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Claims Management In the Middle East Countries

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ABSTRACT

Construction industry in the Middle East countries has been growing rapidly in the past three to four decades. However, the term “Claims Management” is still new for many in the industry of constructions.

The judicial systems, the culture, & the nature of the constructions in the Middle East, all of these factors affect the claims nature and size. The paper gives an overview of the type of projects and conflicts associated to it in the Middle East countries. It also gives an exposure to the jurisdiction systems in the Middle East countries.

I Introduction

Conflicts occur very often during a construction project. That is the nature of the construction industry everywhere. The needs of the owner, the professionalism of the architect, & the performance of the contractor; all of these factors come together and form an environment that can be described as a conflict sensitive environment. Conflicts usually come in the form of either a change order, or it can also grow to a claim.

The Middle East countries have experienced a rapid growth in constructions. The economical needs have driven the industry to grow firmly, and have attracted contractors from all around the world. However, this need for international constructions agencies was not accompanied with changes in the judicial systems that govern the construction contracts. Construction firms have often found their ignorance in the judicial systems one of the major problems in executing projects in the Middle East countries (1).

This paper will review the literatures in this area, and will give an exposure to the judicial systems in the Middle East, and the laws and regulations that govern the construction projects.

II East & West

There are several things that east and west differ in their judicial systems. Culture and history play the major role in forming the

judicial system. While many of the industrial countries around the world, use the judicial system extracted from the old British Empire law. Some others based their judicial system on the French laws. However, the biggest source of law in the Middle East is the Islamic law.

Construction firms working the Middle East countries understand the differences between different judicial systems. A construction agency that used to work in North America must not understate the conflicts that could occur when executing projects in other parts of the world (1).

III Jurisdiction Systems (1)

As explained earlier, Islam is the main source for most of the laws and regulations in the Middle East countries. Some Islamic countries have constitutions that are combined of laws from different judicial systems. However, even in those countries, Islamic laws remain the main source for most of the regulations. In other Islamic countries, Islamic laws are the only source for regulations and rules.

It is very common to call Islamic law Shari'a. Islamic law or Shari'a can be defined as the rules and laws that are extracted from Qur'an, Sunna, or Ijma'. Qur'an is the holy book for Muslims. Muslims believe that Qur'an is the word of god. Sunna is the collection of sayings and acts of Prophet Muhammad. Ijma is simply the agreement of a big number of Islamic scholars on a certain issue.

The Islamic law "Shari'a" has different schools, and hence it differs from a place to another.

While Islamic Law "Shari'a" is one law governing all Muslims, the application of Shari'a to actual legal problems will depend on the country in which the problem arises. Many Islamic countries have adopted civil codes.

IV Basic Contract Law Under Islamic Law "Shari'a" (2)

Qur'an –the holy book- elevates contractual undertakings to the level of religious duty. One of the verses of Qur'an states, "Ye who believe fulfill your covenant". Because the principles of Qur'an are eternal, the commandment to fulfill one's contracts applies to modern contracts.

However, Qur'an forbids certain types of contracts. Qur'an –for instance- forbid "Riba". Riba was translated as usury, augmentation, or accretion (2). Some scholars hold that interest is disallowed altogether, while more liberal scholars suggest that interest can be justified as "compensation for inflation" or the decline in real value of money or goods.

The prohibition against Riba overlaps with the prohibition against gambling and the general prohibition of unjust enrichment.

As in all legal systems, offer and acceptance is required for the formation of a contract. The exchange of offer and acceptance is not considered an exchange of promises, but is an exchange of grants.

The time during which an offer remains open is termed "majlis". Majlis translates as Physical proximity. Majlis begins when parties come together and ends when they separate.

The contract under Islamic law is sacred. It is the Shari'a of the parties. If a contract violates another rule of the Islamic law, it becomes void.

Shari'a contains options of rescission in which one party may rescind, "Khayar Al-Wasf". This option allows an injured party to rescind a contract where the quantity or quality of goods or services, as described in the contract are not met. Another option to rescind for fraud is called "Khayar Al-Tadlis".

Shari'a requires a breaching party to compensate the injured party. However, Islamic Law accepted force majeure as valid grounds for rescinding a contract.

V Contracting in the Middle East

There are several contracts that are normally used in constructions in the Middle East countries. In Saudi Arabia, government projects use "The Public Constructions Contract" (2). The "Public Constructions Contract" is used by the government in Saudi Arabia for public projects, although it has been criticized of being very unfair and throw too much of the risk on the contractors shoulders (2). FIDIC and AIA contracts are also used in some projects. In addition to the FIDIC and AIA formats, there are what are called the oil industry

formats. These are design/build contracts and normally used in huge and complicated constructions such as the ones in the oil industry. However, for big projects that involve international contractors, other contract formats are often used (1).

