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DIGEST



SHIFTING SANDS

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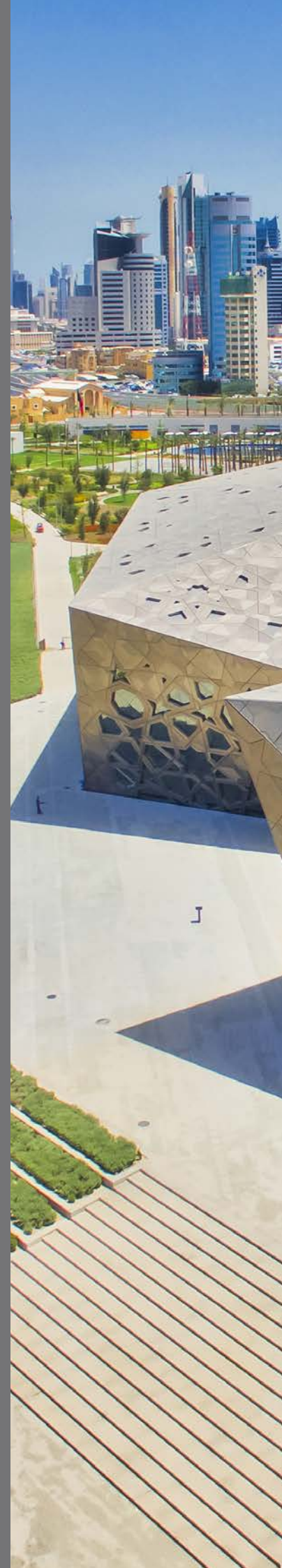
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Welcome

to the

Driver Trett Digest

I am delighted to welcome you to this Middle East focused, 22nd edition of the Driver Trett Digest.

There are many things to be excited about across the region, as we begin to see the return of some normality following the global pandemic, and I am sure that we are all hopeful that this will continue across the world.

In this edition, Jonathan Sanderson, Oman's Country Manager, offers an interesting recap on the company's journey in Oman and where he thinks its future lies. Daniel Morris, from our Qatar office, looks forward to the Qatar 2022 World Cup, and what could follow for the State.

Mahmoud Abougabal and Phil Duggan provide knowledgeable insights into construction litigation in the UAE and the evolution of virtual hearings, which many of us have now become accustomed to.

I would also like to thank Mark Rocca of CMS for providing a very enlightening article on the growth of PPP Projects in the Kingdom of Saudi Arabia and their contribution to the country's Vision 2030 plans.

We have an update to an article from a previous edition of the Digest, about the common shortfalls in the translation of documents - an issue prevalent in this region - and Mustafa Abdulsalam offers his thoughts on the topic.

Completing this edition, we have an interesting Q&A with Stuart Baird, the Regional Operational Director for the Middle East and Asia Pacific.

It is also with great pleasure that I announce our new office in Seoul, Korea, which will allow us to service Korean clients both in APAC and across the Middle East.

Our global expert team also continues to grow in numbers, with an excellent team of delay, quantum and technical experts working across both regions.

I hope that you enjoy this edition of the Digest and I look forward to a continual progression for us all as we exit the pandemic.

David Merritt
Managing Director, and Head of Middle East & Asia Pacific





HOW IT ALL BEGAN...

A long time ago in a country far, far away... a young (ish) John Mullen found himself working on an arbitration with the Ministry of Transport and Communication (MOTC), represented by an equally young Khamis Al Souli, in the Sultanate of Oman. This was the initial 'birth' of the Driver Consult Oman LLC (Driver Trett) office back in 2008.

The office has since gone from strength to strength under various stewardships. In the space of 13 years, there have been three country managers, which is testament to the great relationship the company has with the local businesses and more importantly the Omani people.

I joined Driver Trett in 2018, after having spent a year here in Oman. My family and I feel really at home here, and both Oman and Driver Trett have welcomed us with open arms. Having recently been appointed as Country Manager, I am genuinely looking forward to meeting the challenges (hopefully not too many!), and the opportunities that lie ahead. Oman is a fantastic country, steeped in history, with beautiful scenery and warm and welcoming people. Did you know that Oman is the oldest state in the Arab world and that it is estimated that Omani people have been living here for over 100,000 years? Or that the Omanis are considered the greatest shipbuilders in the world? Truly amazing!

Jon Sanderson
Oman Country Manager



Being an 'expat' in Oman is not as challenging as you may think, especially for me as most Omanis love football! Which, in my view, is the universal language of the world, and fortunately for me most seem to have an affinity with Liverpool. There is the odd exception, but hey, what can I do?! There are so many beautiful things to do and see here in Oman, from the turtle beaches to swimming in the Wadis and even mountain climbing. We really are spoilt for choice... when we're not working and meeting our clients' needs of course!

Over the years Driver Trett's service offering in Oman has developed along with our client's requirements, with the provision of Project Management, Quantity Surveying, Claims and Expert services.

These wide-ranging services have been key to providing our clients with many years of support in achieving successful outcomes on their projects, and which we intend to continue moving forward.

The market in Oman has shifted somewhat over the past couple of years, with many of the larger government infrastructure schemes being completed. This has led to a shift in the proportion of the different service offerings being undertaken. However, this is business and what we as a team are adept at, is being flexible. This, in my opinion, is key to being successful, not only in Oman but worldwide.

As Oman embarks on its 'Vision 2040' plans the underlying aim of which is to move away from a post-oil economy towards a more sustainable knowledge-based one, Driver Trett plan, as a long-established business in Oman, to remain flexible and provide the services needed to support the country with that goal.

