

Insights

IS THE TIDE TURNING FOR CONTRACTORS AND SUPPLIERS IN THE UAE? RECENT CHANGES TO LAW AND POLICY IN THE UAE ADDRESSING CASH FLOW

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SUMMARY

It is said that cash flow is the lifeblood of business and this could not be more true for contractors and suppliers in the construction industry. The UAE's new Arbitration Law and recent guidance on payment terms look set to improve crucial cash flow for contractors and suppliers.

The struggle of contractors and suppliers being paid late or being caught up in lengthy and costly arbitration or litigation to enforce their entitlements to payment is a similar tale around the world. The 1994 UK Latham Report considered this very issue and recommended the introduction of adjudication to "*ensure cash does flow speedily.*" Statutory adjudication, which broadly provides that disputes are determined within 28 days of being referred to an adjudicator, has made a real difference to the cash flow for contractors and suppliers in the UK. Similar schemes have been adopted in Australia, New Zealand and Singapore.

The UAE has also recently taken steps to address the need to keep cash flowing among all levels of the construction industry. This blog looks at two such measures which have the potential to make a positive difference to the solvency of contractors and suppliers.

Abu Dhabi Circular No.1 of 2019

On 26 March 2019, the Abu Dhabi government issued Circular No.1 of 2019 providing that all governmental bodies and companies are to update their existing and future contracts with contractors and suppliers such that payment is made within 30 days of receipt of a "*relevant invoice*". We take this to mean the invoice, as opposed to an application for payment.

The Circular also requires contractors and suppliers to pass down similar provisions to their subcontractors and sub-suppliers such that payment is made to them within 30 days of receipt from the Employer.

Whilst the Circular is not legislation, it is strong guidance, and a clear indication that the UAE is taking encouraging steps to redress cash flow issues in the construction industry.

One area not yet addressed, however, is that pay-when-paid clauses, which entitle a main contractor to wait until it is paid by the Employer before it pays its subcontractors and suppliers, continue to be permissible in the UAE. Such clauses can, and often do, choke the supply of cash to subcontractors and suppliers which can, at times, be fatal to the commercial viability of those organisations.

UAE Federal Arbitration Law and DABs

The new Federal Arbitration Law (Federal Law No.6 of 2018), enacted in the summer of 2018, has been largely welcomed by the arbitration community in the UAE and much has been written about the changes made. One Article which is sometimes overlooked is Article 39 of the Arbitration Law which provides that partial or interim awards will be enforced by the UAE courts. If it becomes clear that Dispute Adjudication Board decisions will be enforceable as partial or interim awards, this could make the use of DABs more attractive to contractors and suppliers.

Dispute Adjudication Boards have been around for some time. The first ones date back to the 1960s in the US and they were introduced in the 1999 suite of FIDIC form contracts. The FIDIC DAB process an 84 day process from referral of a dispute to a DAB to the rendering of a decision (although additional time may be required to first constitute the DAB, depending on whether the contract provides for a standing or ad-hoc DAB).

In theory, the FIDIC 1999 DAB process should offer contractors a relatively quick process to claim their entitlement to payment. However, they are still rarely used in the UAE and we often see the standard forms amended such that the DAB provisions are deleted.

One of the issues with DABs is the perceived difficulty in enforcing decisions. Sub-clause 20.4 of the FIDIC 1999 contracts provides that either party may, within 28 days of receiving a DAB decision, give notice to the other party of its dissatisfaction. If such a notice is issued then the underlying dispute can be opened up in arbitration/litigation. However, the notice does not prevent the decision from binding the parties. Sub-clause 20.4 states: "*the decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitration award*" (emphasis added).

The tension between the "*promptly give effect*" wording, the effect of a notice of dissatisfaction and the combined impact on enforcing DAB decisions was the context of a string of Singaporean cases which resulted in the now well-known Singapore Court of Appeal decision in *Persero*. It held that regardless of whether a notice of dissatisfaction has been issued, the paying party must comply with a DAB decision. The court reasoned that the obligation to pay the DAB decision is a distinct and separate right to opening up the underlying dispute. The Court commented that where an arbitral tribunal is asked to consider the two issues of (i) prompt compliance with a DAB decision (under sub-clause 20.4); and (ii) a dispute over the merits of the underlying dispute, it is appropriate

for the tribunal to make an interim or partial award which disposes of the first issues (i.e. prompt compliance with the DAB decision) and separately proceed with the underlying dispute.

Whilst *Persero* is only binding in Singapore, the decision is well-reasoned and could persuade tribunals, combined with Article 39 of the new Arbitration Law, to streamline enforcement of DAB decisions in the UAE. A contractor need not wait until the end of a lengthy arbitration process, dealing with the complex underlying construction dispute, which could take a number of months or even years before it can expect payment. Instead, it can request that the arbitral tribunal quickly deal with the narrow issue of immediate payment of a DAB decision first, as an interim or partial award, which – thanks to Article 39 of the new Arbitration Law – would be capable of being enforced in the UAE courts.

Such a fast-track route to enforcing DAB decisions is envisaged in the new 2017 FIDIC suite of contracts. The 2017 Yellow Book has updated the DAB process and introduces the Dispute Avoidance/Adjudication Board or “DAAB” which has an enhanced role in the dispute resolution process. In terms of enforcement, sub-clause 21.7 streamlines the enforcement process: where a DAAB decision has not been complied with, regardless of whether it has been challenged, the decision creditor is entitled to refer the failure to comply directly to an arbitration and the *“arbitral tribunal shall have the power, by way of summary or other expedited procedure, to order, whether by an interim or provisional measure or an award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.”*

Conclusion

With cautious optimism, things may be looking up for contractors and suppliers in the UAE. The new 30 day payment mechanism suggested in Abu Dhabi Circular no.1 of 2019 will make a meaningful difference to contractors and suppliers to government entities. The real significance of the Circular, however, is that payment requirements of contractors and suppliers is now very much on the radar of the authorities; indeed, we have already been contacted by government and semi-government entities to consider the impact of the Circular.

At the same time, Article 39 of the new Arbitration Law should give contractors (and arbitral tribunals) confidence that the UAE courts will enforce and support a process to quickly enforce payment of DAB/DAAB decisions if rendered by way of interim or partial award. Of course, the process would be much more efficient if contractors could directly enforce DAB/DAAB decisions in the local courts. However, if arbitral tribunals and contractors follow the guidance of *Persero* or adopt sub-clause 21.7 of the FIDIC 2017 Yellow Book, and make use of Article 39 of the new Arbitration Law, money should be in the pockets of contractors and suppliers much quicker than is currently the case.

Time will tell whether these changes are enough to make DAB/DAABs more attractive for contractors and suppliers. In the meantime, contractors and suppliers can now take advantage of

other expedited dispute resolution procedures. Relevant to the UAE, where contracts often include ICC arbitration clauses, since 1 March 2017 an Expedited Procedure is available which envisages the rendering of an award within 6 months from the first case management conference. The Expedited Procedure automatically applies if the arbitration clause was entered into after 1 March 2017 and where the total value of the claims is less than US\$2m. Parties can also opt-in to the procedure if the value of the claims is higher than US\$2m.

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