

# Arbitration and its Development in the UAE Construction Industry - an Overview



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“The arbitration in the United Arab Emirates is still young compared to most European countries. Still there is no arbitration law implemented in the country. Most of the international investors are still reluctant to enter into the country to invest due to the uncertainties existing in the law and, specially, the lack of international standards in dispute resolution methods...”

## Abstract

United Arab Emirates is one of the emerging countries in the region heading towards development. Currently there are massive construction projects being carried out including the world's tallest tower, green cities, man-made islands and many experimental constructions. This has attracted different investing parties entering into the country including companies from domestic and international property developers, consultants and contractors. Many of the projects are based on 'fast-track' construction methods; therefore the construction activities have become critical when delivering a good quality product on time to the clients. Eventually, this has created many disputes among the parties involved in the industry.

Arbitration is the most preferred course of action to resolve the disputes in the industry. Almost every contract includes an arbitration clause enabling the parties to refer their disputes to the arbitration since arbitration has its inherent advantages over litigation and other dispute resolution techniques.

The purpose of this article is to investigate the development of the arbitration procedure in the United Arab Emirates and to observe its role in the challenging economic boom existing in the construction industry.

The introduction deals with defining the arbitration, the requirement to arbitrate and certain important aspects in the arbitration mechanism. The article focuses on the evolution of the arbitration in the United Arab Emirates from its conception. It also focuses on certain interesting features in arbitration in the country. Then it discusses various institutional laws existing in the country including a brief role in respect to the construction. It also discusses key conventions/treaties ratified in relation to the arbitration in the country. Finally it concentrates on the future of the arbitration in the country.

## Introduction

The arbitration in the United Arab Emirates is still young compared to most of the European countries. Most of the international investors are still reluctant to enter into the country for the investments due to the uncertainties existing in the law and, specially, the lack of international standards in dispute resolution methods. This promoted me to write this article so as to find out the evolution of arbitration in the United Arab Emirates and its role in construction industry in particular.

There are attempts that have been taken by professionals and experts in the field to investigate on the subject. This includes texts, seminars, discussion forums and conferences. However, more analytical and detailed investigations are required to the subject to understand the demands from the various parties in the industry so that the arbitral awards can be recognized and enforced fairly simply and quickly.

## 1.1 The Arbitration

### 1.1.1 The Definition

Arbitration can be described as resolving of disputes arisen between the contractual parties. As the

procedure may vary from case to case, jurisdiction to jurisdiction and region to region, there is no common definition that can be given. This has been pointed out by the authors of the book “Arbitration of Commercial Disputes” as:

“There is no universal definition of Arbitration...each jurisdiction may apply its own ‘spin’ in deciding what may and what may not be arbitrated, who may arbitrate, and how the arbitral process be conducted<sup>1</sup>...”

Another attempt to define the arbitration has been made by a Scottish Author, Professor DM Walker:

“The adjudication of a dispute or controversy on fact or law or both outside the ordinary civil courts, by one or more parties to whom the parties who are at issue refer the matter for a decision<sup>2</sup>”

The main principle in arbitration is the “agreement” to arbitrate, a dispute, a third party reference (an arbitrator) and finding a resolution to the dispute by that third party. It is important to mention that arbitration does not itself directly provide the solution to the dispute; they set out the procedure to be followed in resolving it.

### 1.1.2 Reasons to Arbitrate

There are many advantages in arbitration. The key benefits are discussed below.

- The court procedure takes its established time framework. This cannot be changed by the parties. Also the fees for the lawyers/solicitors are very high and may have to be paid for several times. Therefore, the arbitration is considered cheaper and quicker than lengthy litigation procedure.
- Arbitration is more flexible than litigation since the parties can decide where arbitration is held and who their arbitrators are. Also the parties may agree upon time limits so that it can be completed fairly quickly.
- Arbitration can be conducted in private premises. Therefore, the parties can keep their privacy. In most occasions, litigation is open to the public attendance thus no privacy is reserved in litigation.
- The skilled and knowledgeable input can be obtained to resolve the disputes. The reason is that the court judges are not often the experts in the subject matters.

This leads to the satisfaction of each parties and a fair decision could be received.

