The Middle Eastern and African Arbitration Review

2016

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Global Arbitration Review is delighted to publish *The Middle Eastern and African Arbitration Review 2016*, one of a series of special reports that deliver business-focused intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration.

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The Effects on Arbitration of the Arab Spring

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Summary

The impact of the Arab Spring across Middle East and North Africa (MENA) was significant. By the end of 2012, leaders had been forced from power in Tunisia, Egypt, Libya and Yemen and civil uprisings and major protests had taken place in Bahrain, Syria, Algeria, Iraq, Jordan, Kuwait, Morocco and Sudan.

At the same time, there has been an increase in the number of arbitrations (both commercial and investor–state) involving MENA parties and states.[1] The wave of protests, riots and civil wars that began in Tunisia in December 2010 and spread throughout the Arab world, is often cited as a key contributing factor for the increased participation in arbitration of MENA parties and states. This article considers the impact that the Arab Spring has had on arbitration and may have over the coming years.

EFFECT ON INVESTOR–STATE ARBITRATION

Traditionally, MENA has not generated many arbitrations between foreign investors and host states, perhaps because investment in the region has been in sectors where state-owned companies have a presence, such as energy and construction (thereby enabling aggrieved investors to bring contractual claims). Investors have good reason to avoid bringing claims against states in circumstances where they can bring claims against state-owned entities that have assets to satisfy any award. Statistics from the International Centre for Settlement of Investor Disputes (ICSID) show that states from the region have appeared in only 6 per cent of ICSID cases since the centre opened in 1966.[2]

However, measures to protect investors and to enable claims to be brought against states are, and have been for some time, in place across MENA. In fact, just as the Arab Spring began in Tunisia and spread throughout MENA, it could be said that the history of modern investor–state arbitration, in part, began in Tunisia. Tunisia was the first state to sign the ICSID Convention on 5 May 1965, followed by the United Kingdom, which signed on 26 May 1965. Since then, most MENA states have signed and ratified the ICSID Convention; the notable exceptions being Iran and Libya.[2]

BILATERAL AND MULTILATERAL INVESTMENT TREATY PROTECTION

There are also a number of investment treaties in the region with investor–state dispute settlement (ISDS) mechanisms, including a number of bilateral investment treaties (BITs); the Agreement for the Promotion, Protection and Guarantee of Investment among Member States of the Organization of the Islamic Conference[3] (the OIC Agreement); and the Unified Agreement for the Investment of Arab Capital in the Arab States[4] (the Arab Investment Agreement).

BILATERAL INVESTMENT TREATIES (BITS)

MENA states are signatories to a large number of BITs (although a high proportion of intra-MENA BITs are not in force as the ratification procedures have not been conducted). Egypt has been the most active, with 100 BITs, followed by Kuwait, with 75 BITs.[5] At the other end of the scale sits Iraq, with only seven BITs.[6]

These BITs contain a range of ISDS mechanisms. For example, Egypt's BIT with Switzerland-[7] provides that disputes may be submitted to the courts of the host state, the Cairo Regional Centre for International Commercial Arbitration (CRCICA); an ad hoc tribunal under UNCITRAL rules; or ICSID. In addition, a number of BITs between Arab League (formerly the

League of Arab States) members, such as the Egypt–Jordan BIT, provide for disputes to be heard by the Arab Investment Court.[8]

THE OIC AGREEMENT

The Organisation of Islamic Cooperation (formerly the Organization of the Islamic Conference) is an inter-governmental organisation of 57 countries founded in 1969. The OIC Agreement entered into force on 23 September 1986 and has been ratified by 27 member states. It contains many of the protections commonly found in international investment agreements, such as protection against expropriation, free transfer of capital guaranty and a most-favoured-nation clause (which means investors may be able to rely on more comprehensive protections contained in other treaties entered into by the host state).

Unfortunately, there is a lack of clarity and precedent on the process for bringing a claim under the OIC Agreement. Article 17 of the OIC Agreement provides that, until 'an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled[9] through conciliation or arbitration'; however no such organ has been established.

The first and only known investor–state arbitration under the OIC was the case of ***Hesham Al-Warraq v Indonesia***[10] initiated in 2012, involving a claim arising out of the government's bailout of a bank in which the claimant had invested. This arbitration[11] was conducted as an ad hoc arbitration under UNCITRAL rules and seated in Singapore.

In this case, Indonesia argued that article 17 of the OIC Agreement only provided for state-to-state arbitration. However, the Tribunal rejected this interpretation and found that the OIC Agreement permitted investor–state arbitration. In its final award, the Tribunal found that Indonesia's treatment of the claimant's investment had breached the fair and equitable treatment protection, although it declined to award damages because it found that the claimant had also breached the OIC Agreement.

ARAB INVESTMENT AGREEMENT

The Arab League was established in 1945 following the signing of the 'Charter of the League of Arab States'[12] by Iraq, Jordan, Syria, Lebanon and Egypt. It now has 22 members from MENA. The Arab Investment Agreement entered into force in 1981. The substantive protections in the Arab Investment Agreement are similar to those in the OIC Agreement. The Arab League has subsequently adopted an updated investment agreement, known as the 2013 Amendment to the 1980 Arab League Investment Agreement[13] (the 2013 Amendment). This update broadens and provides greater clarity on the protections offered to an investor and is expected to enter into force in 2016.

The Arab Investment Agreement provides for the Arab Investment Court to have sole jurisdiction unless otherwise agreed. The 2013 Amendment grants jurisdiction to both the Arab Investment Court and state courts unless otherwise agreed. The Arab Investment Court was established in 1985, however, it was not utilised until 2003 when a Saudi Arabian investor, Tanmiah, brought a claim against Tunisia[14] relating to the sponsorship of the Mediterranean Games held in Tunisia in September 2001.

