

Dossier

CONSTRUCTION

JULY - SEPTEMBER 2021

An

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Presentation

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CLAIMS & ARBITRATION
Rohit Singhal, Masin

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MASIN IS A GLOBAL BUSINESS ADVISORY FIRM THAT PROVIDES MULTIDISCIPLINARY SOLUTIONS TO COMPLEX CHALLENGES AND OPPORTUNITIES FOR THE ENERGY AND INFRASTRUCTURE INDUSTRY.



Mr. Rohit Singhal founded Masin, a multi-faceted construction/engineering claims & arbitration consultancy with offices in India, Oman, UAE, Qatar, Kuwait, Singapore & Saudi Arabia. As CEO, Mr. Singhal has led Masin from concept to leadership. He is a techno-legal entrepreneur, has 25 years of international experience involving construction contract disputes, expert testimony and project management. He is one of the most sought after construction/engineering arbitration expert, having appeared in more than 50 international arbitrations as an expert witness. He has presented and published numerous articles and undertaken several speaking assignments on the subjects of claims, schedule and damage analyses and claims prevention in construction and engineering projects. He has been awarded the prestigious “Outstanding Expert of the Year Award” by International Arbitrators & Experts in Engineering Sector (IAEE), UAE.

Prior to Masin, Mr. Singhal was the CEO of a major multinational EPC company and managed a P&L account worth USD 0.5 billion executing mega engineering projects.

CAN YOU ELABORATE ON THE CLAIM AND DISPUTE MANAGEMENT SERVICES THAT YOU OFFER IN OMAN?

Masin is a leading claim and contract management firm for engineering and construction industry with offices in 7 countries including Oman. Masin has undertaken more than 200 international arbitrations as experts and more than 500 assignments as claim consultants.

In 2015, we expanded our services in Oman and since then have been involved in over 25 construction arbitration cases as technical experts through our local office in Muscat. We have worked with most of the leading construction companies in Oman either as claim management consultants or arbitration experts and take pride in having achieved a success rate of more than 90% in favour of our clients. We have also been appointed as experts by arbitration tribunal and have strong knowledge of Omani Contract terms & conditions. We have been involved some of the most high-profile projects like airport, roads, resorts, oil & gas, power, sewage projects in Oman as advisors/consultants.

WHAT FACTORS AFFECT CONSTRUCTION DISPUTES?

In my experiences in Oman, the most prevalent factor is the unfulfillment of the party's contractual obligation to the other party. Projects are tendered when the design is not fully complete, this leads to incorrect pricing of bids and later to variations and project cost escalation. In mega projects where multiple contractors are engaged, interfacing between the contractors is not meticulously planned at the contract procurement stage. This enhances the risk of unavailability of work fronts and improper sequence of works for the successive contractors. Further, the setting up of unrealistic milestones, inadequate scheduling, and lack

of understanding on the technical requirements also add to the construction disputes. Recently, I have seen a trend that delayed or non-payment for the executed works triggers construction disputes particularly towards the end of the project. Cash flow is one of the serious issues, which many construction companies are facing today mainly due to delays in the projects resulting in cost overruns.

WHAT ARE THE BENEFITS OF PRE-DISPUTE CONDUCT IN CONSTRUCTION PROJECTS?

It is our belief that any disputed matter in a project, if approached with right intent can be resolved amicably. It is always in the benefit of the parties and the project to resolve the disputes amicably. We always advise our clients that dispute resolution mechanism should be the last resort in resolving construction disputes. However, if the disputes gets escalated to the courts/arbitrations, pre-dispute conduct is of essence. Before the commencement of proceedings, the arbitration Tribunal expects that the pre-arbitration steps provisioned under the contract have been adhered to and in cases where the contract allows, amicable settlement has been attempted between the parties. The parties should understand each other's position on the disputed matters, make decisions on proceedings in accordance with the contract terms, support the efficient management of the proceedings and reduce the costs of resolving the dispute. Proper documentation management is also an important factor and key to success in resolving the disputes.

TELL US ABOUT THE LIFECYCLE OF A CONSTRUCTION ARBITRATION, THE CURRENT TRENDS AND PROBLEM AREAS?

Arbitration is like a final stage in the dispute resolution process of any

standard construction contract. For ease of understanding, the entire steps of arbitration can be typically broken into three key stages: 1) Administrative Stage; 2) Pleadings & Expert Report Stage ;3) Finalization & Cross Examination Stage.

