

Arbitration – Enforcement and Payment in the UAE

On problem projects in Dubai most contractors find themselves in limbo with large sums of money outstanding, little prospect of getting paid anytime soon and wondering what to do. They may be encouraged by ongoing negotiations with their clients and media reports of large sums of money being given to client organisations. But they are no doubt asking themselves are the current negotiations merely delaying tactics and/or when will the government goose be laying its golden egg on my client?

Most contracts will be based on the FIDIC form and therefore contractors faced with these dilemmas will start turning to the page entitled “Arbitration”. However before they get too excited by thoughts of vindication and early payment, reality will rapidly encroach on their daydreams when people start talking about long drawn out tribunals and huge costs. Also, even if they are successful after such a marathon, how can they enforce an award?

In the UAE an arbitral award can be enforced against the assets of the paying party and credits with third parties, however the award first needs to be ratified by the UAE courts and that’s where the main problems lie. Respondents can attempt to delay payment and invalidate an award by dragging it through the three tier UAE judicial system and it is this process that is the main cause of delay and increased cost. However it is important to remember that the court can only refuse to enforce an award based on procedural matters and breaches of the local legal provisions, and therefore there are several things a claimant can do to reduce delay and control cost.

- Ensure that the arbitration complies with the compulsory Arbitration laws in the UAE. Of particular importance are Articles 203-218 of the UAE Civil Procedure Code and although most of the common rules (e.g. DCCI, DIAC and DIFC) should comply, particular focus should be on non-standard and bespoke rules.
- Check that the arbitration agreement is valid and binding. Under Article 216(1)(a) of the UAE Civil Procedure a court can nullify an award if it is based on invalid terms.
- Ensure that the tribunal was correctly appointed, does not exceed its powers and complies with the agreed Rules. Reference Articles 216(1)(b) & (c) of the UAE Civil Procedure Code.
- Ensure that all representatives are duly authorised preferably by Power of Attorney, and that such authority can be presented at any time (NB. POA must be granted by the director named on the trading licence).

The danger is that the Court approval process can become a lengthy legal action in itself. Under Article 210(1) of the UAE Civil Procedure if there is no time specified in the arbitration agreement, the arbitrator shall render his award within six (6) months of the first arbitration hearing however this can be extended by agreement between the parties or by order of the court (Article 210(2)). Furthermore Court approval could delay the overall process by another

year (NB. Translations of the Code can vary significantly therefore it is essential that one seeks local legal advice).

Finally with respect to enforcement there are two further general points to consider;

- The UAE is a member of the UN's New York Convention of 1958 that promotes the enforcement of foreign arbitral awards in member states. Subject to certain conventions, US courts for example will generally enforce awards involving foreign parties or a mix of foreign and US parties. Also under Section 101(2) of the Arbitration Act 1996 a foreign award can be enforced in England and Wales. This may be an option if the other party has assets in the enforcing member state by virtue for example of a JV relationship.
- On the 1st May 2009 the Dubai International Financial Centre (DIFC) and the Dubai Courts signed a protocol of enforcement enabling the Execution Judge at Dubai Courts to enforce DIFC Arbitral Awards ratified by the DIFC Courts and vice versa. However there are issues regarding the possible limited jurisdiction of the DIFC.

Author:

Phil Adams
Systech Group
padams@systechgroup.net

