue.’ This is different from a judicial process for the deposit of awards with the court. It raises questions as to why the Ministry of Justice needs or wants copies of arbitral awards, and issues of privacy and confidentiality. As with the registration of arbitrators, the law is not clear as to the consequences for the validity of the award if a copy of it is not provided to the Ministry (in time or at all). Also, at the time of issue of the new law, no procedures for the implementation of this article had been announced.

• Article 32 of the new Qatar law, like Article 33 of the Model Law, provides for corrections to, and interpretation of, awards after their issue. Under the Model Law, the parties have 30 days to make such an application, and the tribunal has 60 days to make any additional award. However the new Qatar law shortens these periods to an unrealistic seven days (extendable by the tribunal to 14 days), and it is not clear whether the parties can agree to extend the period for the further award.

• However, the most surprising of all the Qatari additions to the Model Law is Article 32(5), which relates to the correction of awards, and says: ‘The correction is to be written on the original copy of the award and signed by the Arbitral Tribunal.’ In other words, any correction must be physically written onto the original award. This appears seriously to misjudge the nature of corrections in complex commercial arbitrations.

Despite the obvious problems with the new Qatar arbitration law, it is still a vast improvement on the old law, and brings into sharp focus the long delay on the part of the UAE in modernising its arbitration law.

The substantive laws of the region have also developed considerably since the 1950s, with the adoption (and adaption) by most Gulf countries of Dr Sanhouri’s Egyptian Civil Code. But has the approach of arbitrators changed? It would be a naïve to consider that these civil codes provide all of the law necessary to deal with the types of issues that arise in complex infrastructure projects. Arbitrators are, therefore, still left with a difficult task of identifying and applying the law. Since most arbitrators in Gulf construction cases are not locally qualified lawyers, cannot read Arabic, and are often poorly assisted in relation to the law by the parties, they necessarily still follow an approach similar to Lord Asquith’s, applying principles of fairness and justice by reference to the legal system with which they are most familiar. Although, arbitrators are now more diplomatic about the laws of the region, and at least say that they have applied them.

In construction cases, it is essential that the lawyers have the necessary experience and skill to identify the real issues, the relevant evidence, and the principles of law.

The decisions of arbitrators in complex cases are rarely better than the quality of the parties’ representatives. The tribunal cannot be expected to find the relevant evidence and the correct law without assistance. In construction cases, almost more than any other, it is essential that the lawyers have the necessary experience and skill to identify the real issues, the relevant evidence, and the principles of law. But, in the Gulf region, there is a noticeable lack of advocates with these qualities. The stereotypical split is between local lawyers who know the law, and foreign lawyers who know how to present a construction case. All too often, the law gets left behind, on the assumption that the tribunal will only be interested in the law where it is mandatory and different from what they are used to. This only serves to hinder the development of construction law, and perpetuate Lord Asquith’s approach.

Difficult points of law relating to construction contracts should be argued on the basis of the interpretation and development of Arab laws and the Shari’a, rather than decisions of the High Court in London. One example is concurrent delay, which is regularly argued in the Gulf on the
basis of totally irrelevant common law concepts, rather than the principles of apportionment in the civil codes. Clearly the Arabic language is a substantial obstacle for Western lawyers coming to practice in the Gulf region. It is, therefore, primarily for local Arab lawyers to take the lead in developing their own law in specialist fields such as construction. Not only is this a huge commercial opportunity, but it is necessary for the acceptance of arbitration as a fair means of dispute resolution, and not ‘justice’ for foreigners, by foreigners. However, it is notable that the only proper and comprehensive book on construction law in the Gulf (in any language) is by an English solicitor (Michael Grose of Clyde & Co: Construction Law in the United Arab Emirates and the Gulf).

But arbitration should not be too quick to console itself that it is the only viable option (given the difficulties of trying complex cases in the local courts). The DIFC Courts have gained an enviable reputation for highly experienced and able judges, dispensing justice by reference to clear laws, and pursuant to fixed rules. However, to date, the DIFC Courts have not had the expertise or procedures to deal effectively with construction cases. But that is changing. At the time of writing, the DIFC Courts were consulting on a draft new Part 56 to the DIFC Rules, relating to a ‘Technology and Construction Division’. Draft Rule 56.3 states that:

‘A claim may be brought [in this division] if it involves issues or questions which are technically complex. The following are examples of the types of claim which may be appropriate to bring as TCD Claims, but are not exhaustive and other types of claim may be appropriate to this specialist division… (1) building or other construction disputes; (2) engineering disputes… (10) challenges to decisions of arbitrators in construction and engineering disputes.’

The proposed rules are based on those of the Technology and Construction Court in London, which have proved to be highly effective for dealing with cases of this nature. However, the success of any such division in the DIFC Courts will depend on the quality and availability of the judge. (It appears that only one judge is to be appointed (Rule 56.6).) Neither a moderate full-time judge, nor a good part-time one, would be able to satisfy the demands of the construction industry. Also, until the court has proved that it is capable of dealing with such disputes, parties to construction contracts will continue to include arbitration clauses, which will preclude the use of any court (except by agreement).

A final word on the future of construction arbitration in the Middle East should go to Iran. For many years, it has been excluded from the international community, particularly as a result of sanctions that have severely restricted trade (and even some arbitral proceedings). However, following the nuclear deal in 2015, most sanctions have been lifted, and Iran can begin to seek foreign investment. One of the main areas that Iran is looking to develop is its infrastructure, particularly its water industry. Although the expected influx of new business has been slower than expected, due to continuing uncertainty over US sanctions relating to the transfer of money, Iran’s full return to the international business community seems inevitable. And this new business will inevitably create disputes. Fortunately, Iran is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2001); it has a modern arbitration law based on the UNICTRAL Model Law (1997); and a competent international arbitration centre (the Tehran Regional Arbitration Centre). There is good reason to think that arbitration in Iran will provide significant opportunities for lawyers, and efficient dispute resolution for all sides of the industry that they serve.

*That I might see what the old world could say To this composed wonder of your frame; Whether we are mended, or where better they, Or whether revolution be the same.*

[Sonnet 59]

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Notes


Construction contract dispute resolution in the Sultanate of Oman

Omani law

In many private sector projects in the Sultanate of Oman, and overwhelmingly in those in the public sector, Omani law is adopted as the law of the contract. Essentially, Omani law is a variant of the civil law tradition deriving from Egypt and thus originally from France, with a strong sharia overlay. However, not all of its characteristics fit this classic model as well as other Gulf Co-operation Council (GCC) jurisdictions. Oman had no civil code until 2013. It is also possible to detect some affinity with common law, although this should not be overstated. The principle of Qiyas, by which a new issue is compared/contrasted with the established rules found in the Quran and Sunnah, is sometimes likened to the doctrine of precedent. Because of the historic and political relationship between Oman and the United Kingdom, many local lawyers, especially in the government service, received their legal education in British universities, so their attitudes have to some extent been shaped by exposure to the common law.

Although barely four years old, the civil code is the primary source of Omani contract law. The basic principles of contract formation are similar to those of most modern legal systems, though with some notable divergences from common law. For example, an offer with an express time limit must be kept open until that time limit expires, whereas such an offer can normally be revoked at common law. Silence, under Omani law, is capable of constituting acceptance of an offer.

Of over 1,000 articles in the code, just over two per cent relate specifically to construction contracts under the category of muqawala. These include the requisite contents of a construction contract and the limitation periods of ten years and three years. In
addition, a number of the general articles are of special importance to construction contracts, notably force majeure and ‘general exceptional accidents’ and the requirement to perform contractual obligations ‘according to law, custom and justice’, which is an apparently more restricted version of the good faith obligation found, for example, in the United Arab Emirates Civil Code.

**Omani construction contracts**

Because the modern state of Oman had no established standard form contracts of its own, the deficiency was supplied by using FIDIC forms and from those developing public works contracts for government projects. These could then be updated according to subsequent FIDIC editions and modified to meet the risk allocation needs and other specific requirements of a state construction client. Thus, the Sultanate of Oman’s Standard Documents for Building and Engineering Works (‘the Standard Documents’) were developed from the FIDIC Red Book 3rd Edition and versions of the Standard Documents have been used for projects in Oman for many years. In this respect, Oman was following the same path as most of its fellow GCC members: the UAE, Qatar and Kuwait.

As Oman’s modernisation programmes have been introduced, it has been found necessary to utilise more modern contracts reflecting current international standards.

However, while versions of the Standard Documents are still in use, the position has changed. As Oman’s modernisation programmes have been introduced, it has been found necessary to utilise more modern contracts reflecting current international standards. Thus, for the airport upgrade programme, the largest transport infrastructure development in Oman’s history, the decision was taken to use current FIDIC standard forms, albeit heavily amended. This has brought construction procurement on major projects more in line with international norms. An exception can be noted in the case of consultancy contracts. Oman’s Standard Form Consultancy Agreement (the ‘Consultancy Agreement’) is very different from the FIDIC White Book in a number of key respects.