IMPACT OF THE ARAB SPRING

Since 2012, there has been an increase in the number of investment treaty arbitrations involving MENA companies and states. It is also clear, on occasion, that investment treaty arbitrations have arisen from the events of the Arab Spring.

CLAIMS AGAINST EGYPT

A state that has certainly seen an increase in arbitration since the Arab Spring is Egypt. The Egyptian government faced 37 international and domestic arbitration cases worth US$14.3 billion in the three years since the 2011 uprising, in comparison with approximately two cases per year prior to the uprising (according to Ezzat Ouda, the head of the state's lawsuits authority).[15]

Eighteen days of mass protests forced Egypt's president, Hosni Mubarak, to resign in February 2011, after three decades in power. Following Hosni Mubarak's resignation, the new government in Egypt cancelled many contracts that had been entered into with the former regime and, in some instances, corruption charges were brought against government officials and foreign investors.

These actions have led directly to claims. The first was brought by a Dubai-based property group DAMAC Properties and its chairman, Hussain Sajwani, in 2011.[16] In 2006, DAMAC acquired land in the Red Sea resort area of Gamsha Bay. However, only months after the fall of the Mubarak regime, the chairman of DAMAC was convicted in absentia of corruption in relation to the purchase of land and the sale was rescinded. The claim was discontinued in 2014 after a settlement was reached with Egypt.[17] A similar claim was brought in 2014 by a German licence plate manufacturer, Utsch.[18] This claim, which is still pending, relates to the 2011 conviction in absentia of its CEO for wasting government funds.

Cases have also arisen from the pressure on the Egyptian government to overturn the sale of state assets during Mubarak's rule. Egyptian courts have, following domestic lawsuits filed by third parties, annulled a number of deals entered into between the state and foreign investors. Such action led to an investor treaty claim being brought by a multinational, Indorama, in relation to the renationalisation of its textile factory.[19] That claim for US$156 million was settled in 2015 for US$54 million.[20] Egypt has also been engaged in settlement discussions with other investors that were involved in similar privatisation disputes.

With a view to reassuring foreign investors, in 2014 Egypt approved a new law (Law No. 32 of 2014) that restricts the rights of third parties to challenge commercial contracts awarded by the government.[21] This responds to the large number of domestic lawsuits that have been filed challenging the legality of public contracts awarded during Mubarak's regime.

Egypt also made substantial amendments to the Egyptian Investment Law No. 8 of 1997 (the Investment Law) in March 2015 and created three out-of-court forums designed to encourage amicable settlement of investment disputes with the government.[22] The amended Investment Law also removed the legislative consent to investor–state arbitration, which means investors will need to rely on the consent to arbitration in a treaty or contract as the basis for bringing an arbitration against Egypt.

Despite these changes, the number of claims against Egypt has continued to grow. In January 2016, Al Jazeera registered an ICSID claim under the Egypt–Qatar BIT.[23] Al Jazeera is reportedly seeking US$150 million in compensation relating to what it described as a 'sustained campaign of harassment and intimidation'.[24] In September 2013 Al Jazeera had announced its intention to bring a claim against Egypt, stating that Egypt had raised

and closed its offices, confiscated equipment, deported correspondents and jammed its transmission.[25] Events then took a dramatic turn in December 2013, when three journalists working for Al Jazeera, Australian Peter Greste, Canadian Mohamed Fahmy and Egyptian Baher Mohamed, were taken into custody. In 2014, all three journalists were convicted of aiding a 'terrorist organisation' and sentenced to between seven and 10 years' imprisonment. Peter Greste was subsequently released and deported in February 2015, and Mohamed Fahmy and Baher Mohamed were given a presidential pardon in September 2015.

CLAIMS AGAINST LIBYA

Libya's Arab Spring was a bloody affair, ending with the killing in 2011 of Muammar Gaddafi. Since then, investor–state claims have been brought against Libya relating to the deterioration in security as a result of the civil war that led to the fall of the Gaddafi regime.

On 20 July 2015, Strabag SE, an international construction and engineering company, filed a claim against Libya under the Austria–Libya BIT.[26] Details of the claim have not yet been made public, however, it is understood that Strabag is claiming payment for services under contracts entered into prior to the revolution in Libya and damages for the theft of equipment post-revolution. Strabag had a number of projects in Libya, including a €434 million contract to renew infrastructure in the Libyan city of Tajura.

In June 2015, Tekfen Holding, a Turkish construction company, commenced an ICC arbitration against the Libyan Man-Made River Authority and the Libyan state.[27] Tekfen is a 67 per cent owner in a joint venture company that in 2005 was awarded the construction of 380km section of Libya's Great Man-Made River Project. Tekfen suspended operations in February 2011 following looting of its main worksite in Kufra and evacuated its employees. It appears from announcements made by Tekfen that the dispute involves a contractual claim and a claim under the Libya–Turkey BIT.

CLAIMS AGAINST SYRIA

There had, until recently, been no reports of claims being made against Syria. However, in February 2016 Investment Arbitration Reporter reported that Syria had been found to have breached the Spain–Syria investment treaty after it seized a bank guarantee for a project that had been derailed by the ongoing conflict in Syria and EU sanctions.[28]

It may be that potential claimants are waiting for a resolution of the current conflict in Syria, the outcome of which may have significant implications under international law. Under international law, if an insurrection movement succeeds and becomes the new government of a state, its actions are attributable to the state and therefore the state would be liable for the damage caused by the revolutionary forces and also the acts of the previous regime.[29]

GENERAL TREND

As can be seen from the cases described above, the Arab Spring has created circumstances that have led to investor–state arbitrations, particularly in Egypt. However, the number of reported cases that clearly arise from the Arab Spring is relatively low compared to both the total number of claims brought against MENA countries since 2011 and the number of claims arising from other political and economic events affecting specific countries or regions.

