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# Turkey and the Middle East International Arbitration Summit - The New Era

# Turkey and Middle East Construction Disputes

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## Introduction

The main focus of this talk relates to the use of dispute escalation clauses in construction and engineering contracts that are becoming more wide spread in the UAE. This provides an opportunity to consider dispute resolution processes that are operating in the Middle East, and how those processes are being combined in, for example, Engineer Procure and Construct (EPC) contracts, and the differences that you find within the region.

Many construction engineering contracts in the Middle East have traditionally not contained dispute resolution clauses. The local courts have dealt with disputes. Arbitration has become more widely accepted, and also the introduction of standard form of contracts, such as FIDIC, has meant that the ICC's dispute resolution procedure is used as well as rules provided by regional centres, such as the Dubai International Arbitration Centre.

The use of expert determination in EPC contracts has been quite popular in the Middle East, especially in the Kingdom of Saudi Arabia. Adjudication revisions are also found in the Middle East, once again in EPC projects for independent water plants or independent power plants. The use of adjudication is encountered not just in the Kingdom of Saudi Arabia but in other countries, such as Oman and Qatar.

Finally then, the use of a process such as expert determination followed by arbitration might not be uncommon in more complex or higher value contracts. The use of three layers to a dispute escalation clause is also not uncommon. For example, the holding of negotiations between senior managers or senior decision makers of the parties to the contract before then considering expert determination or adjudication and then referring matters finally to International Arbitration.

This paper considers the range of technics, and the institutions that one might come across, and some of the issues and problems that can be encountered with these more complex clauses.

## Escalation or multi-tier dispute resolution

Multi-tiered dispute resolution clauses have been defined as clauses which:

> *"… [provide] for distinct stages, involving separate procedures, for dealing with and seeking to resolve disputes".* [1]

The mechanisms chosen can include negotiation, mediation, adjudication (including DABs or DRBs) expert determination and/or arbitration, which will be considered in detail below. Examples of multi-tiered dispute resolution procedures are found in FIDIC Red, Yellow and Silver books, and are also common in bespoke contracts for large scale projects. Prestigious projects that have used such techniques include the Channel Tunnel and Hong Kong Airport.

1. CM.Pryles, "Multi-tiered Dispute Resolution Clauses", Journal of International Arbitration, 2001, 18 (2: pages 159-176); and Tanya Melnyk "The Enforceability of Multi-tiered Dispute Resolution Clauses: The English Law Position" Journal of International Arbitration or Review, 2002, 5 (4), 113-138.

In large scale projects, the potential risks disputes bring with them are much larger. By providing for a tiered system of dispute resolution techniques, it is hoped that disputes will be dealt with as soon as they arise, and that the majority of disputes will be filtered out, or at least reduced in scale, as early on in the dispute resolution process as possible. This should serve to limit any damage to a commercial relationship which can occur due to litigation.

For the construction of Hong Kong's airport, three different dispute resolution processes were provided for, depending on the type of contract involved. The three types of contracts were for infrastructure projects, the new airport and construction projects. For the infrastructure projects, any disputes between the Hong Kong Government and the contractor were firstly referring the matter to an engineer.

The next step was referring the matter to mediation, and finally the matter would be referred to adjudication. For the construction of the new underground line, the process began by referring dispute to the engineer. This step was followed by mediation and/or arbitration. Finally, for the airport itself, the dispute first went to an engineer, following which the parties could appeal to the project director. If the parties were still dissatisfied then they had 10 days within which to consult the DRB. The final step in the process was arbitration.

Keith Brandt observed there were very few referrals to the DRB.

> *"The DRB made six binding decisions, with only one case being taken to arbitration. A relatively low number of referrals suggests that the existence of the DRB deterred the referral of disputes and it may be that it encouraged a settlement of matters between the parties without further third party intervention"* [2]

The London Olympics 2012 has also opted for a multi-tiered dispute resolution system. The ODA has set up an Independent Dispute Avoidance Panel ("IDAP") of ten construction professionals under the chairmanship of Dr Martin Barnes. Those disputes not resolved by the IDAP will then be referred to an Adjudication Panel, comprising eleven adjudicators under the chairmanship of Peter Chapman.[3]

The courts will enforce multi-tiered dispute resolution provisions. In *The Channel Tunnel Rail Group Limited v Balfour*,[4] Lord Mustill emphasised that:

> *"having made this choice I believe that those who make agreements for the resolution of disputes must show good reasons for departing from them… that having promised to take their complaints to the experts and go if necessary to the Arbitrators, that is where the Appellants should go."*

The courts will also enforce agreements to mediate where they are part of such a procedure. In *Cable & Wireless Plc v IBM United Kingdom Limited* [5], the court was asked to award a stay of proceedings while the parties undertook the ADR processes provided for within that contract. The ADR provisions were held to have binding effect.

The ADR clause was a sufficiently defined mutual obligation upon the parties to go through the process of initiating mediation, selecting a mediator and at least presenting the mediator with its case and documents. Since the clause described the means by which such an attempt should be made the engagement required not merely an attempt in good faith to achieve resolution of the dispute, but also the participation of the parties in the procedure specified. That procedure was for sufficient certainty for a court to readily ascertain whether it should have been compiled with.

