

Litigating and Arbitrating Construction Disputes in Dubai

Dean O' Leary

d.oleary@tamimi.com - Dubai, UAE

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Litigation

Dubai is no different to any other jurisdiction in that an aggrieved party has a constitutional right to have its grievances heard in the local courts. What makes Dubai different is that it has two distinct court systems operating (some might say competing) within the same Emirate.

On the one hand there are the traditional local courts in what is known as 'onshore' Dubai. Whilst on the other hand there is the separate legal jurisdiction, known as 'offshore' Dubai, which is found within the geographical free zone district known as the Dubai International Financial Centre ('DIFC') and which has its own courts, i.e. the DIFC Courts.¹

The onshore courts apply local laws, including the UAE Civil Code and UAE Civil Procedures Laws, both of which are influenced by the sharia. All advocates are required to be Emirati and all proceedings (written and oral) are conducted in Arabic.

The offshore DIFC Courts, however, are modelled on the English Commercial Court and the substantive laws which apply in the DIFC closely resemble English common law (indeed, the latter acts as a default source of law). Its procedural rules are based on the English Civil Procedure Rules, proceedings are conducted in English and there is a system of binding precedent.

For the purposes of this article, only litigation in the local (non-DIFC) courts is considered.

In terms of court structure, there is a Court of First Instance, Court of Appeal and a Court of Cassation. There is no system of binding precedent, but relevant Court of Cassation judgments are highly persuasive. There are no specialist construction courts or judges.

Proceedings are started by filing a claim (Memorandum) along with payment of a court fee. The claimant will include the documents it relies on and is not obliged to disclose documents which are adverse to its own case. If not already in Arabic, these documents will need to be translated before being filed with the court.

Next, the court will fix a hearing date (normally within a month) and serve the claim on the defendant.

At this first hearing the legal representatives of both parties will present their respective Powers of Attorney. Once the Powers of Attorney have been presented the courts will fix a date for the defendant to file its defence (a period of 2-3 weeks is normally allowed for this). The defendant can file a counterclaim with its defence.

As proceedings continue it is not unusual for there to be numerous exchanges of documents and each party asking the court for time to respond to such disclosure.

At some point the judge will take the view that the parties have sufficiently presented their respective

cases and reserve the case for judgment. At this juncture, and if the judge decides that the case is sufficiently complex, a court appointed expert may be appointed (occasionally, this appointment may be made much earlier, especially in the case of urgent matters).

Whilst it is highly unlikely that the local courts will hear evidence from party-appointed experts in construction disputes, it is possible (sometimes necessary) that their reports will be used in the presentation of a party's case in front of the court appointed expert. Therefore, it is crucial that a party engages an experienced construction litigator in the local courts who knows what level of detail will be required in preparing and presenting a case before the court appointed expert.

Upon receipt of the court appointed expert's report the court will fix a date for judgment. If an expert is involved the whole process can take up 2 years from the filing of the claim until a Court of First Instance judgment is delivered.

Any appeal from the Court of First Instance must be made within 30 days of the date of judgment and appeals can relate to both fact and law, which effectively means a rehearing. Any appeal from the Court of Appeal must again be made within 30 days but can only be made on the basis of a point of law. Interestingly, no permission is needed because there is an automatic right of appeal.

Whilst it is possible for the local courts to make an award of inter partes legal costs in favour of the winning party for its attorney's fees, such an award will be minimal.

In terms of evidence, the local courts will very rarely entertain live witness testimony. The proceedings are generally conducted on a 'documents only' basis with submissions on law made by the local advocates. Importantly, the 'without prejudice' rule does not apply in 'onshore' Dubai.

Once a judgment has been handed down the winning party will then seek to enforce its entitlement if the losing party doesn't pay and this is normally done by way of obtaining an attachment (which operates similar to the common law injunction known as a 'freezing order') and execution via the execution court. Other than attachment orders there is no system of interim injunctive relief in the local courts, i.e. there is no summary judgment (except for some very special and limited circumstances), which can cause problems in terms of enforcing mediated settlement agreements of DAB decisions.

Ad Hoc Arbitration

For an ad hoc arbitration to work best there needs to be: (i) cooperation between both parties and their respective lawyers; (ii) the parties' lawyers need to be familiar with the arbitral process; and (iii) there should be a comprehensive arbitration law.

Before commencing an arbitration the validity of the arbitration agreement and the authority of those who agreed to it should be carefully checked. In Dubai it is advisable that a Special Power of Attorney be obtained so as to be able to agree to arbitrate and to represent a party in the proceedings (Article 58 UAE Civil Procedures Law).