Out of a total of 46 investor–state claims brought since 2011 against states in MENA, less than a quarter of these appear to be directly linked to the Arab Spring. In comparison, the

Iran–United States Claims Tribunal (IUSCT), which was established in 19 January 1981 pursuant to the Algiers Accords, has heard over 4,700 cases and ordered payments totalling over US$2.5 billion.[30] The IUSCT came into existence as one of the measures taken to resolve the crisis in relations between Iran and the United States of America (US) arising out of the detention of 52 US nationals at the US Embassy in Tehran, which commenced in November 1979, and the subsequent freeze of Iranian assets by the US.

Another useful comparison is the Argentinian financial crisis in 2001. Following the Argentinian financial crisis, 37 claims were filed against Argentina in the space of five years, 31 of which related to measures introduced by the Public Emergency and Exchange Regime Reform Act enacted in January 2002.[31] The number of claims against MENA states is still relatively modest in comparison, but new cases are still coming to light, and there is the prospect of more cases in the pipeline.

OTHER FACTORS

There has certainly been a steady increase in investor treaty claims involving MENA states and parties since the Arab Spring. However, it would appear that the Arab Spring is one of several factors that have contributed to increased participation in investment treaty arbitration.

A factor that is likely to have increased the growth in investment treaty arbitration involving MENA states and parties is the general increase in the inflow and outflow of investment over the past decade. There has been a decade-long surge in foreign investment into MENA, focusing largely on the hydrocarbon sector.[32] In more recent years, there has also been an unprecedented level of investment by entities from the region in other parts of the world. The Gulf states, in particular, have invested considerably abroad through state entities or investment funds. That has, no doubt, impacted on the number of claimants from the region involved in investment-treaty arbitration.

Another factor for the growth in MENA-related claims is treaty coverage and treaty awareness. As has been the case globally, the growing number of BITs and a rising awareness of the possibility of treaty arbitration where investments have gone awry, has led to a sharp increase in the number of claims in recent years. There is an apparent increased willingness on the part of investors to make use of their right to enforce the protections investment treaties provide them.

FUTURE IMPACT OF THE ARAB SPRING ON INVESTOR–STATE ARBITRATION

While it is expected that investor–state cases will continue to arise in the near future, it seems unlikely that the Arab Spring will lead to the flood of investment treaty cases that a number of commentators anticipated. This may be because the main focus of the Arab Spring has been on regime change and political reform rather than the nationalisation of foreign investments.

It also appears unlikely that states will become flooded with so many claims that they seek to renounce existing treaties. The Arab Spring has not slowed the spread of international investment agreements entered into in the MENA region. As noted above, the League of Arab States adopted an updated investment agreement in 2013 and since the start of 2011 MENA countries have signed 79 BITs (although many of these are yet to enter into force). Worldwide a total of 131 BITs were signed in the same period. Over this period, the United Arab Emirates has signed 11 BITs and Kuwait has signed 10 BITs. Japan has been particularly active in the region, signing BITs with Mozambique, Kuwait, Saudi Arabia, Iraq, Oman and Iran.

EFFECT ON COMMERCIAL ARBITRATION

In recent years there has been an increase in the number of MENA-based parties that are willing to include arbitration clauses in their contracts. Not only has this been driven by the inherent benefits of arbitration, but also by recent developments in the region which suggest that it is becoming a more friendly place to conduct arbitration and enforce arbitral awards. This, as a result, has meant that parties have a greater confidence in arbitration as a means of resolving disputes and, in particular, arbitration conducted in MENA states.

Prior to the Arab Spring, MENA countries were experiencing a growing trend towards modernisation of commercial arbitration laws and a maturing of the arbitration market. Iran ratified the New York Convention in 2001, followed by Qatar in 2002 and the United Arab Emirates in 2006. In 2008 Morocco and Syria both enacted standalone arbitration laws, drawing on the UNCITRAL Model Law. Prior to the outbreak of civil war in Libya, a draft Arbitration Law had been released which incorporated elements from the Unified Arab Code of Civil Procedure, the UNCITRAL Model Law and Egyptian, Tunisian and French Law.[33]

While the Arab Spring may have set back law reform in Libya, elsewhere in the region the modernisation trend continued. In 2012 Saudi Arabia enacted a new arbitration law based on the UNCITRAL Model Law.[34] The law provides parties with greater freedom to determine the procedure of their arbitration and limits the intervention of the courts.

In 2015 Bahrain enacted a new stand-alone arbitration law that directly adopts the UNCITRAL Model Law.[35] There are also reports that Iraq is reviewing its arbitration law.[36] However, while Iraq ratified the ICSID Convention in 2015, it, together with Libya and Yemen, are not yet signatories to the New York Convention.

The past decade has also seen new arbitration centres open in MENA states. In 2006 the Qatar International Center for Conciliation and Arbitration was established. In 2008, the DIFC-LCIA Arbitration Centre was launched (a partnership between the Dubai International Financial Centre and the London Court of International Arbitration). In 2009 the Bahrain Chamber for Dispute Resolution was established, in partnership with the American Arbitration Centre. In Abu Dhabi, a new financial free zone, the Abu Dhabi Global Market, is being established, which has its own court and arbitration law.