I am lucky to have the support of a great team of people here in Oman, without which the continued success of the business could not be realised. The commitment and hard work of the team have provided the platform of success for the business in Oman. Like I say, the manager can send his team out onto the pitch and after that it's down to them...I do really like football analogies!



ماذا يحمل المستقبل لقطر؟

QATAR WORLD CUP

2022

Daniel Morris, Technical Director,
Qatar.

In Issue 4 of the Driver Trett Digest (09.2013), Peter Banathy, Regional Director – Middle East, discussed the potential challenges that Qatar faced in delivering on its ambitious plans to host the Middle East’s first ever FIFA World Cup. Eight years on, we reflect on how Qatar’s plans have progressed and what the future holds for Qatar, beyond 2022.

On 2nd December 2010 Qatar won the right to host the 2022 FIFA World Cup, the first time that the tournament has been awarded to a Middle Eastern country. To deliver on its commitment to host the world’s biggest sporting event, and also, to meet Qatar’s National Vision by 2030, Qatar embarked on a significant advancement of its infrastructure which included highways, stadia, rail, aviation, and marine projects.

In the 2013 article, the potential challenges identified were said not to be ‘financial’ given the strength of the Qatar economy due to its extensive oil and gas exports, but rather ‘logistical’ such as sourcing materials and plant, labour, and professional support, especially given the heavy reliance upon an expatriate work force.

OVERCOMING THE CHALLENGES

With Qatar being a small peninsula in the Arabian Gulf, sea transportation is the major mode of importation into the country. The Doha Port had served as the country’s main gateway since the early 1950s, but in order to satisfy Qatar’s development plans, the government invested in the construction of a new port, Hamad Port. Hamad port is one of the world’s largest greenfield port developments at a reported cost of US\$7.4 billion, significantly increasing Qatar’s importation capabilities.

It became operational in December 2016 with further expansion plans forecast to complete in late 2022.

Qatar also shares a land border with the Kingdom of Saudi Arabia which provided a further route for Qatar to source construction materials and plant. However, following a matter of a geopolitical issue involving the Gulf Cooperation Council (GCC) in June 2017, which saw traditional trade routes cut-off, Qatar had to overcome a logistical challenge that was perhaps unforeseeable back in 2013. At that time, Hassan al-Thawadi, secretary general of the Qatar World Cup Supreme Committee explained to the world media that the government acted quickly, and:

“...contacted the main contractors; we put in place alternative supply chains, we sourced alternative materials from alternate suppliers. I’m very happy to say that our project scale is on time and there is no significant impact on our projects.”

Relations between the GCC countries have since been restored and the traditional trade routes are operational again, which can only be seen as a positive step for all concerned parties.

In terms of sourcing the necessary skilled professionals, Qatar Rail related projects (the Doha Metro and Lusail Light Rail Transit (LRT) scheme) serve as a great example of how Qatar overcame this potential challenge.

The tender award strategies adopted by Qatar Rail for these projects saw joint ventures, or consortium main contractors consisting of combinations of major international contractors, that had the specialist skills and experience in delivering projects of a similar nature, and local main contractors with significant experience of local market issues, laws and regulations and with access to labor resources.

PROGRESS OF SIGNIFICANT 2022 FIFA WORLD CUP PROJECTS

STADIUMS

There are a total of eight stadiums to be used for the 2022 FIFA World Cup, those being Al Bayt, Al Janoub, Al Rayyan, Al Thumama, Education City (as seen overleaf on the right), Khalifa International, Lusail, and Ras Abu Aboud. A July 2021 update from the Supreme Committee's Vice Chairman, Yasir Al Jamal stated:

"Five of our stadiums have been completed, while the other three will be ready soon. Six of the stadiums will be used for the FIFA Arab Cup 2021, which will take place in November and December."

DOHA METRO AND LRT

The Doha Metro consisting of 37 stations with 3 lines (Red, Green & Gold) which connects the city of Doha and provides transport to the doorstep of many of the stadiums is now fully operational. The LRT is expected to open later this year and will provide access throughout the 2022 FIFA World Cup final host city of Lusail.

HAMAD INTERNATIONAL AIRPORT (HIA) EXPANSION

In 2016 and 2017, Qatar had seen a rapid increase in passenger numbers which significantly exceeded the designed capacity. The HIA Expansion project is well underway to boost the airport capacity to 50 million annual passengers and is due to complete in early 2022.

WHAT DOES THE FUTURE HOLD FOR QATAR BEYOND 2022

Given the significant financial investment that the Qatar government has made in preparing for the 2022 FIFA World Cup, and the relatively short period that this has been undertaken in, it may have been reasonable to think that there may be a downturn in construction output post 2022.

However, a June 2021 report forecasted that construction output was to record an annual average growth of 4.2% between 2022 and 2025, due to a number of key factors including:

1. Further projects associated with the Qatar National Vision 2030 plans;
2. Expansion of LNG production capacity – The North Field Expansion;
3. Public-Private Partnership (PPP) planned projects.

The Qatar National Vision 2030 is reportedly planning to consume US\$16.4 billion of investment in infrastructure and real estate projects by 2025.

The aim of the Qatar National Vision 2030 is to develop Qatar to become an advanced society capable of sustaining its development and diversify its economy away from dependence on the oil and gas sector.

Qatar's plans to increase Liquefied Natural Gas (LNG) production capacity will see a significant investment in oil and gas related projects. The North Field Expansion will increase Qatar's liquefied natural gas (LNG) production capacity from 77 million tonnes per annum (Mtpa) to 110Mtpa, which accounts for an LNG production capacity increase of approximately 43%.