The Consultancy Agreement provides detailed descriptions of work stages to be undertaken by the Consultant, whereas the White Book’s ‘scope of services’ is a blank page with a recommendation that the services ‘should be clearly expressed in Appendix 1’.

Perhaps more tellingly, the Consultancy Agreement sets out extensively the Consultant’s obligations, beyond ‘reasonable skill, care and diligence’, to include ‘diligence’ and ‘honesty’ and ‘professional knowledge and skill’ as a ‘faithful agent of the Client’ holding ‘safely the welfare of the public paramount’ and acting ‘in a manner to afford and enhance the honour, integrity and dignity of his Profession’ and respecting ‘the Laws, Regulations and Customs’ of the Sultanate. The White Book is almost minimalist in this respect: ‘the Consultant shall have no other responsibility than to exercise reasonable skill, care and diligence’ (clauses 3.31 and 3.32). This is probably sufficient on its own to explain why the White Book has not acquired the growing status of the modern FIDIC construction contracts in Oman. The introduction in the recent FIDIC 5th Edition of an obligation on the Consultant to act in good faith and in a spirit of mutual trust (clause 1.16) is unlikely to make the form more attractive, as the same is achieved by the general law.

**Dispute resolution**

The Oman Standard Documents contain a dispute resolution clause with reference of any dispute or difference to the Engineer for a decision. The parties then have 90 days to refer the matter(s) in dispute to arbitration, by an arbitrator agreed between them, or in default of agreement appointed by the Chairman of the Committee for the Settlement of Commercial Disputes of the Sultanate of Oman. This presented, of course, a stark contrast with the 1999 FIDIC contracts. The reference to the Engineer – of disputes that may have originated with the Engineer – is replaced by the decision of the Dispute Adjudication Board. Instead of reference direct to arbitration, the amicable settlement provision offers the parties an opportunity to avoid prolonged conflict. Domestic arbitration has been replaced by international
Arbitration, with default appointment and administration by a body of global standing, that is, the International Criminal Court. The dispute resolution provisions are undoubtedly a factor which would weigh with major contractors in tendering for large projects in Oman and other GCC states.

The Consultancy Agreement dispute resolution provisions might give equal or even greater cause for concern to an international engineering firm. Any dispute or difference is to be resolved directly by an arbitrator, appointed as under the Standard Documents. Interestingly, this applies to disputes ‘including those considered as such by only one of the parties’, which would avoid the (common) occurrence of disagreements about whether, and when, a dispute has crystallised.

The absence of alternative dispute resolution stages under these contracts is made more marked by the requirement in the Civil Procedure Code by which ‘a court must propose conciliation at the first hearing before proceeding with the remainder of the session’ and also by the Law of Arbitration, which provides that arbitration is not permissible in matters in which amicable settlement is not possible.

The Law of Arbitration governs both domestic and international arbitrations in Oman, which are expressly distinguished. It has not been entirely without difficulties and, in 2007, the enforceability of clause 67 of the Standard Documents was challenged in the Administrative Court and the law had to be amended to confirm that public sector contracts were administrative contracts, to which the Arbitration Law applies. The courts are sometimes even preferred by government for dispute resolution. The courts’ central role is emphasised by the procedure for selecting either a sole arbitrator or the president of a tribunal of three. In default of agreement, the choice is made by the President of the competent Court of Appeal (Muscat). This can be contrasted with Qatar’s recently enacted equivalent under which the default choice falls to ‘the list of approved arbitrators registered at the Arbitrators Registry of the Ministry’.

In other respects, the Omani Law of Arbitration provides reliable support to the arbitration process. It is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, although not all its provisions derive from that source.

Enforcement of awards is secured by Oman’s status as a party to the New York Convention (since 1999).

Arbitration has a strong presence in construction dispute resolution in Oman, though the absence of an arbitral institution may restrict its progress until this is addressed.

Challenge of the arbitrator is severely limited to ‘circumstances giving rise to serious doubts as to his/her impartiality or independence’. Challenge of the award is also limited, basically to invalidity or incapacity or denial of the right of the party to present its case, with the important addition of the failure of the award ‘to apply the law agreed upon by the parties to govern the subject matter of the dispute’. Arbitrators have to deliver their awards within 12 months in the absence of an agreed timeframe that offers reassurance to the parties.

Conclusion

Almost anyone involved in construction dispute resolution in Oman is exposed to local law, especially on government projects, where it is invariably the law of the contract. In many respects, it is typical of GCC states, though this cannot be assumed and at the margins common law influences are detectable.

The standard form contracts, which in many versions have been the mainstay of public sector procurement in Oman, are today sometimes replaced by the latest FIDIC forms, in order to meet international standards, though this is much less true of consultancy contracts. Alternative Dispute Resolution is at an early stage. Arbitration has a strong presence in construction dispute resolution in Oman, though the absence of an arbitral institution may restrict its progress until this is addressed.

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Notes

* The author has been engaged as counsel in construction disputes in the Gulf States for over ten years and this article draws upon his experience of arbitration under local law and/or from international
projects in the region. He does not hold himself out as qualified in Omani law.
1 Art 2 of the Basic Statute of the State provides that the basis for legislation is Islamic Sharia.
2 This principle can be translated as ‘analogy’.
3 Respectively, the sacred text of Islam and the thoughts/sayings of the Prophet.
4 The Civil Transactions Law, promulgated by Royal Decree 29 of 2013.
5 Art 69 contains the requirements of offer and acceptance.
6 Art 77.
7 Art 74.
8 Contracts to supply materials and services.
9 Art 628.
10 Art 634.
11 Art 637.
12 Art 172.
13 Art 159.
14 Art 156.
15 UAE Art 246.
16 Normally dated from the accession of Sultan Qaboos in 1970.
18 Notably Abu Dhabi and Dubai.
19 The Standard Form of Agreement and Conditions of Engagement for Consultancy Services for Building and Engineering Works.
21 Appendix A.
22 Redolent of the RIBA SFA work stages.
23 Sub-clause 19.1.
24 Clause 67.
25 Stated to be a sole arbitrator, subject to variation by agreement.
26 Sub-clause 20.2.
27 Sub-clause 20.5.
28 Clause 18.0.
29 Art 99.
31 Law of Arbitration in Civil and Commercial Disputes promulgated by Royal Decree 47/97.
32 Art 11.
33 Art 3.
34 Administrative Court Law 2009.
35 Art 17.
36 Law No 2 of 2017 promulgating the Civil and Commercial Arbitration Law.
37 Art 10.
38 For example Art 11, on capacity/legality.
39 Art 53.
40 Art 45.
The concept of ‘time at large’ in the United Arab Emirates

While time at large is a familiar concept in the common law, through which it was developed, it does not have a direct parallel in civil jurisdictions, at least not in its natural form. However, civil law principles are sometimes relied upon in disputes governed by a civil law system to make quasi-time-at-large arguments in order to extend the time for completion and avoid the obligation to pay liquidated damages. This article explains the concept of time at large from the English perspective and considers the various principles of UAE law that a contractor may rely upon to argue that it is required to complete the work within a reasonable time and thus reducing or obviating its obligation to pay liquidated damages to the employer.
Time at large – the fundamentals

Time at large is a common law concept that places a contractor under an obligation to complete work within a ‘reasonable time’ in circumstances where a delay caused by an employer rendered completion by the originally intended completion date impossible or impracticable. A party claiming that time is at large must satisfy two key elements in order for its claim to be successful. The first element is known as the ‘prevention principle’, whereby the employer cannot enforce its rights against the contractor for non-performance of the contractor’s obligations in circumstances where the employer, by act or omission, has prevented the contractor from performing the obligations in question. Importantly, actions by the employer that are perfectly legitimate under a construction contract may still be characterised as prevention if they cause a delay beyond the contractual completion date. Lord Denning summarised the position in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* as follows:

‘It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.’
The second element is an inability to extend the completion date. As Jackson J (as he then was) noted in Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2), ‘acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events’. In practice, there are four broad scenarios in which it may not be possible to extend the completion date, namely where:

• there is no contract;
• there is a contract but it does not specify a completion date;
• the contract contains a completion date but contains no mechanism for extending the completion date; or
• the mechanism for extending the completion date has broken down or become inoperable.

Since most contemporary construction contracts contain a mechanism for extending the completion date, the most likely scenarios in which a time at large argument is invoked is where either: (1) the act of prevention falls outside the scope of the extension of time provision; or (2) where the extension of time mechanism has broken down or become inoperable.

However, while time at large is available at common law, the general approach of the courts is that time will not be held to be at large where the machinery of the contract can be used to correct an unfair extension of time decision (or a lack thereof). In determining whether it is possible to award an extension of time, any ambiguity in the drafting of the contractual mechanism is resolved in favour of the construction which permits the contractor to recover appropriate extensions of time in respect of the events causing delay.

Accordingly, even as a matter of common law, it may be said that the preference of the courts is to award an extension of time, rather than to set time at large, where possible in the circumstances of the case.