In addition, more established arbitration centres in the region, such as the Dubai International Arbitration Centre (DIAC) and CRCICA have also seen an increase in their caseload.

CLAIMS ARISING OUT OF THE ARAB SPRING

While disputes arising out of the Arab Spring has been a hot topic at arbitration conferences in the MENA region, the confidential nature of commercial arbitration means that, in comparison with investment treaty claims, details of specific commercial arbitrations that have arisen as a result of the Arab Spring are harder to identify. One example that is in the public domain is the ICC arbitration initiated in 2011 by East Mediterranean Gas EMG, an Egyptian joint venture company that supplied gas to Israel Electric through the Arish-Ashkelon pipeline (a pipeline that connects the Arab Gas Pipeline in Egypt with Israel and Jordan).[37] Following the fall of the Mubarak regime there were several attacks on the pipeline causing interruptions to supply. EMG sought damages against two Egyptian state-owned companies in relation to failure to deliver gas and threatened termination of the contractual relationship. In December 2015, the tribunal ordered the two Egyptian state

entities to pay over US$288 million to EMG and over US$1.7 billion to Israel Electric. Two treaty claims have also been launched by EMG shareholders against Egypt.

Statistics from certain regional arbitration centres also suggest that the number of commercial arbitrations have increased since the Arab Spring. CRCICA, which has been administering arbitrations for over 30 years, saw a spike in the number of cases filed after the Arab Spring. In 2012 a record 78 cases were filed, 66 cases had been filed in 2011. In 2013, 73 cases were filed and 74 were filed in 2014. While details of the claims are not available, the statistics do reveal that the disputes arose from a broad range of fields. Construction, a sector that has traditionally generated a large number of international arbitrations, has only accounted for around 15–20 per cent of cases at CRCICA since 2011.

However, the increase in the number of cases following the Arab Spring does not, to date, appear to be as significant as the increase in caseload that was experienced by certain arbitration institutions, particularly in the UAE, following the collapse of the property market and associated halt on construction projects in 2008 and 2009. In 2009, a record 292 cases were filed at DIAC, up from 100 the previous year. There was another significant increase the following year, with 431 cases filed in 2010. The number peaked at 440 cases in 2011.

FUTURE IMPACT OF THE ARAB SPRING ON COMMERCIAL ARBITRATION

It is expected that arbitration proceedings will continue to arise in the near future as a result of the events of the Arab Spring. It is the case that war, regime change and political instability provides fertile ground for commercial disputes. Parties have, as a result of the Arab Spring, found themselves in a significantly different legal, economic and security landscape. As a result, obligations may have become difficult if not impossible to perform, and the parties' economic bargain may have fundamentally changed. Commercial disputes arising from the application of force majeure, the civil law concept of economic hardship and the imposition of sanctions have arisen and are likely to arise in the future. The MENA region is also a region where state-owned companies have a presence, in industries such as energy and construction and foreign investors therefore often have the option of bringing contractual claims (not only investment treaty claims) when they suffer losses.

However, while the Arab Spring has had an impact on formal commercial arbitration proceedings and is expected to do so in the near future, the ease of enforcement of arbitration awards in a number of MENA states remains an issue. The MENA region generally is becoming a more friendly place to conduct arbitration but it remains the case that in some states enforcement is problematic and in others it is largely untested. There is, in some jurisdictions, limited reported precedent of enforcement of arbitral awards so as to determine the extent to which parties seek to avoid enforcement and of the approach of local courts to such attempts. The level of confidence that parties have in the arbitration process and the enforceability of any resulting award is likely to be an important factor in whether disputes arising from the Arab Spring progress to formal arbitration proceedings.

CONCLUSION

The Arab Spring has had profound social and political implications in the MENA region and has also had a tangible impact on both investor–state and commercial arbitration. However, to date the flood of cases directly resulting from the Arab Spring that many anticipated has not materialised.

Nevertheless, the MENA region remains politically volatile and many foreign businesses in Arab Spring countries will have lost revenue or their investments as a result of political and social unrest, sanctions or the breakdown of local infrastructure and transport. It is likely that commercial arbitration and investor–state cases will continue to be commenced as a result. However, the number of cases that are commenced and proceed to a substantive hearing will depend, in part, on the attitude that governments wish to take, going forward, to foreign investment and that local courts take when called upon to enforce arbitration awards.

Notes

1. See ICC Court of Arbitration Bulletins 2010-2014, ICC Court Dispute Resolution Bulletin 2015, and UNCTAD Investment Policy Hub, available at: http://investmentpolicyhub.unctad.org.
2. ICSID Case Load Statistics, issue 2016-1, p. 11.
3. See ICSID Database of Member States, available at: https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx.
4. Agreement for the Promotion, Protection and Guarantee of Investment among Member States of the Organization of the Islamic Conference (adopted by resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq, on 1–5 June 1981, entered into force 23 September 1986).
5. Unified Agreement for the Investment of Arab Capital in the Arab States (signed 26 November 1980, entered into force 7 September 1981) League of Arab States, Economic Documents, No. 3.
6. See UNCTAD Investment Policy Hub, available at: http://investmentpolicyhub.unctad.org.
7. Ibid.
8. Agreement between The Swiss Confederation and The Arab Republic of Egypt on the Promotion and Reciprocal Protection of Investments (7 June 2010).
9. Agreement between the government of the Hashemite Kingdom of Jordan and the government of the Arab Republic of Egypt on the Mutual Promotion and Protection of Investments (8 May 1996).
10. The equivalent phrase in French and Arabic versions translates in English to 'resolved'.
11. ***Hesham Talaat M Al-Warraq v the Republic of Indonesia***, UNCITRAL, Final Award (15 December 2014).
12. http://www.italaw.com/cases/1527.
13. Charter of the League of Arab States (adopted 22 March 2015).
14. Unified Agreement for the Investment of Arab Capital in the Arab States (Amended) (adopted January 2013).
15. ***Tanmiah for Consultancy Management & Marketing v Tunisia***, Arab Investment Court, 1/1 Q, IIC 238 (12 October 2006).
16. Editorial, 'Egypt has faced $14 bn worth of cases from investors since 2011: Judge', ***ahramonline*** (22 April 2014), available at: http://english.ahram.org.eg/News/99606.aspx.

