

Insights

THE EVOLVING REAL ESTATE AND CONSTRUCTION DISPUTES LANDSCAPE

KEY TAKEAWAYS FROM HORIZONS & CO. & BCLP'S DISCUSSION

Mar 21, 2024

SUMMARY

As part of Riyadh International Disputes Week (RIDW), Horizons & Co. and BCLP hosted a discussion on the evolving real estate and construction dispute resolution landscape in the Kingdom of Saudi Arabia and wider region.

This interactive discussion involved questions from the audience throughout the session and resulted in many meaningful points being raised.

Below is a high-level takeaway of the key issues discussed and points raised.

STRATEGIES FOR RESOLVING DISPUTES AMONG THE DIFFERENT PARTIES TO DEVELOPMENT PROJECTS

1. Parties to development projects want to develop long-term commercial and business relationships. This greatly assists in the successful delivery of live projects but also goes a long way to building lasting relationships based on trust for collaboration on future projects.
2. A key strategy for resolving disputes is to avoid them in the first place. Contracting parties are encouraged to actively participate in contract administration and identify, discuss, and resolve issues contemporaneously rather than let them build up to be resolved once the project is complete. Dealing with issues as and when they arise creates opportunities to mitigate their impact on the project and helps avoid them morphing into formal disputes.
3. An important consideration in building a successful and thriving construction industry is the prompt payment of all parties in the supply chain including subcontractors and suppliers. Too often, subcontractors and suppliers are not paid until disputes are resolved at the main contract level which can lead to disruptions and, in the worst cases, insolvencies in the supply chain. As

such, a holistic approach, with consideration of all parties in the supply chain, to dispute resolution is essential in creating a robust construction industry.

THE ROLE OF MEDIATION AND ADR AS VIABLE MECHANISMS

1. Mediation is an alternative to formal dispute resolution and is gaining traction in the UAE and Saudi Arabia with both countries recently ratifying the Singapore Convention on Mediation which facilitates the enforcement of settlement agreements arising from mediation in other signatory states. The advantage of mediation is that where settlement is reached it is invariably quicker and cheaper than litigation or arbitration and is more likely to preserve business relationships.
2. FIDIC Dispute Avoidance/Adjudication Boards (DAABs) are seen as a real alternative to litigation and arbitration and are particularly well suited to construction and engineering disputes. A perceived disadvantage is that DAAB decisions are difficult to enforce. However, the panel's experience is that where parties properly participate in the process, and where DAABs are made up of experienced professionals, parties generally comply with decisions and thereby avoid having to re-litigate or re-arbitrate their disputes.
3. FIDIC DAABs can also be used to avoid disputes. Under the FIDIC 2017 suite of contracts, DAABs are 'standing' which means they are in place from the beginning until the end of the construction works. Parties, and the DAAB themselves, are encouraged to proactively identify claims and issues when they arise and, with the assistance of the DAAB, seek workable solutions. Where solutions are contemporaneously found and agreed it is very likely that disputes will not follow, saving time and money for all involved.

THE ADVANTAGES AND DISADVANTAGES OF HAVING MULTIPLE FORUMS TO CHOOSE FROM WITHIN A SINGLE JURISDICTION

1. The UAE has three distinct arbitration 'seats': one 'onshore' and two 'offshore' jurisdictions in the Dubai International Finance Centre and Abu Dhabi Global Market financial freezones. Each seat has its own arbitration laws and regulations and its own courts. An advantage of having multiple arbitration seats in one country is that arbitration users can choose the most appropriate seat for their disputes based on factors such as familiarity with laws, ease of enforceability and convenience.
2. Having multiple arbitration seats in one country can lead to complexity and uncertainty. For example, up until the introduction of the UAE 'onshore' Federal Arbitration Law in 2018, which is based on modern arbitration practice and brought the onshore regime in-line with the UAE's offshore jurisdictions', there was a perception that the DIFC regime was more arbitration-friendly than its onshore counterpart. This led to a phenomenon whereby successful parties in an arbitration would use the DIFC as a 'conduit jurisdiction' to recognise and enforce arbitration awards, notwithstanding that there was no commercial or legal nexus to the DIFC. Conflicts between the different jurisdictions arose resulting in the creation of a special Joint Judicial

Tribunal to decide which jurisdiction should properly be used: this ultimately led to additional time and costs for parties seeking to enforce arbitration awards.