However, a note of caution has been sounded in the recent case of *Balfour Beatty Construction Northern Limited v Modus Corovest (Blackpool) Ltd*.[6] In this case the mediation agreement was characterised as nothing more than an "*agreement to agree*". Unlike the mediation agreement in *Cable & Wireless* case, it was held to be too uncertain to be enforced by the court. The judge went on to say that he would only stay a claim and counterclaim for mediation if he concluded that:

> *a) the party making the Claim and or Counterclaim was not entitled to summary Judgment on that*

2. Keith Brandt "For Use and Development of Mediation Technique in the UK & International Construction Projects" a paper given at the Chartered Institute of Arbitrators Conference East greets West: New Opportunities for Dispute Resolution in Hong Kong on 2 February 2002, pages 10 and 11.
3. Ellis Baker "Is it all necessary? Who benefits? Provision for multi-tried dispute resolution in international construction projects. A paper presented to a joint meeting of the Society of Construction Law and the Society of Construction Arbitrators." January 2009, 154, page 22.
4. *The Channel Tunnel Rail Group Limited v Balfour Beatty Construction Limited* [1993] 61BLR1, HL
5. [2002] EWHC 2059.
6. *Balfour Beatty Construction Limited v Modus Corovest (Blackpool) Limited* [2008] EWHC 3029 (TCC); and Construction Industry Law letter, February 2009 page 2661.

*Claim and/or Counterclaim, i.e. that there was an arguable defence on which the other party had a realistic prospect of success; and*

*b) the best way of resolving that dispute was a reference to mediation."*

## International arbitration

Arbitration is a process, subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choosing. According to Stephenson, Lord Justice Sir Robert Raymond provided a definition some 250 years ago which is still considered valid today:[7]

*"An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have an arbitrary power; for if they observe the submission and keep within due bounds, their sentences are definite from which there lies no appeal."*

Providing arbitrators stay within the law, there is generally no appeal from the Arbitrator's award, and the award may be enforced by the courts, if necessary.

Arbitration is essentially a process which is available as an alternative to litigation. The parties must agree to submit their dispute to arbitration and a distinction is often drawn between existing and future disputes. The distinction is of historical importance because some jurisdictions, notably France, would not until comparatively recently recognise agreements to refer future disputes to arbitration.

The advantages of arbitration are well rehearsed and include; flexibility, economy, expedition, privacy, freedom of choice of Arbitrator, and finality. On the other hand, the disadvantages of arbitration appear to have been on the increase. In comparison to litigation, where the judge and court facilities are provided at public expense, the parties to an arbitration will ultimately have to bear the costs of the arbitrator and the facilities. Where, as is often the case in construction, more than two parties are involved in a dispute, there is relatively little statutory power to consolidate the actions in one arbitration. Some forms of contract, such as the JCT and the FCEC form of sub-contract, provide for consolidation in limited circumstances.

Dispute resolution in the region and in Dubai has provided some challenges. The local courts have been unfamiliar with complex construction contracts, and local employers have not always been keen to agree to use international arbitration. International arbitration is, of course, widely used throughout the world for substantial projects involving suppliers and contractors from countries other than the one where the work takes place. Nonetheless, Dubai has a regional arbitration centre in the form of the Dubai International Arbitration Centre (DIAC) and also the Dubai International Financial Centre (DIFC). Egypt has for some time had an arbitration centre in Cairo, and now Qatar also has the Qatar International Centre for Conciliation and Arbitration (QICCA).

## DIAC and DIFC

The DIFC is an example of a "*jurisdiction within a jurisdiction*", a regime used in several Middle Eastern countries with the objective of providing certainty and familiarity to international business to attract investment.

DIFC is a 'financial free zone', located in the Emirate of Dubai and for this reason is commonly referred to as "*offshore*" Dubai, whilst the jurisdiction of the Emirate of Dubai itself is referred to as "*onshore*" Dubai.

DIFC is an autonomous common law jurisdiction (despite the Emirate of Dubai being a civil law jurisdiction) empowered under UAE law to enact its own legal and regulatory framework for all civil and commercial matters.

7. EStephenson D. A. (1998)

The supervisory court, which deals with all civil and commercial matters, not just arbitration, is the DIFC Court. The language of the DIFC Court is English.[8]

DIFC also has its own arbitration law and institution. The DIFC Arbitration law is modelled on the UNCITRAL model law, as amended in 2006, and came into force in 2008.

Pursuant to this law, there is no requirement for the parties to have any connection with DIFC (or to be based in Dubai or the UAE generally) in order to provide for an arbitration to be seated within the jurisdiction.[9]

In February 2008, the DIFC inaugurated the DIFC-LCIA Arbitration Centre, which is a joint venture between the London Court of International Arbitration, known as the LCIA, and DIFC.

The DIFC-LCIA Arbitration Rules are closely modelled on the LCIA Arbitration Rules. The DIFC-LICIA Arbitration Centre functions with the assistance of the LCIA Secretariat and has full access to its expertise and general systems.

The DIFC-LCIA Arbitration Centre gives parties who refer disputes under its auspices access to the LCIA's extensive database of arbitrators, although arbitrators may be appointed from off the database as well.

As with all international arbitration rules, the parties are free to nominate their own arbitrators, in which case the nominees will be appointed by the LCIA Court (the Court which forms part of the structure of the LCIA).

The DIFC-LCIA Registrar is responsible for the day to day conduct of a DIFC arbitration and assists with the procedure. Under the Rules, a sole arbitrator will be appointed unless specified otherwise by the parties, or unless the DIFC-LCIA Registrar determines that a three member tribunal is appropriate in the circumstances.

Unlike under the ICC Rules, the LCIA Court is not made responsible for scrutiny of the award. This means there is no "*quality contro*l" on the awards, although it also results in the procedure being less costly than the ICC.