Any typical arbitration commences with one party (Claimant) filling the request for arbitration or issuing notice of arbitration. The other party (Respondent) then replies to this request/notice. This step is followed by nominating the arbitrators and finalizing the arbitration tribunal. The Contract usually provides the provision of a Sole Arbitrator or three Arbitrators. After finalization of the Tribunal and the parties completing the aspects of payment, power of attorneys (various administrative issues), the framework of the arbitration is finalized through a document called "Terms of Reference" (TOR) and the "timetable" is finalized, which marks the end of Administrative Stage. Post the timetable & TOR finalization, the main submissions commence for both parties which involves a mix of Legal & Technical submissions. The key deliverables include Statement of Claim (SOC), Statement of Defence (SOD) and Counterclaims, Reply & Rejoinder, Fact Witness Statement, Expert Reports. A voluminous exchange of documents occurs during major submissions and the course of arbitration. All these documents are indexed & cross referenced properly through a "Trial bundle Index" which marks the end of Pleadings & Expert Report Stage. After all document submissions, an opening submission is made by both the parties, followed by a hearing or Cross Examination with Closing submissions after the hearing to conclude the third stage of the arbitration process. The process is more or less the same in the domestic ad-hoc arbitrations with slight changes as per the tribunal's directive.

Arbitration process has evolved over the years and based on the current trend, parties while entering a contract prefer an institutional arbitration over ad-hoc arbitration. An institutional arbitration is administered by a specialized arbitral institution like Oman Commercial Arbitration Centre and the primary advantage includes that an established format and fixed set of guidelines are available to conduct the arbitration. The other trend that we have seen that the “memorial style” arbitrations are preferred over “pleading style” arbitrations. Memorial style of submissions involves the Expert Reports, Fact Witness Statement to be served along with the SOC or SOD which expedites the whole process and the Tribunal gets a measure of the legal & technical aspects of the case at the start of the arbitration proving more time to review the case.

So far, the most common problem that we have witnessed is the delay in administrative fee payments by parties to kick start the arbitration process. However, the introduction of third-party funding for the complete arbitration costs has overcome this situation lately, but the third-party funding acceptance legally remains a challenge.

The other problem area is the slow decision making by parties during the arbitration process in terms of appointing co-arbitrators, local law firms etc. Further, the non-availability of right fact/expert witnesses to testify in front of the Tribunal also impacts the pleadings stage.

CAN YOU ELABORATE MORE ABOUT YOUR EXPERIENCE IN ARBITRATION AND TIME PERFORMANCE?

Arbitration is a process which typically takes 1-2 years excluding any appeal by the losing party and the enforcement of the arbitral award by courts where required,

therefore, it is important that the parties should be well prepared and focused while pursuing arbitration. We have faced initial hesitation by contractors resolving disputes through arbitration route. In Oman market, contractors do their best to settle disputes and differences amicably which we support as well. The downside is that a lot of time is expended in amicable settlement and in cases where disputes are not resolved amicably, the claimant party has limited time and resources to prepare for arbitration. A delay in the amicable settlement stage results in large volumes of money being stuck in the dispute consequently affecting the financial health of the parties. In many cases, the availability of sufficient project records is also a challenge where projects were completed long time back.

In Ad-hoc arbitrations which are common in government projects in Oman, pre-arbitration procedure and setting up of arbitration panel takes time. Sometimes, the unclear arbitration contract clauses such as for number of arbitrators, language of arbitration, governing law are not properly defined, and it takes time for the parties to agree on this. Therefore, it is essential that parties to the contract review, the terms of arbitrations properly at the time of entering in the contracts.

WHAT ARE THE VARIOUS ASPECTS OF THE DELAY RELATED CLAIMS IN THE CONSTRUCTION PROJECT?

The proper presentation of the cause and effect of alleged delay events by a party is the most important aspect in the construction project. It is very important that the delay related claims are supported with documentation showing the contractual entitlement, evidence that the contract procedures in terms of notices, detailed particulars etc have been followed in pursuing the claim. A proper critical path delay

analysis is essential to establish the causation of delay. It is important to understand that not all delay events affect the end date of the project and only critical delays identified through proper delay analysis are of important in delay disputes. In my experience, I have noticed that delay claims which are balanced and open in terms of showing both parties delay using retrospective delay analysis have better success rates in successful arbitration awards.

PLEASE THROW SOME LIGHT ON CONSTRUCTION CLAIMS AND DISPUTES IN TIMES OF COVID-19?

Covid-19 has impacted the construction businesses badly causing delay and disruptions in the projects. We are hopeful that this impact is temporary, and the construction market will rebound eventually. As a result of this, there is a liquidity crisis in the construction industry worldwide and also in Oman.

The project running costs have escalated and there is a degree of uncertainty whether the Covid-19 costs are fully recoverable and also under which clause/article of the contract and law.

Most of the ongoing projects commenced prior to Covid-19 and there is no express entitlement to recover time and costs due to Covid-19 and it is being debated in legal circles, how Covid-19 claims/disputes needs to be handled. This situation is legally far more complex where the procurement of materials involves multiple jurisdictions and restrictions issued by local authorities.

On the other hand, Covid-19 has given opportunity to make the arbitration process over digital platforms. Now a days, the arbitration hearings are seamlessly being conducted virtually resulting in reduction in arbitration expenses.