The United Arab Emirates approach

The concept of time at large is not recognised per se under United Arab Emirates law. However, there are a number of provisions of the Federal Law No 5 of 1985 (UAE Civil Code) that are often invoked to argue that an employer is prevented from relying on its own acts or omissions in holding the contractor to the original completion date, such that the completion date must be extended and the contractor must be relieved from payment of liquidated damages.

Indeed, the Dubai Court of Cassation, in finding that a contractor was not liable for delay to the progress of the works and, therefore, not liable to pay liquidated damages, stated that:

‘It is established – in the jurisprudence of this court – that the contractor is not bound by the delay fine agreed upon in the contractor contract, if it is proven that the breach of the contractor’s obligation to complete the works within the time limit specified in the contract is due to reasons related to the employer or to a cause beyond the control of the contractor.’

(Emphasis added.)

**There is at least a recognition in UAE jurisprudence of a concept akin to the prevention principle.**

There is, therefore, at least a recognition in UAE jurisprudence of a concept akin to the prevention principle. While the judgments of the UAE courts often do not elaborate in detail on the legal basis for their findings, there are a number of provisions of the UAE Civil Code that may be relied upon by a contractor to argue that it is not bound to achieve the completion date or to pay liquidated damages to the employer where the employer has prevented it from performing its obligations.

**Relief from liability that could not have been guarded against**

Article 878 is arguably the most directly relevant provision of the Civil Code with respect to time-at-large-type arguments because it applies specifically to construction contracts. The Article provides that:

‘the contractor shall be liable for any harm or loss resulting from his act or work product whether by his wrongful act or default or not, but such liability shall be negated if it arises from an event that could not have been guarded against’.

(Emphasis added.)

Accordingly, to the extent that a contractor is unable to protect itself against an employer’s act of prevention, it may be able to rely on Article 878 to argue that it has no liability towards the employer for delay caused by the employer’s act of prevention.
Good faith

Article 246(1) of the UAE Civil Code requires that a contract must be performed in accordance with its contents and in a manner consistent with good faith. Drawing on the equitable nature of the prevention principle, contractors may argue that it would be contrary to good faith for an employer to insist on completion being achieved by the original completion date in circumstances where the employer prevented the contractor from achieving completion by such date.

Suspension of performance

Article 247 of the UAE Civil Code permits a party to suspend performance of its obligations under a contract where the other party has failed to perform a mutual obligation:

‘In contracts binding upon both parties, if mutual obligations are due for performance, each of the parties may refrain from performance of its obligation if the other contracting party does not perform that which it is obliged to do.’

It may be open to a contractor to rely on this provision to argue that it was not obliged to carry out the works during such time as the employer prevented it from doing so and, therefore, it is required to carry out the works in a reasonable time. However, Article 247 applies only in circumstances concerning the performance of ‘mutual obligations’ under a contract, therefore it may be of little assistance where the employer’s act of prevention is not a failure to perform its own obligations under the contract.

By way of example, in Dubai Court of Cassation No 310/2009, the Court held that the employer’s failure to comply with its obligation to pay the contractor justified the contractor’s suspension of its reciprocal obligation to perform the works:

‘[T]hat the Appellant was late to pay the amounts payables to the latter for a period of (551 days) while the delay period in some payments exceeded (43 days, 61 days, 22 days, 51 days, 173 days and 68 days) and others, which justify the delay of the Appellee in completion and which is considered as legal excuse for the Appellee to suspend the work until full payment.’

Conversely, Article 247 may be less helpful where the employer issues a variation that causes delay to the completion date because, in this scenario, there is no failure on behalf of the employer to perform its obligations under the contract.

Set-off

Article 414 of the UAE Civil Code embodies the general principle of set-off. It provides essentially that where there is a connection between two obligations, a party may withhold its performance until the other party performs its obligation. Similar to the suspension provision, this provision may assist a contractor in claiming an extension of time where the employer fails to perform an obligation under the contract, which then prevents the contractor from carrying out its connected obligation. By way of example, where the employer is responsible for providing detailed drawings but fails to do so by the stipulated time, the contractor may be able to rely on Article 414 to argue that it was entitled to withhold performance of its obligations in respect of the related construction works until such time as the employer provides the requisite drawings.

Impossible or onerous performance

Article 472 of the UAE Civil Code provides that a ‘right shall expire if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part’. While ‘extraneous cause’ may be interpreted as a cause external to the contract such that an employer’s failure to perform its own obligations may not constitute an ‘extraneous cause’, this article may assist a contractor nonetheless in persuading a court or a tribunal that a contractor should not be held to the original time for completion in circumstances where, through no fault of the contractor, it is impossible to achieve the original time for completion.

Similarly, Article 249 of the UAE Civil Code may also be of assistance:

‘If exceptional events of a public nature which could not have been foreseen occur

Articles 390 and 290 may assist the contractor in reducing or avoiding the imposition of liquidated damages where the employer caused or contributed to the loss it has suffered as a result of the delay.
as a result of which the performance of the contractual obligation, even if not impossible, becomes onerous, for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the onerous obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void."

Again, while it is unlikely that an employer’s act of prevention will constitute ‘exceptional events of a public nature which could not have been foreseen’, a contractor may refer to Article 249 as support for a time at large argument to show that, under UAE law, a judge may reduce a party’s obligation to ‘a reasonable level’ if performance becomes too onerous.

Relief from liquidated damages

Article 390 of the UAE Civil Code expressly permits the court to vary the amount of liquidated damages fixed in the contract ‘so as to make the compensation equal to the harm, and any agreement to the contrary shall be void’. As the Union Supreme Court has explained:

‘The meaning of Article 390 of the Civil Transactions Law – as settled by the decisions of this Court – is that the debtor’s breach of the obligation does not in itself suffice to give rise to [the creditor’s] entitlement to liquidated damages. The element of harm to the creditor must also be satisfied, such that the agreed penalty [for breach] falls away if the debtor proves the absence of harm.’

In the context of construction contracts, the Dubai Court of Cassation has confirmed that: ‘It is settled, by the rulings of this Court, that the clause in construction contracts which obliges the contractor to pay a specific amount for every period of delay in progressing the works entrusted to it is indeed a penalty clause – that is, a compensation fixed by agreement.’

Accordingly, under Article 390 of the UAE Civil Code, the amount of liquidated damages payable by the contractor shall be reduced in light of the harm suffered by the employer (or lack thereof).

In this regard, Article 290 of the UAE Civil Code becomes relevant since it permits the court to reduce the level of indemnity where the employer caused or contributed to the harm suffered:

‘It shall be permissible for the judge to reduce the level of indemnity or not to order indemnity at all if the person suffering harm participated by his own act in bringing about or aggravating the harm.’

UAE courts may seek, with the assistance of expert evidence, to fix a new completion date where possible.

While Articles 390 and 290 may be of limited use in arguing that time is set at large, they may assist the contractor in reducing or avoiding the imposition of liquidated damages where the employer caused or contributed to the loss it has suffered as a result of the delay.

Concluding remarks

The provisions of the UAE Civil Code and the approach taken previously by the courts appear to support an argument that, at the very least, a concept akin to the prevention principle exists under UAE law such that a contractor will not be held liable for delays caused by an employer’s act of prevention. However, it may be difficult for a contractor to go a step further and argue successfully that, because of the employer’s act of prevention, time has been set at large and the contractor is entitled to complete the work in a reasonable time. Rather, it seems that the UAE courts may seek, with the assistance of expert evidence, to fix a new completion date where possible. This is not all that different to the approach of the English courts, which, as explained above, will try to award an extension of time, rather than to set time at large, where possible, in the circumstances of the case.

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Notes

1 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447.

3 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447, at [56].
4 Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260.
5 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447, at [56].
6 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447, at [56]; see also Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm) at [243].

7 See, for example, Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 at [59]-[66]; Adyard Abu Dhabi v SD Marine Services [2011] EWHC 448 (Comm) at [243]-[256].
8 See, for example, Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 at [67]-[94]; Bernhard’s Rugby Landscapes Ltd v Stockley Park Consortium Ltd [1998] All ER 249.

9 Bernhard’s Rugby Landscapes Ltd v Stockley Park Consortium Ltd [1998] All ER 249.
10 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447, at [56]-[57].
11 Dubai Court of Cassation, Petition No 310/2009; see also Dubai Court of Cassation, Petition No. 288/2008.
12 Dubai Court of Cassation, Petition No 310/2009.
13 UAE Union Supreme Court, Petition No 414 of JY21 (Civil), 27 March 2001.
14 Dubai Court of Cassation, Petition No 310/2009.
Sustained low oil prices have had a significantly adverse effect on the economies of countries in the Middle East, particularly in the Gulf, which remain largely dependent on oil revenue. Governments in this region have been forced to cut billions of dollars of capital expenditure, scale down projects and make drastic fiscal adjustments in an attempt to trim their budget deficits. Across the Gulf, the value of infrastructure contracts awarded last year fell 44 per cent to US$100bn from US$178bn in 2015.¹ Qatar’s spending on new construction fell by 92 per cent in the first quarter of last year,² and the United Arab Emirates (UAE) government cut public spending, nationally and at the Emirate level, by 27 per cent in the year up to September 2015.³ Saudi Arabia was recently forced to adopt severe austerity measures to reign in its large budget shortfall resulting in the restructuring of hundreds of projects in the past two years.