As with most arbitral rules, including DIAC, the parties are largely free to agree on the procedure to be followed by the tribunal. Where the parties have not agreed on the procedure to be followed, then the tribunal has the discretion to discharge its duties in order to conduct the arbitration in a fair, efficient and expeditious manner.

Arbitration proceedings are commenced when the DIFC-LCIA Registrar receives the request for the dispute to be referred to arbitration.

The DIFC-LCIA Arbitration Rules also set out provisions that govern the response, submission of statements of case, witness statements, experts (appointed by the tribunal), the type of hearing (oral or written), and powers to order interim measures. The Rules provide for proceedings to continue even where the Respondent fails to file a response, or if either party fails to attend a hearing or to produce evidence.

The DIFC-LCIA Arbitration Rules also provide for an expedited procedure for the formation of the arbitral tribunal in matters of exceptional urgency.

Arbitral awards under the DIFC-LCIA Arbitration Rules are final and binding and the parties irrevocably waive any right to appeal. However, requests for the correction of errors in an award of a typographical, computational or clerical nature can be made to the DIFC-LCIA Registrar within a period of 30 days from the receipt of the award.

The DIFC-LCIA Arbitration Centre charges a registration fee of AED 9750. Time spent by the Registrar, Deputy Registrar or Counsel is charged at AED 1,300 per hour with other Secretariat personnel being

8. *The DIFC Court was established under Dubai Law No.9 of 2004 in respect of the Dubai International Financial Centre and Dubai Law No.12 of 2004 in respect of the Judicial Authorities Dubai International Financial Centre*
9. DIFC Arbitration Law (DIFC Law No.1 of 2008) (repealed DIFC Law No.8 of 2004).

charged at AED 650 per hour. Time spent by the LCIA Court, will be charged at hourly rates advised by the LCIA Court and a sum equivalent to 5% of the total fees of the tribunal (excluding expenses) will be charged in respect of the general overhead of the DIFC-LCIA Arbitration Centre.

The tribunal's fees depend on the circumstances of the case, including its complexity and any special qualification of the arbitrators, but will ordinarily fall within the range of AED 1085 to AED 2525 per hour.

If the parties provide not only that the DIFC-LCIA Arbitration Rules apply to their disputes, but that the governing law or 'seat' of the arbitration is DIFC, then once a final award is issued, a party may apply to the DIFC Court for an order recognising the award.[10]

Until October 2011 the process by which arbitral awards ratified in this way by the DIFC Courts would then be enforced in 'onshore' Dubai was set out in a 2009 P*rotocol of Enforcement between Dubai Courts and the DIFC Courts* (the "**Protocol**").

The Protocol provided for the mutual recognition and enforcement of judgments, awards and/or Orders between the two courts, whereby, for example, provided a Decision was final, had been translated into Arabic and was "*appropriate for enforcement*", arbitral awards ratified by the DIFC Courts could be enforced 'onshore' in the Dubai Courts (and vice-versa) without any further review by the Dubai Courts.

These provisions have recently been codified into Law No. 16, the effect of which is to enshrine the provisions of the Protocol in formal legislation (Article 7 of Law No. 16).

This means that a DIFC award (once recognised by the DIFC Courts and supported by a Dubai Court Judgment) should, in theory, be enforceable in:

- Dubai and/or the other Emirates in the UAE;
- any of the six GCC countries as a result of *The Protocol on Enforcement of Judgments, Letters Rogatory and Judicial Notices used by the Courts of the Member States of the Arab Gulf Co-operation Council* (1995) (the "GCC Protocol"); and
- any of the 12 countries in the Middle East which are signatory to the *Riyadh Arab Agreement for Judicial Co-operation* (1983) (the "Riyadh Convention").

Given that the UAE is also a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, a DIFC award should also be enforceable internationally.

It should be noted that it is important that the place of the arbitration must be expressly stated to be DIFC. It is not enough to specify the DIFC-LCIA Arbitration Rules apply to the arbitration. As Michael Hwang (a DIFC Judge) summarised in the recent case of *Amarjeet Singh Dhir v Waterfront Property Investments Limited and Linarus FZE:* [11]

> *"the moral of this case is that, if the parties want DIFC Arbitration Law to apply and the DIFC Court have jurisdiction over an arbitration, they should expressly select the DIFC jurisdiction in their arbitration agreement."*

If the parties select the DIFC Arbitration Rules, but do not provide for DIFC jurisdiction within their arbitration agreement, providing instead for the seat to be Dubai, then the Dubai "onshore" courts will have jurisdiction of any issues which arise in connection with the arbitration, including recognition of the final award for purposes of enforcement.

As regards to DIAC Arbitration, the current DIAC Arbitration Rules came into effect in May 2007. They brought the DIAC Rules into line with other major arbitration centres around the globe. For example, the DIAC Rules now provide that on the application of one of the parties, the tribunal has the power to order interim measures (Article 31) and that the proceedings of all awards, evidence and documents produced or disclosed in the arbitration are confidential (Article 41).

10. *Article 43 of the DIFC Arbitration Rules.*
11. Claim number CFI011-2009 8 July 2009.

DIAC is an autonomous, permanent and non-profit institution and is financially and administratively autonomous. It is based in "*onshore*" Dubai, and, therefore, assuming that the seat of the arbitration is Dubai, the supervisory court will be the Dubai courts rather than the DIFC Courts (although it would, theoretically, be possible to provide for an arbitration which is subject to the DIAC Arbitration Rules with a seat in the DIFC).

DIAC is currently facing stiff competition from the DIFC-LCIA Arbitration Centre, especially given the new legislation passed on 31 October 2011, which should make enforcement of DIFC arbitration awards more straight forward.