The enactment of a new law regulating PPP projects is expected to attract private sector investment in the development of infrastructure projects such as schools and healthcare and assist in the delivery of the Qatar 2030 Vision.

Overall, it would appear that this tiny country, arguably 'punching above its weight', has, some eight years on from our article identifying various challenges it faced then, risen admirably to face those challenges and is on course to deliver on its ambitious plans to deliver a first of its kind World Cup experience.

See you in 2022.



Qatar Foundation Mosque, part of the Education City development.



CONSTRUCTION LITIGATION IN THE UAE

THE PURSUIT OF A PERFECT START, AND THE ART OF MAINTAINING MOMENTUM

Mahmoud Abougabal
Technical Director, Abu Dhabi

There are numerous ways in which construction disputes could end up in litigation: from defective and vague arbitration agreements to failed ADR¹ procedures, and sometimes even, as a consequence of negotiated contract provisions.

In one recent example, the Dubai Court of Cassation ruled an arbitration agreement null and void because for parties to refer to the use of the FIDIC Red Book in its entirety was too vague and imprecise. In another², it was ruled that an agreement to follow specific amicable settlement procedures will not prevent parties from directly having recourse to local courts, should they eventually have jurisdiction.

These situations spell uncertainty for many international entities. Especially those unfamiliar with the local legal landscape, the speed in which the process takes place, or the importance of being consistently ready to either present your claim or defend your position before court-appointed experts.

¹ ADR: Alternative Dispute Resolution

² Case 14 of 2008

FIRING THE STARTER ROUND

For claimants, the rule of thumb is that by the time a dispute reaches court, claims must be consistent, complete, and ready to be presented concisely in Arabic from day one.

A common misconception is that claims produced during the progress of the works are adequate and sufficient for use in court proceedings, but this may not always be the case. Whether because of gaps, errors, or heavy reliance on complex technical matters, it is always recommended to have claims reviewed, inspected, and sometimes even adjusted by a claims professional before they are handed over to determination by a court.

The best time to lay the foundations for a sound defence strategy is during the period between a court's notice and the date on which a court appoints a technical expert.

Once an expert is appointed, time tends to warp and compress so much that defendants can be on the backfoot and playing catch up rather than working to put their best arguments forward.

STAYING THE COURSE

Work does not end with the first round of submissions but tends to persevere for the many skirmishes that usually follow.

A court appointed expert will often invite parties to several in-person meetings and will consider the prospects of site visits. They will also often require parties to reiterate and summarise their arguments by means of brief presentations in Arabic and invite the other party to comment on them.

While in-person meetings have now shifted online due to the pandemic, they are still a very important feature of construction litigation because they provide a roadmap to where experts should carry their investigations instead of sifting through tens of thousands of often convoluted technical documents.

There are two critical success factors to 'staying the course': first, there is the issue of keeping up with the expert's requests for more information, which are often required within the span of only a few days. Then second, comes the delicate art of distilling complex matters and presenting them clearly in a manner that would withstand challenges. These presentations are done in-person and in the Arabic language.

The language barrier is a significant issue, not only because court submissions are required in Arabic and parties will often find themselves having to expend large sums of money

for translation, but also because exhibits and technical documents are often processed by legal translators who, for the most part, are not trained engineers. Thus, parties may run the risk of having their technical arguments misinterpreted or, in extreme cases, altered. (See our other article in this edition of the Digest on the subject of the challenges of accurate translation.)

COMMON PITFALLS

Parties hailing from common law jurisdictions may quickly realise that expert determinations are not restricted by the contract agreed by the parties but will also extend to incorporate other civil law principles, such as the duty of good faith to avoid issues of unfairness.

Unlike common law jurisdictions which view construction entities as "normally well able to look after themselves"³, and so have only developed "piecemeal solutions in response to demonstrated problems of unfairness"⁴, the duty of good faith in local UAE court proceedings may very well extend to contentious issues such as: time bars, concurrent delays as well as perceivably delayed payments and engineer determinations.

This is why defendants must be cautious not to centre their legal arguments around administrative failings alone, such as a claimant's failure to submit a claim on time, without explaining why these have caused loss to the defendant. An example of such loss could be where a subcontractor fails to submit its claim to the main contractor within time, which then results in the main contractor losing its rights under the main contract.

Another issue is where claimants artificially inflate the value of their dispute in the hope of settling for a higher amount than they are actually owed. The downside is that court appointed experts may find this an overt element of bad faith, which may then have knock-on effects on other aspects of the matters in dispute.

Finally, one cannot stress enough the importance of appointing legal counsel and technical support in a timely manner.

In an industry where construction disputes are handled by a limited pool of highly-qualified professionals, it is always advised to plan ahead and work towards building your 'dream team' as soon as practical.

Signs of a highly functioning team can be seen arising from early identification of strengths and weaknesses of the case, agreement on claims or defence strategies, establishing efficient channels of communication, and then later, achieving a favourable and equitable outcome, either via negotiation or via the court process.

³ Humphrey Lloyd, 'Adjudication' [2001] ICLR 437

⁴ Bingham LJ in *Interfoto v Stiletto* [1987] EWCA Civ 6



VIRTUAL HEARINGS

AN EXPERT'S VIEW

Phil Duggan, Regional Head of Diales in the Middle East
- Quantum and Delay Expert

In the last 18 months or so, all parts of our lives have changed beyond recognition. Thankfully, for many of us, there have been many adaptations made to allow us to continue going about our day-to-day lives. For me, one of the most significant changes I have faced has been the move to virtual hearings, taking us away from the customary courtroom or arbitration room settings we previously frequented. The change has allowed the wheels of dispute resolution to continue to turn with little delay and has taken us into a new way of conducting hearings that I think will be here to stay, certainly in part at least.