- Arbitration is preferred by many parties especially in complex international commercial disputes. The reason is that the parties outside the place of arbitration are unfamiliar with jurisdiction and languages. There is a tendency towards being bias and unfair in certain countries. Even the arbitration can be held outside the region where the dispute has taken place.
- Finally, the decision of the arbitrator is final and binding and is enforceable in law similar to a decision of the court.

### 1.1.3 The Arbitration Award

The arbitration award is a decision of the arbitrator given for that dispute after the proper submission by the parties. Also the award can be an oral one or a written one; however, oral awards are rare. On the other hand, mostly the parties prefer to have their awards in writing in case it is so required by certain legislations in the country. Also the party may have to present it to the courts if there is a failure from the other party to comply with the arbitral award.

Another purpose of an award is to record the arbitrator’s decision, which is final and binding, so that the parties are informed about the decision. An award may be a payment of money, order a rectification, order to do or refrain from doing something or a specific performance.

### 1.1.4 Characteristics of Arbitration

#### 1.1.4.1 Agreement to arbitrate

There should be a valid agreement to arbitrate in order to have a valid Arbitration between the parties. The absence of this causes the arbitration to fail. This is a fundamental requirement in arbitration. The reason is that the arbitration agreement is considered as another agreement. Similarly, the recognition and enforcement of an arbitration award should be established in the concerned jurisdiction though courts order, if applicable under the conventions<sup>3</sup> (when international parties are involved) where the arbitration takes place. Also an arbitration agreement can form a part of a main contract or a separate agreement. When it takes a role of a separate agreement, it is considered as an ‘ad-hoc’ agreement.

### 1.1.4.2 The judicial nature of Arbitration

An arbitrator has more freedom than a court judge due to the flexibility in the arbitration procedure as discussed earlier. However, they (arbitrators) cannot discard the basic principles of justice. A party can, however, challenge a decision given by an arbitrator in the court in very limited provisions such as a bias or incompetent act to resolve the matter. It is worth mentioning that, challenging (appealing) an arbitral decision could be more difficult than appealing against a court decision. Therefore, arbitration award has more power in enforcement than most of other alternate dispute resolution methods.

Unless the parties have agreed, there are no fixed rules in the arbitration process. Arbitrators may implement case base approach to arrive at a resolution based on the submissions of the parties. The submissions are not usually disclosed unless otherwise required to do so.

### 1.1.4.3 The Award is final and binding

As mentioned in chapter 1.1.4.2, an Arbitral Award is usually final and binding. However, in some countries, it is questionable whether an Award is final and binding. For example, in United States, the use of non-binding arbitration by the courts in domestic disputes is not uncommon<sup>4</sup>. However, this feature attracts many parties to choose arbitration. Also, it is important to note that, once the arbitration is commenced, parties cannot quit from the proceedings.

## 2.1 The Development of Arbitration in the UAE Construction Industry

### 2.1.1 Introduction

The Emirates, specially Dubai and Abu Dhabi, have become the world's leaders in construction related projects over the past 10 years. Most of the projects are 'fast track', and the projects need to be completed within a very short period of time without compromising quality and cost. However, this goal has been challenged due to the complexity of commercial transactions made between international companies and local enterprises and it creates more disputes among the parties. Main reasons for such disputes are; the sudden inflation in the region due to the high demand for the supplies, major changes to the designs, delay in carrying out the projects and increase of labor wages in line with the current global economic recession.

In the recent past, foreign companies were reluctant to invest in this challenging industry as they are unfamiliar with the law and jurisdiction, specially the accessibility and fairness of the UAE courts and, in particular, the arbitration process. Currently there is no formal legislation in the Emirates exclusively for the use of arbitration which is similar one to England and Wales<sup>5</sup>, thus it is at present governed by the UAE Civil Procedure Code.

### 2.1.2 Arbitration and the UAE Courts – some key features

#### 2.1.2.1 Arbitration Agreement

The courts in United Arab Emirates recognize a decision made by both the parties to refer their differences (disputes) to the arbitration under the Federal Law No. (11) of 1992<sup>6</sup>. No parties can request a court decision before the arbitration in the event of a dispute if there is an agreement to refer to arbitration. Also the parties can refer their matters to the arbitration any time during the litigation.

