

# The Importance of Expert Evidence in Disputes Involving Technology and Software Matters

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The software and information technology services industry abounds with examples of companies that enter into commercial contracts for services related to software development, installation and updates as well as other technical solutions.

Disputes frequently arise during the course of performance of such contracts over matters of a largely technical nature. Although such disputes can be hard to pinpoint due to the very nature of the work and contracts involved, they generally tend to be centred on the following issues:

- Delays in performance of contract work;
- Unsatisfactory work in terms of quality and work that does not conform to specifications;
- The contract scope of work and whether work is included in the contract;
- Non-payment and the amount payable at the completion of work;
- Post-installation operational and technical issues; and
- The ownership of work completed.

Such disputes are resolved in much the same manner as any normal court proceeding where the claimant files an action before the relevant court. Without delving too deep into the different kinds of courts and their functions, general rules in commercial disputes, which could apply in software cases, include jurisdiction being vested in the court in whose area the defendant has his domicile; or vested in the court in whose area the agreement was made or was performed in whole or in part; or vested in the court in whose area the contract should have been performed.

A common feature of these types of disputes is that the courts usually find themselves required to appoint a technical expert. This expert will review the case file based on the court's mandate and advise on technical matters, depending on the nature of the dispute and the claims and defences asserted.

Article 69 of the Law of Proof in Civil and Commercial Transactions states:

*“The Court may, when necessary, rule to appoint one or more experts from amongst the employees of the State or those listed in the register of experts, in order to seek their opinion to give insight on the issues on which judgment is to be made in the case. The Court shall determine the deposit which must be lodged with the Treasury Department of the Court on account of the expenses of the expert and his fees, the party who shall be required to lodge this deposit, and the time by which it must be lodged; also the amount which may be drawn by the expert towards his expenses.”*

Expert evidence forms part of the overall evidence in the case on which the court may or may not rely. Article 90 of the Law of Proof states that:

*“The opinion of the expert shall not bind the Court. If the Court rules in contradiction to the opinion of the expert, it shall show in its ruling the reasons which led it not to accept this opinion in full or in part.”*

It is therefore very important that all the parties involved look at the expert's credentials to make

sure he has the necessary expertise and specialisation in the relevant area. Any incorrect or unsound opinions would reflect adversely on the expert's conclusions and, ultimately, on the court's ruling.

It is worth noting that Article 77 of the Law of Proof deals with the recusal (removal) of experts as follows:

“The adversaries shall be permitted to reject the expert if some reason pertaining to him makes it probable that he will be unable to perform his function without prejudice. In particular the expert may be rejected if he is a relative or in-law of one of the adversaries up to the fourth degree, the agent of one of them in his private business, his executor or guardian, if he works for one of the adversaries, or if he or his spouse has some current dispute with one of the adversaries in the case or with his spouse, provided this dispute has not arisen after the appointment of the expert with the aim of rejecting him.”

While the causes of removal under the above article relate principally to neutrality, there is nothing to preclude the parties from objecting to the court-appointed expert and seeking his removal on genuine and convincing grounds that his expertise has absolutely no bearing on the subject matter of the dispute and, therefore, he is unable to undertake the court's mandate.

Ultimately, the court shall decide quickly on the application for rejection and the ruling issued on the request shall not be subject to appeal. If it refuses the request for rejection, the person making the request shall be subject to a fine of not less than two hundred dirhams and not more than five hundred dirhams.

In light of case law and practice, the following practical challenges for parties and court-appointed experts emerge:

- Lack of clarity and definition that can lead to conflicts about the scope of work and what has been performed within and/or outside the scope of the contract and should be paid for. If a contract's terms are too unclear or indefinite, the court-appointed expert cannot advise on the technical aspects of the case. It would all depend on the expert's expertise in the field in which expert evidence is required and his assessment of whether the variation work is part of the original contract and does not need to be expressly mentioned.
- The time schedule for each phase and a lack of agreed methodology and consensus on receipt and acceptance procedures.
- No itemised budget forecast for each phase.
- No agreement on the procedures to be followed in the event of a breach of contract by either party and no clear basis for measuring the value of work completed and no clear agreement on the consequences and obligations that would arise if the contract is terminated.
- Making changes to the scope of the project without setting them down in writing in the form of contracts and addenda where either or both parties could end up losing their rights.
- One of the biggest practical challenges for an expert is a situation in which he finds himself unable to inspect the work because the employer, by reason of his contractual dispute with the contractor, has terminated the contract and hired a different contractor to either complete outstanding work or cancel everything and start over. The parties will surely have difficulty proving the work actually completed and the expert, for his part, will not be able to ascertain such work through inspection. It is therefore advisable in such cases that the contract include a clear process and method for offsetting this deficiency and the parties keep track of the progress and approval of each phase. In a worst case scenario where either party terminates the contract or goes to court, that party should at least be able to take necessary steps to prove the work completed to date. This can be done through a summary action to determine the status of the work in which a specialised expert is enlisted to perform an inspection and note the completed work in a report which will then be presented as evidence in court.

Given the particularly important role that expert evidence plays in matters before the courts in the adjudication of purely technical matters, it is always advisable to draft clear and precise contracts whose essential terms are sufficiently certain to be enforceable. Contracts should clearly set out the work methods and time periods and receipt, inspection and acceptance procedures and variations should be set down in writing in the form of contracts or addenda that are sufficiently clear to avoid any issues down the line when a dispute reaches the courts.