# Arbitrating Construction Disputes in the UAE: The Process from Start to End

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So you have taken your claim through the prescribed contractual procedures to try and resolve it amicably but this has failed.

Therefore, you find yourself with little option other than to commence arbitration proceedings, but you are not really sure what this will entail.

This article provides an overview of arbitrating a construction dispute. It is not intended to be exhaustive of the whole process, and clients should take advice from specialist construction arbitration practitioners when making or facing such a claim.

**Introduction**

Whilst arbitration may have its critics due to its duration and cost, commercial clients should not overlook the clear benefits, e.g. the flexibility of the process, option to choose the place (seat), confidential nature of the proceedings, detailed analysis of claims and defences, recoverability of legal costs (as a general rule), the perception that the parties will have their dispute heard in a neutral arena by specially selected arbitrators who have the appropriate level of experience and knowledge to handle complex construction disputes and that arbitral awards will be more readily enforced around the world than court judgments.

**Starting the arbitration**

To avoid a jurisdictional challenge at the very outset that arbitration proceedings have been commenced prematurely it is imperative that the initiating party ensures that: (i) the claim has crystalised into a dispute; and (ii) the dispute has met with all the pre-conditions to arbitrate (e.g. consider Clause 67 of FIDIC 1987 and Clause 20 of FIDIC 1999).

All too often we come across situations whereby an arbitration has been commenced but, upon investigation, the claim is either a new one which has not yet been disputed or has not yet run through the tiered dispute resolution process. This latter issue can become extremely complex when interim claims have been previously made and are then supplemented or superseded by ‘new’ claims, which may be said to be an embellishment of the previous claims, or are inextricably linked to them.

If the above criteria are met then careful regard must be had to the wording of the contract to see how arbitration should be commenced.

The agreement to arbitrate should be checked to ensure it is binding (for example, was it signed by persons who had express authority to bind the respective contracting parties to arbitration?). Careful consideration should be given whether the arbitration clause provides for an institutional or ad hoc arbitration. Whilst most experienced arbitration lawyers would generally like to work with institutional rules, this often depends on the particular institutional rules themselves, because some of them are not exactly comprehensive, comprehensible or user friendly, and uncertainty offers leads to disputes; hence, even more costs.  Some inexperienced arbitration lawyers may be

sceptical of ad hoc arbitrations, but experienced practitioners should be able to work with the tribunal in agreeing on the process and will often seek to adopt the UNCITRAL Rules to govern the process.

So the above checks have been made and you are now ready to start your arbitration, what next?

The arbitration is started when the claiming party (the Claimant) issues a 'Notice to Arbitrate' (often referred to in institutional proceedings as a 'Request for Arbitration'). Some arbitration laws may be vague or even silent on when proceedings are formally commenced, so careful regard may be needed to this issue if the expiry of a limitation period is looming.

The Notice to Arbitrate should clearly state that it is a demand to arbitrate the dispute. It should also provide some basic details; e.g. names of parties and their contact details, inclusion and reference to the arbitration clause, reference to underlying contract, description of dispute, relief sought, details of compliance with pre-conditions, choice of arbitrator (if appropriate), details of language, law and seat of the arbitration.

If it is to be an institutional arbitration then registration fees for filing the Request for Arbitration will have to be paid.

Whilst institutional arbitrations allow for the responding party (the Respondent) to issue a response (by way of an Answer or Reply) and possible counterclaim, ad hoc proceedings generally do not cater for such a document (unless the arbitration clause has been drafted in considerable detail or the UNCITRAL Rules have been incorporated).

The next stage is the constitution of the arbitral tribunal. The arbitral tribunal may comprise a sole arbitrator, or, as is more usual for construction disputes, a three-person tribunal. If the mechanics for appointing a tribunal have not been set out in the arbitration clause, and if the parties fail to subsequently so agree (which may very well be likely once they are in dispute), the relevant provisions of the UAE's arbitration law will apply.

Along with retaining experienced arbitration lawyers, choosing a suitable arbitrator is crucial to the success of the overall process. As mentioned above, arbitration is a flexible process and the parties should take advantage of this flexibility by appointing suitably qualified and experienced arbitrators. Unfortunately, leaving institutions to appoint can sometimes lead to unsuitable arbitrators being involved in the process. Unlike the legal profession, there is little control or regulation over who may qualify and sit as an arbitrator in the region.

In our experience, the process of constituting the tribunal can sometimes become protracted due to challenges to party nominated and chairman arbitrators.

Whilst in an institutional arbitration the tribunal will be appointed by the institution, in an ad hoc arbitration the parties will be required to enter into a tri-partite arbitration agreement with each arbitrator.

In the case of an institutional arbitration advance fees for the institution's administration and tribunal's fees will have to be paid before the case file will be transferred to the tribunal.

The UAE's arbitration law provides that within 30 days of its constitution the tribunal is required to give notice of the date for the first (preliminary) meeting.

The parties and the tribunal will before, at, or after the preliminary meeting execute a document entitled the 'Terms of Reference'. This document is extremely important because it will set out the parties' respective claims and the issues to be decided by the tribunal, thereby defining the scope of the tribunal's jurisdiction. It will also with ancillary issues, such as what rules of evidence will

apply, what expert evidence is required, whether the witness statements are to stand as evidence-in-chief, etc.

At the preliminary meeting, or shortly thereafter, the tribunal will issue a 'Procedural Directions Order' which will map out what each party is expected to do and when. One criticism of arbitration is that these timetables are often rescheduled leading to lengthy proceedings. However, there are often genuine reasons why the timetable may need to change.

It is quite usual for the tribunal to request the lawyers to present their respective 'Powers of Attorney' at the preliminary meeting.