17. ***Hussain Sajwani, DAMAC Park Avenue for Real Estate Development S.A.E., and DAMAC Gamsha Bay for Development S.A.E. v Arab Republic of Egypt***, ICSID Case No. ARB/11/16.
18. See Editorial, 'Egypt says disputes with Dubai's DAMAC are resolved', Reuters (Cairo, 15 May 2013; ICSID Case Details, ICSID Case No. ARB/11/16, available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/11/16&tab=PRD.
19. ***Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Helmut Jungbluth v Arab Republic of Egypt***, ICSID Case No. ARB/13/37.
20. ***Indorama International Finance Limited v Arab Republic of Egypt***, ICSID Case No. ARB/11/32.
21. Sebastian Perry, 'Egypt sews up textile dispute', ***Global Arbitration Review*** (14 July 2015), available at: https://globalarbitrationreview.com/news/article/33962/egypt-sews-textile-dispute/.
22. Law No. 32 of 2014 Regulating Certain Procedures for Challenging State Contracts, issued 22 April 2014.
23. Law No 17 of 2015, issued on 12 March 2015.
24. ***Al Jazeera Media Network v Arab Republic of Egypt*** (ICSID Case No. ARB/16/1).
25. Al Jazeera Media Network press release, 'Al Jazeera instructs lawyers over Egyptian arrests, attacks and jamming', 12 September 2013, available at: http://pr.aljazeera.com/post/61008582542/al-jazeera-instructs-lawyers-over-egyptian.
26. Ibid.
27. ***Strabag SE v Libya***, ICSID Case No. ARB(AF)/15/1.
28. Tekfen Holding A.S. press release, 'Tekfen Construction's Libya Project', 18 June 2015.
29. Luke Eric Peterson, 'Investigation: Syria held liable for investment treaty breach after authorities seized bank guarantee for a project that was derailed by conflict and sanction', ***IAReporter***, 1 February 2016.
30. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, article 10.
31. U.S. Department of State, 'Iran-U.S. Claims Tribunal', available at: http://www.state.gov/s/l/3199.htm.
32. See Ricardo Ortiz, 'The Bilateral Investment Treaties and the cases at ICSID: The Argentine experience at the beginning of the XXI century', available at: http://fdcl-berlin.de/fileadmin/fdcl/Publikationen/FOCO-ICSID-engl-2006.pdf.
33. MENA-OECD Investment Programme, 'Draft Background Note: Recent FDI Trends in the MENA Region', December 2014.
34. See Abdul Hamid El Ahdab and Jalal El-Ahdab, Arbitration with the Arab Countries, (***Kluwer Law International*** 2011), p. 158.
35.

Royal Decree No. M/34 concerning the Approval of the Law of Arbitration, issued 16 April 2012.

36. Law No. 9 of 2015 on Arbitration, issued 5 July 2015.

37. See Noor Kad, 'Between Iraq and a Hard Place': The problem of non-ratification of the New York Convention in Baghdad', ***Kluwer Arbitration Blog***, 18 March 2014, available at: http://kluwerarbitrationblog.com/2014/03/18/between-iraq-and-a-hard-place-the-problem-of-non-ratification-of-the-new-york-convention-in-baghdad/.

38. Douglas Thomason, 'Israel wins gas supply claim against Egypt', ***Global Arbitration Review***, 7 December 2015, available at: https://globalarbitrationreview.com/news/article/34410/israel-wins-gas-supply-claim-against-egypt/.

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Construction Arbitration in the Middle East

Nasser Ali Khasawneh, Gurmeet Kaur, Mohamed Khanaty and Pooja Kohli

Summary

The Middle East is made up of diverse economies and is one of the largest exporters of oil and fastest growing regions in the world. There are ongoing efforts across the Middle East to reduce national dependency on oil and attract international trade. This has seen rapid infrastructure development in many countries across the region as a result of increased capital investment. The large-scale infrastructure investment programmes and the upcoming international events such as Qatar's 2022 World Cup together with the 2020 Dubai World Expo evidence the magnitude of the construction industry in the Middle East.

Disputes are a common feature of the construction industry typically arising out of time, cost or quality issues. The implications of a construction dispute can be far-reaching and have adverse consequences on, not only the delivery of a construction project, but the economic growth of the region as the failure to resolve such disputes and enforce decisions may lead to a withdrawal of international investment over the long term. This is just one of many reasons why states in the region are keen to establish a comprehensive arbitration framework and successful arbitration centres to deal with such disputes, that are effective, reputable and in line with international standards.

A BRIEF HISTORY OF ARBITRATION IN THE MIDDLE EAST

The notion of deferring to an objective and neutral personality is a recognised dispute resolution custom in the Middle East. Traditionally, Islamic law encourages the use of arbitration (or certainly conciliation) to settle disputes. One well-known story of the Prophet Mohammad's early life involved him being chosen by feuding tribes, who could not agree on a vital element of the reconstruction of the Ka'aba, to resolve the dispute. The Prophet bridged the gaps between the quarrelling parties by suggesting an original solution that was essentially a win-win for all.