The courts must certify all arbitration decisions in the emirate. Also the courts can invalidate any arbitral decision based on the procedural considerations which will be discussed in detail later in the article. This provision allows the parties to appeal for the certification which may prolong the award indefinitely. This is a disadvantage in the system and vitiates the purpose of setting a limit for an arbitrator for his/her award.

#### 2.1.2.2 The Arbitral Tribunal

In the Emirates, the appointment of the arbitrators is not generally restricted to the nationality, gender or religion. This is the case in most Arab countries in the region as well as in other countries in the world. The only restriction in this regards is found in the Article 206 of the Civil Procedure Law, which is; an arbitrator must not be a minor, under guardianship or deprived of his civil rights<sup>7</sup>.

The arbitral tribunal may be appointed by the parties in the following manner. Each party may appoint their arbitrators according to their own will, and then the two arbitrators will jointly appoint the third arbitrator who acts as a panel judge. Otherwise, the arbitrators may be appointed in accordance with the institutional rules provided that the parties have

agreed. There are powers and restrictions granted by the law for the tribunal, which is outside of the scope of this article.

Here, an interesting point is that, the law expressly obliged the tribunal to comply with the arbitration agreement made by the parties. This provision gives the parties to appeal (challenge) against the award/tribunal on the grounds in addition to the other provisions such as the tribunal is being bias. Another point in the Emirates law regarding the arbitration is that, any arbit

6 months from the date of the first arbitration session subject to the extension can be granted to this by an agreement by the parties or by a court order. If an arbitral award is not granted within the stipulated time, either party can refer to the dispute to the court.

It is also important to 'formally establish' the extension to the time limit. In one of the cases held in Abu Dhabi Supreme Court in 2002, the main consideration of the courts was to find out whether or not there was a valid agreement to extend the time limit between the parties. It could have been more advantageous if the parties had formalized their agreement to extend the time bar. Since there was no valid agreement, it was held that the award was invalid. However, as previously noted, the main purpose of such a dead line is to push the parties to the arbitration. Otherwise there is a danger of parties delaying the proceedings and finally appealing to invalidate the award based on the time bar. Also there are some critics about the time limit as to its sufficiency since more complex commercial disputes need more time to arrive at a resolution.

### 2.1.2.3 Enforcement of an Arbitral Award

Prior to the New York Convention, the enforcement of foreign arbitral awards was not certified automatically in the country. The parties, especially internationally, had many difficulties in relation to their desires to enter into the country. Until the New York Convention (refer chapter 2.1.4.1), the enforcement of foreign arbitral awards were enforced by the provisions of the Civil Procedure Law as discussed earlier.

Article 235 of the Civil Procedure Law sets out, in order to enforce a foreign award, the Courts must

ratify the awards. Once an award is made, the parties need to request from the Courts to ratify it. The Courts will ratify it only where the followings are satisfied:

1. That the State courts do not have jurisdiction in the dispute which the judgment/award has been given or the order made, and that the foreign courts which issued it have jurisdiction therein under the international rules for legal jurisdiction prescribed in their law;
2. That the judgment or order has been issued by a court having jurisdiction under the law of the country in which it was issued;
3. That the opposing parties in the case in which the foreign judgment has been given have been summoned to appear and have duly been approved;
4. That the judgment or order has acquired the force of a *fait accompli* under the law of the court which issued it;
5. That it does not conflict with a judgment or order previously issued by a court in the state and contains nothing in breach of public morals or order of the state.

### 2.1.3 Key Arbitration Institutes in the United Arab Emirates

There are several institutes existing in the Emirates which provide sets of procedural arbitration rules. Most of these rules are based on the United Nations Commission on International Trade Laws (UNCITRAL) or Civil Procedure Law of the country.

The advantage of having arbitral institutes is that the parties can agree to refer by reference to these rules so that there will be a body which exercises an administrative and supervisory functions more efficiently. However, as there is no proper arbitration law yet been developed and implemented, arbitration procedure exhibits somewhat complicated as pointed out earlier in chapter 2.1.2

#### 2.1.3.1 Dubai International Arbitration Centre (DIAC)

In 1993, the Abu Dhabi Chamber of Commerce Industry established the Abu Dhabi Commercial Conciliation and Arbitration Centre to settle commercial disputes through conciliation or

arbitration. However, the most popular establishment is the Dubai Chamber of Commerce and Industry Conciliation and Arbitration Centre (known as Dubai International Arbitration Centre or DIAC) established in 1994<sup>8</sup>.