As a practicing expert witness (in matters of quantum and delay) the contrast was apparent from the very beginning of my first testimony in the virtual world. Whilst I am used to swearing an oath or affirmation that I will truthfully give my evidence, the expansion to declare that I am alone in the room, do not have any documents present (other than clean copies of my reports), that I do not have access to a telephone or any other communication device, and will declare if anybody does enter the room, really brought home the different circumstances to those that I was used to.

Indeed, in another hearing I was requested by the Chairman of the tribunal to rotate my camera 360° to afford a panoramic view of the room to ensure that I was indeed alone, and that there was nothing around me that was not permitted. Of course, none of this is necessary in a “live” hearing room where one is under the watchful gaze of a fairly large group of people.

I have heard many anecdotes of witnesses being caught breaching the protocols that are in place to allow a hearing to proceed virtually with complete integrity of the process. I have heard of people using their phone during a break, forgetting their cameras and audio were still rolling, and in another case where a witness had placed a large panel of notes on the wall, only for them to be revealed when it became obvious, he or she was looking at them as counsel and members of the tribunal had a close-up view of the person’s face whilst giving their evidence. It does seem to me though that such stories are very much the exception, and that the overwhelming majority of hearings have passed off in the right way.

When I have been giving evidence virtually, I have personally found it much more intense and tiring than when giving evidence in a live hearing. In part, I think that this is largely due to the fact that my eyes have been strained to focus on one place for the duration of each session, staring at a screen looking at the person cross-examining me and/or viewing documents that I am being referred to. Contrast that to the live hearing where my eyes constantly wander from the person asking me a question, to a document, and then towards the tribunal to give my answer.

The fact that I can only see the person questioning me and not everybody who is present in the virtual room is also a significant difference.

I miss the theatre of the live hearing, where there is a row of people nodding profusely when I have been asked a question and they are expecting me to give a “yes” answer (and then the unanimous incredulity they show when I actually give a “no” answer).

I also miss seeing the body language of the tribunal members, whereas now, instead, I am left wondering what sort of impression I may have made on them, and more importantly if I think they have understood the answer I have given or whether I should perhaps elaborate more. I have heard that arbitrators like the close-up view of witnesses and experts that virtual hearings provide, as it allows them to study facial expressions and goes some way to them forming an opinion on their honesty and/or credibility.

Generally, I have found the technical aspect to virtual hearings to be very slick and there have not been any glitches in any of the hearings I have been involved in. The use of a technical rehearsal for all participants together with a sound and vision check before giving evidence has played a major part in allowing the process to work efficiently.

In one hearing I was involved in, active participants (i.e., the tribunal, counsel, witnesses, and experts) were spread across six different continents and the coordination of this was no mean feat but was achieved without a hitch.

A testament to all those involved in the organisation. I am also sure that the parties to the dispute would have been conscious of the savings made in travel costs had all the participants had to travel to the same location given they were spread so far and wide. It is with this in mind that I am led to think virtual hearings are here to stay, at least in some form.

It makes perfect sense for a witness that is a considerable distance away from the hearing venue, and who will only be required to give evidence for a very short period to do this virtually. This will not only save costs to the parties but will also go some way towards making our arbitrations greener.

I think (save for the above point on cost and travel savings) a straw poll of participants in dispute resolution would show a preference towards a live hearing over a virtual forum. However, with little abatement of the effects of the global pandemic, we are all left with no option but to embrace the virtual world in which we operate and to be thankful for the speed in which we were able to adapt to it.

Virtual hearings are here to stay, at least in some form.

An aerial photograph of a modern city skyline in Saudi Arabia during sunset. The sky is a mix of blue and orange. Several prominent skyscrapers are visible, including a tall, dark, faceted tower on the left and a white, perforated tower in the center. The foreground shows a cluster of buildings with geometric, faceted facades. A construction crane is visible in the distance.

THE GROWTH OF PPP PROCURED PROJECTS IN THE KINGDOM OF SAUDI ARABIA



Mark Rocca, Partner
CMS (UAE LLP)

AND THEIR CONTRIBUTION TO THE COUNTRY'S VISION 2030 PLANS

Despite the impact of COVID-19 which resulted in the Kingdom's borders being closed for many months, the drive for progressing the programmes set out in the Kingdom's Vision 2030 continues, and not least in encouraging private sector investment in public sector assets. KSA PPPs are active.

RENEWABLE ENERGY

The Kingdom, as with other Gulf Cooperation Council states, has set itself ambitious targets for green energy usage. The targets set out in Vision 2030, which were re-affirmed earlier this year, are that 50% of the Kingdom's electricity usage will come from green energy sources by 2030. Naturally, considering the solar insolation ratings in the Kingdom, there is a particular focus on solar as a means to generate green energy. The Kingdom is clearly serious about these targets, as demonstrated by the Ministry of Energy's renewable energy programme which is into its third round of procurement and has involved procurement of large and small solar independent power projects (IPPs) across the Kingdom, focusing on locations where the electricity can be generated and distributed over short distances to where it is needed.