The DIAC Board of Trustees, which comprises 21 members with expertise in the field of arbitration, including legal consultants, lawyers, academics and other specialised professionals both inside the Emirates and abroad, set down the DIAC Arbitration Rules.

The parties to a contract may agree that the DIAC Rules apply to their dispute or they may elect the DIAC Rules to apply once a dispute has risen.

Under the DIAC Rules, the parties are free to choose the law applicable to the dispute. If they do not do this, the tribunal applies the law(s) it considers most appropriate.

The proceedings are conducted in the language of the agreement, unless the parties specify otherwise. The DIAC Rules also allow the parties to appoint an arbitrator of their choice. The appointment of arbitrator is then formalised by the DIAC, who must determine their suitability to act.

The tribunal can adopt either an adversarial role (the common law approach) or an inquisitorial role (the civil law approach) with arbitrators reserving the right, after consultation with the parties, to call in their own experts to deal with technical matters.

The parties may request hearing for presentation of oral witness evidence. If they do not request this, the tribunal can decide whether to hold such a hearing or to conduct the proceedings on the basis of written documentation alone.

The DIAC Rules place a strict timeframe on arbitral proceedings. Generally an award has to be made within six months of the arbitrators receiving an instruction to decide the case, although this period (as with the equivalent requirement under the ICC Rules) can be extended by the tribunal or further extended with a request to the Executive Committee. (In our experience, this period is very frequently extended).

A party may apply to DIAC to request expedited formation of the tribunal. The tribunal is empowered to order interim measures on application of one of the parties.

The DIAC charges a one off, non-refundable fixed registration fee for commencing an arbitration.

Administration fees and fees of the arbitrators are determined as a percentage of the amount of the dispute with the maximum and minimum limit according to the circumstances and complexity of the case, according to a scale established by a committee of the DIAC.

The parties may refer the award back for review by the arbitrators if there is an issue or concern that there has been an oversight. This does not invalidate the award. Insofar as permitted by the law of the proceedings, the parties waive the right to appeal against awards rendered by DIAC.

It has been our experience (and this is supported by views expressed to us by other) that the quality of the administration services provided by the DIAC is sometimes not as good as one would hope, and that the quality of some of the arbitrators on DIAC's list (where the DIAC is to make an appointment rather than the parties) is also not uniformly high.

Assuming that the seat of the arbitration was Dubai, then under Article 215 of the UAE Code of Civil Procedure, a DIAC award must be recognised by the local court with the effect of converting it to a Court Judgment. This is in contrast to the DIFC system which permits the DIFC Court to provide this recognition.

Unfortunately, there is no consistent barometer of the Dubai Courts' attitude to domestic awards. In the widely reported case of *Bechtel v The Department of Civil Aviation of the Government of Dubai* in 1994, the Dubai Court of Cassation refused to enforce a US$25 million award in favour of the claimant on the grounds that the arbitration had failed to require the witnesses to swear an oath in the manner prescribed by the UAE Civil Procedure Code.

Since that date, matters have improved somewhat and arbitration practitioners in the region have developed a list of dos and don'ts in an effort to minimise the risk of annulment. For example, arbitrators are required to sign every page of the award and not doing so can cause problems.

However, generally speaking, given the DIAC's large case load, enforcement problems seem to be relatively rare. Indeed, we recently obtained a favourable award for one of our clients which was subsequently enforced in the Dubai Courts without difficulty. The only word of caution we would add is that the enforcement process appears to be much slower than it is in other jurisdictions such as the United Kingdom or France.

## Adjudication

Adjudication is now a dispute resolution process that most in the UK construction industry are familiar with. The process was introduced by the Housing Grants, Construction and Regeneration Act 1996, which became effective from May 1998. We have therefore lived with it for almost 15 years. Adjudication is included in all of the standard form contracts, but in any event will be implied, as we all now know, into any contract that meets with the definition of "construction contract" under the Act.

Other common law countries have followed suit. All of the states in Australia now have security of payment legislation, which introduces a right to adjudication. New Zealand is the same. Singapore also introduced a Security of Payment Act which provides for adjudication. Malaysia introduced a similar act providing for adjudication in June 2013, and it is due to be in force soon. Other countries have considered similar legislation. The mechanics of the legislation varies between countries and states, but they all share the desire to provide a rapid binding dispute resolution procedure.

The situation in the Middle East is somewhat different. There has been considerable construction work in that region for many years. The wealth created by oil has lead to increasing levels of development throughout the region. Dubai is perhaps the best known for its substantive impressive developments such as The Palm and The Burj Khalifa Tower. Despite a slow down of construction activity four years ago, as a result of the economic crisis, Dubai has continued to grow. The Dubai Theme Park is now underway, along with many other substantial developments.

It is then, perhaps, unfortunate that adjudication has not been introduced by local legislation within the Middle East. However, that would require a cultural understanding not just of the locals from the Middle East, but also the international contractors and consultants that work there. Both have a different perspective on how differences and disputes are resolved. Why should the international community impose upon the Middle East a rapid dispute resolution procedure, which in commercial terms is quite new to the business community even by international standards? Perhaps it is something that will be considered and debated over time.

On the other hand, dispute boards have been used in the region in some instances. They are not necessarily the norm, but through use of FIDIC dispute adjudication boards and dispute review boards have been encountered.