3. Another layer of complexity in the UAE arises from the recent abolition of well-established arbitration intuitions. In 2021, Dubai abolished the DIFC-LCIA arbitration centre and consolidated it, along with other abolished centres, into the Dubai International Arbitration Centre. According to Dubai law, arbitration agreements which provide for DIFC-LCIA arbitration are still effective and are to be read as providing for DIAC arbitration. However, to this day, uncertainty remains as to whether such clauses are enforceable underlined by a recent US court decision refusing to enforce an arbitration agreement which provided for DIFC-LCIA arbitration.

THE INFLUENCE OF CULTURE AND SHARIAH LAW ON DISPUTE RESOLUTION IN THE GCC

1. In many GCC countries access to the courts is regarded as an inalienable right. The upshot is that courts interpret arbitration agreements narrowly and have historically mandated that signatories to such agreements must have special and specific authority to bind entities to arbitration. Care must therefore be taken in drafting arbitration agreements and to ensure that the individuals agreeing to arbitration are properly authorised.
2. International contractors, subcontractors and suppliers operating in the GCC will need to be aware of the nuances between the substantive laws of each jurisdiction. Many GCC countries are ostensibly civil law countries with their main laws derived from a civil code. In response to Saudi Arabia's enactment of its Civil Transactions Code in 2023, some commentators mistakenly characterised Saudi Arabia as a civil law country. Saudi Arabia derives its laws from the Sharia and the effect of the Civil Transactions Law is to codify aspects of Sharia principles but it does not supplant them. Saudi Arabia remains a country whose laws are primarily derived from the Sharia.
3. In Saudi Arabia, arbitration awards which contravene the Sharia may be unenforceable. For example, it is common in construction disputes for a party to claim interest on late payments. Generally, the award of interest (or Riba) is prohibited under Sharia law. There is therefore a risk that the award of interest in an arbitration award will not be enforced in the Saudi courts. Parties seeking to enforce arbitration awards in Saudi Arabia must therefore be mindful of what is and is not permissible under Saudi law.

COMPARISONS BETWEEN CURRENT PRACTICES IN THE KSA AND UAE AND WHAT WE COULD EXPECT IN THE FUTURE

1. As things stand, there is clarity in the arbitration regime in Saudi Arabia. There is one jurisdiction, governed by the 2012 Arbitration Law which is based on the UNCITRAL Model Law and which reflects modern practice. There is also one main arbitration centre in the Saudi Centre for Commercial Arbitration. This leaves arbitrating parties with a simple choice and avoids the

complexities of having to navigate parallel arbitration seats and to choose from multiple different arbitration centres.

2. With Saudi Arabia's rapid and continued modernisation we can expect to see the introduction of new substantive laws including, for example, a new commercial law to regulate legal relationships between commercial entities. It is also likely that Saudi Arabia will create freezones within the country, complete with their own arbitration laws and regulations which will create distinct arbitration 'seats' within Saudi Arabia.
3. The UAE and Saudi Arabia continue to lead the world in ambition and scale with their mega-construction projects. There is a real opportunity for contracting parties to break from the mistakes of the past and work together to resolve claims and issues when they arise and, through the adoption of ADR, avoid costly and lengthy litigation and arbitration.

OUR EXPERT PANEL

- Ali Al Zarooni, Founder and Managing Partner, Horizons & Co. - [email](#)
- Richard Dupay, Partner, BCLP - [email](#)
- Othman Alshmry, KSAUSALEGAL - [email](#)
- James Weier, Architect, Attorney, Mediator, C-Suite Executive

Moderated by:

- Richard Davies, UAE Managing Partner and Head of Construction Disputes, BCLP - [email](#)

We would like to thank all attendees and speakers for contributing to this and RIDW and the Kingdom of Saudi Arabia for enabling and promoting such a sharing of knowledge and confluence of the global legal community.

Please do reach out to the speakers listed should you have any questions.

RELATED CAPABILITIES

- Real Estate Disputes
- International Arbitration
- Construction Disputes

MEET THE TEAM



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