Round one saw the procurement of two solar IPPs with a combined capacity of 700MW, and in 2019 round two was launched consisting of six solar IPPs ranging from 20MW to 600MW with a combined 1.4GW. Whilst round two was underway, round three was also launched consisting of four solar IPPs with a combined capacity of 1.2GW. So, since 2017,

the Kingdom has actively been progressing twelve solar IPPs at a total of 3.3GW and it is expected that round four will be launched later this year. The success of the programme and the speed of its roll-out is due to the establishment of a transparent and trusted procurement process, an experienced team in the Kingdom's Renewable Energy Project Development Office (REPDO) and the creation of a bankable suite of precedent project agreements, whilst the Ministry and REPDO continue to strive to improve round on round to achieve the best results for the Kingdom, both in terms of price as well as confidence in the developers to deliver each of the projects.

HEALTHCARE

The Kingdom's healthcare sector's key priorities as set out in the National Transformation Plan and the privatisation plan revolve around privatising government healthcare services, increasing PPP healthcare delivery models, scaling up medical education, training its local workforce, and boosting the adoption of digital information systems. The Ministry of Health (MOH) has 20 clusters providing healthcare services across the Kingdom and intends transferring responsibility for healthcare provision to a network of new entities. Under this structure, hospitals and health centres will be separated from the MOH and be standalone entities or groups - "clusters", competing with each other and private sector operators. Most of the service provision is public sector but with the stated aim of enhancing the role of the private sector from currently 25% to 30%. The sector has been slower than others in progressing a PPP programme. The Al Ansar Hospital project (a 244-bed new hospital in the Al-Masjid Al Nabawi area) recently came to market and attracted 87 expressions of interest from both locally based and international service providers/consortia. The project is in progress with an initial list of 9 bidders.

As well as new hospital projects, there are also opportunities for private sector involvement in providing specialist services dealing with, for example diabetes and obesity. Models here have included upgrading primary care facilities in various locations under a PPP arrangement and training MOH clinical staff in the services (adopting the private sector methodology of service provision) based on an expected throughput of patients and working to KPIs.

EDUCATION

The Kingdom has over 38,000 schools with around 80% being funded publicly. The development of the schools programme is under the auspices of the Tatweer Building Company (a PIF owned entity) and the first schools PPP for 60 schools in Jeddah and Makkah achieved financial close in November 2020. Wave two is under way with the procurement of 60 schools in Medina. The Kingdom plans to procure up to 4,000 schools as part of Vision 2030. The PPP design, build, maintain, and transfer structure and project documents adopt an internationally recognised approach which will no doubt be further developed through waves two and three of the programme.

TRANSPORT

In the last 10 years the Kingdom has invested over US\$100bn in transport, a trend which is set to continue and even accelerate, very much with the assistance of the private sector. All the traditional transport modes – rail, road, ports, aviation – will see a piece of the action and some of the schemes are eye catching in terms of their scale and ambition. For example, the Land Bridge project is a US\$7bn railway linking the Red Sea with the Arabian Gulf via Riyadh, and if we head East to Bahrain the procurement of the US\$3.5 billion causeway project is also underway. The Saudi Ports Authority has plans to develop eight new ports, new toll roads are planned, and there are also plans to privatise airports. In addition, some of the Giga-projects (Neom and the Red Sea Project) are promoting cutting edge transport as a service approach, developing new ways travellers and communities will benefit from transport provision.

PPPs in KSA are taking root with more project opportunities expected to come to market in a range of sectors.

Market interest also appears buoyant with one project recently attracting over 80 expressions of interest.

As the Kingdom marches on with progressing Vision 2030, PPPs will have a significant role to play in achieving those goals.



بينما تمضي المملكة
قدما في تقدم رؤية
2030، سوف تلعب دورا
مهم في تحقيق تلك
الأهداف (PPPs)



小心碰头

Take care of your Head

LOST IN TRANSLATION

PART TWO

Mustafa Abdulsalam, Senior Consultant, Kuwait

In our previous article titled 'Lost in Translation' published in Issue 18, October 2019, of the Driver Trett Digest, we explained the common shortfalls and flaws in documents submitted to courts that were translated by generic translation agencies. We also highlighted the increasing demand for translation services due to requirements in most Middle East jurisdictions that all the documents that are submitted to the courts must be in Arabic.

In this article, we will take a closer look at the field of Arabic translation and provide practical notes in relation to approaches to translation and associated challenges.

This article will also provide some tips on how to produce a well-prepared translated document that delivers a true and accurate meaning of the original documents without any ambiguity or distortion.

Translation plays a significant role in our everyday lives, more than we realise. Translation can be seen as a medium that is used to spread knowledge and ideas between people, and to facilitate effective communication between different cultures.

The history of translation began a long time ago when there was a need to exchange knowledge of science and arts between different cultures, and for society to fulfil the human enthusiasm to gain knowledge from every possible source.

For example, the Arabians preserved Greek notions and philosophies during the Middle Ages with their translations, and the Bible was translated into more than 500 languages.

Moreover, as trade and economies advanced, physical location became less of a barrier to business.

International companies benefitted from working overseas due to the additional markets that they got to trade in, and their clients benefitted from the professional and industrial expertise of others, all of which resulted in the need for high-quality translation for communication to be effective. Therefore, translation is considered a bridge for communication to not only provide the equivalent meaning of the words in the original language, but also to spread the thoughts and sentiments beyond the mere meaning of the text. Arabic and English languages are no exception.

There are many reasons why translation has become an important aspect of industry and commerce, including in the construction industry, and particularly in the Middle East.

Whilst many documents are produced in English due to the global nature of the construction industry and its tendency to rely heavily on the use of English, Arabic is the official language for many countries in the region, and therefore, if these documents are required to be submitted to government entities such as ministries or courts, Arabic translation is required - which usually prevails over the original text.