However, economic diversification in these countries still remains a long term economic
and political priority, and it is expected that this will encourage investment opportunities in the private sector to create more diversified economies and productive employment. As the sustained focus on cost efficiency and timely delivery takes centre stage and increased competition drives down prices, the Middle East will undoubtedly become a more difficult market for the international construction industry to do business in. It will be important for those involved in delivering projects in the region to be more proactive in evaluating the impact of local law on their projects, managing risks and avoiding disputes.

**Contracting in the Middle East: the legal and contractual landscape**

*Arab Civil Codes*

Egypt, Qatar and the UAE are civil law jurisdictions. They each have well-established systems of codified law that are influenced by Shari’a law.

**Egypt**

In Egypt, the main legislation governing contracts is the Civil Code (No 131, 1948) (the ‘Egyptian Civil Code’), which constitutes one of the most significant legal developments in the region. Drafted in 1948 by Professor Al-Sunhuri, it is a combination of Shari’a law and the Napoleonic Codes, including the French Civil Code. Professor Al-Sunhuri also provided an explanation of the civil code in 12 volumes known as Al Wasit. As one of the first Civil Codes in the Arab world, the Egyptian Civil Code forms the basis of the civil codes of most countries in the region. Consequently, the application of the civil codes by the Egyptian courts remains an important source of law for many practitioners and Egyptian law remains a significant source of law. Other Egyptian sources of legislation relevant to construction contracts include: (1) the Tenders Act (1998) and Tenders Regulation 1998; (2) the Building Act 1976 as amended; (3) Building Regulations 1998; (4) the Contractors Federation Act (1992); and (5) the Social Security Regulations for construction workers (1988).

**Qatar**

In Qatar, contracts are governed by the Qatari Civil Code (Law No 22 of 2004) (the ‘Qatari Civil Code’) which is modelled on the Egyptian Civil Code. Public works contracts are governed by the Tender Law (No 26 of 2005). Similar to the UAE Civil Code, the Qatari Civil Code contains general provisions and specific provisions that apply to construction contracts.

**Saudi Arabia**

Unlike Egypt, the UAE and Qatar, Saudi Arabia has not adopted a civil code. Its primary legislation is Shari’a law. Although there are regulations enacted to govern particular matters such as foreign investment, employment, tax, trademark, patents, etc, these remain secondary to Shari’a law and the courts only apply the regulations to the extent they are not inconsistent with Shari’a law.

**Mandatory provisions**

A feature of the above-mentioned civil codes is the fact that certain provisions...
are compulsory in the sense that any agreement to the contrary is void. This means that, if the parties attempt to override a particular provision that is expressed to be mandatory in these terms, part of the agreement is negated, as opposed to the entire contract itself. These are provisions that can have a direct impact on the parties to a construction project.

**Formation and sanctity of contract**

Each of the above-mentioned civil codes contain provisions specifying the necessary requirements for the formation of a contract. They all agree that there must be clear evidence of the mutual intention of the parties to enter into a contract and the contract itself must be sufficiently clear and cover the essential terms. For example, under the UAE Civil Code, a muqawala contract must have a description of the subject matter, the manner of performance, the time period in which the contract must be performed and the amount to be paid.\(^9\)

Each of the civil codes in question also agree on the sanctity of the contract.\(^10\) A contract is considered to be the legal code of the contracting parties and must be complied with in its entirety, including any revisions to it. Terms are not, however, readily implied in contracts and if they are sufficiently clear, cannot be deviated from or subject to interpretation. If any ambiguity does arise in a contract, all three civil codes dictate that the courts must take a more subjective approach to determining the mutual intention of the parties, taking into consideration the trust and confidence that should exist between contracting parties. This should be contrasted with other common law jurisdictions, such as England, where courts generally tend to take an objective approach.

**Termination**

Each of the civil codes outline grounds for termination that apply to all contracts. Parties are permitted to expressly agree on automatic termination on the grounds of default in the contract, however, this contractual termination right will be considered supplemental to the grounds specified in the civil codes. The civil codes permit termination by consent and termination by court order.\(^11\)

Subject to the above, the effect of a unilateral termination clause is unclear in these jurisdictions. It has been suggested that the party seeking to exercise their unilateral right to terminate would only be able to do so with the consent of the other party. In an attempt to address this issue, a common approach used by contractors is to draft contracts with unilateral termination clauses that include deemed consent to a termination if one of the parties is exercising its right to terminate as a result of the other party’s default. Careful drafting of termination clauses is therefore recommended.

There must be clear evidence of the mutual intention of the parties to enter into a contract and the contract itself must be sufficiently clear and cover the essential terms.

The Egyptian and Qatari civil codes both also provide a termination right specific to construction contracts. The right to terminate for convenience allows an employer to give notice of termination to the contractor, provided the employer compensates the subcontractor for the expenses incurred, any work already performed and the loss of profit the contractor expected to earn undertaking the work.\(^12\) Although such a termination right is not provided for in the UAE Civil Code, it has been judicially established that such a right is available to an employer in the UAE.

**Shari’a law**

By way of background, Shari’a law is a comprehensive code of behaviour which consists of both ethical standards and legal principles. Its principles are based on two primary sources: the Qu’ran and the Sunna (the teachings and deeds of the Prophet Mohammed according to his friends). As previously mentioned, although Egypt, Qatar and the UAE have codified systems, Shari’a law is embedded to varying degrees in the laws of each of these countries. Shari’a law informs the provisions of each of the civil codes. In Qatar, for example, it is enshrined as its main source of legislation.\(^13\) In all of the aforementioned countries, the courts will refer to the civil codes as well as Shari’a law when making judgments on disputes arising from contracts. Therefore, it is important that the international construction industry
undertaking works in these countries have a good understanding of how Shari’a law may impact on their activities.

With respect to contracts, Shari’a law seeks to ensure justice and equity and a proper balance of benefits between the contracting parties. This can be seen from the principles a contract must comply with in order to be given force and effect. One such principle is that of the sanctity of contract. Under Shari’a law, contracting parties must abide and comply with their contracting obligations. Given this core principle, it is imperative for those doing business in the region to be clear about the scope and impact of those obligations.

The duty of good faith is a fundamental contractual principle under Shari’a law, one adopted by all of the civil codes. This duty extends beyond an obligation to comply with the express terms of the contract to that which is relevant by virtue of law, custom and the nature of the contract. The civil codes of Egypt, the UAE and Qatar also expressly impose a duty to act in good faith making a breach of this duty a legitimate ground on which a party could apply for damages and possibly even termination.

There is no guidance given as to what are the principles to be followed in order to establish the performance of a contract in good faith. However, it is generally accepted that the duty encompasses the concept that one party must not take advantage of or exploit the other and to cooperate. It is a flexible tool, but it has its limitations. If one party has entered into a burdensome contract, the imposition of a duty of good faith does not simply allow that party to escape its obligations. Something more is required for the principle to operate.

In a construction context, the duty of good faith has been suggested as a means by which a contractor can protect himself against the effects of failing to serve a notice within the contractually prescribed period in order to obtain an extension of time or recover loss and expense. Whether this is the position depends upon the facts of a particular case, but there may be scope to deploy the argument if the facts support this.

Particular legal issues impacting contracting

When considering the laws relevant to the construction process, it is important to draw a distinction between those that regulate local participation in the process covering matters such as procurement, health and safety, and employment, and laws which are relevant to an understanding of the rights and obligations of the parties to one another. This section will consider particular issues that arise when a construction contract is subject to Arab law.

Contract imbalance and the doctrine of changed circumstances

The doctrine of changed circumstances has its origin in Shari’a law, Udhr, and the French doctrine of imprevisio. This doctrine, which can also be found in each of the civil codes, gives judges, where an exceptional and unforeseen event occurs, the power to amend the contract in order to restore economic equality between the parties. It is important to note that parties cannot contract out of the doctrine of changed circumstances, as it is mandatory and applies to all contracts, unlike imprevisio which applies to administrative contracts.

There are certain conditions that must be satisfied in order for the doctrine of changed circumstances to apply:

• an exceptional event must have taken place;
• the event must have been unforeseeable by the parties when they entered into the contract;
• the event must also have been general in nature, meaning that it must have affected the whole industry and not just the particular project in question; and
• as a direct result of an exceptional event, an obligation contained in the contract has become unduly onerous, threatening excessive loss.

