



Navigate Construction Arbitration Landscape with The ADROIT's Newsletter designed for Legal and Construction Professionals

🔍 What's inside this edition?

- 👉 The Legal Segment: Deep dive into pivotal legal topics
- 👉 Arbitration Updates: Key trends and case highlights from the last quarter
- 👉 Virtual Spotlight: Recap of impactful virtual events
- 👉 Firm's Recognition: Celebrating milestones and accolades
- 👉 Making Headlines: Featuring our Partners' thought leadership

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ADROIT CLAIMS & ADR CONSULTANTS (ACAC)

ADR NEWS LETTER- Volume 10/ 25

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From the Desk of the Managing Editor

Dear Colleagues and Readers,

It gives me immense pleasure to present the 16th Edition of our ADR Newsletter, continuing our journey of sharing knowledge, practical insights, and updates from the world of Construction Law and Arbitration.

This edition emphasizes the principles of good faith and their application within Middle East construction frameworks, a topic of growing importance for global stakeholders. We also explore the concept of reciprocal obligations, a cornerstone of fairness in contracts, and shed light on the vital role of non-compliance reports (NCRs) in strengthening project documentation and protecting contractual rights.

Our feature, “The Other Side of the Coin: Turning NCRs to Your Advantage,” invites readers to view compliance not as a burden but as a tool for building transparency and professional credibility.

We are also proud to highlight our collaboration with ATIM Law Firm for the upcoming event on Managing and Handling Claims under the FIDIC Red Book — a platform for bridging practical and legal perspectives in construction projects across Asia and the Middle East.

As always, I extend my gratitude to our partners, clients, and readers for your continued trust and engagement. Together, we are shaping a stronger, more collaborative ADR ecosystem that upholds fairness, professionalism, and integrity in the construction industry.



A. Ramasubramanian B.E., LLB., FCIARB,
Managing Director/ Lead Consultant - ADR

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MONTHLY NEWSLETTER

GOODFAITH PRINCIPLES AND MIDDLE EAST CONSTRUCTION

- Good faith is a sacrosanct principle of law recognised throughout the MENA region. It is a prevailing principle in the laws of Arab states, where it governs all aspects of a contractual relationship, from the negotiation phase to the conclusion of the contract, its performance and its termination. It is described by Islamic shariah scholars and practitioners as ‘the essence of Islamic Contract law’.
- The principle of good faith requires that contractual obligations be performed not only in accordance with the express terms of the agreement but also in a manner that reflects honesty, fairness, and mutual respect. This aligns closely with the foundational Islamic shariah principle of ‘no harm and no reciprocated harm’, which underpins the broader legal and ethical imperative to regulate interpersonal relations on the basis of cooperation, solidarity and the avoidance of harm.
- Among the legal issues and principles at the heart of construction disputes governed by MENA region civil laws are

- good faith,
- abuse of rights,
- estoppel,
- prohibition of taking advantage of one’s own wrongdoing,
- force majeure and improvisation,
- notices for breach,
- global claims,
- accelerated claims,
- delay damages,
- concurrent delay,
- principles of interpretation, implied terms,
- the duty of mitigation, suspensive conditions, interest,
- decennial liability,
- exceptio non adimpleti contractus limitation and exclusion of liability,
- unjust enrichment claims, nullity,
- termination and rescission.

Good Faith

The principle of good faith requires that contractual obligations be performed not only in accordance with the express terms of the agreement but also in a manner that reflects honesty, fairness, and mutual respect. This aligns closely with the foundational Islamic shariah principle of 'no harm and no reciprocated harm', which underpins the broader legal and ethical imperative to regulate interpersonal relations on the basis of cooperation, solidarity and the avoidance of harm. Islamic jurisprudence, and subsequently many comparative legal systems influenced by it, have enshrined this principle to ensure that legal relations foster equitable dealings and social harmony, which reinforces the obligation of good faith in both form and substance

GOOD FAITH PRINCIPLES AND MIDDLE EAST CONSTRUCTION



The Abu Dhabi Court of Cassation has held that the duty of good faith is an overarching fundamental principle and obligation imposed on the contracting parties.