DIAC was first established 1994 as a Centre for Commercial Conciliation and Arbitration. The primary objectives were to provide extensive facilities to conduct commercial arbitrations, promoting parties to settle their disputes in arbitration and practicing arbitrators for international arbitration. In addition to the local experts and qualified lawyers, DIAC has a connection with the network of international law firms in various countries so that they provide their services to the international parties.

The Rules of Commercial Conciliation and Arbitration of 1994<sup>9</sup> has been replaced by DIAC Arbitration Rules 2007 which are to be applied to all disputes referred for arbitration since 1994<sup>10</sup>. These new rules provide comprehensive set of procedures in conducting arbitration such as appointment of the tribunal, place and language of arbitration, defense, hearing, witness statement, and the enforcement of the award.

### **2.1.3.2 Dubai International Financial Centre (DIFC)**

Dubai International Financial Centre (DIFC) and London Court of International Arbitration (LCIA) have jointly established the new DIFC Arbitration rules in September 2008. Although the objective of the establishment of DIFC arbitration law is to conduct dispute resolution in connection with DIFC Authority<sup>11</sup>, the DIFC LCIA Arbitration Centre is open to any parties who have agreed to have their disputes settled with the Centre. This is the second arbitration centre established in Dubai after Dubai International Arbitration Centre.

The new DIFC Arbitration rules are based on the United Nations Commission on International Trade (UNCITRAL) Model Law on International commercial Arbitration. Since the DIFC Court judgments will be enforced through the Dubai Court, it is necessary to obtain DIFC Court judgment for the DIFC Arbitration awards which is then enforced through the Dubai Courts. Then the arbitration award

is enforceable in UAE and in the Gulf Cooperation Council (GCC) under the 1983 Riyadh Convention. Further, DIFC Courts have been established based on Common Law of system which gives more flexibility with comparing to United Arab Emirates' civil jurisdiction.

Compared to Dubai International Arbitration Centre (DIAC) rules which handle primarily construction related disputes, DIFC has an advantage of attracting international commercial arbitrations with one or both the parties being outside the UAE.

The records of Dubai International Arbitration Centre shows that there were 77 new arbitration cases referred to the Centre in 2007 and 80% of them were related to the construction industry. In this year, so far in total 55 cases have been reported<sup>12</sup>.

## **2.1.4 The Conventions/Treaties in the United Arab Emirates**

### **2.1.4.1 The New York Convention**

The UAE has become the 137th member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The New York Convention has been ratified by the UAE Federal Decree no. 43 and the convention entered in to force internationally for the UAE on 19th

November 2006. (Foreign arbitral awards in the UAE have been dealt with in the same manner as foreign judgments under Articles 235 – 246 UAE Federal Law 11 – Civil Procedure Code)

Under this convention, any award made in any state, whether that state is a member of the convention or not, will be recognized and enforced by any other state that was a party, so long as the award satisfied the basic conditions set out in the Convention.

Article 1 of the Convention provides:

“1. This convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where recognition and enforcement are sought.”

Article 2 requires the “Arbitration Agreement in writing.” The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letter or telegrams<sup>13</sup>. Therefore, the need for documentation of terms of contract is an important step in commercial transactions in the region.

Article 3 of the Convention requires each Contracting party to recognize the arbitral award as binding and will be enforced in accordance with the rules of the territory.

Also the Convention provides the provision for the refusal of enforcement under certain limited conditions. The main provisions include; when the arbitration agreement is invalid, when the party was not given proper notice, where the dispute is not the one that an arbitrator was given, the appointment of an arbitrator or arbitration procedure was not in accordance with the agreement, and finally when the enforcement of the award would be contrary to the public policy if the country. It is difficult to refuse an arbitral enforcement condition other than the above.

#### **2.1.4.2 The Riyadh Convention**

On 17th June 1996, the Emirates ratified the Riyadh Convention. As of to date, Gulf countries have ratified the Convention. Article 37 deals with the enforcement of arbitral awards made between the member countries in relation to civil, commercial, administrative and personal status disputes. As in other occasions, the Convention takes precedence over the country’s Civil Procedure Law.