Historically, there has been a reluctance to use arbitration as a form of dispute resolution in the context of trade between the Arab and Western worlds. The 1950s and 1960s saw several international arbitration awards determined against Arab governments in favour of private Western companies. These adverse decisions led to a questioning of the process's legitimacy and ultimately the Saudi Arabian Council of Ministers and Libyan government refused to accept arbitration as an appropriate forum for any dispute with any ministry or government agency. In Libya, this decision was eventually reversed as the Libyan economy was affected as the value of contracts with Libyan governments dropped to reflect the risk that the contracting parties would not be able to arbitrate. There has also been a number of international arbitration awards in favour of Middle Eastern governments that helped to convince Middle Eastern countries of the effectiveness of arbitration in the context of trade between the Arab and Western worlds. In 1973, the Kuwaiti government obtained a significant arbitral award against a private British firm in relation to the construction of the Kuwaiti airport. The award was enforced in the United Kingdom pursuant to the New York Arbitration Convention (the Convention), following Kuwait's accession to the Convention in 1978.

In the Middle East, countries are resolving to upgrade their arbitration laws to international best practice standards. This is evidenced by the fact that most Middle Eastern countries have adopted the Convention. Jordan and Syria were among the first countries to adopt the Convention, which came into effect in 1959. Since then, Kuwait became a contracting party in 1978, Bahrain in 1988, Saudi Arabia in 1994, Oman in 1999, Iran in 2001 and, more recently, Qatar in 2002 and the United Arab Emirates in 2006. Iraq, Libya and Yemen are

among a few countries that are not signatories to the Convention. Further, Middle East states are increasingly adopting the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law) in arbitration centres throughout the region. The Model Law was drafted by UNCITRAL with a view to assisting countries seeking to improve their laws in such a way as to ensure the best possible procedures for commercial arbitration.

THE NATURE OF CONSTRUCTION DISPUTES

The nature of construction disputes tends to be technical and complex and generally requires an expert to determine the issues in question. The past decade has seen a huge number of significant infrastructure projects being implemented around the region. The Middle East is currently hosting a substantial number of complex construction projects to complement its growth and development. The construction industry's growth rate is expected to remain positive, as a result of increased government expenditure on developing infrastructure and industrial construction in the region.

This is very apparent when looking at the individual countries. Saudi Arabia's population is rapidly growing. According to Central Intelligence Unit's World Factbook, nearly 30 per cent of its population is currently under the age of 15. This surge in youth has led the government to accelerate investment in education and infrastructure in an effort to ensure jobs for the growing population and improve the high unemployment rates. Saudi Arabia is in the process of implementing some of the world's most ambitious infrastructure projects such as the US$20 billion Riyadh metro. The metro project alone is expected to create about 15,000 jobs in Saudi Arabia.

Qatar's economic policy focuses on sustaining Qatar's non-associated natural gas reserves and increase private and foreign investment in non-energy sectors. The success of Qatar's 2022 World Cup bid has augmented huge infrastructure projects such as Qatar's metro system, light-rail system, the construction of a new port and sporting infrastructure.

In the UAE, Abu Dhabi and Dubai alone are currently undergoing six 'mega' infrastructure projects worth over US$55 billion to deal with the rapid population growth in the emirates, to prepare for hosting the Expo 2020 and to position the UAE as an international shipping and aviation hub.

In Oman, strong construction growth has been driven by the development of transportation mega projects, with road upgrades facilitating the flow of traffic from the Sohar Industrial Port along the Batinah highway to Muscat and the railway project increasing the scope for producers and manufacturers to expand their presence.

A large proportion of these Middle Eastern projects were initiated prior to the global financial crisis and reinvigorated in response to the Arab Spring in 2011. The number and value of construction disputes in the Middle East are increasing to reflect the growing investments and also the economic landscape, such as the developments in oil price, the change in the geopolitical landscape, the increase in foreign direct investments into the economy, the increase in cross-border activity, the legacy effects of bids priced soon after the 2008/2009 financial crisis and a rising global cost base. Consequently, a significant number of Middle Eastern countries have been busy updating and enhancing their laws and regulations on arbitration to effectively handle the rising number and value of construction disputes.

Construction disputes typically arise over time, cost, scope of work or quality issues. Construction contracts, particularly those based on standard forms such as the International Federation of Consulting Engineers, are generally voluminous and there are often issues arising from the interpretation of the various documents forming part of the contract. Disputes over the scope of work of the contract, represented by the plans and specifications (as modified or amended), are some of the most significant areas of dispute on a construction project. The documents can often be interpreted differently, particularly if the description of work in the engagement documents is unclear or ambiguous or when the plans or specifications provided by the employer are contradictory to the actual site specifications. Usually, the employer would provide an implied warranty that the plans or specifications are accurate and developable. However, the contract will also often include exclusions to the warranty. The extent of these warranty exclusions will often be the subject matter of a dispute.

The scope of work between a contractor and subcontractor is also a common topic of dispute. Often, the contractor will engage a subcontractor to bid on a particular scope of work without specifying in detail the parameters applicable to that scope of work. Terms such as 'back to back' are often used, which are not as effective as clearly specifying the actual obligations on the subcontractor. The subcontractor bid may exclude works anticipated by the contractor and this may lead to disputes. Likewise, change orders and extra work or out-of-scope work can lead to disputes over whether or not the contractor or subcontractor is entitled to extra time and costs.