Good faith involves both acts and omissions (passive and active duties) and necessitates the absence of bad faith. In the specific context of construction contracts, an arbitral tribunal has tackled good faith, essential mistake and fraudulent misrepresentation in the conclusion of the contract and stated that if one party knew of a mistake pertaining to the conclusion of the contract and refrained from communicating it to the other party, the former shall be deemed to be acting in bad faith.

In manifestation of the duty of good faith, an employer is expected to exert all possible efforts to allow the contractor to complete the work without impediment. [76] If the work requires the intervention of the employer, it shall do so within the contractually agreed period or within the period customarily required for that specific type of work.[77] That is why the parties remain under a positive obligation of cooperation during the performance of the contract (as a variant of good faith), even if the contract does not specifically include all its manifestations.

Prohibition of taking advantage of one's own wrongdoings

Most of the MENA civil codes prohibit a party from taking advantage of its own breach or wrongdoing, even in the absence of a specific legislative provision to that effect. The Egyptian Court of Cassation reaffirmed this general principle when it stated that 'it is established that a person cannot blame others for its own wrongdoing, be it fraud or negligence, and cannot benefit from one's wrongdoing vis-à-vis others, even if that other [person] is also at fault'.

In the same vein, Article 216 of the Egyptian CC provides that 'The court may reduce the amount of compensation or reject any request for compensation where the fault of the creditor contributed to or aggravated the damage.'

This grants a court or tribunal an express discretionary power either to reduce the amount of compensation or not to grant damages (whether agreed or not) at all, as deemed reasonable, where a party has, as a factual matter, caused or contributed to the damage.

The prohibition of taking advantage of one's own fault is a general principle of law. A court or a tribunal will have to take into consideration the fault committed by the creditor (regular, gross, intentional) and how much it contributed to the overall damage (partially or fully) then weigh the same with the fault and damage caused by debtor.

Thus, a debtor's liability would be wholly extinguished if the creditor's fault outweighs and overwhelms that of the former or if the former's fault was only an inevitable consequence of the latter's. In other cases, the debtor's liability may be proportionately reduced by the magnitude of fault it committed compared with that of the creditor.

Abuse of Right

A person is entitled to use their rights as mandated by the law or as agreed in a contract; however, a person is not entitled to use their right in an illicit or abusive manner.

Naturally, the person invoking abuse of right must not be acting in bad faith. While not expressly included in legal provisions regulating contracts, nothing prevents utilising abuse of right, where necessary, in the context of contractual arrangements, especially that it is arguable that non-abusive use of rights can only be characterised as an application of the overarching principle of good faith.

Article (5) of the Egyptian CC sets the criteria for abuse of right. The first criterion deals with the illegitimacy of the pursued interests. This denotes the absence of a legitimate and serious interest.

Every right is validly created to achieve a certain legitimate objective. If one uses the right to achieve an illicit objective, this may be characterised as an abuse of right. Indeed, the prevailing views confirm that the provisions of Islamic shariah may have a role in assessing the illicit nature of the pursued interests.

The second criterion deals with the existence of an intention of aggression. This would be the case if a person's main intention is to inflict harm, even if the act or omission is associated with a secondary intention to achieve a benefit.

The third criterion denotes significant disproportionality between the benefits and prejudices resulting from the exercise of the right. This is the case whether the person who exercised the right was recklessly inconsiderate of the damage others may suffer for the sake of a minor benefit, or had a hidden intent to inflict harm under a pretext of a fictitious or minor benefit that is clearly outweighed by the damage sustained by another person.

The person exercising such right would be deviating from the usual conduct of an ordinary person, and is committing a breach for which they must be held liable.

Estoppel

Although the principle of estoppel is not be legislatively captured in most civil codes within the MENA region, estoppel (or *allegans contraria non est audiendus*) is a well-established legal principle derived from fundamental tenets of Islamic shariah and forms part of the legal systems of several countries in the region.

Nevertheless, Article 70 of the United Arab Emirates Civil Code 1985 (the UAE CC), Article 239 of the Jordanian Civil Code 1976 (the Jordanian CC), Article 547 of the Tunisian Code of Obligations and Contracts 1907 (the Tunisian COC) and Article 720 (Rule No. 40) of the Saudi CC explicitly capture the principle of estoppel.

