

Dispute Resolution Mechanisms Available in the United Arab Emirates and Other Middle Eastern Countries



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Abstract

The occurrence of disputes in Middle Eastern countries have risen to unprecedented levels due to rapid growth in international business in relation to the oil sector, construction industry, trades etc. Therefore, it is important to look into the methods available for resolving disputes through adopting alternative dispute resolution techniques, arbitration and litigation.

The objective of this paper is to identify the dispute resolution techniques used in the Middle Eastern countries (Arabian Gulf countries), including the United Arab Emirates (UAE), to resolve disputes within the framework of the respective legislative systems in place.

This paper provides an overview of the advantages and disadvantages of each dispute resolution technique available and the techniques yet to be implemented in the Arabian Gulf countries. In order to facilitate the choosing of an appropriate technique to resolve a particular dispute, the Alternative Dispute Resolution (ADR) process, together with commonly used resolution methods such as arbitration and litigation, is disclosed herein.

The potential benefits and risks of the ADR process are discussed in this paper, as well as the validity of agreement of disputes in line with the UAE legislative system. Moreover, this paper highlights the process of enforcing an award given to parties who belong to different countries, the availability of awards and treaties for the enforcement of foreign judgments in line with the law of the country.

Introduction

Disputes and conflicts on contracts are common in the Middle Eastern countries. Dispute resolution mechanisms and facilities such as negotiation, mediation, conciliation,

med-arb,, dispute review boards, neutral evaluation, arbitration and litigation are available in order to resolve disputes in construction, commercial, and trade contracts. It is noteworthy that some of the above techniques are rarely practiced in the Gulf region.

An increasing number of construction projects underway throughout the Gulf region, together with issues relating to the payment delays, variations, delay in projects, ambiguities or discrepancies that appear in contract documents, changes of conditions, unexpected escalations in the cost of materials, all lead to conflicts and finally to disputes.

Before entering a contract parties must check the mechanisms included in the contract for the resolution of disputes. Parties must choose a mechanism for dealing with disputes which is cost effective, speedy and causes minimum disruption to each party.

In this paper, the dispute resolution mechanisms adopted, especially in relation to the construction contracts in the UAE and other Middle Eastern Countries, in line with their respective legal system are discussed.

Dispute Avoidance through Conflict Management

Most conflicts or disputes in construction contracts occur due to the unwarranted exigency created by developers in completing contracts within the shortest possible time, thereby not allowing sufficient time to develop designs and contract documents.

Notwithstanding the emphasis on the desire to avoid dispute, there may be occasions where the parties

have legitimate disputes and the techniques of dispute resolution could be used to bring about a settlement.

Legal Systems and Dispute Resolution Techniques used in the UAE and Other Middle Eastern Countries

Legal Systems

All the Arabian Gulf countries such as Saudi Arabia, Qatar, Bahrain, Oman, Kuwait and the UAE are based on a Civil Law System that relies heavily on codified laws. Many states in the region have Conciliation and Arbitration Centers for the settlement of Commercial disputes.

Within the UAE Legal system, the sources of law are drawn from:

- 1) The Constitution;
- 2) Federal laws;
- 3) Local Emirates laws and regulations;
- 4) The Islamic Shari'ah
- 5) Custom and practice

The hierarchy of the UAE law places the Shari'ah at the peak of the pyramid, followed by the federal and local laws (laws promulgated by individual Emirates).

In most of the Arabian Gulf states, the Civil Courts deal with all civil and commercial matters of any nature. However, in Saudi Arabia, the Sharia law and the Commercial law form one body of law, with Sharia rules prevailing over commercial rules, a situation which differs from the other Gulf Arabian states where Sharia law and commercial law co-exist as separate systems.

Dispute Resolution Techniques

The common forms of dispute resolution methods and facilities carried out are as follows:

- Negotiation
- Mediation
- Conciliation
- Med-Arb
- Dispute Review Boards
- Neutral Evaluation
- Arbitration
- Litigation

Negotiation

This is the most common form of dispute resolution used in the Middle East and the rest of the world. In negotiation, the parties themselves can attempt to resolve differences, make concessions and compromise, rather than sinking to coercion and confrontation.

