

Construction Contracts' Dispute Resolution Provisions In GCC Countries: *What Lessons To Be Learnt?*

Marwan Sakr LL.M, FCI Arb

Avocat à la Cour (Beirut, Paris), Advocate (DIFC, Dubai), Chartered Arbitrator

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Introduction

This presentation will address:

- The use of dispute resolution clauses in construction and engineering contracts that are becoming more wide spread in the GCC countries with an emphasis on multi-tiered (escalating or “waterfall”) clauses in the UAE and Qatar.
- The dispute resolution processes that are operating in these two jurisdictions and how those processes are being dealt with by the local courts.

NB: This presentation will only address the practice of “onshore” courts in the UAE and Qatar both being civil law jurisdictions and not in the courts and laws of the DIFC or QFC that are autonomous English common law based jurisdictions.

Introduction

- In the Middle East, Construction engineering contracts have traditionally not contained dispute resolution clauses
- Local courts have been unfamiliar with complex construction contracts
- Local employers have not been keen to agree to international arbitration.
- Nonetheless, Arbitration has become more widely accepted, and also the introduction of standard form of construction/engineering contracts, such as FIDIC, has meant that
- ICC procedures as well as rules provided by regional centers, such as the DIFC-LCIA and the QICCA

1. General considerations on arbitration laws and practice in the UAE and Qatar

- Technicalities which are peculiar to the UAE and Qatar arbitration laws and practice and the “arbitration friendliness” of these two jurisdictions
- Such technicalities include requirements that:
 - a UAE award must **be physically signed** within the UAE
 - the legal representative of each party possesses a **valid power of attorney** to act in the proceedings

1. General considerations on arbitration laws and practice in the UAE and Qatar

➤ witnesses in a UAE arbitration should **swear the oath in the formula prescribed for UAE court hearings**:

- See the *Bechtel* case, where the Dubai Court of Cassation overturned an arbitration award because the by witnesses during the arbitration did not swear oath following that formula (*Int'l Bechtel Co. Ltd. v. Dep't of Civil Aviation of Gov't of Dubai*, Dubai Court of Cassation, case No..503/2003, judgment dated May 15, 2005). Notably, the Paris Court of Appeal, upheld the award in favour of Bechtel, setting aside the Dubai Court of Cassation's decision (*Direction générale de l'aviation civile de l'Émirat de Dubai c/ International Bechtel Co.*, Cour d'appel [CA] Paris, 1e ch., 29 Sept. 2005)

1. General considerations on arbitration laws and practice in the UAE and Qatar

- Arbitration awards in Qatar should be rendered in the name of the Emir irrespective of the seat of the arbitration:
 - see e.g. Qatar Court of Cassation, Case No. 64/2012, judgement dated 12 June 2012). Qatar's Court of Cassation seems to have now changed this approach. In its decision of 25 March 2014 (Qatar Court of Cassation, Cases No. 45 and 49 of 2014), the Court applied the New York Convention and reinstated an ICC award rendered in Doha in 2012. However, it seems that the issue is not finally settled yet in the case law of Qatari courts.

2. Local approaches to multi-tiered dispute resolution clauses

- Some of these peculiarities can also be encountered in the enforcement and interpretation of multi-tiered dispute resolution clauses
- Multi-tiered dispute resolution clauses have been defined as clauses which:
 - “... [provide] for **distinct stages**, involving **separate procedures**, for dealing with and seeking to resolve disputes”
 - (CM. Pryles, “Multi-tiered Dispute Resolution Clauses”, Journal of International Arbitration, 2001, 18 (2: pages 159-176)
- Can include a combination of: negotiation, mediation, adjudication (including DABs or DRBs) expert/engineer’s determination and/or arbitration/court litigation.