It is important to note that it is not necessary for the contract to have become impossible to perform, as in the case of say, the English law principle of frustration. If the above conditions are satisfied, the court or arbitral tribunal can amend the contract to rectify the
fundamental disequilibrium in the contract. The court or arbitral tribunal could either suspend the onerous obligation until it becomes more bearable to perform or add counter-obligations to the unaffected party in return for the affected party maintaining its onerous obligation. This could have a significant effect on the carefully structured allocation of risks and obligations in the original contract. Accordingly, contracts continue to be performed (be it with difficulty) but with a certain relaxation of the burden. An example where the doctrine of changed circumstances was applied is during the Egyptian 2011 revolution.17

**Liquidated damages**

It is common in construction contracts in the Middle East for the contractor to limit their liability for delay by reference to the period of delay and also to cap the total liquidated damages that can be recovered by the employer. Egypt, the UAE, Qatar and Saudi Arabia are distinct in the manner in which they deal with liquidated damages. Article 390 of the UAE Civil Code – which cannot be contracted out of – allows contracting parties to fix an amount of compensation in advance; however, this compensation is subject to the provisions of law. The award of liquidated damages by the court is subject to a tripartite test; it must be proved that:

- a breach was committed by the party who agreed to be liable for the liquidated damages at the start of the contract;
- actual damage has been sustained by the party seeking to enforce the liquidated damages clause; and
- there is a causative link between the fault and the damage sustained.

This is no different to the position in many legal systems. However, under the UAE Civil Code, the courts or a tribunal have the power to consider the amount of liquidated damages and substitute the amount agreed on for what it believes to be the actual loss sustained by the injured party.18 This, therefore, seeks to intervene in the bargain struck by the parties.

However, the approach adopted by the UAE courts when challenges are made has been inconsistent. In some cases, the burden of proof has rested with the party arguing that liquidated damages are inaccurate to establish the actual amount of loss, while in others the onus has been on the party seeking to enforce the liquidated damages clause. This difference of emphasis can be important in practice, especially since a contractor may not have access to the information necessary to prove that the employer’s loss is less than the amount of the liquidated damages.19

**Limitation and exclusions clauses**

Limitation and exclusions clauses are commonly used in construction contracts to apportion risks in projects equitably between the employer and the contractor. Egypt and Qatar adopt a similar approach to liquidated damages.20 They will not be awarded if the debtor can prove that the injured party did not suffer any damages. Both civil codes also expressly allow an employer to recover a greater amount of compensation where the actual amount of loss exceeds the agreed upon amount, provided the employer proves gross negligence or fraud on the part of the contractor.21 Although the UAE Civil Code does not contain a directly comparable provision, it has been argued that Article 383(2) of the Civil Code has a similar effect.

Liquidated damages provisions are also generally deemed valid in Saudi Arabia, however they are interpreted in the context of Shari’a law. Under its contractual principles, liquidated damages are only awarded if damage has actually occurred and the liquidated damages are compensation for direct losses.

Therefore, the court will not uphold a claim for a predetermined sum of liquidated damages they deem excessive. This is reinforced by the Government Tenders and Procurement Law 2006, which governs all public construction works in the Kingdom. Under this legislation,22 a contractor in default of his obligations under a construction contract will be subject to a penalty not exceeding ten per cent of the value of the contract in addition to deduction of the value of the unexecuted works.23

Limitation and exclusion clauses

Limitation and exclusions clauses (provisions that seek to limit the liability of the contractor) are commonly used in construction contracts to apportion risks in projects equitably between the employer and the contractor. Although permitted in Egypt, the UAE, Qatar and Saudi Arabia, limitation and exclusion clauses are
subject to their local laws. For example, the Qatari Civil Code expressly states that such clauses are not effective in relation to fraud and gross negligence,24 while the UAE Civil Code extends the scope within which limitation and exclusion clauses are void to any harmful act.25 Similarly, the contractual principles under Shari’a law, adopting principles of good faith and morals, prevent such clauses being enforced in circumstances of negligence or misconduct.26 It is generally considered that a party is not entitled to limit or exclude its liability when there has been gross negligence or fraud on his part. Where the local law prescribes the limits of such clauses, parties cannot contract out of the exemptions.

**Decennial liability**

Decennial liability is a well-known concept in civil law which has its source in the French Civil Code.27 It provides that a contractor and a supervising architect (which can include a supervising engineer) are jointly and severally liable to compensate the employer for a period of ten years from the date of delivery of the works, if the building suffers a total or partial collapse, or there is a defect that threatens the stability and safety of the building. This type of liability applies to both patent and latent defects. Contractors and supervising architects remain liable even if structural stability or safety is compromised as a result of a defect in the land.

Importantly, decennial liability is mandatory. The concept of decennial liability is driven by public policy relating to safety and, thus, parties that attempt to misapply or reduce the effect of decennial liability through contract drafting will find such provisions ineffective if ever considered by a court or tribunal.

The civil codes in Egypt, Qatar and the UAE all contain decennial liability provisions relating to the construction of buildings or other fixed installations. The principle of Decennial liability is based on the assumption that an employer would not ordinarily possess the required technical expertise in relation to construction works and, as a result, cannot necessarily be expected to identify defects at the point of delivery. The law, therefore, affords the employer special protection and also mitigates the effect of damage to third parties, society and the economy in general from a total or partial collapse.28

Decennial liability is a strict liability, therefore, there is no requirement to prove negligence or fault of either the contractor or architect when bringing the claim. Similarly, the contractor or the architect cannot absolve himself by showing he did not commit any fault or negligence. Under each of the Civil Codes, any agreement that seeks to restrict or contract out of this liability is void and unenforceable.29 This should be contrasted with the position in many common law jurisdictions where liability will, in general, apply only to designers if they have failed to perform their professional obligations in accordance with standards of professional skill and care.

Unlike in the UAE and Qatar, under the Egyptian decennial liability regime, insurance to cover such liability is mandatory. Given the absolute nature of decennial liability, professional liability insurance and other insurance may not cover decennial liability. Decennial liability insurance itself can also prove to be expensive and burdensome, as some insurers may demand the right to be involved in the execution of the works. In all three jurisdictions, the limitation period associated with decennial liability is ten years from the time of delivery of the work, unless the contract expressly states a longer period. However, any claim on the basis of decennial liability must be commenced within three years of the collapse or the discovery of the defect. As a result, the limitation period may either be shortened if the collapse or discovery of the defect occurs in the first ten years of the limitation period, or extended if the discovery is found in the last three years.

It should be understood, however, that decennial liability only arises after delivery of the work. In a decision of the Abu Dhabi Court of Cassation, the court determined that the risk of liability only comes into effect after delivery.30 Therefore, if a fault develops during the construction, the decennial liability provisions will be of no effect.
FEATURE ARTICLE

Strategies for dispute resolution and avoidance

Given the above, contracting parties must be aware of not just the provisions of the relevant Civil Code, but the core principles of Shari’a law, including the concept of good faith. While local law provides the framework within which the contract operates, it can also impose obligations and provide rights that are beyond those contained in the contract. Therefore, although the parties may have carefully negotiated those terms, it is essential to have an understanding of local law to appreciate fully the scope of their rights and obligations.

In order to avoid disputes, contracting parties should closely monitor the contractual issues that have time and cost impacts, and ascertain how local law issues may impact on the issues. Contracting parties should undertake due diligence of their contracts and commercial relationships to identify areas of risk, uncertainty and opportunity. These issues should be recorded and revisited as the project progresses. For parties at the procurement stage, contract provisions will need to be considered alongside relevant Civil Code provisions and Shari’a law principles. In this regard, contracts should be drafted clearly to reflect a fair balance between the employer and the contractor. A one sided contract is more likely to lead to disputes and to fall foul of local laws. Given the distinguishing features of local law in the Middle East, advice from local counsel should always be obtained, in particular to ascertain whatever mandatory laws exist and to ensure that the contract is not in breach of these laws.

Arbitration is the most popular and preferred method of dispute resolution in the international construction industry and the proliferation of local arbitration centres in chambers of commerce and as standalone regional and financial centres have all helped to increase local arbitration knowledge and capabilities across the region. However, those involved in disputes will need to be aware of how mandatory local laws and Shari’a principles are considered and applied by a tribunal.

Notes
1 See Financial Times: www.ft.com/content/5f95b292-d7f8-11e6-944b-e7eb37a6aa8e, accessed on 27 March 2017.
4 In 2016, the Egyptian government initiated several infrastructure power projects to encourage the production of electricity from renewable resources. The upcoming Expo 2020 in Dubai has brought with it opportunities for infrastructure projects in Dubai including the Dubai Route 2020, a project that will see the extension of the Dubai Metro to include an additional seven stations (two of which will be underground) and stretch 15km. Similarly, the Qatari government has engaged in large infrastructure projects in preparation for the FIFA World Cup in 2022. Additionally, the Kingdom of Saudi Arabia’s vast ambitions to become an industrial power house has seen multi-billion dollar commercial and industrial cities being built from the sand up in Jubail and Yanbu.
5 Under Egyptian law, privately financed construction contracts and publicly funded contracts (known in Egypt as administrative contracts) receive different treatment. Administrative contracts are subject to the exclusive jurisdiction of the High Administrative Court unless the Arbitration Law No 27/1994 applies, while non-administrative contracts are considered civil law contracts and disputes are heard in the ordinary courts.
6 ‘A ’muqawala’ is defined in s 872 of the UAE Civil Code as: ‘a contract whereby one of the parties thereto undertakes to make a thing or to perform work for consideration which the other party undertakes to provide.’
7 Civil Transactions Law No 5 of 1985 (‘UAE Civil Code’), Arts 872–896.
8 Law No 22 of 2004 (‘Qatar Civil Code’), Arts 708–715.
9 UAE Civil Code, Art 874.
10 Egyptian Civil Code, Art 141(1); UAE Civil Code, Art 267(1); Qatari Civil Code, Art 171(1).
11 UAE Civil Code, Art 267: ‘If the contract is valid and binding, it shall not be permissible for either of the contracting parties to rescind it, nor to vary or rescind it, save by mutual consent or an order of the court, or under a provision of the law.’
12 Egyptian Civil Code, Art 605; Qatari Civil Code, Art 707(1).
14 UAE Civil Code, Art 246: ‘The contract must be performed in accordance with its contents and in a manner consistent with the requirements of good faith.’ See also Qatari Civil Code, Art 172(1).