They can settle their dispute at any time through negotiation, when other techniques are still being processed.

This technique is the best out of all those mentioned above in regard of the saving of time, cost and confidentiality.

Normally, under the Conditions of Contracts in Middle Eastern countries, there is a provision to settle a dispute amicably between the parties before going to arbitration. Accordingly, arbitration shall not be commenced unless an attempt has been made by the parties to settle such dispute amicably through negotiation.

Mediation

Essentially, mediation is a private and non-binding form of dispute resolution where an independent third party facilitates the disputed parties coming to an amicable settlement.

It is, on the whole, a successful idea, because even if settlement is not achieved at the mediation process, the parties, with the help of the mediator, finally agree upon a deal that allows them to get on with the project and avoid the process of arbitration. In order to achieve this, the parties and mediator have to work hard. The mediation is the process controlled by the parties themselves.

The most important aspect of mediation is the parties choose the mediator and its procedures, timetable, disclosures. The party will also appoint the mediator and control when and where and the way they proceed with the mediation..

It is not the mediator's role to suggest terms, make recommendations or express any formal judgment on the case. The mediator can talk about the option but mediator cannot insist on a deal. If requested, they may advise each party. They are neutral message carriers.

Mediation is entirely without prejudice. Where mediation is successful, it is generally speedier and less costly than arbitration or litigation.

This process is very useful rather than going for the lengthy procedure of arbitration, as in most of the local Construction Contracts.

The mediation technique is rarely used in the UAE and it is high time that a system is established for resolving disagreements through mediation in the local construction industry.

Conciliation

Conciliation is another alternative dispute resolution process whereby the parties to a dispute (including future interest disputes) agree to utilize the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences. Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions. In mediation, the mediator tries to guide the discussion in a way that optimizes each party's needs, takes feelings into account and reframes representations¹.

Conciliation in the UAE

There are two Commercial Conciliation and Arbitration centers in UAE. A party desiring conciliation can seek facilitators from the Dubai International Arbitration Center (DIAC) or the Abu Dhabi Commercial Conciliation and Arbitration Center (ADCCAC), in accordance with the rules and procedures of the centers.

It is noteworthy to state that while some believe conciliation is of little benefit because of its limitations, since most of the forms of Contract (modified versions of FIDIC) and the FIDIC 1999 Rainbow suite of contracts and the 1987 4th Edition Conditions of Contract for Works of Civil Engineering Construction being used in the UAE contain the provision for amicable settlement. Unless otherwise agreed by the parties, if amicable settlement not achieved, then the next process for dispute resolution is only through arbitration.

Conciliation remains one of several available forms of alternative dispute resolution. If the parties involved in a dispute consider this to be an effective way of resolving their issues, then it is a method that should be retained.

Med-arb

A combination of mediation and arbitration, where the parties agree to mediate but if that fails to achieve a settlement, the dispute is referred to an arbitrator. The same person may act as mediator and arbitrator in this type of arrangement².

This technique is rarely used in the UAE and other Middle Eastern countries.

Dispute Adjudication Boards (DAB)

This technique facilitates a process where an independent board evaluates disputes. Most of the Conditions of Contract used in UAE are based on the FIDIC Forms of Contract 1987 edition, modified to suit requirements. However, the Conditions of Contract used in the UAE are based on the FIDIC Forms of Contract 1987 edition, which does not provide for DAB; the latest trend in the UAE to adopt the FIDIC Forms of Contract 1999 has instigated the emergence of adjudication by establishing DAB.