According to this sacrosanct principle, the person who seeks to revoke what has been agreed, or engages in contradictory behaviour, shall be barred from doing so. Moreover, estoppel is explicitly endorsed and upheld by the judgments of Arab courts, and it is validly argued that estoppel is a variant of good faith.

In the specific context of construction contracts, if the employer or contractor engages in contradictory behaviour or either seeks to revoke what has been agreed or endorsed, estoppel and good faith will militate against validating such actions or omissions. For example, the UAE Court of Cassation held that 'there is no place for issuing a judgment awarding a delay penalty where the stoppage of work before the end of the contractual period is attributed to the appellant himself, in addition he who seeks to contradict his own previous actions is estopped from doing so'.

UAE Court of Cassation, Challenge No. 87 of judicial year 27, hearing session dated 26 June 2006.

Concluding notes:

While English courts have in recent years sounded-out the possibility of introducing the concept of good faith into contractual dealings, the English view tends to be that any such duty must be spelled out expressly in the contract. And indeed, that view is increasingly taken across the Middle East. While it is important to be aware of the potential benefits and the burdens arising from the principle of good faith when disputes arise in Middle East courts or arbitral trials, most contracts will expressly cover any issues independently of good faith.

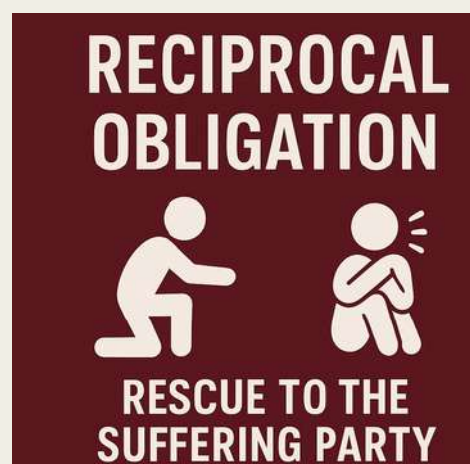
Any business operating in the Middle East therefore has to strike a balance between understanding the principle of good faith, and the specifics of how it applies in different countries, and ensuring that all potential disputes are in fact covered by specific clauses in contracts.

Author: A.Ramasubramanian
Managing Director/ Lead Consultant - ADR

RECIPROCAL OBLIGATION - RESCUE TO THE SUFFERING PARTY

Key Takeaway: *This case is a crucial precedent. If a client's failure to provide materials, access, or approvals holds up your work, their action constitutes a breach. Always document these failures. A contract protects both sides, and your client's obligations are not just suggestions—they are enforceable duties.*

- Ever had a project stall because the client didn't deliver on their end? A landmark Supreme Court case, ***Ramachandra Narayan Nayak vs. Karnataka Neeravari Nigam Ltd. & Ors.***, is a powerful lesson in why their promises are just as binding as yours.
- **The Deal:** A contractor was hired to build a canal. The government body (KNNL) was contractually obligated to supply the cement.
- **The Breach:** KNNL failed to provide the cement, making it impossible for the contractor to do his job.
- **The Core Principle:** Reciprocal Promises The case hinged on a simple but powerful concept: if your performance depends on the client doing their part first, you can't be faulted if they fail. You can't be expected to build without the bricks they promised to provide.
- **The Supreme Court's Verdict:** The Court sided firmly with the contractor. The key message was that a contract is a two-way street. Government bodies are not above the law and must honor their contractual obligations just like any private party.



Author: K Jainivas
Associate Lawyer - ADR

NON-COMPLIANCE REPORTS - KEY CONSTRUCTION DOCUMENTS

Key Takeaway: *Ultimately, the disciplined use of NCRs transforms your position in a dispute. It moves your claim from a weak, after-the-fact argument of "The work was defective" to a powerful, contemporaneous statement of fact: "Here is the NCR we issued on that date, formally recording the non-compliance and putting you on notice." This shift from subjective recollection to objective proof is often the single most important factor in a successful claim.*