The use of the term "Dispute Boards" or occasionally "Disputes Boards" (collectively DBs) is a relatively new term. It is used to describe a dispute resolution procedure which is normally established at

the outset of a project and remains in place throughout the project's duration. It may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved and provide binding decisions. The one person or three person DBs are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents and attending hearings and producing written recommendations or decisions if and as appropriate.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards ("DRBs"), which originally developed in the domestic USA major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel. The use of DRBs has steadily grown in the USA, but they have also been used internationally. However, DRBs predominantly remain the providence of domestic USA construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board ("DAB") was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

Therefore, the important distinction between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation.

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1. Dispute Review Board – the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period, then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.
2. Dispute Adjudication Board - DRB's decision is to be implemented immediately.
3. (Combined Dispute Board ("CDB") – this attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests, and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

According to the ICC, the essential difference is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation but only if the employer and contractor express no dissatisfaction within the time limit. The combined procedure seems, at

first glance, to be a somewhat cumbersome approach attempting to build upon the benefits of the DRB and DAB, without following a clear pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

At the other end of the spectrum a DB could be considered as a flexible and informal advisory panel. In other words, before issuing a recommendation, the DB might be asked for general advice on any particular matter. The DB will then look at documents and/or visit the site as appropriate and, most usually, provide an informal oral recommendation which the parties may choose then to adopt. If the parties were not satisfied, the DB would proceed to the issue of a formal, albeit non-binding, written recommendation after following the formal procedure of exchange of documents and a hearing. Perhaps this amicable approach will suit the Middle East more than a rapid binding adjudication process.

## Negotiation

According to the Concise Oxford Dictionary,[12] "to negotiate" means to "confer with others in order to reach a compromise or agreement." Negotiation is merely the name given to that process. Goldberg et al, described negotiation as "communication for the purpose of persuasion; the pre-eminent mode of dispute resolution."[13] Nonetheless negotiation should not be considered as merely a dispute resolution process. Negotiation in its broadest form may be considered as the process by which individuals communicate in order to arrange their business affairs and private lives by establishing agreement and reconciling areas of disagreement.

In its most basic form direct negotiation provides a simple party based problem solving technique. A further dimension is added when either party introduces advisers. Nonetheless, the essential feature of this process is that control of the outcome remains with the parties. Litigation and arbitration require the parties to submit their dispute to another who will impose a legally binding decision. Negotiation is a "process of working out an agreement by direct communication. It is voluntary and non-binding." The process may be bilateral (between two parties) or it could be multi-lateral (many parties). Each party may utilise any form of external expertise it considers necessary, and this is often described as "supported negotiating".

Negotiation clearly involves some form of communication leading to joint decisions. Do these negotiations always maintain a processual shape with identifiable features regardless of the individuals involved or the conditions under which the negotiation takes place? Gulliver maintains that negotiation is essentially a developmental process with eight distinct but often overlapping phases.[14]

Phase 1: The Search for an Arena

Phase 2: Agenda and Definition

Phase 3: Exploring the Field (emphasis on differences)

Phase 4: Narrowing the differences

Phase 5: Preliminaries to final bargain

Phase 6: Final bargain

Phase 7: Ritualising the outcome

Phase 8: Execution of outcome

## Mediation

To mediate means to act as a peacemaker between disputants. It is essentially an informal process in which the parties are assisted by one or more neutral third parties in their efforts towards settlement. Mediators do not judge or arbitrate the dispute. They advise and consult impartially with the parties to assist in bringing about a mutually agreeable solution to the problem. Some definitions in circulation include:

"Mediation is negotiation carried out with the assistance of a third party. The mediator, in

12. Concise Oxford Dictionary (1995)
13. Goldberg S. B. (1992) Dispute Resolution: Negotiation and Meditation and Other Processes, 2nd edn Little Brown, Boston
14. Gulliver, P H. (1979) Dispute and Negotiations: A cross Cultural Perspective, Academic Press, London
15. Goldberg, S. B. et al, (1992). p103

contrast to the arbitrator or judge, has no power to impose an outcome on disputing parties." [15]

"Mediation is a facilitative process in which disputing parties engage the assistance of a neutral third party who acts as a mediator in their dispute." [16]

"Where two or more people or companies are unable to resolve a particular problem they invite a neutral person to help them arrive at a solution. The neutral person, or mediator, will work hard with each side and help them to understand better their own and the other person's position, and explore alternative solutions" [17]

"Mediation consists of the effort of an individual, or several individuals, to assist the parties in reaching the settlement of a controversy or claim by direct negotiations between or among themselves. The mediator participates impartially in the negotiations, advising and consulting the various parties involved." [18]

There are two common threads. Firstly, the form of the third party intervention. The primary role of the third party is to facilitate other people's decision making. The process builds on negotiation, and the mediator fundamentally sustains and reviews the situation with the parties. Secondly, the third party should be independent of the parties in dispute. The essence of mediation that the mediator is impartial. The trust which develops during the process allows the mediator to perform "a bridging role" between the parties.

Confusingly, the term 'conciliation' is often used interchangeably with mediation. In the UK conciliation is usually taken to mean a more interventionist or evaluative style of mediation. However, there is no internationally agreed norm. The conciliation of labour disputes by ACAS is generally considered to be more evaluative, as is ICE conciliation. If the parties fail to settle under the ICE procedure, the conciliator will make a recommendation. However, the terms mediation and conciliation are often used interchangeably.

During a facilitative mediation, the mediator is trying to re-open communication between the parties and explore the options for settlement. The mediator does not openly express his/or her opinions on the issues. If, on the other hand, the mediator is called upon to state his opinion on any particular issue then he/she is clearly making an evaluation of that issue.

