

Arbitration: Light at the end of the tunnel

A modernised method of administering arbitration proceedings is set to liberalise the local scene, and make the thought of commencing this popular dispute resolution mode within the construction industry less intimidating than it currently may appear to be. **Antonios Dimitracopoulos**, partner, Bin Shabib & Associates (BSA) LLP, highlights the pros of looking to the DIFC as a possible alternative



The UAE has yet to witness a rush on major arbitration proceedings for construction disputes.

Certainly, the number of instances where such disputes reach the stage of an enforceable arbitral award pales into insignificance when compared to the contractual volume the construction industry generates in the UAE. One reason for this may of course be the urge for contractors to minimise time and costs spent in legal battles and maximise their resources in securing projects.

One other reason may be the fact that obtaining an enforceable award in the UAE could defeat any advantages that arbitration may initially have over litigation: seeking authentication of the arbitral award can be a rather daunting task involving a laboriously long process of what is yet another legal battle before the UAE Courts of First Instance, Appeal, Cassation or Supreme Federal Court on the formalities of the award.

During this process, a one to two year-long slow progression before the UAE Courts can take place and every possible procedural argument could be patiently listened to before it is decided upon and, over an additional pe-

riod of thirty days, be passed on to the higher Courts and then the highest Courts for their further elaborate deliberation.

A further reason why many intended arbitration proceedings do not take place may be due to the time a dispute arises and is mature enough to be referred to arbitration, no validly executed agreement is in place — or at least no arbitration clause has been countersigned by both parties.

But there appears to be light at the end of the tunnel for those that may toy with the idea of leaping onto arbitral proceedings to resolve their construction disputes: On 17th February 2008 the Dubai International Financial Centre ("DIFC") inaugurated the DIFC/LCIA Arbitration Centre.

What appears to be the key advantage of awards issued by the DIFC/LCIA Arbitration Centre is their enforceability anywhere in the UAE, following what is expected to be a comparatively faster authentication by the DIFC Courts.

This would be so, primarily because of the substantially lesser volume of caseload the DIFC Courts have as well as because of the fact that there is only one

level of Appeal. In addition, parties seeking to enforce the Centre's awards would also enjoy equal chances of international enforceability as any other UAE arbitral award.

But will this fast track to enforcement be accessible to anyone that is not DIFC based?

The DIFC Arbitration Law currently in force (DIFC Arbitration Law No.8 of 2004) does not seem to allow so: only disputes that arose out of or in connection with DIFC could be referred to DIFC arbitration. However, the draft DIFC Arbitration Law No.1 of 2008 has been released for consultation and is expected to be enacted later in 2008 to amend the 2004 Law.

This draft law allows non DIFC based entities to agree having the DIFC as a seat of arbitration. This could mean that the DIFC/LCIA Arbitration Centre could become an alternative and possibly, for the reasons highlighted above, a preferred forum for construction disputes.

The proposed 2008 DIFC Arbitration Law comes in as a breath of fresh air by substantially liberalising the way in which an arbitration agreement can be concluded. Whilst the

agreement to arbitrate needs to be evidenced in writing, it can be validly incorporated by reference, recorded in an exchange of emails, faxes (and even tel-exes and telegrams). There appears to be no requirement for the arbitration agreement/ clause to be physically or electronically signed.

To allow for an arbitration clause to be validly agreed upon by way of reference only, say to a standard FIDIC arbitration clause, is particularly useful as this is the (unfortunately unworkable so far) common practice amongst many members of the construction industry.

There are a few teething problems with the remaining provisions of the DIFC Arbitration Law (both the current one and the 2008 proposed draft) which may be addressed by the forthcoming DIFC/LCIA Arbitration Rules. In any event, the overall authority and supervisory jurisdiction of the DIFC Courts is set to provide additional confidence in delivery of fair administration of arbitral proceedings as well as fast conversion of awards into enforceable judicial orders.