The difficulty in the UAE with such dispute resolution mechanisms is their enforceability (or lack of it) under UAE law; it is by no means certain that the UAE courts would enforce/execute an award or decision made by an adjudicator appointed by the parties. The parties could, however, devise mechanisms for rapid dispute resolution which comply with UAE civil procedural law on arbitration, in which case the award/decision is likely to be enforceable; whether the UAE courts would give effect to the outcome of the procedure that is not compliant with the Civil Procedure Law is debatable³.

This technique is the most recent development in the field of alternative dispute resolution in the international Construction field has been the widespread adaptation of dispute boards for large construction projects.

¹ <http://en.wikipedia.org/wiki/Conciliation>

² Part 1 Introduction to Arbitration by Kay Linnell, FCI Arb, FCA, MBA, MBIM, CFE, MEWI

³ Royal Institution of Chartered Surveyors, Dubai Sector, Seminar at API Tower, Dubai, UAE, 25 October, 2005, Getting Paid by Steven Hunt, Mason Galadari

In the last few years, dispute boards have become a regular feature outside of the USA, to which their origins can be traced some three decades back.

International institutes such as the FIDIC and the World Bank, both who make provision of their standard forms of Contract for the projects have now adopted this method.

A dispute board is a tribunal established under a contract to resolve disputes. DAB shall comprise either one or three qualified persons. If the DAB is to comprise three persons, each party shall nominate one member for the approval of the other party. The parties shall consult both these members and agree upon the third member, who acts as chairman of the board.

On small projects, a one person tribunal is appropriate. Usually, tribunal members are either Engineers or Lawyers. The dispute board receives and hears written and oral submissions from the parties and issue a determination.

The proceedings are short - 56 days under the World Bank and for the FIDIC, within 84 days after receiving such a reference or within such other period as may be proposed by the DAB and approved by both parties.

The dispute board procedure is not designed to impose final and binding determination on the parties.

If either party is dissatisfied with the DAB determination, then either party may give notice to the other party of its dissatisfaction within the time frame stipulated in the contract.

If neither party objects to the determination of DAB, its determination becomes final and binding and must be complied with. The hope is that both parties will accept the determination so that the dispute shall end.

This method is widely adopted in construction contracts around the world and the success rate is comparatively high. I hope this more flexible alternative to arbitration will be adopted in more forms of contract in the Middle East, including the UAE, in the near future.

Neutral Evaluation

Under this process, a neutral person (often legally qualified) gives an opinion after hearing each party's case and gives a non-binding assessment of merits. This can be used as a basis for settlement discussion or further negotiation.

This process is rarely used in the UAE and other Middle Eastern countries.

Arbitration

What is arbitration?

Arbitration is a legally enforceable procedure to obtain fair resolution to a dispute by an impartial tribunal without unnecessary delay or expense. It is a private and confidential process between the parties and the arbitrator and the parties are free to agree upon how their disputes are resolved; the court should not intervene except to assist in administration of the process. The award of the arbitrator is enforceable, as with a court judgment⁴.

Practice in the UAE

This is a common form of dispute resolution technique used in the UAE where other alternative dispute resolution techniques fail to achieve a settlement of a dispute.

Arbitration in the UAE is still developing, although the UAE has three arbitration centers in the emirates of Abu Dhabi and Dubai. The Abu Dhabi Chamber of Commerce has established an independent arbitration center called the Abu Dhabi Commercial Conciliation and Arbitration Center and has introduced procedural rules and a schedule of costs for conducting arbitration in Emirate of Abu Dhabi. These rules deal with local and international arbitration systems and a few arbitration cases have already been conducted under the said rules.

There are two prominent sets of rules of arbitration used in Dubai. They are as follows:

- Rules of Arbitration of the Dubai International Arbitration Centre (DIAC)
- Rules of Arbitration of the Dubai International Financial Centre (DIFC)

⁴ Part 1 Introduction to Arbitration by Kay Linnell, FCI Arb, FCA, MBA, MBIM, CFE, MEWI

The Ruler of the Emirate of Dubai has recently enacted a new arbitration law for the Dubai International Financial Center (DIFC). Dubai enacted local emirates law have an arbitration law. The law will enable the recently established DIFC-LCIA (London Court of International Arbitration) to provide neutral, efficient and reliable dispute resolution to companies in free zones which have entities established under Financial Free Zone Law.