2. Local approaches to multi-tiered dispute resolution clauses

- FIDIC Red, Yellow and Silver books (*e.g.* Clause 67 of FIDIC Red Book 1987 and Clause 20 of FIDIC Red Book 1999), and also in bespoke contracts for large scale projects.
- The use of three layers, for example:
 - negotiations between senior managers or senior decision makers
 - expert determination or adjudication
 - finally to International Arbitration.
- Practical issues and problems can be encountered with these complex clauses in the UAE and Qatar.

i. Expert determination

- The parties instruct a third party to decide a particular issue. The third party is selected because of his or her particular expertise in relation to the issue
- A typical expert determination clause should ensure that :
 1. **issue(s) to be determined should be clearly and precisely expressed** an opportunity to argue about the jurisdiction of the expert)
 2. state that the expert is **to act as an expert and not as an arbitrator**; and whether his or her opinion in relation to the issue in dispute is capable of being challenged or not.
- This gave rise to different approaches by the courts in the UAE and Qatar which show some confusion as to the effect of the expert determination provisions.

i. Expert determination

- The UAE courts have held that a multi-tiered dispute resolution clause cannot “prevent [a party] from having recourse to the courts directly”
 - Dubai Court of Cassation in case number 14 of 2008:
“[i]f the parties agree to follow certain specific procedures (expert determination) in order to resolve amicably any difference that may arise between them concerning the execution of certain work, that does not prevent them from having recourse to the courts directly on grounds that the court has a general jurisdiction to determine disputes.”
 - (Dubai Court of Cassation, Case No. 14/2008, judgement dated 23 September 2008):
“the fact that one of the parties has resorted to the courts directly is indicative evidence of failure to arrive at an amicable solution or settlement”
- UAE courts have consistently found multi-tiered dispute resolution clauses to be unenforceable.

i. Expert determination

- Arbitration Tribunals have taken a much more cautious approach.
- A growing number of Arbitration Tribunals have decided **to stay the proceedings** in order to give the parties the opportunity to go through the alternative dispute resolution processes
- It is of course arguable that an Arbitration Tribunal, standing in place of the UAE courts, should **have little scope to take a different approach** to the UAE courts based on the case law available.

i. Expert determination

- Qatar Court of Appeal Case No. 799/2002, judgement dated 6 May 2003:
 - a dissatisfied party took the matter to litigation and asked the Court of First Instance to set aside the expert's determination provided by the clause, on the ground that the expert did not take oath and made its determination on documents only without hearing the parties
 - the Court of Appeal found that the expert determination clause was to be construed as an agreement to arbitrate the dispute and that:

"[t]he expert's mission was to resolve the dispute between the parties and should as such, be treated as an arbitrator despite his description as an expert by those parties and his determination has the value of an award which became res judicata and no party can raise the issues in dispute once again before the courts."

- The drafting of the clause can be instrumental as to its efficiency: non-binding expert determination may be held unenforceable by the courts
- If parties' intention is that the expert's determination is not capable of being challenged. Then they should expect that the courts may find that the third party is acting as an arbitrator, and then the formalities of an arbitration procedure must be adhered to.

ii. Adjudication

- Introduced by the UK Housing Grants, Construction and Regeneration Act 1996, which became effective from May 1998.
- Included in standard forms of construction contracts such as the 1999 edition of the FIDIC rainbow of contracts.
- In the region, encountered in some instances through the use of FIDIC dispute adjudication boards (DAB) and dispute review boards (DRB):
 - DAB decisions are binding and must be implemented immediately
 - DAB issues recommendation which the parties voluntarily accept

ii. Adjudication

- Different approach by local courts: Dubai Court of First Instance, Commercial Case No. 1202/2012, judgement dated 11 March 2013:
- the mechanism of the clause sets forth a three-stage dispute resolution procedure:
 - Amicable settlement the dispute.
 - Adjudicator appointment by the Dubai Chamber of Commerce
 - If one of the parties is not satisfied with the adjudicator's decision, they may resort to DIAC arbitration **before a three members' tribunal**.
- Failure of the amicable settlement process
- The Subcontractor then referred the matter directly to a Dubai court which found that it lacked jurisdiction over the matter and referred the parties to the Dubai Chamber of Commerce for the appointment of an "arbitrator" (and not an adjudicator as provided for in the clause).

ii. Adjudication

- The Dubai Court of First Instance dismissed the objection made by the Subcontractor that the dispute resolution clause distinguished between the appointment of an **adjudicator** appointed by the Dubai Chamber and the **DIAC arbitration panel**, by stating that the Dubai Chamber of Commerce does not appoint adjudicators but only arbitrators!