The level of interaction between international and local companies when it comes to negotiation of business transactions, partnerships or sponsorship agreements, also drives the need to exchange written documents in two, or sometimes more, languages. Unless the translations precisely capture the meaning and the true intention of the text in its proper technical context, miscommunications and misunderstandings can arise, which could end up resulting in a dispute.

In recent years, Driver Trett has provided technical translation services to many of its clients in the State of Kuwait, and in the wider region. Our services usually involve the translation of our deliverables from English to Arabic and the presentation of the same to their clients and/or to expert panels, and the like, in local courts, or other third-party tribunals.

In doing this kind of work, it is paramount to consider two key aspects: the technical subject knowledge required, and the language and translation knowledge required. From the technical side, one of the key advantages we have at Driver Trett, is that translations are carried out by native Arabic speakers, who have the technical knowledge and qualifications to translate technical reports and documents, in the right context.

It is not uncommon for the consultant who prepares the report in the first place to be the same consultant who carries out the Arabic translation of that same report. This therefore helps ensure that the Arabic translation reflects accurately the meaning of the technical terms and terminology that has been used in the English text without compromising the quality of the information presented in the translated documents. Recently, we were appointed to represent a leading international contractor operating in the energy sector in the State of Kuwait in front of a panel of experts in the local courts, where the official language was Arabic. For this commission, Driver Trett not only produced a rebuttal and counterclaim for use by its client in the proceedings, but also translated these documents into Arabic and further provided one of its native Arabic speaking consultants to attend the hearings and simultaneously interpret and interact with the discussions between the experts and the parties' representatives.

As many languages have different origins and characteristics there is sometimes a risk that the quality of translation could easily be compromised. For example, the terms 'quantum meruit' and 'ad hoc' which are terms widely used in the field of dispute resolution, are Latin-based terminologies which have no equivalent in the Arabic language. For that reason, it is necessary that a translation should capture the proper meaning of any specific terms and incorporate them in the right and appropriate context. This of course would be difficult if the translator did not have the appropriate technical background to understand such terms.

Depending on the circumstances and the nature of the commission, we adopt different approaches and techniques to translate documents. For some documents, albeit an approach not frequently used, we focus on the word-for-word technique where each word in the original text is translated using the most common meaning and keeping the word order of the main document.

There are also instances where we follow the literal translation of the text, i.e. where each word is translated independently using the most common meaning in its context and then reordered to follow the grammatic structure of the Arabic language.

To deliver the precise meaning it may be appropriate to focus and translate the overall text without considering the meaning of each word separately. In a recent commission involving a dispute between an international and local contractor in the State of Kuwait, which the parties decided to refer to the local courts, Driver Trett was instructed to review a document that had been translated by a generic translation agency, before submitting it to the court. During our review we focused on, among other things, identifying the technical terms that were incorrectly interpreted from the original text. One of these terms was "unjust enrichment" or in Arabic "الإثراء بلا سبب" which the translator, who was not familiar with the meaning of the term, had translated to the Arabic word equivalent to "Graft".

This term if submitted to the court as it had originally been translated, might have had a serious consequence on the outcome of the case.

In conclusion, translation of technical documents is not always the straightforward process that some might consider it to be. It requires certain skills and technical experience as well as knowledge of both the languages to produce a well-translated technical document. The choice of the translation approach and technique depend on the circumstances and the nature of the document. However, the ultimate objective of a technical translation is to communicate accurately the thoughts and sentiments of the document beyond the mere literal meaning of the original text, when that text is translated.



ARE SHADOW EXPERTS HAVING A POSITIVE IMPACT ON DISPUTES?

Julian Haslam-Jones
Regional Director and UAE Country Manager

Experts frequently play an important part in the conclusion of complex construction disputes. The usual role of experts is to provide independent opinion in their field of expertise in order to assist the Court / tribunal in their findings.

The English case of the *Ikarian Reefer* [1993] 2 Lloyd's Rep 68 is one of the original references for the duties of an expert.

The expert witness must remain objective and independent throughout because a failure of either will affect their credibility and, therefore, weight to be given to the expert's evidence which, in turn, may affect the success of the party's case¹.

However, the use of experts is expanding in construction disputes, as acknowledged by the London Court of International Arbitration (LCIA). One of the newer roles of experts is the role of the "shadow" expert, sometimes referred to as "expert advisor" or "dirty" expert.

THE DEFINITION OF A SHADOW EXPERT

The original use of the shadow expert was born out of the scenario where the tribunal, court or parties appoint a joint independent expert. This is particularly common in jurisdictions such as Australia and Hong Kong.

In this scenario the parties often employ an expert/advisor to assist with case strategy and technical matters in their field of expertise. Exploring and developing a claim or defence to a claim often requires substantial technical or specialist expertise, beyond that which can be provided by counsel. For this reason, experts are often engaged to assist in this process.

Shadow experts are an extension of the party itself. The person or persons appointed as a shadow expert do not give evidence in the proceedings. Their role is to assist the party that has appointed them to enable the strongest case to be advanced. This is quite a contrast to a "clean" / independent expert whose duty is to the Court / tribunal with a remit to present impartial expert evidence as summarised below.

¹ Dean O'Leary, the use of experts in construction disputes in the UAE, May 2014

A party may engage one expert as [an] advisor and a separate expert to act as [an] independent expert. The advisor is providing expert assistance whereas the independent expert is providing expert evidence. The “clean” expert is engaged to act as the independent expert. His paramount duty is to the Court, not to the party that retained him. He owes the duties set out in the Uniform Civil Procedure Rules. By contrast, the advisor is referred to as a dirty expert because he is not independent. He has no duty to the Court. He acts solely on behalf of the litigant. His role is to provide advice and formulate arguments in order to advance the case².