Arbitral proceedings are commenced when one party (the Claimant) serves a Notice to Arbitrate on the other party (the Respondent). Ordinarily, there is no requirement in an ad hoc arbitration for a responding party to file an Answer.

The UAE's arbitration law is silent on how many arbitrators will make up the Tribunal, other than it must be an odd number. In terms of complex construction disputes it is usual to agree on a 3-person Tribunal. Unless such matters can be agreed, there is a risk that the local courts will decide that a sole arbitrator is to be appointed and who that person will be, which would defeat one of the benefits of party autonomy.

Unlike an institutional arbitration, in an ad hoc arbitration the parties will generally enter into direct contracts with the members of the Tribunal by way of Terms of Appointment.

Within 30 days of being constituted the Tribunal will be required to notify the parties of the date for the first hearing.

One of the most crucial documents in any arbitration in Dubai is the Terms of Reference. This document, which is required to be signed by all relevant parties, will set out the details of the arbitration and what the Tribunal is being asked to decide.

At the first hearing (or shortly thereafter) the Tribunal will usually issue a Procedural Directions Timetable.

Because the Tribunal will have only been provided with the details of the dispute stated in the Notice to Arbitrate it will want both parties to state (i.e. plead) their respective cases in writing. This is normally done by way of a:

- i. Statement of Claim;
- ii. Defence and Counterclaim;
- iii. Reply and Defence;
- iv. Rejoinder;

As in any jurisdiction, the primary source of evidence in arbitrations in Dubai will be contemporaneous documents. However, unlike litigation in the local courts, witness evidence is the norm in an arbitration.

Depending on the issues involved, it is not unusual to see delay and quantum experts involved in construction disputes. Occasionally, there may also be a requirement for technical, property valuation and/or forensic accounting experts.

A recent trend in Dubai has been for Tribunal's to request that all evidence (documentary, witness of fact and expert evidence) be filed with the pleadings (known as 'memorial' style pleadings). Whilst this may work well in general commercial arbitrations where the volume of documentation and scope of issues in dispute are minimal compared to construction, this method of pleading is extremely burdensome, time consuming and costly in complex construction arbitrations. This is a reason why it is important that the selection of the members of the Tribunal (including the chairman) be carefully made because a Tribunal not experienced in construction disputes may have little or no experience of what is entailed in preparing and presenting such a case, which means both parties may be disadvantaged by possibly being ordered to comply with unreasonable and unrealistic deadlines.

The proceedings will culminate in an evidentiary hearing. The purpose of this final hearing is to allow both parties to present their respective cases and allow the other side and/or the Tribunal to ask questions. Immediately prior to and after the hearing both parties will normally be required to make written submissions.

During the evidentiary hearing the witnesses are excluded from hearing the evidence of others, though this rule is generally relaxed for the experts by way of an agreement between the parties. All witnesses are required to give their evidence under oath. Importantly, a Tribunal may continue with the proceedings in the absence of a non-participating party.

According to the UAE's arbitration law, the final award must be made within 6 months of the first hearing. However, it is quite usual for the Tribunal to approach the parties for their consent to grant an extension to this six-month period.

In complex construction arbitrations it can take between 18 to 24 months, sometimes longer, from the commencement of proceedings through to the issuance of a final award.

As with an institutional arbitration, it is imperative that the arbitrators sign every page of the final award,

that it be dated and state the place where it was issued (i.e. state the juridical seat). The final award should include the facts of the dispute and the legal basis for reaching its conclusions and the arbitration agreement should be included. Unless the parties have agreed otherwise, the final award should be issued in Arabic; hence, the importance of setting down the language of the arbitration in the arbitration clause.

There is no legal basis for appealing against a final award. However, losing parties often deploy arguments to try and annul (i.e. set aside) a final award when a winning party attempts to have the award enforced in the local courts.

The UAE's arbitration law does not cater for the award of inter partes legal costs, so, unless the same was made an express issue for the Tribunal to decide upon in the Terms of Reference, there would be no legal basis for the Tribunal to make an award of legal costs.

Institutional Arbitration - Dubai International Arbitration Centre ('DIAC')

Parties are at liberty to use any institution to administer the arbitral process. The most commonly used institution in Dubai is the Dubai International Arbitration Centre and the DIAC Arbitration Rules 2007.