In Addition to the above, the United Arab Emirates have signed up to two bilateral treaties with France and India in relation to the enforcement of foreign judgments and awards.

### **2.2 The Future of Arbitration in United Arab Emirates**

As mentioned earlier, no arbitration law has been enforced in the Emirates. However, the Ministry of Economy and Commerce, in coordination with Ministry of Justice, has recently finalized a draft federal legislation on arbitration<sup>14</sup>.

More care has been taken to suit the law into the existing economic and trade rules while creating provisions for domestic and international arbitration. The new draft law is based on the Model Law of the United Nations Commission on International Trade Laws (UNCITRAL). The new law will enforce the arbitral awards domestically and internationally in consistent with various conventions/treaties including the New York Convention. It is also an objective of the new law to establish an arbitration office to monitor the international developments in arbitration and make recommendations for improving the law further.

### **3 Conclusion**

The Arbitration has its inherent advantages over the other dispute resolution methods. Especially in construction arbitration, due to the complex nature of the disputes, most parties prefer the arbitration as a dispute resolution method. The key advantages of arbitration are; the final and binding nature of arbitral awards, flexibility of the procedure, more input expertise that can be used, and that it is quick and cheaper than litigation.

The Arbitration in the United Arab Emirates is still in the initial stage. The requirement for an arbitration law has been identified by the government. As a result, a draft arbitration law has already been drafted and now opens for the comments by the experts in the field. The arbitration draft law will soon come into force. However, the absence of a proper arbitration law has caused some drawbacks and international parties are reluctant to invest in the country.

There are several institutes operating in the United Arab Emirates to provide procedural arbitration rules for the parties in dispute. The advantage of having arbitral institutes is that the parties can agree to be referred by these rules so that there will be a body which exercises administrative and supervisory functions more efficiently. The Dubai International Arbitration Centre and Dubai International Financial Centre are the primary governmental bodies which provide procedural arbitration rules.

The United Arab Emirates had ratified significant conventions and treaties for recognizing and enforcing arbitration awards made locally and internationally. The New York Convention and the Riyadh Convention are the important conventions ratified by the government.

Certainly, the future of arbitration in the country will be very successful if the draft arbitration law is well established.

## Specific references

- 1 Tweedale A, and Tweedale K, 2007, Arbitration of Commercial Disputes, Oxford, P34.
- 2 Refer fn.1 above.
- 3 A Convention or a treaty is a contract signed between governments e.g. New York Convention-See chapter 2.1.4.1
- 4 A federal court will have no jurisdiction to enforce an arbitration award where the parties have not consented in the agreement to allow the judgment to be entered upon award by the court. See The US Arbitration Act, Chapter 1, s9. This rule applies only to domestic cases.
- 5 The Arbitration Act 1996 (England).
- 6 [www.diac.ae](http://www.diac.ae)
- 7 Refer Article 206, Civil Procedure Law of UAE for more details
- 8 Michelle N, Masons G, Dispute Resolution in the Middle East; Highlights of the Middle East Construction Industry, 2006, SCL.
- 9 These are the rules that the Dubai Chamber of Commerce & Industry has established with the aim of settling commercial disputes through conciliation and arbitration.
- 10 The new rules have been issued by Decree No. (11) 2007 in the Official Gazette, no. 321 - year (41) on May 2007.
- 11 DIFC Authority has been established by the Dubai Law No. 9 of 2004 and DIFC Courts have been established to have exclusive jurisdiction in civil and commercial matters in DIFC.
- 12 ALB legal news;  
<http://www.asia.legalbusinessonline.com>
- 13 Article 2 – Para 1 – New York Convention.
- 14 Refer <http://www.uae.gov.ae/Ministries/moc.htm> and [www.uae.gov.ae/moia](http://www.uae.gov.ae/moia)

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## *Gillies Ramsay Diamond v PJW Enterprises Ltd (2003)*

*A claim for professional negligence against Diamond, who had provided general consultancy services in relation to a building project, was referred to adjudication.*

*It was found that these services included arranging construction operations for others and/or contract administration and therefore the matter could be referred to adjudication, despite the absence of an adjudication clause in the contract.*