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15 UAE Civil Code, Art 249; Qatari Civil Code, Art 171(2); Egyptian Civil Code, Art 147(2).

16 The common law principle of frustration potentially applies where a serious event occurs that is both unexpected (so that any contractual force majeure provisions do not cover it) and beyond the control of the parties to a contract, and that will make performance of the contract in the changed circumstances fundamentally different from performance under the contract that the parties originally entered into.

17 The Egyptian Civil Code, in addition to the provisions under Qatari Civil Code, has a specific provision that deals with the economic imbalance in construction contracts. Art 658(4) provides that if an unforeseeable exceptional event causes ‘the economic equilibrium between the respective obligations of the employer and of the contractor to collapse, and the basis on which the financial estimates for the contract were computed has consequently disappeared, the judge may grant an increase in the price or order the termination of the contract.’

18 UAE Civil Code, Art 390 (2).

19 It has been argued that UAE Civil Code Art 390(2), may provide the courts with the power to increase the agreed sum so that it is equal to the employer’s actual loss. However, this is only likely in a domestic contract where the liquidated damages agreed are nil, or if it is considered that the liquidated damages were based on a formula that produced an absurd result.

20 Qatari Civil Code, Art 266. There are, however, nuances across the region in how liquidated damages operate and are applied. In Qatar, government employers are able impose a penalty on contractors engaged in public sector works without having regard to actual loss. Tender Law (No 26 of 2005) imposes its own delay damages regime irrespective of liquidated damages agreed by parties, Art 55 (Amended by Law 22/2008); see also Egyptian Civil Code, Art 224.

21 Qatari Civil Code, Art 267; see also Egyptian Civil Code, Art 225.

22 All government entities are required to use approved contract forms to engage third parties to perform public works (referred to as the ‘Saudi Public Works Contract’).

23 Government Tenders and Procurement Law 2006, Art 49. In this regard, Shari’a law may be relevant in such circumstances by applying the principle of unjust enrichment.

24 Qatari Civil Code, Art 259.

25 UAE Civil Code, Art 296.

26 For example, Egyptian law has attributed a high threshold to circumventing this exemption. ‘Gross negligence’ has been referred to as a mistake which, once it has reached a certain limit, justifies a presumption of bad faith notwithstanding the absence of such a presumption. See Mohammed Kamal Abdelaziz, The Civil Code in Light of the Judiciary & Jurisprudence – Source of Obligations, 1212.

27 See French Civil Code, Art 1792.


29 Egyptian Civil Code, Art 655; UAE Civil Code, Art 882; Qatari Civil Code, Art 715.

Although delay is usually considered to be of primary importance to the project, an academic study of 24 construction projects found that loss of productivity claims constituted half of the value of all claims submitted. Despite being so routinely put forward, disruption claims are notoriously difficult to prove.

What is disruption?

It is a widely held view across the construction industry that practitioners wrongly consider delay and disruption synonymous. The second paragraph of the disruption chapter in Burr’s 5th Edition dispels this:

‘Disruption is not delay. Although disruption may cause delay, and it may be caused by delay, delay is not a precondition of disruption and, indeed, disruption may occur when the progress of the works is not only not delayed but when the effect of an earlier delay is being mitigated, or recovered, or when the work is being accelerated.’

The 2016 Consultation Draft of the Society of Construction Law’s (SCL) updated Delay and Disruption Protocol (the ‘Second Protocol’) defines disruption as:

‘Disruption (as distinct from delay) is a disturbance, hindrance, or interruption to a contractor’s normal working methods, resulting in lower efficiency.’

The most common definition of performance which is a measure of efficiency is: productivity (the ‘unit rate’) = work hours / quantity of work. A lower unit rate value will mean a higher productivity than unit rate. The unit rate is most commonly only direct labour, and is commonly converted to ‘earned value’ so weighting of activities is possible, but this rate could also include equipment and on-site overheads, and may be measured in work hours or costs.
Claiming disruption in the Middle East

Simply experiencing disruption does not mean that the contractor is entitled to recover damages from the employer. It is a basic tenet of United Arab Emirates law that for a party to successfully recover damages for breach of a contract, the following requirements must be satisfied:

• contractual breach;
• actual damages sustained; and
• there must be a causal link between the contractual breach and the damages suffered.

Generally speaking and subject to certain exceptions, the burden of proof in respect of these three requirements lies with the party who is seeking damages and the failure to discharge this burden would result in no entitlement to damages. These basic principles of the UAE law have been upheld by the Dubai Court of Cassation on numerous occasions.

Like other claims, disruption claims should satisfy these requirements. While considering whether to bring disruption claims, contractors should closely examine which breach gives rise to a disruption claim. This would usually trigger some uncertainties since most of the standard forms of contract do not expressly address recovery for disruption. In other words, how should the contractor establish a ‘disruption breach’ when the contract is silent? Would UAE law provide contractors with possible solution or legal basis for their disruption claims?

UAE law does not expressly address disruption. However, Article 246(2) of the UAE Civil Code provides that:

‘The contract shall not be restricted to an obligation upon the contracting party to do which is contained in it, but shall also embrace that which appurtenant to it by virtue of the law, custom, and the nature of the transactions.’

On the latter point, leading Middle Eastern civil law jurists explained that employers are subject to certain obligations and such obligations are appurtenant to Maqualwa contracts. For instance, these jurists held that:

• ‘The employer shall be obliged to do anything necessary for the execution of works by the Contractor.’
• ‘The Employer shall be obliged to do everything he can in order to enable the Contractor to commence working and to enable to the Contractor to proceed with the works until completion.’
• ‘The Employer shall allow the Contractor to complete the works and shall not put any obstacles in this respect.’

While these opinions may give some guidance in relation to the employer’s obligation not to hinder the works, they would not be of direct relevance to the contractor’s right to claim damages because of the employer’s preventive (or disruptive) actions.

Perhaps more specifically, Professor Shanab is of the view that delay on the part of the employer shall result in the contractor being entitled to damages. He held that:

‘If the employer is late in performing what he is obliged to do so and such delay has caused damages to the contractor, the latter shall be entitled to claim compensation provided that the employer is notified to perform his obligations.’

This position is expressly codified in a number of jurisdictions in the Middle East. For instance, Article 692 of the Qatari Civil Code states:

1) Where performance of the work requires a specific action within a specific time period by the employer but he fails to act within such time period, the contractor may demand the employer to act within such reasonable time as determined by the contractor.

2) Where such time period expires without the employer’s action, the contractor may demand termination of the contract without prejudice to his right to claim damages, as applicable’.

Article 671 of the Kuwaiti Civil Code provides for a similar rule.

A ‘notice to cure’ should therefore be served on the employer to establish the latter’s liability for delay. This would usually be a requirement under the applicable laws in the Middle East region and it would be sensible for the contractor to issue such notice even if the contract is silent.

It should be also noted that the laws of the Middle East do not distinguish between delay and disruption claims and the aforesaid general legal principles would apply to both claims.
Similarly, the recovery of disruption damages would generally be dealt with in the same manner as other damages that may arise under a construction contract (save for liquidated damages) as further discussed below.

Disruption damages

Another basic tenet of UAE law (and other jurisdictions in the Middle East) is that potential damages are not recoverable. UAE only recognises the recovery of the actual damages as provided for in Article 389 of the UAE Civil Code. Article 389 expressly states: ‘If the amount of compensation is not fixed by law or by the contract, the Judge shall assess it in an amount equivalent to the damage actually suffered at the time of the occurrence thereof.’

Further, Article 292 of the UAE Civil Code states: ‘In all cases the compensation shall be assessed on the basis of the amount of harm already suffered by the injured party, together with loss of profit, provided that this is a natural result of the harmful act.’

The prohibition of any recovery for potential damages is also rooted in one of the fundamental provisions of the UAE Civil Code. In respect of this, Article 60 of the UAE Civil Code states: ‘No regard shall be had to the mere possibilities.’

Professor Al Sanhouri\(^\text{15}\) explains that types of damages that are recoverable for a breach of contract are material damages and moral damages.\(^\text{16}\)

As for the material damages, Sanhouri held that in order for these damages to be recovered, the following two conditions must be satisfied:

- the damages must be detrimental to a financial interest for the injured party; and
- the damages must be actual.