VI Types of Conflicts

Conflicts are natural in construction projects (4). As mentioned earlier, conflicts can be in the form of just a change order, but it also can grow to become a claim. Change orders in general are not a big deal, if the owner of the project acknowledges them. In most of the cases, contractors manage to convince the owner to accept the change order. However, a higher cost change order is less likely to be accepted easily by the owner. When, the cost of the change order becomes higher, it is more feasible for the owner to take the risk of going to court to finalize this. Owners hope that the contractor will not continue fighting until the last moment. Although, these situations are kind of costly, but nevertheless, they are few.

Conflicts that grow to claims can be resolved either using arbitration or going to litigation. Experts in the construction industry understand that as far as you go in a construction claim, as much risk and cost get higher.

There are, in general, three conflict resolution approaches from a project manager's viewpoint: withdrawal, compromise, problem solving (4).

Contractors that understand the judicial requirements take good steps to avoid the losses of unacknowledged change orders or construction claims.

Success in construction projects mainly depends on how well project managers handle conflicts (4).

VII Claims Management (2)

The term "Claims Management" is a bit new for the Middle East construction industry. Actually, it started to be part of the industry terminology when huge constructions started to execute by international contractors. Very recent studies showed that the understanding of the importance of claims management has just begun to influence the local construction industry. (Abbas, 2000) in his recent study stated "the claims department in Saudi Arabia is something relatively new in the construction industry atmosphere".

VIII Claims in the Middle East

Researches and studies on the causes and amount of claims in the construction industry in the Middle East are very few. However, claims in public projects in Saudi Arabia go through "Claims Department". This department looks at the contractor claim and evaluate.

A recent study By (Abbas, 2000) showed that contractors in Saudi Arabia think that the reason behind most of the claims in the construction industry is the late payments by the owners (2).

Most construction firms that move into the Middle East go into a joint venture with a local partner. This is an excellent way to become familiar with a new country (3). Most of the conflicts can be avoided if all parties do thoroughly understand the culture.

IX Arbitration in the Middle East (1)

The rules of Shari'a, or Islamic law, regulate the conduct of arbitration.

The shari'a arbitration has four elements;

1. There must be a dispute.
2. it must be the will of two competent parties to submit the dispute to an arbitrator.
3. The arbitrator must have the qualifications of a judge.
4. The arbitrators must agree to conduct the arbitration.

Egypt, while still recognizing Shari'a as the primary source of law, has developed an additional statutory system of arbitration. The Egyptian Chambers of Commerce was empowered to arbitrate disputes. Five arbitrators are used, and both parties must agree to submit the dispute to the Chamber's arbitration.

Saudi Arabia, too, while still retaining the option of a Shari'a arbitration, has developed a statutory system of arbitration.

Chambers of Commerce is empowered to conduct arbitration. The parties must submit written requests for arbitration to the Chamber.

X Litigation in the Middle East (1)

As discussed earlier, the Islamic law governs all litigations in Islamic courts. In almost all the cases, the courts of the country of the employer are available to the extent that the employer is subject to suit in that country. Most contractors are reluctant to submit their claims to a national court. They are at an obvious disadvantage, especially when the country does not have a developed jurisprudence or a tradition of judicial independence. For example, many foreign contractors are reluctant to submit their disputes to the courts of Saudi Arabia. However, their apprehension is unfounded because the Saudi courts enjoy a reputation for fairness and incorruptibility.

Most contractors would be pleased to submit their disputes to their own national courts. In the absence of a choice of forum provision, a contractor's right to sue a foreign employer "owner" in its own court will depend on the court's ability to obtain jurisdiction over the employer and the deference with which foreign entities, especially public bodies, are treated under the law of that country.

XI Conclusion

- Claims management is a new concept for local construction firms in the Middle East countries.
- Different types of contracts are used in the construction industry in the Middle East countries. Some of the most common types of contracts are used like FIDIC and AIA. Some other local government contract forms are also used.
- Shari's or Islamic law is the source of most of regulations and laws in the Middle East. In some countries, judicial systems were modified with clauses and concepts from the common law and the civil code. In other countries like Saudi Arabia, Islamic law is the only source for the judicial rules and regulations. However, even in these countries, some rules and regulations were incorporated, especially in huge constructions or in multinational contracts.
- Arbitration is one method for dispute resolution. Arbitration is governed like all other regulations by the local laws often extracted from the Islamic law "Shari'a".
- Litigation in Islamic law is done according to Shari's in an Islamic court. However, very often, foreign contractors insist on their contracts to have any disputes to be resolved in their national courts. This is due to the fact that some of those contractors could not fit with the rules and regulations that Shari's or Islamic law call for.

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