*Table 1: facilitative and evaluative processes*

| Mediation or Conciliation | |
|---|---|
| *Facilitative* | *Evaluative* |
| The mediator/conciliator aids the negotiation process, but does not make recommendations | The mediator/conciliator makes a recommendation as to the outcome |

In practice a mediation that starts off in a purely facilitative way may become evaluative in order to try and reach a settlement. This may occur intentionally, at the request of the parties or with forethought on the part of the mediator, or unintentionally by the words or actions of the mediator. The boundary is clear in theory, but not necessarily in practice. Nonetheless, at a basic level a distinction can be made between "settlement" processes and "decision" imposing processes. Control of the outcome, or the power to settle rest with the parties during negotiation, mediation and conciliation. By contrast, "adjudicative" or "umpiring" processes, such as litigation, arbitration and adjudication, rely on the judge, arbitrator or adjudicator having the power to impose a decision.

16. Brown, H. and Mariott, A. (1992) ADR Principles and Practice, Sweet and Maxwell, London. p108
17. British Academy of Experts (1992)
18. American Arbitration Association, (1992)

*Table 2: Settlements and decisions*

| Control of the outcome rests with the parties | Decisions are imposed |
|---|---|
| Negotiation | Litigation |
| Mediation | Arbitration |
| Conciliation | Adjudication |
| | Expert determination |

## Expert determination

Expert determination is a process by which the parties to a dispute instruct a third party to decide a particular issue. The third party is selected because of his or her particular expertise in relation to the issues between the parties. According to Kendal:

> "There is nothing very new about expert determination. It has been a feature of English commercial and legal practice for at least 250 years. What is new about it is that it is being called in to help with the current crisis in commercial dispute resolution. Expert determination is a simple procedure by which valuation and technical issues are referred to a suitably qualified professional to determine "acting as an expert and not as an Arbitrator" ... Unlike alternative dispute resolution (ADR), expert determination guarantees a result which is final and binding."[19]

Expert determination is essentially a creature of contract. The parties to a contract agree that some third party will decide a technical or valuation issue between the parties. Expert determination has traditionally been used in rent reviews. According to Kendal, approximately half of all commercial leases contain a provision for rent review by a surveyor acting as an expert, whilst the other half state that the surveyor is to act as an arbitrator. Nonetheless, expert determination is not restricted to mere land valuations.

The technique lends itself to valuation and complex technical issues. In this respect, expert determination may be found in a wide variety of circumstances: valuing shares in private companies, certifying profits or losses of a company during sale and purchase, valuing pension rights on transfer, determining market values in long term agreements. Further, the use of expert determination may be used as part of a multi stage dispute resolution procedure. In this instance, some technical matter may be referred to an expert leaving the other issues in dispute to arbitration or litigation.

A typical expert determination clause should ensure that specific items are clearly dealt with. First, the issue or issues to be determined should be clearly and precisely expressed. Lack of clarity in relation to the issue to be determined may provide an opportunity to argue subsequently about the jurisdiction of the expert. Second, it is important to state that the expert is to act as an expert and not as an arbitrator. Much of the case law in the area of expert determination focuses on this point. If the third party is acting as an expert, then his or her opinion as to the value or opinion of the correct decision in relation to the issue in dispute is not capable of being challenged. On the other hand, if the third party is acting as an arbitrator, then the formalities of an adjudicative procedure must be adhered to.

Third, a further essential feature of expert determination is that the decision should be final and binding. On the other hand adjudication and decisions of dispute review boards are often expressed as final unless challenged by a subsequent arbitration.

Finality is a common feature of expert determination. Finally, the contractual machinery should provide some mechanism for appointment of an appropriate expert. This would usually provide for appointment by agreement between the parties or in default by some appointing authority stated in the contract. The default procedure will ensure that an expert is appointed regardless of the strategies associated with the other party. In addition, it is beneficial to include express provisions

19. Kendal, J. (1996) Dispute Resolution: Expert Determination, 2nd edition, Longman, Harlow

in relation to the expert's qualifications and state how the expert is to be paid. These are usually split equally between the parties with a further provision allowing the expert to decide otherwise.

The leading case in this area is *Jones -v- Sherwood Computer Services Plc.*[20] This case involved a sale and purchase agreement where part of the consideration was to be deferred. The valuation of this deferred consideration depended upon the acquired company's sales figures exceeding a certain level. If the vendor and purchaser's accountants were unable to agree this figure then a third accountant was to determine the figure as expert. The vendor's and purchaser's accountants could not agree on the categories of transactions which should be included as sales.

Coopers & Lybrand were appointed as the expert firm who determined that the sales amounted to £2,527,135. The vendor was not satisfied and wished to challenge the reasoning behind the determination. The Court of Appeal stated that the expert had been asked to determine the level of sales and that is exactly what they had done. On the other hand, if the expert departed from their instructions - for example, by valuing shares in the wrong company - then that would be sufficient to upset an expert's decision. Jones -v- Sherwood suggests then that an expert would need to make some manifest mistake in relation to its jurisdiction before the Court would intervene.

*Nikko Hotels (UK) Limited -v- NEPC Plc* [21] 2 EG 86 considers the expert's jurisdiction in relation to points of law . If the expert had answered the wrong question, then his decision would be a nullity. On the other hand, if the expert had answered the right question but in the wrong way the decision would still be binding.