Sanhouri further explains that:

- actual damages can be either current or future;
- in terms of future damages, it must be proven that these damages will certainly occur in the future;
- loss of profit is still actual damage; and
- potential damages are not recoverable.

Sanhouri’s analysis reflects the position on recovery of damages across several
Jurisdictions in the Middle East and it is likely that the recovery of disruption damages in this region will be subject to these rules (depending on the jurisdiction in question).

**Deconstructing loss of productivity analysis**

Summarising United States law in relation to disruption, Bruner and O’Connor state: ‘the fundamental question in any disruption claim, productivity is “loss compared to what”?’. In this article, the ‘what’ is referred to as the ‘Datum’. The Datum is usually a ‘Datum Productivity Rate’, that is, the rate of productivity against which actual productivity should be measured in order to assess the extent to which there has been a loss of productivity. But it could also be a ‘Datum cost’ or ‘Datum cost rate’. The ‘loss’ or the ‘loss of productivity’, ultimately must come down to the Quantum associated with the disruption, and it is a matter of choice as to which should be used to prove the case.

A productivity-based disruption claim is complex and is achieved by three essential functions:

- establishing the Datum;
- quantifying the loss of productivity; and
- establishing the causal link.

The quantification of the loss of productivity is relatively straightforward once the contractor has established the actual productivity rate and production curves for discrete activities. The Datum is deducted from the actual productivity to calculate the loss of productivity for selected areas or activities of the works. The importance of establishing and quantifying an appropriate ‘Datum’ from which to measure loss of productivity is fundamental and is explored in this article. Once this has been ascertained, the success of the claim depends on the sophistication and level of detail of the analysis.

**Establishing the Datum**

In the authors’ view, the Datum should only be one of the following three rates:

- tendered productivity rate;
- ‘measured mile’ rate; or
- modified productivity rate.

In essence, when presenting its claim, the contractor must choose the Datum it feels is most appropriate. What is most appropriate will depend on several factors.

**Tendered productivity rate**

A contractor typically attempts, in its tendered productivity rate, to estimate the actual productivity that it will achieve on the particular project. The tendered productivity rate should not be the best theoretical productivity achievable by the workers, but a rate (below its optimum efficiency) that reflects the realities of the project, and its anticipated own inefficiencies. A good contractor who properly plans and organises their project will reduce its anticipated own inefficiency to meet or exceed tender rates. Conversely, a poor contractor may increase inefficiency in its workforce. The construction industry is, by its nature, inefficient and so any productivity rate provided, including those in industry guides such as Laxtons, should account for intrinsic inefficiencies.

The basis of any tendered productivity rate will change according to geographical region, skill level of individual workers and incentives, among many other factors. Assessing the appropriate tendered productivity rate depends on the experience of the contractor, the ability of its tendering team to understand the works, and the balance of the commercial bargain struck between the parties.

Some contracts, such as the NEC3, are explicit about specifying tendered productivity rates under the normal working method. The NEC3 makes provisions for a programme to be identified in the contract data with the wording ‘for each operation, a method statement which identifies the Equipment and other resources which the Contractor plans to use’. Assuming that the contractor complies with this, it should be clear to all parties:

- what the normal working method is;
- what the tendered productivity rate is; and
- what constitutes a deviation from either of these, when the contractor wishes to put forward a disruption claim.

This, of course, assumes that both the methodology and the rate were adequate in the first place. Just because a productivity
rate was put forward in the tender or agreed in the contract, it does not necessarily follow that that rate was actually achievable. It will still be up to the contractor to prove that it was indeed the case. Proof that the tendered productivity rate was sufficient can come from:

• expert testimony to explain how the rate was reasonably built up during tender;
• a project-comparison study of similar projects; or
• taking a ‘measured mile’ of the actual progress of the works, proving that it could achieve the rate at some point.

The actual productivity rate is made up of the optimum efficiency and any inefficiencies ultimately caused, like delay, by either the contractor, the employer or by force majeure events specified in the contract, or any combination of these.

Just because some management or worker inefficiency has occurred, it does not necessarily follow that the actual productivity rate will fall below the tendered productivity rate. Ultimately, the contractor is under no obligation to explain what its optimum rate could potentially be. An often touted discussion in delay circles is the question of ‘who owns the float?’ A similar question with regard to disruption (although not quite so catchy) might be ‘who owns the contingency within the tendered productivity rate?’

It might, in practice, be beneficial for the contractor to provide working calculations of how contingencies were built into the tendered productivity rates, especially in cases where decisions have been made for commercial reasons, but in our experience in the Middle East this is not always available. In these circumstances, the tendered productivity rates may have to be justified by use of a witness statement from the tendering team, or an independent expert may have to verify rates.

**Measured mile**

The Second Protocol firstly states that ‘measured mile analysis’ is a project-specific, productivity-based study that ‘seek(s) to measure the loss of productivity in the utilised resources and then to price that loss.’

The benefit of using this ‘most widely accepted method’ is clearly spelt out by the Second Protocol’s committee. A measured mile analysis is said to eliminate:

‘disputes over the validity of original tender stage productivity assumptions and the Contractor’s own performance.’ (Emphasis added.)

This is a contentious statement. The measured mile analysis is the only method, in establishing the Datum, that requires actual progress records. However, the measured mile analysis does not necessarily take account of the contractor’s own fluctuating (under)performance outside of the measured mile, even if the Datum has increased thereby resulting in the contractor showing its own losses. The Second Protocol’s definition is as follows:

‘[A Measured Mile Analysis]… compares the level of productivity achieved in areas or periods of the works impacted by identified disruption events with productivity achieved on identical or like activities in areas or periods of the works not impacted by those identified disruption events.’ (Emphasis added.)

*A contractor should remove impacted sections of works from the analysis that it knows were substantially affected by its own actions.*

The committee’s definition separates the measured mile analysis into two portions:

• the unimpacted period or area, that is, the ‘measured mile’; and
• the ‘impacted work activity’.

The definition of the measured mile is expanded later in the same paragraph:

‘ *(Where) there is no completely unimpacted period or area of the same or a similar work activity to act as the baseline with which to compare the impacted work activity… It may be preferable instead to identify a period of least disruption and, using this as the measured mile, to show minimum likely additional loss and expense during periods of greater disruption.*’ (Emphasis added.)

This advice is in line with Zink, who in 1986 originally proposed the measured mile analysis. He stated that the ‘build-up’ and ‘tail-out’ effects in the first and last ten per cent may skew results and should be excluded. The Second Protocol alludes to ‘the initial lost productivity inherent in the measured mile’, related to the learning curve. Zink’s method is sometimes considered problematic because pervasive disruptions may mean that a sufficiently near-uniform continuous period for a measured mile just may not exist:
‘When a measured mile or baseline is not obvious, and is difficult to find through only cause and effect analysis, objective methods to establish the baseline are highly appreciated by the industry... The “measured mile” approach to isolating the disruption costs of acceleration is generally accepted by the courts as being a reasonable way of determining the damages incurred over and above those which should have been expected. However, the size of the sample must also be reasonable – ie, extrapolating two percent of progress into 80 percent of expected costs would hardly be reasonable.’

In Gulezian’s and Samelian’s view, Zink’s measured mile does not address that: ‘variability is a property of all measurements, it is fundamental and should be considered in order to develop a meaningful baseline...’ Zhao and Dungan provided a review of current methods to take a measured mile, some of which use complex mathematics algorithms and statistical techniques that are beyond the scope of this article. The issues that these methods attempt to address is that: ‘[productivity data may] include extreme data points that do not represent the contractor’s normal operating process. Some of them may be impacted by the assignable disruptions, and some others may be caused by clerical errors, data update delays, or the inclusion of dissimilar work on some data points.’ (Emphasis added.)

These statistical methods are not explored by the Second Protocol but, in our view, may better allow for identification of outliers as well as a more objective selection of the measured mile to alleviate the issue of taking the measured mile from one period only.

However, the errors (highlighted above), while removed from the measured mile, may still be present in the impacted work activity portion and therefore the overall loss of productivity calculation. It is for this reason a contractor should remove impacted sections of works from the analysis that it knows were substantially affected by its own actions. Gulezian and Samelian recommend looking at ‘construction project records or other available information’ to assess ‘where the responsibility lies’ for the outliers.

A measured mile analysis may be persuasive to the courts only if it demonstrates that the contractor has been able to prove that it did achieve the rate set out during some portion of the works, that is, during the measured mile. The Second Protocol alludes to this as follows: ‘(Where) the impacted work activity in respect of which the loss of productivity is being measured was also impacted by matters not giving rise to entitlement to compensation, leading to the need to calculate productivity adjustments.’ (Emphasis added.)

This statement illustrates the situation where the liability in the causal link has not been sufficiently separated. In our view, this is the biggest issue with disruption analysis claims and is not specific to measured mile analysis. In truth, this statement could be applied to all productivity-based methods.

The purpose of a measured mile is not to separate out the causes of the disruption, but to establish a Datum from which to measure the productivity loss, which may show that the tendered rate was either sufficient or insufficient.