“[i]t is evident to the Court from the Contract which is the ground of the Lawsuit that it stated in Article (19) thereof that in case of any dispute to arise between the two parties regards this Contract, the other party is to be notified thereby, and the two parties are to attempt to settle it amicably within the fifty six days to precede the commencement of arbitration, and that in case of failure to amicably settle any dispute within the 56 days to follow the notice, such dispute is to be settled by way of referring it to a third party sole arbitrator to be appointed by Dubai Chamber of Commerce and Industry. This means that the intention of the two Parties was to settle the disputes related to that Contract by way of appointing an arbitrator by Dubai Chamber of Commerce and Industry [...] without taking into account the allegation of the Plaintiff that the translation of Article (19) of the Contract did not mean to appoint an arbitrator but to appoint an adjudicator because Dubai Chamber of Commerce and Industry mentioned to be the authority entrusted to appoint him does not appoint adjudicators, but it appoints arbitrators.”

iii. Engineer's determination

- Qatar Court of Appeal, Case 116/2008, judgement dated 27 April 2009 (confirming Qatar Court of First Instance, Case No. 411/2008, judgement dated 30 November 2008)
- The dispute resolution provisions contained in Clause 67 of that contract were modified as follows:

*“1. If any dispute or difference shall arise between the Employer or the Engineer and the Contractor in connection with or arising out of the Contract or the execution of the Works (during the progress of Works and before termination or abandonment of the Contract) it shall **in the first place be referred to and settled by the Engineer** who shall within a period of ninety (90) days after being requested by either party to do so give written notice of his decision to the Employer and the Contractor. Save as hereinafter such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until the completion of the Works and shall forthwith be given effect to by the Contractor who shall proceed with the Works with all due diligence whether or not the Contractor or the Employer requires to refer such dispute or difference to the court as hereinafter provided and shall be settled according to Qatari Law.*

*2. If the Engineer fails to give a written notice of his decision in accordance with sub-clause (1) of this clause within ninety (90) days or if the Employer or the Contractor has reason to dispute the Engineer's decision then the Employer or the Contractor **may refer the dispute to the Qatari Competent Court of Justice** provided that fifteen (15) days written notice has been given to the Engineer of the intention to do so.”*

iii. Engineer's determination

- The contractor brought a case against the Employer directly before the Qatar Court of First Instance without referring the dispute to the engineer for determination
- The Court in Case No. 411/2008 dismissed the case on the grounds that clause 67 of the contract constitute a **binding arbitration agreement** between the parties and that the court did not have jurisdiction over the dispute:

*“ it is evident to the Court from the wording of clause 67 of the construction contract that it provides in case any dispute or difference arises between the Employer or the Engineer and the Contractor in connection with or arising out of the Contract or the execution of the Works, the dispute shall be referred to the Engineer for final and binding determination [...] and that these provisions constitute a clear, express and unambiguous agreement by the parties to refer the matter to the Engineer **acting as an arbitrator..**”*

Conclusion

- More complex construction and engineering contracts
- More sophisticated dispute resolution procedures
- Less common procedures still available, often used as pre-arbitral:
 - Face to face negotiations still hold strong
 - Expert or Adjudicator nomination
- Local courts attitude towards the dispute resolution procedures
- Difficulties with multi-tiered clauses can arise because of:
 - poorly drafted clauses
 - The cultural approach in dealing with provisions (e.g., extensive concept of public policy)

Conclusion

- Suggested drafting elements to help enforceability of multi-tiered clauses:
 - i. **Certainty of procedure:** the chosen procedure must be detailed and certain : reference to institutional model clause can avoid interpretation.
 - ii. **Mandatory:** the clause distinguishes if it is mandatory procedure or a condition precedent to litigation or arbitration (e.g., use “shall” rather than “may”).
 - iii. **Time period:** Set a clear time period:
 - **starting** from the giving or service of a notice
 - **during** which the dispute resolution mechanism is to take place and
 - before the **end** of which litigation or arbitration shall not be commenced.

Thank you !

msakr@saas-law.com

www.saas-law.com