In recent times I have witnessed an expansion in the use of shadow experts such that it is not just limited to disputes where a joint expert is appointed. It is now not uncommon for parties involved in disputes, to appoint a shadow expert as an advisor to support counsel even in circumstances where they have appointed their own independent expert.

THE ARGUMENT FOR USING SHADOW EXPERTS

In the traditional scenario, where the tribunal, court or parties appoint a joint independent expert, the main advantage the shadow expert provides is to help ensure that technical matters are presented strongly in claims and/or defences.

Further, the shadow expert can assist with aiding the understanding of the single expert’s opinion and/or providing guidance to counsel for areas to focus upon in any cross-examination.

In many scenarios the claimant or defendant often have employed the services of a claims consultant during the course of the project to provide advice and/or assistance in the preparation of claim submissions or defence rebuttals, and often retain the consultant as a shadow expert to assist in any proceedings.

This has many advantages. Firstly, it can help to avoid an unsupported or immature claim from being submitted into the proceedings. Secondly, the shadow expert can often help to set the parameters for the engagement of an independent expert who will ultimately provide evidence to the tribunal. Finally, the detailed history and records of the project the consultant has built up during the works can be presented, by the shadow expert, to the independent expert and any follow up actions such as answering queries or providing further information can be efficiently addressed.

These above points can result in the claimant or defendant enhancing the value it has invested in employing the claims consultant during the course of the works. In addition, it allows a strong and clear claim or defense to be submitted in the proceedings using appropriate expertise whilst at the same time ensuring that the independent expert retains their independence.

² Declan Kelly & Dan Butler, Ethical Considerations in Dealing with Experts, 1 December, 2010

THE ARGUMENT AGAINST SHADOW EXPERTS

One of the downsides of having shadow experts is the perceived additional costs which are considered to arise which could be thought of as contrary to the purposes of having one joint independent expert.

Another potential concern is that once counsel learns, with the shadow expert’s assistance, the strongest version of the case’s technical facts, a “clean” expert is hired to serve as the trial witness. The clean expert is informed only of the best features of the case and told only what is necessary to produce the most favourable independent expert reading of the case.

There is of course no guarantee that the views of the shadow expert will mirror that of the independent expert. The risk of such an outcome would be similar where a tribunal appoints a single expert along with the experts appointed by the parties.

CONCLUSION

So, what does the future hold for of the role of the shadow expert?

To answer this question, consideration must be given to the fact that the role of shadow experts is a relatively new role and like anything at the early stages of development the nature of the role is emerging.

In scenarios where a joint independent expert is appointed by the parties the role of the shadow expert in construction disputes seems a logical appointment to assist the claimant or defendant with technical expertise and experience which they may not have in-house.

The use of shadow experts, where independent experts are appointed by each party, is less clear. However, such a role can play a large role in assisting with resolving the dispute and reducing costs for the parties involved at the early stages of the proceedings. Alternatively, and as a minimum it will greatly enhance the quality of claims and defence submissions made in the proceedings such as to allow all participants to better understand all facets of the case.

One consideration all shadow experts should contemplate is that their advice is rarely visible to other participants in the proceedings. It is therefore important that if these experts perform other roles, in particular when they act as arbitrators, they bear in mind potential conflict issues arising out of any behind the scenes advice they have given in the past.

As with any emerging service perhaps the answer is for the relevant bodies and authorities to provide some guidance and regulation on such services.



Q&A WITH STUART BAIRD



WHAT IS YOUR ROLE?

I am the Regional Operational Director for the Middle East & Asia Pacific.

HOW DID YOU GET INTO THE INDUSTRY AND HOW DID YOU GET TO WHERE YOU ARE TODAY?

I started my career as a trainee estimator/quantity surveyor for a main contractor in Scotland in 1999 having responded to a job advertisement in the local newspaper. For the first year, I was asked to work for 3-month periods in the estimating, quantity surveying, project management, and bonus surveying departments which my then boss felt was the best way to properly learn the contracting business by understanding the various responsibilities of the key departments. Looking back, it was a great grounding for a young professional in the industry gaining practical experience on site and learning very quickly how to manage relationships with site personnel – especially joiners and brickies during my 3 months in bonus surveying!

In 2005 I moved to the UAE with an international PQS practice and progressed to senior commercial manager responsible for the operations across North Africa. Upon the Arab Spring in 2010 however, the North African operations were suspended, and I was redeployed to the claims department to assist with a major arbitration in connection with the Palm Jumeirah project.

This opportune moment turned out to be the gateway to my career in the dispute resolution industry, and led to me holding senior roles in Malaysia and Australia, prior to returning to the Middle East in 2015.

WHO HAS BEEN THE GREATEST INFLUENCE ON YOUR CAREER?

Working with colleagues and clients from different cultures and backgrounds has probably been the greatest collective influence. I have learned over time to adapt my approach to service delivery and building relationships depending on the background of the colleague and client I am working with, and the country I am working in. I have also been fortunate to work with many managers over the last 21 years who have demonstrated and shown me professionalism, entrepreneurship, and empathy which I believe are the three main characteristics of an effective business leader.

WHAT HAS BEEN THE BEST MOMENT OF YOUR CAREER?

I would say being promoted to Country Manager of Malaysia for an international dispute resolution consultant in 2012. This was a significant step in my career and a transition from being a claims practitioner on a project-by-project basis, to a manager responsible for the overall operational and financial performance of a key region for the business.

WHAT MAKES YOU TICK?