**Modified productivity rate**

The need to adjust loss of productivity calculations applies to all methods of analysis. There are a myriad of reasons, many of which are common practice in the Middle East, that may require rates to be retrospectively modified, such as:

- the tender may have commercially allowed for ‘front loading’ of the programme of works, where the prices for activities are higher, meaning the productivity rates are also higher for earlier activities to aid the contractor’s cash balance;
- the truism that ‘it is often the contractor with the biggest error in its tender that wins the project’;
- the contractor could have mistakenly tendered an impossible normal working method and may be responsible for the design or buildability under the contract;
- the unit rate may not address the relevant underlying premises and assumptions related to the inclusion of dissimilar work. A simple example from the region is where a unit rate for shuttering of columns was assumed to be uniform, but taller columns required much more work so the tendered unit rate was inappropriate; and
- clerical errors or data update delays when recording progress as explained above.

This is a particular problem in the Middle East where contractors typically use low cost clerical staff, without structured database software, to record progress.

Any disruption analysis that incorporated an insufficiency in tender productivity rate may
be flawed and would be easy pickings for the respondent to exploit. This can be considered in the analysis in one of two ways:

- modifying the Datum by using an estimate of the loss as per a Modified total cost claim; or
- applying corrections to the loss of productivity analysis after it has been calculated.

The Second Protocol states: ‘whilst adjustments might be helpful, the more that are applied, the more theoretical and unreliable the analysis will become’. Applying a modified productivity rate is often more simplistic than applying post-calculation corrections and is potentially less transparent. In our experience, a project-comparison study is a useful tool to back-up any assumptions made about productivity for the new work.

One of the major reasons for applying modifications is that the data was not captured correctly in the first place.

One of the big distinctions that the Second Protocol makes is the difference between a cost analysis and a productivity analysis. While a cost analysis does not consider labour in isolation, it still is accepted, for example, in the US, as academics suggest:

‘where the owner’s breach only affects one item of work, for example, painting or excavation, courts will more easily accept a damage claim using “total cost” and find the “total cost” safeguards easily met’.55, 36

Modified total cost claims that attempt to crudely estimate the amount of loss due to the contractor’s own faults are routinely submitted by claimants. The difficulty with applying such a claim is that it is not particularised, but it is preferred by the courts to ordinary total cost claims as it does potentially address the causal link.

Adjustments can be made for any of the reasons above, but in our experience, one of the major reasons for applying modifications is that the data was not captured correctly in the first place as stated by Zhao and Dungan. The build-up of any Datum needs to be understood to avoid what Hamish Lal refers to when he quotes Thomas’ book:

‘Comparison between actual productivity and the allowance in the tender might not be appropriate as a basis of calculation. This method does not take into account errors in the tender. Further, the project team may have changed the method of construction assumed by the estimator. What needs to be considered is the actual productivity with that which ought to have been achieved using the proposed method and sequence that the contractor would have used if there had been no disruption.’

Conclusion

The laws of the Middle East contain general principles in relation to the employer’s liability for delay and these principles will equally apply to both delay and disruption claims. This means that there is a legal entitlement for contractors in the region to recover disruption damages even if the contract is silent – assuming, of course, that damages can be quantified.

The quantification of damages using a productivity based analysis is still a developing field and is highly dependent on precise records of both manpower and production. In the authors’ view, the measured mile is the preferred methodology to measure an appropriate Datum. The use of new statistical techniques to objectively apply this is key to potentially expanding the use of the measured mile, where typically the records may not provide a long enough uniform period of unimpacted work.

Notes


2  Andrew Burr, Delay and Disruption in Construction Contracts (Construction Practice Series) (5th edn, 2015) 763.

3  The SCL published its Delay and Disruption Protocol (the ‘First Protocol’) in October 2002 to provide guidance on both delay and disruption. Disruption accounted for less than three of the total 82 pages, providing only superficial coverage of the subject. The 2016 consultation draft is the second edition of the SCL Protocol which substantially revises and expands the disruption section and follows the Rider 1 of the SCL Protocol (July 2015), which did not revisit the topic of disruption.

4  Second Protocol – Core Principle No 21.

5  ‘... identifies the amount of man-hours included in the tender allowance for completing certain work activities and compares this with the actual man-hours for completing those work activities. As the work activities are progressed and the tender allowance is
expended, the man-hours are “earned”... The analysis can also assess the man-hours expended in particular periods of time. Where details of planned and actual man-hours are not available, an earned value analysis might focus upon cost.’ Second Protocol at para 7.16.

6  The terms ‘contractor’ and ‘employer’ have been used throughout this article. The ‘contractor’ may be either a contractor to an ‘employer’ or a subcontractor to a contractor or even a subcontractor of a subcontractor. Essentially, for the purposes of this article, the ‘contractor’ is the party to the contract carrying out the works whereas the client is the party looking to have something built. These are akin to the ‘plaintiff’ or ‘claimant’ and the ‘respondent’ when disruption claims reach the courts.

7  In the UK, Lord Drummond Young summarised what a claimant has to normally prove for a loss and expense claim in John Doyle Construction Ltd v Luang Management (Scotland) Ltd [2004] ScotCS 141 (11 June 2004):

‘For a loss and expense claim to succeed, a claimant must aver and prove three matters: first, the existence of one or more events for which the defendant is responsible; secondly, the existence of loss and expense suffered by the claimant; and thirdly, a causal link between the event or events and the loss and expense’.

8  See, for example, Dubai Court of Cassation Petition No 41/2007 dated 15 April 2007.


10  Professor Abdel Razzak El-Sanhouri, ‘Commentary on the Civil Law’ (2007) 7 Egyptian Bar Publications, para 78, p 118.

11  Ibid, 119.

12  This is similar to the UK law position where the implied responsibility for not hindering obligations or causing disruption to the other party falls under the classic passage in the speech of Lord Blackburn in Mackay v Dick (1881) 6 App Cas 251:

‘Where in a written contract it appears that both parties have agreed that something should be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing though there may be no express words to that effect’.

In the UK, disruption claims are typically treated differently to a normal direct loss and/or expense claim and what rights there are under common law.

13  Professor Shanab is former Dean of the Faculty of Law at Ain Shams University in Cairo, Egypt and is the author of one of few text books on construction law in the Middle East.

14  See n 9 above, 192.

15  Professor Al Sanhouri is one of the most prominent jurists in the Arab World. He drafted the civil codes of a number of Arab countries, most notably, the Egyptian Civil Code.

16  See n10 above.

17  Bruner and O’Connor, Chapter 15; Risks of Construction Time: Delay, Suspension, Acceleration and Disputes in Bruner and O’Connor on Construction Law (2014 edn, 2002).

18  Established in 1817 and published annually, Laxton’s Building Price Book provides detailed cost data on preliminaries, regional variations, basic prices of materials, composite prices for approximate estimating, wages, plant, square metre prices, day work charges, fees, etc. It provides a cornucopia of benchmarked labour hours associated with particular activities for those seeking labour productivity rates.

19  The New Engineering Contract is the 3rd edition of the Engineering and Construction Contract created by the Institution of Civil Engineers (ICE). The three editions were released in 1993, 1995 and 2005 (NEC3). The NEC3 was first issued in June 2005, amended in June 2006, and again in April 2013.

20  NEC3 Clause 31.1 and Contract Data Part Two – Data to be provided by the Contractor.

21  NEC3 Clause 31.

22  In the ‘Records’ section of the Second Protocol, under ‘Contract and tender documents’, the committee advise:

At Para 2.39(b): ‘on the part of the Contractor; records demonstrating the build-up to its tender price (and any amendments to the price) and the assumptions on which the tender price is based.’

At Para 2.40: ‘Tender documents may be relevant to demonstrating the reasonableness of claimed costs in periods affected by delay or disruption events or the enforceability of the liquidated damages provisions. However, unless incorporated into the contract, tender documents are not relevant to the interpretation of the contract.’

Second Protocol, para 7.16.

25  Second Protocol, para 7.16.

26  Second Protocol, para 7.16(a). This wording has almost entirely been taken from Schwartzkopf and McNamara: ‘The measured mile calculation is favored because it considers only the actual effect of the alleged impact and thereby eliminates disputes over the validity of cost estimates, or factors that may have impacted productivity due to no fault of the owner.’

27  Second Protocol, para 7.16 (a).


29  Tong Zhao and J Mark Dungan ‘Improved Baseline Method to Calculate Lost Construction Productivity’ (2014) 140 J Constr Eng Manage.


31  See n29 above.

32  Second Protocol, para 7.16 (a) starts that ‘... the baseline period selected must be sufficiently long to serve as a reliable sample of non-impacted performance’.

33  See n30 above.

34  Second Protocol, para 7.16 (a).

35  Reginald M Jones, ‘Lost Productivity: Claims for the Cumulative Impact of Multiple Change Orders’ (2001) 31 Pub Cont L J 1, 31: ‘The four-part test of “total cost” method is set out by Jones: (1) proving actual losses directly is impractical; (2) reasonableness of bid; (3) reasonableness of project’s actual costs; and (4) contractor’s lack of responsibility for added costs.’


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