Construction disputes also often arise as to whether work was completed in accordance with the agreed specification and expected quality. Each party to the contract may have a different view on whether the quality is acceptable, particularly in international contracts where standards may greatly differ. Other common causes of construction disputes typically involve speed, ineffectiveness of management control of any subcontractors, delays, and management of spending.

Typically, contract provisions allow the employer to terminate the contract for a material breach of the contract by the contractor or insolvency. The contractor, whether provided in the contract or not, can generally terminate if the employer is in material breach of any of its contractual obligations, the most obvious of which is failure to pay.

The importance of arbitration to resolve construction disputes

Where construction disputes occur, parties are increasingly turning to arbitration for resolution. The flexibility of arbitration, as well as its speed, efficiency and confidentiality, has made it an attractive method of dispute resolution to parties performing contracts with an international element in the Middle East. Construction work in the Middle East is predominantly procured by the government from global contractors and engineering companies (who often partner with local contractors). These global players prefer the use of international governing law and jurisdiction clauses and arbitration clauses in their contracts to allow any disputes to be heard by arbitration centres with which they are more familiar. Typically, the preferred arbitration centres are London, Paris, Hong Kong and Singapore owing to their reputation and recognition for an established formal legal infrastructure, the neutrality and impartiality of the legal system, the national arbitration law and track record for enforcing agreements to arbitrate and arbitral awards. Conversely, the employer (often the government agent for construction contracts) will generally prefer or be restricted (for

example, under local procurement or tender laws) to using its local court system or domestic arbitration to resolve disputes.

The use of a local arbitration centre, however, is now increasingly being adopted as a middle ground, where law and public policy permits. However, owing to the confidential nature of arbitration, there is little public record to evidence this seeming upward trend.

In Saudi Arabia, contractors involved in private sector projects can negotiate all aspects of the contract. However, for public works contracts, the government entity clients are generally required to use the Saudi government's standard form contracts. The Government Tenders and Procurement Law (the Procurement Law) governs almost all construction projects involving the government and does not allow for any alterations or waivers. The Procurement Law requires an ad hoc committee to be formed to hear any dispute either where a contractor believes that a government body has either breached the terms of a contract or a government body believes that a contractor has breached the terms of a contract, performed the contract defectively or engaged in fraud, deceit or manipulation. Either party has the right to appeal the committee's ruling to the Board of Grievances within 60 days of the decision but any appeal decision is final. Owing to these requirements, disputes between a government entity and a private construction company could not be subject to arbitration in Saudi Arabia unless there is a specific approval by the Council of Ministers.

In the UAE, pursuant to article 203 of Federal Law No. 11 of 1992 (the Civil Procedural Law) it is permissible for contracting parties to refer any dispute between them to one or more arbitrators. However, the generally accepted position for resolving construction disputes involving a government entity is to do so through the local court system. In Iraq, however, the use of arbitration in relation to government contracts has been explicitly endorsed under article 11 of Regulation No. 1 of 2008 Regulations for Implementing Government Contracts.

Whilst there is no systematic reporting of arbitration cases in the Middle East, there are a number of GCC states reporting an upward trend in the use of local arbitration centres for the settlement of international construction disputes.

ARBITRATION CENTRES IN THE REGION

The earlier period of reluctance by Middle East countries to use Western arbitration centres to resolve disputes has contributed to the development of arbitral systems in the region. Now, as the enthusiasm for Middle East countries to be used as a platform for international trade increases, some arbitration centres have been growing in line with international standards. The Middle East now offers a wide range of regional options for arbitration that include the following.

THE UAE

Arbitration in the UAE is governed by articles 203 to 218 of the Civil Procedure Law. Under the Civil Procedure Law contracting parties are permitted to refer any dispute concerning the implementation of a specified contract to one or more arbitrators. The UAE increasingly favours arbitration as a suitable mechanism for alternative dispute resolution (ADR) and is home to the following arbitration centres.

ADCCAC

The Abu Dhabi Commercial, Conciliation and Arbitration Centre (ADCCAC) was inaugurated in 1993 and oversees a number of construction disputes for Abu Dhabi-based parties.

Since early 2007, construction contracts by the Abu Dhabi government have provided for disputes to be referred first to an ad hoc dispute adjudication board, in line with International Federation of Consulting Engineers (FIDIC) forms, and then to ADCCAC arbitration. In October 2013, the ADCCAC implemented new procedural regulations for the conduct of arbitration. The new ADCCAC Regulations introduced good modern arbitration practice to the ADCCAC arbitration process in an effort to encourage more parties to consider the ADCCAC as a forum for ADR.

DIAC

Dubai International Arbitration Centre (DIAC) was established in May 2003, as a successor to the Centre for Commercial Conciliation and Arbitration. The DIAC has in place its own Arbitration Rules acting as an appointed authority under the UNCITRAL Arbitration Rules and is now one of the busiest arbitration centres in the Middle East for construction disputes. In 2006, the UAE acceded to the Convention and in 2007 DIAC implemented its revised Arbitration Rules to bring the centre up to international standards.

DIFC-LCIA

The most recent addition to the forums available to handle construction disputes in the region is the DIFC-LCIA, which was officially founded in 2008. DIFC-LCIA is a branch of the London Commercial Arbitration Centre (LCIA) and it follows the LCIA rules very closely. As at 6 December 2015, the DIFC-LCIA had around 30 open arbitration or other ADR proceedings.