More recently the House of Lords considered expert determination in the case of *Mercury Communications Limited v Director General of Telecommunications and Another.*[22] In that case two companies, BT and Mercury were granted licences to run telecommunication systems under Section 7 of the Telecommunications Act 1984. Clause 29 of the Agreement provided for a review of the Terms of the Agreement after five years. If either party was unable to agree to any fundamental changes of the Terms then a reference was to be made to the Director General of Telecommunications for the determination of any particular issue. An issue in relation to pricing was referred to the Director General. Mercury challenged the Director General's decision on the basis that he had misinterpreted the costs to be taken into account when setting the price.

Initially, the Director General applied to strike the action out on the basis that the action was an abuse of process. The Director General argued that as the Agreement was formed under the Telecommunications Act 1984 any determinations of the Director General were in the domain of public law and should therefore be subject to judicial review and not a private action. The House of Lords held that as the dispute related to a contractual matter (albeit by way of a statutory power) then an action in private law was appropriate. In relation to the exercise of that decision making function the House of Lords decided that they ultimately had jurisdiction to interpret the construction of the clause. They went on to say that provided the expert does not depart from his/her instructions then the decision cannot be challenged unless there is some allegation of fraud.

## Enforcement of awards in Saudi Arabia & UAE

In March 2013 a new Enforcement Law came into effect in Saudi Arabia, replacing the relevant provisions of the 1989 Rules of Civil procedure before the Board of Grievances. With a particular impact on the enforcement of arbitral awards, whether domestic or international, this new Enforcement Law also contains provisions that affect aspects of domestic and foreign judgements and is a welcomed change.

Prior to the new Enforcement Law, parties were required to bring applications for the enforcement of foreign judgements and arbitration awards before the Board of Grievances. This was a lengthy and rigid procedure as the Board of Grievances would undertake a full review on the merits of each award, ensuring that the award was compliant with Shariah law. It also required all relevant documents from the arbitration to be submitted to the Board in Arabic to allow for the review.

20. [1992] 1 WLR 277
21. [1991] 2 EG 86.
22. [1996] 1 AER 575.

An illustration of the old system is seen in an ICC case, *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (UAE)*. In 2006 Jadawel commenced arbitration before a three-member tribunal seated in Saudi Arabia claiming damages of US$1.2 billion based on a breach of contract by Emaar on a construction project. The lengthy arbitration took two years but was finally dismissed with Jadawel being ordered to pay legal costs. The award was then submitted to the Board of Grievances for enforcement. In its review, the Board proceeded to re-examine the merits and not only did it decline to enforce the award, but it reversed the award and ordered Emaar to pay damages to Jadawel.

Abandoning the old system of enforcement proceedings before the Board of Grievances, the new Enforcement Law introduces an Enforcement Judge to deal with all enforcement issues.

The Enforcement Judge is required to follow Shariah principles, unless the law stipulates otherwise, and Article 9 of the new Enforcement provides for compulsory enforcement upon the presentation of an executive deed, including a final arbitral award.

Also notably, appeals of the Enforcement Judge's decisions suspend enforcement. This goes against domestic law trends seen in other parts of the law such as France.

The Enforcement Judge may enforce foreign arbitral awards only on the basis of the principles of reciprocity, refusing to enforce arbitral awards from jurisdictions that would not enforce Saudi judgments or awards, and if the party seeking enforcement can ensure that:

- Saudi courts do not have jurisdiction with regards to the dispute;
- The award was rendered in compliance with due process requirements;
- The award is in final form in the law of the seat of the arbitration;
- The award does not contradict a judgment or order issued on the same subject by a judicial authority in the Kingdom of Saudi Arabia; and
- The award does not contain anything contradictory to Saudi public policy.

The new Enforcement judge will be specialised in enforcement of awards and judgments should be more expedient.

A similar situation was seen in the Courts of UAE as there are a number of technicalities which are peculiar to UAE law. Such technicalities include requirements that:

- a UAE award must be physically signed within the UAE;
- the legal representative of each party possesses a valid power of attorney to act in the proceedings; and
- witnesses should not be present in the evidentiary hearing except when they are giving evidence (however, it is worth noting that this is often relaxed by the agreement of the parties).

In the past, awards have been overturned by the courts for apparently insignificant errors such as the tribunal's failure to sign each page of the award in full, instead simply initialing each page. The *Bechtel case*[23], *as mentioned above*, is an example of this, where the Dubai Court of Cassation overturned an arbitration award because the oath used to swear in witnesses during the arbitration did not follow the formula prescribed for UAE court hearings.

Notably, the Paris Court of Appeal, upheld the award in favour of Bechtel, setting aside the Dubai Court of Cassation's decision. The Paris Court of Appeal ruled that the arbitral award satisfied the requirement

However, despite the history of technicalities, there are also positive developments in the UAE courts. There appears to be a general trend by the UAE courts, away from overturning arbitration awards on purely technical reasons. Although there are still exceptions to this trend, there seems to be a more arbitration-friendly climate in the UAE and the developments are positive.

23. Direction Générale de l'Aviation Civile de l'Émirat de Dubai v International Bechtel Co.

The new Enforcement Law in Saudi Arabia is a positive step in the right direction. It should guarantee that the merit of the dispute is no longer revisited: however, it is yet to be determined what effect the provisions have in practice. The new Enforcement Law does not protect parties or foreign awards which are unfamiliar to Saudi law or Shariah law concepts.

## Conclusion

Dispute resolution procedures have become more sophisticated in the Middle East by virtue of the use of more complex construction and engineering contracts. A range of technics are available, although these mediation and dispute boards is not particularly common. Face to face negotiations still hold strong, with the use of an expert or the appointment of one adjudicator to resolve disputes before then using International Arbitration as a final dispute resolution process. None of these processes escape the need for enforcement, and this will, of course, raise separate questions about where assets might be placed, and local courts attitude towards the dispute resolution procedure and any decision made by a contractual dispute decision maker, or the enforceability of an arbitration award.

