Dispute avoidance in KSA: practical tips and considerations

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Introduction

As high value, complex construction projects continue to be procured at pace across a range of sectors in the Kingdom of Saudi Arabia and as the country accelerates towards achieving its Vision 2030 goals, it is to be anticipated that some projects will inevitably encounter issues meriting the need for dispute avoidance strategies to be considered, and where necessary deployed. It is therefore important to be aware of some of the key options that can be considered in order to help contracting parties try and avoid or otherwise mitigate the prospect of a formal dispute arising.

In this article we will briefly examine some of the key dispute avoidance strategies that can be implemented and provide practical tips for contracting parties to consider.

Dispute Avoidance Strategies

Some of the key dispute avoidance strategies include the following:

1. Good contract management and administration: In a separate article published in this edition of Law Update entitled "Effective Contract Management and Administration: Key Considerations", we have examined how good contract management and administration can be used effectively in order to help parties avoid disputes. Please follow the above link for further information;
2. Expert determination;
3. Settlement;
4. Mediation; and
5. Dispute Avoidance and Adjudication Boards.

Expert Determination

Parties to a contract can agree to refer a dispute to an expert for determination (a process that is more commonly referred to as 'expert determination').

The expert is usually an expert in the relevant technical field. The expert's identity can be pre-agreed within the contract, but if not, may be selected at the time of the dispute to ensure: (a) the availability of the expert; and (b) a suitable expert is appointed with expertise for the specific type of dispute in question.

The process of appointing an expert requires the agreement of the parties. If this is in doubt then a default procedure can be implemented, for example by referring within the contract to a specific third party body that will have the right to appoint an appropriate expert on behalf of the contracting parties. If the parties cannot agree on an expert this may suggest there is unlikely to be agreement between them to be bound by the expert's findings.

It is common for the use of expert determination to be limited to technical disputes. However, defining what is and what is not a 'technical' dispute is not straightforward and is often something which is not

properly addressed in construction contracts. Care therefore needs to be taken in considering what types of dispute can benefit from and fall within the remit of expert determination and which cannot. It may be that purely technical disputes such as issues relating to performance shortfalls, should be referred to an expert or it may be that the parties would rather use expert determination for a broader range of both technical and non-technical issues.

Generally expert determination will not be a final and binding process. It is intended to give an impartial decision which the parties may adopt by mutual agreement. As such, expert determination is not an alternative to arbitration or litigation, but can be a cost effective way of assisting the parties in resolving their disputes without the cost and time generally associated with the other more common, formal dispute resolution proceedings.

At the very least expert determination can provide a useful reality check for the parties as to their prospects of success which can potentially lead to the instigation of settlement negotiations, or if the dispute cannot be resolved, can help facilitate the development of an appropriate dispute resolution strategy.

Settlement

It is important to note that Saudi law actually prescribes and indeed requires parties that have recourse to litigation, to first attempt to amicably resolve matters and thus try and avoid a dispute before bringing their dispute before the courts. This approach is enshrined in the Saudi Commercial Courts Law (issued on 14/08/1441H, corresponding to 17/04/2020), which provides that before proceeding to litigation, the parties to a contract must first try and resolve the dispute in question by means of conciliation and mediation for a period that does not exceed 30 days.

This approach emphasises the importance that Saudi law in principle places on dispute avoidance and the need for parties to always try and consider alternative options to formal dispute resolution proceedings, with a view to trying to resolve disputes amicably. It also reaffirms a key principle of Sharia law- the principle of good faith, which requires parties to always ensure they are acting in a fair and reasonable manner, notwithstanding what the relevant contract may or may not allow. Parties' attempting to amicably resolve disputes is arguably one such way in which this key principle of Sharia law can be honored.

Settlement is generally to be encouraged for a number of reasons. Compared to other forms of dispute resolution, settlement is arguably by far the most cost effective way of resolving a dispute and can help to maintain the commercial relationship especially where a dispute has arisen early on in a project and where there may be an overriding commercial need to try and maintain a good working relationship between the parties, given that it is arguably a less-adversarial approach.

Where settlement negotiations are undertaken in Saudi Arabia (including by way of mediation) it is important to remember that there is no 'without prejudice' principle, as in other jurisdictions and so admissions made in settlement offers or discussions can potentially be brought into evidence in later proceedings and used against a party. Parties should therefore be acutely aware of this during the settlement process. It should however also be noted that non-disclosure agreements can be entered into to facilitate frank dialogue and open discussion with the objective of settling disputes and mitigating against the risk of disclosures being used against a party to undermine their position.

