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DISPUTES IN THE MIDDLE EAST – HOW BEST TO GET A HAPPY ENDING

By Raid Abu-Manneh

There's usually more than one way to resolve a dispute, but, in the Middle East, what's the best way? Arbitration is key to enforcing entitlements but good old-fashioned amicable resolution is also important and should be explored. Experience shows, however, that successfully resolving a dispute requires an understanding not only of the local law but also of the local culture and custom..

Amicable resolution - culturally preferred

Contractors frustrated by waiting for months for payment may feel compelled to issue proceedings but culturally this may not be necessary, as there is a clear preference in the Middle East for resolving disputes by amicable means or "Sulh".

Traditionally, if negotiations fail, settlement is often achieved by both parties referring their dispute to mediation by a third party they both know and respect. This process is often informal and followed without submitting any documents to the mediator. Contractors should therefore consider "Sulh" as a means to resolve a dispute. Alternatively, they might consider a western-style mediation, which are becoming increasingly popular and recognised in contracts.

Arbitration - increasingly accepted

Where possible, contractors should include arbitration clauses in their contracts because, on the whole, the region's courts tend to be slow and, in most instances, lack the relevant expertise to deal with a large infrastructure dispute such as might arise on one of the many substantial projects in the region.

It is often suggested that Arabs do not favour arbitration. This is incorrect. Arbitration or Tahkim (in Arabic) is reported to have been used by the Arabs as early as the 7th century. In many countries it is therefore part of local custom but, historically, there was a difficulty with international arbitration as a result of several arbitration awards in the 1950s and early 1960s which were unfavourable to state governments.

In one such arbitration between *Sheikh of Abu Dhabi and the Petroleum Development Co.* [1957], Lord Asquith stated: "If there exists a national law to be applied, it is that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran, and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."



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Unsurprisingly, Arab countries became suspicious that international arbitration would not provide them with a fair means of resolving their dispute but the global trend towards international arbitration and various conventions in favour of international arbitration have substantially eroded hostility and increased the acceptance of international arbitration.

Evidence of increasing acceptance of international arbitration may perhaps best be seen in the latest figures from the Dubai International Arbitration Centre. So far this year, there have been 65 new arbitrations, in comparison with 100 arbitrations for the whole of 2008, principally as a result of the credit crunch.

Despite the undoubted progress made in developing arbitration across the Middle East, however, difficulties remain in the enforcement of arbitral awards, particularly in Saudi Arabia. Even in Dubai, and despite the accession of the UAE to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the door is presently left wide open to the respondent in an arbitration to challenge enforcement. It is for this reason that a new federal arbitration law is awaited to replace the UAE Civil Procedure Law No.11 of 1992. In the meantime, if a respondent in a Dubai arbitration fails to pay the award and has assets in Europe or the US, it is preferable for enforcement to be attempted there instead of in the Dubai courts.

Early preparation essential

The process of enforcing entitlements should not start with the commencement of proceedings but considerably earlier, when issues arise during the course of the project. If a dispute does become unavoidable, then the contractor will be best placed to pursue its entitlements.

Assess local law

Contractors should not assume that local law in the Middle East will be the same as English law. The key to resolving disputes is to understand the distinguishing features of local laws and assess their impact on the dispute at an early stage. This enables contractors to set the correct course in correspondence and claims.

The good news for contractors is that there are substantial similarities between the laws of the various Middle Eastern countries, because the Egyptian Civil Code is the source of the vast majority of laws in the region. Although parts of the Code are similar to the French and German Civil Codes, the Egyptian Civil Code expressly recognises Shari'a as a source of law, a feature that distinguishes the Arab Civil Codes from other civil codes in the West. The Egyptian Civil Code has not, however, been applied in Saudi Arabia and Yemen where, in essence, Shari'a prevails.

Because of the influence of Shari'a, an aggrieved contractor may find (in addition to any rights under the contract) useful arguments to pursue its entitlement under local law.