The UAE (except for the Emirate of Dubai), however, does not have an arbitration Act.

Arbitration is currently being conducted under UAE Civil Procedures Law, which governs litigation before the courts. Articles 203 to 216 of the Civil Procedures Law specially addresses arbitration, the validity of the arbitration and the appointment of arbitrators⁵.

Articles 235 to 246 of UAE Civil Procedures Law deal with the enforcement of foreign arbitration in the UAE⁶.

The UAE has joined the UN Convention for the recognition and enforcement of foreign arbitration awards in 2006.

The UAE Civil Procedure Code, Federal Law No (11) of 1992 chapter (iv) states the execution of Foreign Judgment under Article (235), (236), (239) and (238).

This gives UAE courts powers to enforce arbitration awards given in foreign countries.

The UAE companies doing business globally and foreign investors looking at opportunities in the country will benefit from the country becoming a signatory to the Convention on the recognition and enforcement of Foreign Arbitral Awards.

The process ensures a higher quality of decision-making and saves management and travel costs.

Enforcement of Foreign Arbitral Award in Middle East

As a further indication that arbitration has become widely accepted in the Middle East, all GCC states have acceded to the New York Convention. Lebanon, Oman, Iran, Qatar, and the UAE recently acceded in 1998, 1999, 2001, 2002, and 2006, respectively⁷.

There are virtually no treaties for the reciprocal enforcement of court judgments between Middle Eastern countries and Western nations, an enforcement treaty between France and the UAE being one of the few that exist. Accordingly, parties wishing to litigate in the courts of a Western country are likely to end up having a 'paper tiger' at the end of the process, if all assets are located in the Middle East. Arbitration in the UAE has gained momentum as a result of the UAE's accession to the New York Convention, which has been in effect since 19 November, 2006. There has been no reported case as to enforcement in the UAE under the New York Convention. It is hoped that UAE judges will recognize the importance of the international community and trade in relation to enforcement, especially in applying the public policy ground for refusal of enforcement contained in article V2(b) of the New York Convention. Saudi Arabia acceded to the New York Convention in 1994, but enforcement has proved problematic. A foreign award needs to be ratified by the Saudi Arabian Board of Grievances, which is the commercial court having jurisdiction to enforce foreign judgments and arbitral awards. In so doing, the Board of Grievances would likely consider the issues ab initio, thus adopting a merits review of the award. This has been a disincentive for arbitration practitioners to recommend arbitration in Saudi Arabia as it practically adds another layer to the dispute resolution process. The Board of Grievances has refused to enforce foreign awards on the ground of public policy if the awards do not comply with principles of Islamic or Shari'a law. As far as the authors are aware, no foreign arbitration award has ever been enforced in Saudi Arabia⁸.

⁵ Arbitration: Theory and Practice in the United Arab Emirates by Al Tamimi & Company, Advocates and Legal Consultant.

⁶ Refer No 5

⁷ Middle East Overview by Stephen Jagusch, James Kwan, Allen & Overy LLP

⁸ Middle East Overview by Stephen Jagusch, James Kwan, Allen & Overy LLP

Most forms of contract available in the UAE adopt the following clause:

‘All dispute arising from the interpretation, implementation or termination of agreement shall have initially settled via negotiation or conciliation in accordance with the provision of the Commercial Conciliation and Arbitration Center’s or Chambers of Commerce procedural rules in the respective emirate’

In UAE, an award made by arbitrator is enforceable. The unsuccessful party will perform the award in accordance with the terms of the agreement. In the event that the unsuccessful party fails to comply with the terms of the award, the successful party may start court proceedings

Challenging the award

A party can challenge the award on the ground of substantive jurisdiction, serious irregularity, appeal on point of law etc.

