

Arbitration in Construction Contracts (June 2005)

Dubai's property and construction market is booming as world-class projects are being launched by innovative property developers with the help or association of international companies and operators. The number of such construction projects has dramatically increased in the UAE, and Dubai in particular, which has inevitably given rise to significant numbers of claims and disputes, mainly between contractors and employers. Such disputes, arising out of construction contracts predominantly set out in FIDIC or similar forms, are generally settled by way of arbitration held in the English language, with specialist arbitrators appointed due to the technical nature and background of the aspects involved and particulars of the disputes.

Construction disputes are generally complex because of the nature of the construction contract and the parties involved in such disputes tend to engage in extensive legal arguments to overcome technical deficiencies. Shedding the light on the legal framework governing arbitration in the UAE may help us understand some of the legal issues construction disputes referred to arbitration may give rise to.

Under UAE laws in effect, arbitration is governed and regulated by the UAE Civil Procedures Code of 1992. For the interest of clarity, I will attempt to give a brief outline of the relevant provisions of the code in this regard.

The arbitration award must be rendered in the UAE for it to be deemed to be a local award otherwise it will be treated as a foreign award and will be subject to the rules pertaining to the enforcement of foreign arbitral awards. Such rules lay upon the party applying for the enforcement of an arbitral award the duty of proving the existence of an agreement to refer the case to arbitration, that the parties have been properly summoned, that the award is enforceable and that it does not violate the public policy of the UAE. All claims must go through a channel of legalization and be notarised by the UAE Embassy in the country concerned and the Ministry of Foreign Affairs in the UAE.

It is to be noted that the UAE is not yet a party to the New York convention on the Enforcement of Foreign Arbitral Awards. Hence, it is important for a party potentially interested in enforcing an arbitration award against UAE based entity or assets, to avoid agreeing a foreign arbitration clause.

The arbitration clause or agreement should specify the rules under which the arbitration proceedings should be conducted. For a more effective supervision and conduct of arbitration proceedings held in the UAE it is advisable to agree to local rules. This will facilitate the certification of the award by the supervising body and subsequently its authentication through the UAE Courts.

An award rendered by an arbitrator is final and may not be appealed against. However, for the award to be enforceable the award must be ratified by a UAE court which examines only the formalities involved and does not review the merits of the award. The judgment ordering the enforcement of the award may, however, be appealed in the normal course of appealing a judgment unless the parties explicitly agree otherwise.

There is frequently a compelling need to seek interim relief in connection with arbitration. When the arbitral tribunal is fully constituted, most of the arbitration rules and modern arbitration laws empower the arbitrators to grant interim relief such as conservatory or provisional measures. Although the UAE Civil Procedures Code remains silent on this issue, however, in line with Egyptian and Kuwaiti jurisprudence, the Dubai Court of Cassation upheld that in the absence of the parties' mutual understanding in the Arbitration Agreement to empower the arbitrators to issue interim injunctions and orders, such powers shall not be recognized for the arbitrators. Moreover, a case study shows that the Dubai Court of Cassation upheld on various occasions that arbitration is an exceptional way of dispute resolution, restricted to what the parties specifically agreed with regard to the Arbitration terms and conditions.

As for partial awards, in principle, UAE laws do not preclude the recognition and enforcement of a partial award, i.e. an award in which part of the dispute is finally resolved. However, the UAE is a young jurisdiction, and this matter has not been examined by or tested in UAE courts.

In all cases, the issue of the enforceability of a partial award should be dealt with in light of the parties' recorded understanding as to the Arbitration terms and conditions.

In fact, although an award rendered by an arbitrator is final and may not be appealed against, however, for the award to be enforceable the award must be ratified by a UAE court which examines such an award on specific procedural grounds. These are set out in Article 216 of the UAE Civil Procedures Law. Article 216 states *inter alia* that if arbitrators exceed the limits of the powers given to them in the arbitration

clause/agreement, such award will be invalid, at least to the extent that it includes decisions that have been made beyond the powers of the arbitrators.

Ultimately, the award will take the form of a judgment and as such it is imperative to ensure that it is as legally sound as possible, so that its nullification by the UAE Courts is avoided and that throughout the Arbitration procedure attention is focused on the ultimate validity of the arbitration award.

To conclude, we believe that arbitration may be the most adequate dispute resolution mode available on the local market, for disputes related to construction contracts. However, uncertainties or silence under the UAE Civil Procedures Code regarding certain fundamental issues, and procedural complexities lead us to believe that the solution for such dilemmas under the current legal framework, lies in the proper structuring of arbitration clauses and agreements. In fact it is imperative to ensure that an arbitration clause or agreement is comprehensive and that it records the parties' full understanding as to the Arbitration terms and conditions, particularly with regard to the scope of arbitration, rules governing the arbitration proceedings, venue, mechanism for the appointment of arbitrators and powers given to them.

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