**The Team**

Parties who are about to embark on a substantive construction arbitration should be aware that a team will be needed to handle the dispute.

The arbitration team will comprise: (i) the legal team (including possibly external counsel, more of which is discussed below); (ii) the experts (likely to include delay and quantum and possibly, technical, valuation, forensic accounting, and maybe legal); (iii) the client (including its in-house counsel, commercial and contracting staff); and (iv) witnesses of fact.

Picking the right legal team is crucial for several reasons.

Clients should be choosing their lawyers based not only on fees, but also on experience, knowledge and recommendations.

Construction arbitrations are legally and technically complex. It is essential, therefore, that the client carries out its own due diligence when appointing its lawyers. They should be wary of lawyers with little hands-on experience of arbitrating construction disputes, or those who are generalists who dabble in construction disputes from time to time.

The best due diligence a client can do is by carefully reading CVs/profiles, interviewing and obtaining references/recommendations. Watch out for words like "assisted", "involved", or "managed" in CVs/profiles; ask what these words actually mean.

Further, when choosing the law firm clients may wish to have regard to how the firm usually handles such disputes. For example, it may be alien to some firms to instruct senior English barristers (QCs) to advocate at a final hearing; whilst some firms may instruct external counsel as a matter of course for almost everything.

Most of the above apply to appointing experts and external counsel. In terms of both external counsel and experts, a crucial factor will be at what stage in the process should they be appointed.

**Preparing for the Hearing**

So the tribunal is constituted and the directions timetable leading to the final evidentiary hearing has been issued, what next?

In short, your appointed lawyers should lead in handling the process from start to finish.

Your lawyers will need to marshal the evidence, both documentary and witness (factual and expert).

It is not unusual for requests to be made for disclosure of documents from the other party (usually set out in the form of a Redfern Schedule). This is an extremely important facet of arbitration, because ordinarily in the UAE parties will only seek to disclose documents which support their own

case.

The issues that the experts will be required to provide their opinion on need to be identified relatively quickly by the legal team and instructions issued accordingly.

Witness statements, if not taken already, should also be taken relatively quickly. Construction projects have definitive start and finish dates, so project staff will move on. Therefore, it is imperative that the key witnesses are identified early on and interviewed so that their evidence will not be lost.

The pleadings will need to be prepared and these can run to hundreds of pages, with volumes of exhibits, schedules and appendices attached to them.

As well as managing fees and other issues relating to the experts and external counsel, the lawyers will be involved in assisting the experts in the preparation of their reports (i.e. obtaining important documents, giving instructions on matters of law/contract interpretation, etc.). Sometimes, and especially with quantum and forensic accounting experts, confidentiality agreements may need to be executed to allow experts to review sensitive information.

In the build-up to the final hearing (which may involve a split hearing between liability and quantum (bi-furcated proceedings)), practical aspects such as finding a suitable venue, translators and transcribers will need to be arranged.

Immediately prior to the hearing the parties will usually be required to file written opening submissions. The tribunal will also likely fix the agenda for the hearing and deal with issues relating to the order of witnesses, whether experts should be allowed to sit in during the evidence of factual witnesses, whether experts will be required to give their evidence together, etc. All of this will normally be dealt with during a pre-hearing review.

At the end of the hearing the tribunal will normally state that proceedings are closed, subject to any final written closing submissions. Sometimes, but not very often, proceedings may be re-opened.

In substantive construction arbitrations closing submissions will usually be dealt with in two rounds, the first dealing with a party's substantive closings and claim for legal costs (if legal costs are an issue to be decided by the tribunal), followed by a second round which comments on the closing submissions (including claim for legal costs) made by the opposing party.

**The Award and Enforcement**

Whilst under UAE law the tribunal is bound to issue its award within the 6 months, the parties usually agree to grant the tribunal an extension to this period.

If there is a sole arbitrator then an award can usually be expected fairly quickly after the final hearing. However, if there is a three-person tribunal, with some or all of the arbitrators residing overseas, it can often take several months to receive an award. If there is an institutional body like the ICC involved, then there will be further time involved because the ICC will need to scrutinize the award before the award can be issued.

At some point the award will be issued to the parties. It is essential that once received it is carefully reviewed to check that it complies with the formalities of the UAE arbitration law, e.g. it is signed on every page, states the place where it was issued, includes the arbitration agreement. It should also be checked for arithmetical and typographical errors.

The dispositive part of the award will set out which party has won and what the losing party must do. Sometimes, the losing party will act on this and that will be the end of the matter.

Unfortunately, that is not always the case.  If the award is not complied with the winning party will have to take steps to recover its entitlements.

Whether the award is a foreign (seated and issued outside the UAE) or domestic (seated and issued within the UAE) will determine what laws apply to the enforcement process.

In the UAE, the enforcement of a domestic award involves: (i) the ratification of the award; and (ii) the execution of the ratified award.

In terms of the appropriate forum for enforcement, and following recent case law, the DIFC Courts now seemingly offer a viable alternative to having domestic awards (both ‘on-shore’ and ‘off-shore’) enforced and then taken across to the Dubai Courts for execution, thereby possibly by-passing the legal arguments that could otherwise be deployed in the defence of ratification proceedings (e.g. consider Article 216 of the UAE Civil Procedures Code) in the local courts.  However, this is a new development in this area of law and it remains to be seen how the Dubai Courts will act in the future.

**Summary**

Arbitrating construction disputes can be a lengthy process, which inevitably leads to greater cost, but this is due to the fact that construction disputes are technically and legally complex, involve multiple parties, involve projects which span many years and involve the review of thousands of documents and numerous witnesses (factual and expert).

Therefore, it is imperative that a party gives careful consideration to the process, the applicable laws and its team.