Litigation

This is a formal lawsuit in a state or federal court pursuant to the terms of the contract and under the rules of the jurisdiction where the lawsuit is filed. Lawsuits are time consuming, lengthy and very expensive and the outcome may rest more on legal technicalities than on fact or circumstance. A party submitting a dispute to litigation retains no control over process or outcome⁹.

The formal process whereby claims are taken through court and conducted in public. Judgments are binding on the parties, subject to rights of appeal.

Comparison of Dispute Resolution Techniques

Technique	Statue	Frequency of use	Speed	Cost	Confidentiality	Binding	Adversarial	Special Features
Negotiation	No	Very Common	Varies	Low	Yes	No	No	Can Continue throughout the dispute
Mediation	No	Infrequent	Fast	Low	Yes	No	No	
Conciliation	No	Rare	Fast	Low	Yes	No	No	
Neutral Evaluation	No	infrequent	Fast	Low	Yes	No	No	
Arbitration	Yes	Common	Contingent	Contingent	Yes	Yes	Yes	
Litigation	Yes	Common	Slow	High	No	Yes	Yes	

Comparison of litigation with Mediation/Conciliation and Arbitration

Dispute Technique / Area	Mediation/Conciliation	Arbitration	Litigation
Formality	informal	Formal	Formal
Flexibility	Good	Contingent ON WHAT?	Poor
Party Control	Yes	No	No
Party Choice	Yes	Contingent	No
Creative Solutions	Yes	No	No
Speed	Fast	Contingent	Slow
Cost	Low	Contingent	Expensive

⁹ Skills & Knowledge of Cost Engineering 5th Edition Revised by AACE International, USA

Conclusion

The Middle East construction market is large and complex; construction will undoubtedly have disputes within it. Wide ranges of dispute resolution techniques are available in the construction industry.

Negotiation is the most efficient tool to resolve conflict or disputes and most practical and healthy for all parties involved. Some disputes cannot be resolved through negotiation due to the disagreement of the parties and may result in the process of arbitration or litigation.

If negotiation is not successful, then look to the alternative dispute resolution methods available. Actual experience of ADR processes such as mediation, dispute review boards, resolution advisers, expert determination, neutral evaluation, and med-arb in the Middle East is minimal but it is growing. The ADR methods have been found satisfactory in the USA and other countries, which have already adopted them but most of the ADR methods are rarely used in Middle Eastern countries.

In the Middle East, disputes that are not resolved by negotiation are resolved in the framework of Conciliation, Arbitration and Litigation. Most parties in the region

regard arbitration as the final binding method of dispute resolution.

Finally, disputes and conflict of any nature are unpleasant. Disputes must be resolved through dispute avoidance techniques or ADR processes, otherwise the result is the lengthy processes of arbitration or litigation which cause the unnecessary wastage of time, money and resources and can lead to the dissolution of the working relationships of the parties.

References

1. <http://en.wikipedia.org/wiki/Conciliation>
2. Royal Institution of Chartered Surveyors, Dubai Sector, Seminar at API Tower, Dubai, UAE, 25 October, 2005, Getting Paid by Steven Hunt, Mason Galadari
3. Part 1 Introduction to Arbitration by Kay Linnell, FCI Arb, FCA, MBA, MBIM, CFE, MEWI.
4. Arbitration: Theory and Practice in the United Arab Emirates by Al Tamimi & Company, Advocates and Legal Consultant.
5. Middle East Overview by Stephen Jagusch, James Kwan, Allen & Overy LLP
6. Skills & Knowledge of Cost Engineering 5th Edition Revised by AACE International, USA

William Lacey (Hounslow) Ltd v Davis (1957)

A contractor tendered for reconstruction of war-damaged property and was led to believe that they would receive the contract. William then prepared, at Davis's request, calculations and estimates which Davis used to negotiate a claim with the War Damage Commission, Davis then sold the property without concluding a contract for the reconstruction.

Held that a promise by the defendant to pay a reasonable sum for these service could be implied.