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The construction & energy law specialists

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## Partner

Nicholas conducts a mix of contract drafting, strategic project advice and dispute resolution work. He acts in a wide range of construction sectors in the UK and internationally, including general construction, transport, communications, industrial, process plant, petrochemical, and energy. A solicitor advocate and chartered surveyor, his dual qualifications provide a layer of expertise that adds a practical level to his work.

Noted by *Chambers and Partners UK* as "very well known in the field", his industry background reassures clients that he has a "good grasp of the issues."; he has also been praised for his "ability to pre-empt potential problems and provide advice in a clear manner that maintains the individual needs of clients." Legal 500 UK 2012 lists Nicholas in three sections: Construction (highly recommended), International Arbitration (esteemed practitioner) and as Mediator. According to the IBA's *Who's Who Legal Construction* he is "revered for his 'excellent mind'". The IBA's *International Who's Who of Business Lawyers Today* listed Nicholas as one of the ten most highly regarded individuals internationally for construction law.

Nicholas has considerable experience dealing with contracts of various forms including FIDIC, ICE, NEC, JCT, PPC, IChemE, M/F, GC/Works, BPF/ACA, ACE, RIBA, and various EPC, EPCM and PFI/PPP contracts. Nicholas also deal with subcontracts such as NEC, Dom 1 and 2, ECA, FCEC Blue Form, JCT. Procedural rules; DIAC, CEDR, ICC, UNCITRAL, ICE, SIAC, CIMAR, LCIA, FIDIC, CIArb, TeCSA, CIC, and the Scheme. He led the drafting of CEDR's Project Mediation Procedural Rules.

### Specialist expertise

Nicholas is an expert in dispute resolution where his experience spans litigation, arbitration (domestic and international), adjudication, DAB/DRB, mediation, early neutral evaluation and expert determination. He has also conducted Government funded research into construction dispute resolution. He regularly acts as a mediator in construction, engineering and commercial disputes, and sits as adjudicator on international Dispute Adjudication Boards and as arbitrator.

*Examples of Nicholas' expertise include:*

- advising an EPC contractor in respect of the largest gas combined cycle power plant completed in Europe in 2012. See Alstom Power Ltd v Somi Impianti SRL [2012] EWHC 2644 (TCC);
- providing contractual and claims advice in respect of a JV agreement and EPC turnkey agreement for a 900 MW oil fired steam power plant and desalination plant. Project cost US$1.8 billion, with claims circa US$ 300million;
- acting for one of the world's largest specialist power station contractors in respect of a substantial extension of time and prolongation claim under a bespoke EPC contract. Advice in respect of the dispute resolution provision comprising mediation, contractual adjudication and High Court litigation;
- advising an airport owner regarding a £4.2 billion airport development in respect of

- claims under bespoke NEC based partnering packages for the building management system and related claims;
- advising a government's transport ministry in respect of a new metro system;
- acting for a joint venture contractor in relation to a potential high value (circa £150 million) dispute arising from a UK off shore wind farm project. Advising on various contractual issues, entitlement to extensions of time and associated additional costs as a result of variations and developing overall strategy;
- acting for the National Energy Authority of a Government to advise on and defend an ICC arbitration for the construction of a hydroelectric dam in Asia.

### Other activities

Nicholas is a Senior Visiting Lecturer and an Executive Committee Member, at the Centre of Construction Law, King's College, London, and an assessor for the Commercial Management MSc at UMIST. Nicholas regularly lectures at King's College London, for ICC, DRBF, IBC at their summer school at Cambridge University, ICE, RICS, UMIST, CEDR together with a variety of in-house and ad hoc lectures. Video includes: Einstein Network; Mediationfirst; and a live radio appearance on BBC Southern Radio. Nicholas chaired IBC First Construction Law Web Congress.

He has published widely in the area of construction law and dispute resolution, and won a Silver Award at the CIOB Literary Awards in 2000 for his book Dispute Resolution in the Construction Industry published by Thomas Telford. The Rt. Hon Sir Philip Otton described the book as "the most fascinating publication to come across [his] desk for many a year."

Nicholas was also lead author of *'Mediating Construction Disputes: An Evaluation of Existing Practice'* (2010) which received a CEDR award for excellence. The Rt Hon Lord Woolf commented in the House of Lords in January 2010 that: "Mediation is no longer a novelty in the UK. … Commendably, a solicitor, Nicholas Gould, has now with the assistance of a team of supporters completed research for King's College London … As I would expect, the survey showed that the process led to a saving of time and cost in a significant number of cases. I warmly congratulate Mr Gould and his team on the empirical data that they have assembled."

### Nicholas' memberships/positions include:

- chairman of the ICC's International Expertise Sub-committee;
- member of the Dispute Resolution Board Foundation (DRBF) and President of Region 2 of the DRBF;
- past chairman of and current case editor for the Adjudication Society;
- fellow of the Royal Institute for Chartered Surveyors (RICS) and the Chartered Institute of Arbitrators (CIArb);
- member of King's College Construction Law Association (KCCLA);
- member of International Chamber of Commerce (ICC);
- member of the London Court of International Arbitration (LCIA);
- member of the International Bar Association;
- member of The Technology and Construction Solicitors Association (TeCSA);
- publicity Officer of the CCG;
- former Chairman of the Society of Construction Law;
- freeman of the Worshipful Company of Arbitrators;
- accredited arbitrator for DIFC-LCIA Arbitration Centre, Dubai.