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Dispute Resolution in Abu Dhabi (Part 2) – Do We Have The Time, Or Luxury, To Rely Only On Arbitration As The Only "Alternative" in ADR?

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Constructively, commercial arbitration is a judicially recognized and an enforced method of dispute resolution in the UAE.

Via Article 203 (5) of the Civil Procedure Law (1992), if the parties have agreed to refer a dispute to arbitration, an action on that dispute cannot be brought before the courts.

So let us assume for present purposes that the project in question, or the relevant commercial transaction, does have an arbitration agreement in it, which is recognized by the courts and enforced.

In many ways arbitrating major disputes in the UAE can be a far more complex process than in, say, the USA or UK or Europe.

First, what needs to be understood is that the list of criticism and "adverse" features in modern comercial arbitration, enumerated by Thomas Stipanowich recently in his paper "Arbitration: The New Litigation" (Univ. Illinois Law Review 2010) are all present and accounted for in the UAE. But in the UAE their mix and relative weightings differ.

300 plus years of common law litigation process in both the USA and UK has produced such a detailed set of procedures for litigation, that their almost complete adoption into many major arbitrations, has done arbitration a great dis-service.

In these Western countries, the Medieval processing of the merchants (the "sniff & smell" arbitrations) have now been replaced by processes quoted by Thomas as being similar to civil litigation – judicialized; formal; costly and time consuming.

We all know what the elements are, in the arbitration process, that lend themselves to this criticism. They include discovery (especially nowadays "e" discovery); accessing 3rd party documents; prehearing procedures; factual and expert reports (for both claimant and respondent); a "hearing" process of some form, including possibly oral testimony and cross- examination.

Next, and quite critically, once an award is delivered while there needs to be a clear pathway to enforcement, in some jurisdictions the relevant arbitation law will permit appeals – allowing time

to run on and further costs to be incurred. It is unfair to generalise too much as there are, of course, many examples of successful arbitations. But let us accept for present purposes that in the Gulf most arbitrations over significant sums of money or complex technical issues do involve these traditionally “litigious” style of steps and processes.

Now consider a scenario under which the concept of “judicialized” did not, in effect, exist.

“Judicialized” can of course mean many things, but to western lawyers it is, perhaps, the briefest way of starting with “due process” ; moving though “natural justice and fairness” ; touching upon the independence of experts and the arbitrator(s); having the abitlity to verify facts, and ending with a comprehensive, detailed, judgment, with reasons.

Accordingly, a fair deal of the debate on arbitration reform, especially in the USA and UK has been framed on the baisis of a comparative analysis with the processes in the respective court systems. But what if, in the country of your arbitration, there were not so similar court processes? What would then be the “meates and bounds” of the arbitration debate? I would suggest far less clear and far more open to argument on the fundamentals.

The UAE is a civil law system, but one that has developed in very recent years, comparatively to the USA; UK and Europe. The Federation was only formed in 1972 and the UAE Civil Code first promulgated in 1985. A Commercial Code followed in 1993, a year after the Civil Procedures law.

The court system in the UAE copes with technical or complex construction matters by essentially referring the issues out to court appointed “experts” . In construction matters, those experts are generally engineers fluent in Arabic. The expert will submit his report to the court and the court will decide whether to adopt it or, if the findings are contested, then the court might be persuaded to refer the matter to another expert. This whole process can take 30-60 days and be entirely based on the materials submitted by both parties. Rarely, if at all, is there a hearing with oral testimony in civil cases. Accordingly, there has not been and indeed there cannot really ever be a “judicialisation” of arbitration in the UAE – if by that term we mean the processes of civil litigation in western common law and civil law systems. Accordinly, in the UAE, the responsibilities that then devolve to the relevant arbitration body and arbitrator(s) are, in my view, far more significant than in Western countries.

Put another way, for disputes arising from major projects , or complex commercial transactions , the pressure on the arbitration process to get it right and to deliver an outcome that is just, fair and within an acceptable time frame, is probably no greater anywhere than in the UAE at present – given the sheer size of the UAE’s build and investment programme.

And that is not at all to say that the arbitration institutions in the region have not risen to the challenge. They have, and continue to do so. But the sheer size and volume (and complexity) of many of the disputes in the region have never really had to be addressed by such a small artibration community.

Finally , what the GFC has thrown up in the Gulf, in the context of dispute resolution, is the role and legitimate interests of the finance/banking sector and investors. Unfortunately, the “system” in the UAE has had difficulty coping with the combination of insolvent developers; defaulting purchasers and defacto “mortgagees in possession”.

Add to that the fact that most of the building contracts and real estate sale and purchase agreements

included arbitration clauses, and for some developmetns there are literally 100s of disgruntled purchasers who have to initiate individual arbitrations to try to either get their deposits and partial payments back, or to seek some form of remedy.

The challenge therefore, particulary in Abu Dhabi, for the legal profession and for the government seeking to secqure international investment, is to design and implement dispute resolution processes that recognize the relaties and limitations of the underlying court system(s) and respond to the demands for investor certainty and enforceable outcomes.

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