Lots of coffee! On a daily basis! My wife and kids (aged 6 and 4) also help me keep life and work in perspective. Nothing is a more positive distraction from work than my enthusiastic son giving me a running commentary of an episode of Paw Patrol either at home or on Skype!



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With our current expansion across the Middle East and Asia Pacific, we are delighted to announce the opening of a new office in Seoul, Korea.

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We have been providing expert witness services for nearly four decades, and the Driver Trett team have extensive expert knowledge. For higher profile litigation and arbitration cases, we have our Diales brand.

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LITIGATION TECHNICAL SUPPORT



WHAT IS LITIGATION TECHNICAL SUPPORT?

Many construction contracts across the Middle East allow for the resolution of disputes by litigation. The process involves parties to a dispute to submit complex technical matters to local courts and their appointed technical experts, all in the Arabic language.

At Diales, our experienced technical team assist in the preparation of claims, as well as summarising and presenting technical cases to court.

We understand the requirements of legal teams, the court, and the court-appointed experts, and we present technical matters in an accessible format, appropriate to each respective recipient.

WHY DO I NEED LITIGATION TECHNICAL SUPPORT?

Like adjudication, construction litigation is extremely high paced, so much so that defendants often find themselves in the difficult situation of having to process and respond to thousands of intricate technical documents within very short periods of time. This makes the early decision to involve an experienced Arabic speaking expert one that will have a profound impact on the course of your case.

HOW CAN WE HELP YOU?

Our team of experienced experts have been involved in several landmark litigation disputes, worth over a billion dirhams. Our team understands the challenges of the process, and aside from assisting you with the technical challenges, have also formed many successful synergies with several law firms in the region.

Whether the dispute relates to delay, quantum, or a combination of both, our team are able to assist you with:

- Working with your legal team to develop a strategy before filing your claims to court;
- The preparation of, or defence against, delay and quantum claims through technical reports that are written in the Arabic language;
- Presenting your technical case to the court-appointed experts in the Arabic language;
- Participating in cross-examination sessions with the court-appointed experts;
- The preparation of follow-up and rebuttal reports.

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الدعم الفني للتقاضي

ما هو الدعم الفني للتقاضي؟

تشرط العديد من عقود التشييد في الشرق الأوسط حل النزاعات عن طريق التقاضي. وهي عملية يقدم الأطراف فيها مسائل فنية معقدة، باللغة العربية، إلى لجنة خبراء فنيين معينين من المحاكم الفنية.

ولهذا، فإن فريقنا ذو الخبرة الواسعة في هذا المجال سيقوم بمساعدتك على إعداد جميع متطلباتك الفنية، وعرض قضيتك والدفاع عنها بصورة احترافية متنسقة مع استراتيجية دفاع فريقك القانوني ومع متطلبات المحكمة والخبراء المعينين من طرفها.

لماذا تحتاج إلى الدعم الفني للتقاضي؟

تتميز عمليات التقاضي بسرعة إجراءاتها، مما قد يدفع الأطراف إلى معالجة وتحليل الآلاف من المستندات الفنية المعقدة والرد عليها خلال فترات زمنية وجيزة. ولذلك، فإن قرارك المبكر في إشراكنا لمساعدتك كخبراء فنيين متمرسين، ومحدثين باللغة العربية سيكون له بلا شك، أثراً إيجابياً على مسار قضيتك.

كيف يمكننا مساعدتك؟

يتفهم فريقنا، المتمرس في المجال، تحديات عمليات التقاضي. حيث شارك أعضائه في نزاعات تشييد لمشروعات هامة ومعروفة تخطت قيمتها المليار درهم. كما شكل فريقنا منصات دفاع ناجحة مع العديد من الهيئات القانونية بالمنطقة.

ولذلك، فسواء تعلق النزاع بتأخيرات المشروع أو الكميات المنفذة والتعويضات، أو بكل هذه الأمور مجتمعة، فيمكن لفريقنا مساعدتك في:

- العمل مع فريقك القانوني لوضع إستراتيجية لحل النزاع قبل رفع الدعاوي إلى المحكمة؛
- إعداد تقارير مطالبات التأخيرات والتعويضات باللغة العربية؛
- إعداد تقارير فنية لدحض المطالبات المضادة باللغة العربية؛
- عرض قضيتك الفنية باللغة العربية أمام لجنة الخبراء المعينين من المحكمة؛
- المشاركة في جلسات الاستجواب مع لجنة الخبراء المعينين من المحكمة؛
- إعداد تقارير المتابعة والتعقيب.

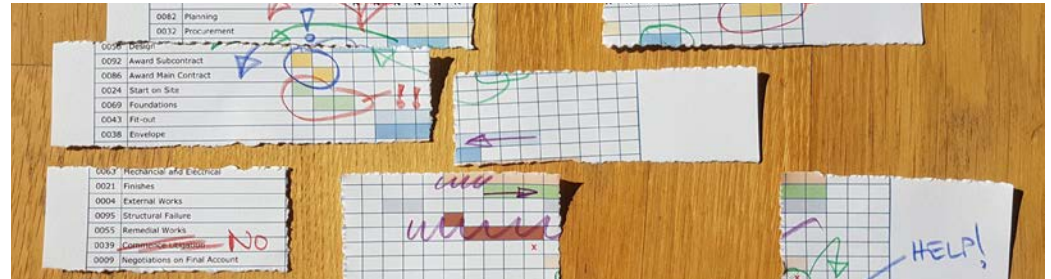


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Article byte



YOU NEVER SAID YOU WERE GOING TO DO THAT...

Associate Director, Andrew Miller, discusses the role of the quantum expert in the dispute resolution process. Scan the QR code to read the article.



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