

BSS FIRST INTERNATIONAL LAW CONFERENCE, DAMASCUS, JULY 2008
Panel Session 4: Legal Framework for Real Estate & Construction
Speech Notes: Barry Manie

Introduction

It is a fact that construction projects, of whatever size and complexity, and wherever they are undertaken in the world, are capable of generating disputes. This will undoubtedly be the case for projects in Syria, as anywhere else in the world. Construction disputes can be over many issues, but they are generally of a technical, contractual or financial nature – although, ultimately, they are almost all about time and money.

Typically, a dispute arises when the parties to a construction contract cannot agree on the merits of a claim for additional time to complete the project, or a claim for additional payment over and above the Contract Sum. The dispute might be about the basic principle of entitlement, or it might be about the period for an extension of time or the amount of money to be paid.

Common methods of resolving disputes

Commercial settlement

The first approach to dispute resolution should be through commercial settlement. It is usually cheaper in the long run. It takes account of commercial realities, rather than pure legal/contractual entitlement; it acknowledges the cost of resolving the dispute through more formal means, whoever ultimately wins; and it can take account of the value of an ongoing commercial relationship.

It is not always possible, however, to achieve a commercial settlement acceptable to both sides – particularly if one party is in a stronger, more dominant position, and is unwilling to accept the other party's arguments, however reasonable those arguments may be; or if either party is unwilling to be honest with themselves about their entitlement and their own culpability; or is unwilling to accept a certain amount of compromise; or is insistent on having their "day in court".

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Litigation

If a negotiated settlement is not possible, one way of resolving disputes more formally is to seek a ruling from the courts. This may be the most appropriate method if the parties' places of business are both in the country in which the project is being carried out. Frequently, however, the parties to an international construction project will be businesses from different States, with different legal – Common Law or Civil Code – systems. It is therefore quite common for international construction contracts to specify arbitration as the method for the final resolution of disputes.

Arbitration

Arbitration, whereby a dispute is resolved outside of the courts by a neutral third party, who is respected and accepted by the two protagonists as the person to resolve their dispute, has a long and ancient tradition throughout the world. Modern arbitration is a formal process, regulated by procedural laws and rules designed to ensure that it is conducted in a fair and efficient manner. It allows the parties to choose (at the time of entering the contract) a procedure based on a law that is acceptable to both, with the possibility of specifying a neutral location for the “seat” of the arbitration.

Arbitration has other features, which may make it more attractive than litigation, such as:

- it is private
- less formal than litigation
- more flexible, with the parties generally having more control over the process
- arbitrators can be chosen for their technical qualifications or construction experience
- the arbitral tribunal can (if appropriate) consist of three arbitrators, one chosen by each of the parties and the third by the two party-appointed arbitrators
- it can be cheaper and quicker than litigation through the courts
- an international arbitration award made in a country which is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 [“the New York Convention”] (as Syria is) can be enforced in another signatory country.

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There is a growing recognition in many Middle Eastern countries that an acceptable framework for arbitration by an independent tribunal, with enforceability of Awards, assists inward investment in capital projects. This is particularly true in some of the GCC countries. The UAE signed up to the New York Convention in 2006. At present there is no specific arbitration law in the UAE but there is a draft Federal Arbitration Law, which incorporates the 1985 UNCITRAL Model Law - already adopted as the basis of arbitration law in many other jurisdictions, including Egypt, Jordan and Oman. In Dubai, the Dubai International Arbitration Centre [DIAC] has recently (2007) introduced new rules of Commercial Conciliation and Arbitration.

A further development in Dubai is the setting up of the Dubai International Finance Court [DIFC] which establishes a separate legal system (based on the Common Law) for disputes arising from within the free zone of the DIFC. My understanding is that this will initially have provision for arbitration of disputes arising within its jurisdiction, but the DIFC may ultimately be available as an arbitration centre for the referral of disputes generally.

Methods of Alternative Dispute Resolution [ADR]

Arbitration is a *final* method of resolving a dispute. An arbitration award is generally final and binding on the parties, with limited scope for appeal. There are many other methods of resolving disputes, which are not necessarily binding on the parties but which can lead to a solution which is acceptable to both. Commonly referred to as methods of “alternative dispute resolution” (ADR), they include mediation, conciliation, early neutral evaluation, mini-trials, adjudication and expert determination.

Mediation

In mediation, the parties are assisted by a neutral third party to achieve a negotiated settlement. A particular feature of mediation is that (like Commercial Settlement) it allows the parties to explore non-contractual issues and remedies, and can be beneficial in maintaining continuing relationships.

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Conciliation

Conciliation is very similar to mediation (and the terms are often used interchangeably) but it is generally differentiated by a conciliator being allowed to present his own solution, whereas a mediator is not. In both cases, there is no resolution of the issue unless both parties are in agreement.

Expert Determination

An independent expert is brought in to determine a particular issue on which the parties cannot agree – such as a specific matter of a technical or engineering nature. An Expert Determination is normally binding on the parties.

Adjudication by Dispute Board

An increasingly popular method of resolving disputes on large international projects is to appoint a Dispute Board [DB]. The DB comprises one (or more usually) three members, who are independent and impartial and experienced in the technical area of the project. There are essentially two types: a Dispute Review Board [DRB] whose function is to review disputed matters and make non-binding “recommendations”, which the parties can accept or not; and a Dispute Adjudication Board [DAB], which gives “decisions”. DAB decisions are usually binding on the Parties unless one of them objects within a specified period of time (for example 28 days). The DB can be set up at the outset of the contract, or as an ‘*ad hoc*’ process.

The DAB procedure is now incorporated into the newer (1999) versions of the FIDIC contract, replacing the procedure for an Engineer’s Decision under the earlier (1987) edition of the FIDIC form of contract. Interestingly, Abu Dhabi has recently included the DAB approach as the first level of dispute resolution within the conditions of contracts for government departments.

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Concluding remarks

Some methods of dispute resolution may be more appropriate than others in a given situation. Many people argue for a staged approach – an attempt at commercial settlement, followed by mediation/conciliation, or a form of adjudication (such as a DAB decision) might all be tried before resorting to arbitration or litigation. Where there is a choice, various factors might be taken into account in deciding the approach to be taken, including possible cultural preferences, and the desire to maintain ongoing commercial relationships.