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Dispute Resolution in Abu Dhabi (Part 3) – A Lot Now Rides on Success of the DAB System

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The most commonly used form of construction contract in the Gulf is the FIDIC form. Although the FIDIC forms, for project procurement and consultantcy services, progressed slowly over the years, culminating in the burst of colours in the suite of contracts issued in 1999, some parts of the Middle East still use the 1987 (Red Book) version. Indeed, most government contracts in Oman are based on the 1981 version of the Red Book, updated marginally in clause 67.

In Abu Dhabi, some years ago, a decision was made by the government here to prepare, under license from FIDIC, two bespoked forms of the contract – build only, and design and build. Those forms were issued in 2007 accompanied by the requirement that they be used as the form of contract by all government departments in the Emirate of Abu Dhabi.

The centrepiece of the ADR process in that new form of contract is the use of a Dispute Adjudication Board (DAB).

It is not the purpose of this note to review the quite lengthy and detailed DAB and related dispute resolution procedures set out in the contract.

What is perhaps more relevant for the theme of this 4-part commentary, focusing on ADR in the Abu Dhabi major projects market, is the fact that, via this mandated form of FIDIC, the dispute resolution process proceeds first to the DAB(cl20.4) ie the use of a DAB is now the default rather than, in earlier versions, an option.

The Abu Dhabi government's version of the FIDIC contract does maintain cl20.5 which expressly encourages amicable settlement at any time.

Finally, if those two processes do not resolve the matter, the dispute is referred to "final and binding" arbitration. The default body and rules are those of the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC).

In theory, of course, it is possible for some of these provisions to be amended by a government authority for a specific project. But what is more relevant for this note, is that after a detailed review and consultation process, the decision was made to mandate a DAB.

I see the introduction of a DAB as a very valuable and important step to facilitate major project disputes in Abu Dhabi.

In theory, a project-specific DAB, properly appointed and constantly in touch with a project's progress and the development of a dispute, seems like not just a good solution, but an almost " must have" for the demands created by projects in Abu Dhabi in 2010 and onwards.

But as good as they appear to be in theory, DABs seem to have a chequered history and more of a "B" rating, than an A+ in construction disputes.

Perhaps their fate is not helped by the entry alongside "dispute board" in Wikipedia which says "This article is an orphan, as few or no other articles link to it".

But that is being a little unfair. In many jurisdictions DABs compete with an array of offerrings from commercial ADR institutions, advancing soltionsthat are quite varied and not limited to just arbitration (see for example AAA's and the ICC's extensive menus of ADR solutions).

So what are, or should be, the drivers in the Abu Dhabi market for making this DAB process work?

First, speed to an initial decision. Around the world, and particularly with in-house counsel, the constant and resounding criticism of arbitration is that it takes too long, and is too appealable (ie even longer). In almost all surveys of arbitration users, time and delay ranks far more significantly than cost. The case for arbitration, for major project and construction disputes, is not helped these days as being almost always a very expensive process. But speed of decision consitently comes first in surveys of in-house counsel and the users of the ADR systems, as the key factor in choosing an ADR solution or in measuring its success or valueto them.

Consistently with the views of Tom Stipanowich (Arbitration: the New Litigation(Univ. Illinois Law Review 2010) a speedy process must, by its very nature, require the setting of tight boundaries on evidence and submissions and expert reports. And the surveys tend to indicate that a controlled, and ostensibly fair but speedy system, is what most large orgainaistions are looking for thesedays.

Witness the outstanding success of the adjudication system in England. In England, and in Australia where it has been almost uniformly adopted in all states, it has had the effect of greatly reducing the number of disputes that go to arbitration. Adjudication has, however, had some adverse side effets. It has produced a large number of court cases at the stage the court is asked to adopt the adjudicator's report. In the first 4 years of its introduction in Australia, there were over 150 cases ranging from issues of statutory interpreation through to whether the adjudicator had exceeded his jusrisdiction. The outcome being that a relatively short statute needs to be read an interperted in the light of quite a number of important judicial pronouncements. Another side-effect is that lawyers running these matters regularly have to prepare in 14 or 28 days claims and evidence that otherwise would take many months in an arbtiration or even in court.

So will the use of a DAB in Abu Dhabi produce a better result than say arbitration? Or is there a better alternative in this region and at this time in the cycle of major projects?

On any view the introduction of a mandated DAB is a very good first step. The essence of an effective DAB is a decision making process, in real time, by people who can see and view the project and fully understand the issues.

It is the complete converse of a project-specific DAB, that years after construction is completed 3 learned arbitrators have a sitting lasting mouths, to hear and consider expert debate on what did happen and more theoretically, what should have happened or been done, as they look at "as-built"

programmes and the true audited accounts of the builder (did he really suffer a loss?).

If you therefore set the sceneas being Abu Dhabi in 2010 and onwards, looking to attract and secure investment; seeking to give transparency to the dispute resolution process and both physically and commercially just purely manage the massive volume of work (and hence disputes) there can be no argument against doing everything that is sensibly possible to make the DAB system work.

One real concern I have is that this initiative is not backed by my professional collegues, or their clients, in Abu Dhabi. If that were to happen, I do not believe that the “system” absent a DAB process, will cope at all.

Finally, let us not forget mediation. In the final part of this series I would like to advance the case for both ad-hoc and institutional mediation to be used as a first choice even before DAB’s in the major project market in Abu Dhabi.

It is not by chance that ADCCAC’s title includes the term “ concilitation” and that the centre promotes a disputes clause that requires the parties first to attempt concilitation, before embarking on an arbitration. In the next part I will review in some detail ADCCAC’s approach to conciliation and how it might be a valuable process for this market, at this time.

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