A further advantage of settlements are that the parties can agree whatever they wish to settle. Unlike with litigation or arbitration this can involve a broader range of creative solutions which may include non-monetary options or settlement terms which take into account commercial matters beyond the scope of the project in dispute. For example, agreements can be made between the disputing parties to award additional work, use incentives agreed commercially or settle claims in respect of other projects in order to secure a settlement.

Mediation

As an alternative to settlement there is also the option of mediation. Mediation is effectively an assisted form of settlement. The mediator will be a third party but their role is not to determine the matters brought by the parties or issue any form of binding decision, but rather to assist and facilitate a settlement and commercial agreement between them.

Mediation has historically been viewed with suspicion in the Kingdom as to its merits and viability. It has however grown in popularity. This was recently underlined by Saudi Arabia's ratification of the United Nations Convention on International Settlement Agreements resulting from Mediation, which entered into force in Saudi Arabia in November 2020, and paves the way for the enforcement, through the Saudi courts, of international settlement agreements resulting from mediation.

Typically, everything that is disclosed in mediation proceedings is confidential, whereby the mediator will act as a 'shuttle negotiator' between the two parties in an attempt to move discussions forward with a view to helping parties' reach an amicable settlement. If a settlement is finally agreed, the mediator will usually step aside and allow the parties to finalise the specific terms of the settlement between them.

No matter how a settlement is reached, it is important that it is properly recorded in a robust and well drafted settlement agreement which is binding on the parties and which can itself be enforced in the Saudi courts, if needed. Settlement agreements therefore need to be carefully drafted in order to ensure that they address all aspects of the settlement including in respect of matters and claims which may occur in the future.

Dispute Avoidance and Adjudication Boards

Dispute Avoidance and Adjudication Boards (or 'DAABs') are a further alternative dispute avoidance mechanism, with the dispute avoidance element in particular a new creation introduced as part of the 2017 suite of standard form contracts of the Federation International des Ingenieurs-Conseils (or 'FIDIC' as it is more commonly known).

The DAAB introduces an additional 'avoidance' stage to the previous multi-tiered Dispute Adjudication Board (or 'DAB') aspect of the FIDIC General Conditions. This additional stage is effectively an informal dispute avoidance mechanism through which parties, subject to their agreement, may jointly request the DAAB to intervene and assist the parties in attempting to resolve issues that have arisen prior to bringing formal proceedings. The dispute avoidance aspect of the DAAB arguably does not extend to being a formal mediation type role but nevertheless may be used to facilitate frank dialogue and discussion between the parties with a view to resolving any legal, technical or commercial differences between them. The DAAB may also take a more proactive role in dispute avoidance by inviting the parties to request their assistance when it becomes aware of any issue or dispute arising.

Although a common feature of the FIDIC 2017 suite of contracts, bespoke drafting can be included in non-FIDIC based contracts in order to ensure a similar dispute avoidance mechanism is overcome prior to the parties invoking formal dispute resolution proceedings.

Practical Tips and Considerations

Aside from good contract management and administration, the use of settlement, mediation and DAABs, there are a number of other important practical tips and considerations which can help parties avoid or at

least mitigate the impact of a dispute. These include the following:

1. From the outset of a project, identify and closely monitor those key legal and commercial pressure points which are important to you as a business and moreover important for the successful completion of the project. This means being organised, being proactive and being up to speed on the contract and also on progress on site so that you can address and where needed even anticipate and respond to these pressure points or issues as and when they arise;
2. Either contractually or internally implement an escalation mechanism whereby if a dispute or disagreement does arise, which despite your best efforts cannot be resolved with the counterparty, you can escalate the issue internally to the appropriate member of senior management with authority to resolve and settle such issues. In doing so, the relevant individual may be able to use their expertise and influence to find a workable, commercial solution that is acceptable to all parties;
3. From an early stage, seek to develop good communication protocols with a view to building firm relationships with the counterparty's representatives. This may in part be through arranging regular face-to-face meetings and other forums through which there can be open and transparent dialogue between the parties;
4. Seek external legal or professional assistance early on. All too often parties seek legal advice at a late stage, without having engaged counsel early on to properly evaluate and advise on their legal rights or obligations (or those of the counterparty) under the applicable contract or at law. This is a simple measure which if undertaken at an early stage in the dispute, may save parties considerable time, money and other resources and help inform the dispute resolution strategy before moving forward; and
5. Be reasonable and realistic. In doing so parties should try and adopt a flexible, pragmatic and objective approach when entering into dialogue on disputed matters. Typically we find that those disputes which are not avoided or settled amicably are those in which the parties have not looked upon the issues objectively and properly examined and accepted their own failures or weaknesses on the project. Therefore a candid approach to such discussions is important.

For further information, please contact Leith Al-Ali.