In order to commence arbitration, a party must file a Request for Arbitration and pay a registration fee. The Request must contain, amongst other things, a description of the nature and circumstances of the dispute, a statement of the relief sought, comments concerning the number of arbitrators and the name of any nominated arbitrator.

DIAC will be responsible for serving the Request on the Respondent.

The Respondent has 30 days from the date of receipt of the Request to file an Answer along with its counterclaim (if any), though this date can be extended. In the unusual event that the Respondent fails to file an Answer the proceedings will continue.

The next step is for DIAC to fix an advance on costs. The advance on costs is an amount that DIAC considers will cover the fees and expenses of the Tribunal and DIAC's administrative costs. DIAC will request payment of an advance on costs from the parties in equal shares; however, if one party fails to pay its share the other party must pay the full amount of the advance in order for proceedings to continue. The advance on costs will ultimately form part of the costs of arbitration.

In terms of the number of arbitrators, the DIAC Rules default to a sole arbitrator in case of no agreement otherwise.

The arbitral file will be sent to the Tribunal as soon as it is constituted, provided that the advance on costs has been paid.

Although not expressly referred to in the DIAC Rules, upon receipt of the file the Tribunal will usually draw up the Terms of Reference, which will govern the scope of the arbitration. The Terms of Reference are usually discussed at the preliminary meeting along with a Procedural Directions Timetable (which sets out what needs to be done going forward, including dates for filing pleadings, the submission of witness statements, and a date for the evidentiary hearing).

If the parties did not file detailed Statements of Case with their Request or Answer then they may be required to file a Statement of Claim or Defence (and Counterclaim) in as short a period as 30 and 60 days respectively of the Tribunal's constitution, though experienced counsel and arbitrators will usually agree to extend these periods for complex construction disputes (it should be remembered that the DIAC Rules were not drafted specifically for construction disputes).

Unless the parties agree to hold a hearing on the papers (which would be highly unusual for a complex construction dispute), it is usual for an evidentiary hearing to be scheduled. The length of the hearing will

be determined by the complexity of the case, the volume of documents and the number of witnesses (factual and expert). Generally, witness statements stand as evidence-in-chief. Witnesses are required to attend the hearing and provide their evidence under oath.

The final award should be rendered within 6 months from the date when the Tribunal received the file, but this time limit may be extended upon application to DIAC by the Tribunal, or by agreement with the parties. As with an ad hoc arbitration, it usually takes up to 18-24 months (possibly longer depending on the complexity of the case and any interim matters that arise) to obtain a final award. Again as with an ad hoc arbitration, it is imperative that the Tribunal sign every page of the Final Award, that it be dated and state where it was issued. Unusually, the DIAC Rules do not specify that the Tribunal has power to award legal costs, so as with ad hoc arbitration, the Tribunal cannot award these unless an explicit agreement between the parties is reached on the issue.

If the losing party fails to comply with the orders directed in the final award, the winning party will be compelled to commence proceedings in the local courts to have the final award enforced.

As is the case with an ad hoc arbitration, it is now possible to take onshore arbitral awards to the offshore DIFC Courts for ratification purposes in an attempt to avoid the legal grounds for challenge in the local courts. However, the losing party in the arbitration may still simultaneously commence challenge proceedings in the onshore Dubai courts. This enforcement issue, and the question of which court has jurisdiction over the matter, remains very much a hot topic and a developing area of law in Dubai.

Summary

The following table attempts to summarise the foregoing.

	Litigation	Arbitration
Advantages	<ul style="list-style-type: none">• Can be quick, especially if no expert is involved• Pleadings can be relatively brief compared to common law court litigation and arbitration which saves on time and cost• Possible to make urgent applications• Less risk in being required to disclose documents which could be adverse to your own case• Little risk in having to provide oral testimony• No need to use foreign counsel Finality of judgment• Tends to be cheaper because venue and judge need not be paid for• Little risk of a substantial adverse costs order	<ul style="list-style-type: none">• Can select which law will apply to the proceedings• Can select the applicable arbitral rules• Can select the venue (neutrality)• Can select the arbitrators who should be chosen based on their specialist skills in light of the nature of the dispute• Proceedings are confidential Allows for detailed analysis of claims and defences• Allows for a party's case to be tested and scrutinised by way of cross examination• Usually parties can request disclosure of documents• Parties are free to choose their own experts• Parties are free to use international lawyers/advocates• Usually <i>inter partes</i> legal costs can be recovered, which can be quite substantial• If they are international, awards can be enforced around the world (New York Convention)