- In the lifecycle of any complex construction project, it's common for issues to be discovered after a section of work is complete. For example, months after a concrete slab has been poured and cured, quality control tests might reveal that the specified compressive strength wasn't achieved. When this issue is raised with the contractor, the contractor's response often hinges on the project's documentation. They may state, "Your site engineer was present during the pour, observed the process, and signed the daily report without raising a formal objection."
- This creates a common contractual dilemma. The dispute shifts from the technical reality of the defect to the procedural question of when it was, or should have been, identified. The arbitrator is left weighing contractor's signed document against your memory—a battle of objective proof versus subjective recollection.
- This is the exact pain point the Non-Compliance Report (NCR) is designed to eliminate.
- An NCR is not a "complaint." A verbal instruction to a foreman is not a "rejection." An NCR is a time-stamped, contractual instrument. It is an objective, irrefutable record that you identified a deviation from the contract specifications and formally put the other party on notice.
- The biggest challenge in a defects dispute is proving you did not accept faulty work. Your NCRs are the official stamps in your project passport, demonstrating your diligence and formal rejection. They build a powerful narrative that proves:

1. What was wrong (e.g., Concrete slump test failed; specification required S4).
 2. When you identified it (e.g., The date on the NCR, proving it wasn't a post-completion complaint).
 3. What the consequence was (e.g., The pour was formally put on hold pending instruction, as noted in the NCR, causing a two-day delay to the critical path).
- There's a critical principle in construction law that often gets learned the hard way: "Silence implies acceptance." If you see something that isn't to specification and fail to formally document your non-acceptance, the legal presumption is that you were satisfied with it.



Author: V Durga
Associate - Arbitration - ADR

THE OTHER SIDE OF THE COIN: TURNING NCRS TO YOUR ADVANTAGE

Key Takeaway: *By systematically addressing and closing each NCR, you do more than just fix a problem—you build an irrefutable record of accountability. This documented history of integrity allows you to control the narrative in any dispute, demonstrating that your commitment is not to a flawless project, but to a professionally managed one.*

But what happens when you are the one who receives an NCR? While it may seem like a problem, a properly managed NCR is an opportunity to build a powerful defense. In any arbitration, a record of ignored or unresolved NCRs paints a picture of negligence. Conversely, a file full of promptly closed NCRs is compelling evidence of your professionalism and good faith.

By addressing the issue, proposing a solution, and documenting the close-out, you are actively creating a positive record. This record demonstrates to an arbitrator that:

1. You Are Proactive: You take contractual obligations seriously and act to mitigate issues before they escalate.
2. You Are a Competent Problem-Solver: You have a systematic process for rectification, which enhances your credibility.
3. You Are Acting Reasonably: It neutralizes any attempt by the other party to portray you as a contractor who cuts corners or performs shoddy work.

An arbitrator doesn't expect a perfect project with zero issues. They expect a professionally managed one. A log of closed NCRs changes the narrative from "Here is a list of their failures" to "Here is the evidence of their diligence in correcting the few issues that arose." This proactive approach can be just as persuasive as the NCRs you issue.

Author: V Durga
Associate - Arbitration - ADR

OUR TEAMS PRESENCES IN THE INTERNATIONAL CONFERENCE

Our Managing Director and Lead Consultant **Mr. Ramasubramanian** will be a speaker during ***The Society of Construction Law's 11th International Conference*** in Seoul (www.scl2025.com), South Korea.

Topic: Loss of Profit v Profitability in the construction projects.

This year's theme, "*Bridging Past, Present and Future*", will focus on the global practice of construction law, insights into the legal, business, economic challenges and opportunities in construction industry, and the exchange of best practices from all around the world.



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- Ramasubramanian, (Adroit Claims)
- Madhu Mithra (ADROIT Claims)
- Nguyen Thanh Hien, (ATIM Law Firm)
- Nguyen Thi Huynh (ATIM Law Firm)

 Date: 31 October 2025

 Time: 08:30 – 10:00 (Vietnam Time)

 Venue: Lux 6 Tower, Vinhomes Golden River, Ho Chi Minh City or online via registration link



Webinar Invitation

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MAIN CONTENT

- ▶ Identifying and managing disputes in construction projects
- ▶ Effectively preparing and handling the claim
- ▶ Classifying, assessing, and managing delays in construction
- ▶ Contract management & dispute resolution – International practices and learning experience

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