The Dubai International Financial Centre (DIFC) is an autonomous common law jurisdiction, empowered by Federal Law No. 8 of 2004 to enact its own regulatory and legal framework for all civil matters. The DIFC Arbitration Law No.1 of 2008 is based upon the Model Law. The DIFC is an opt-in jurisdiction which does not require parties to have any 'connection' with the DIFC in order to refer an arbitration to its jurisdiction. Anyone, from any jurisdiction, can opt for the DIFC as an arbitration seat. Pursuant to the Judicial Authority Law (Law No. 12 of 2004), DIFC awards, once ratified by the DIFC courts are enforceable by the Dubai courts. Once the award is ratified by Dubai courts it can also be enforced in the GCC under the 1995 Protocol on the Enforcement of Judgments Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Co-operation Council for enforcement. The DIFC/LCIA centre is fast becoming a popular choice for resolving construction disputes in the UAE. The DIFC-LCIA Rules will shortly be updated to reflect changes and improvements contained in the 2014 LCIA Rules.

QATAR

The adoption of arbitration as a forum for resolving construction disputes is also growing in Qatar. Nonetheless, Qatar is yet to implement a comprehensive arbitration law. A draft law has been in circulation for over a year and is expected to come into force in the coming months (the Draft Qatari Law). The Draft Qatari Law is based largely on the Model Law and is meant to replace the existing provisions under articles 190-210 of the Civil and Commercial Procedure Law No. 13 of 1990 (the Civil and Commercial Procedure Law), which currently govern arbitration in Qatar.

QATAR INTERNATIONAL CENTRE FOR CONCILIATION AND ARBITRATION (QICCA)

QICCA was established in May 2012 and is now more frequently being adopted as a forum for the resolution of disputes arising from construction contracts. Generally, parties are free to agree to an arbitration process in a construction contract.

In addition, the Qatar financial centre has its own arbitration rules and regulations under the jurisdiction of the Qatar International Court and Dispute Resolution Centre, a wholly separate jurisdiction to the state of Qatar in its own right although at present of limited significance in the context of construction arbitrations.

IRAQ

On paper, Iraq has established three arbitration centres in Baghdad, Basrah and Najaf. Arbitration has been recognised as a mode for dispute resolution under the Iraqi Civil Procedure Code since 1956, and was modernised in 1969 when the present Civil Procedure Code came into force. When compared to other Arab countries, this early legal development was hardly surprising as the British-backed monarchy that ruled Iraq during the 1920s to 1958 was interested in modernising Iraq's legal system.

However, in the early 1970s when the Ba'ath Party came to rule Iraq, a shift took place after the regime started consolidating powers domestically. This stymied earlier efforts to reform Iraq's interactions with foreign investors. Despite a construction boom throughout the 1970s, arbitration continued to dwindle in the background as Iraqi judges tended to interfere in arbitrations based on 'public policy' grounds. The anti-arbitration sentiment permeated commercial relationships, particularly in government-backed projects involving foreign contractors. Unreliability and uncertainty became synonymous with arbitration.

In 2006, the first democratically elected Iraqi parliament enacted the Investment Law to attract foreign investment, which recognised arbitration as a mode for resolving commercial disputes. However, it was not restricted to Iraqi arbitration, which in practice resulted in further desertion of the local arbitration centres as foreign entities resorted to more developed institutions. Today, only Najaf's arbitration centre is somewhat active. While the arbitration centres in Baghdad and Basrah continue to exist on record, they are not really utilised.

SAUDI ARABIA

Saudi Centre For Commercial Arbitration

Last year, Saudi Arabia's first commercial arbitration centre was formed to handle local and international commercial and civil disputes. The centre is currently drafting its own rules of arbitration. Historically, arbitration in Saudi Arabia has been under-utilised as a method of dispute resolution. The new centre represents Saudi Arabia's efforts to provide a forum for arbitration locally and worldwide. However, under local law, government bodies are restricted from using arbitration as a means of dispute resolution.

OTHERCOUNTRIES

Other arbitration centres in the Middle East include the following:

- the Bahrain Chamber for Dispute Resolution;
- the Cairo Regional Centre for International Commercial Arbitration;
- the GCC Commercial Arbitration Centre;
- the International Islamic Centre for Reconciliation and Arbitration;
- the Istanbul Chamber of Commerce Arbitration Centre;
- the International Court of Arbitration;

- the Lebanese Arbitration Centre;
- the Tehran Regional Arbitration Centre; and
- the Yemen Centre for Conciliation and Arbitration.

ENFORCEMENT OF CONSTRUCTION ARBITRATION AWARDS

Critical to the choice of the appropriate arbitration centre for any construction contract should be the consideration of the enforceability of any arbitration award sought. Parties may choose to use a particular arbitration centre if it has intelligence that the respondent holds assets in a particular jurisdiction. This is because a local arbitration award should be more straightforward to enforce by the courts of its home country. If it is not possible or preferable to arbitrate in the country where the respondent holds assets, the Convention can be relied upon for enforcement.

The Convention mainly establishes the principle that a properly made arbitration award in one member country must be binding and enforceable in another member country, unless the award can be rejected on the basis of certain grounds for refusal of enforcement, which are narrowly defined in the Convention. Under article V(2)(b) of the Convention, the enforcement of an arbitral award may be refused if 'the recognition or enforcement of the award would be contrary to the public policy of that country.'

The parameters of what a country regards as 'public policy' can be wide and are often a challenge. In Saudi Arabia, an arbitration agreement or award is upheld provided that it is not contrary to the principles of shariah law. Such a limitation falls within the 'public policy' exception, but the key lies in the way such an exception is applied. In addition, Saudi judges have had wide discretion to issue rulings according to their own interpretation of shariah law, and the judiciary has long resisted the codification of laws or the reliance on precedent when making rulings.

In the UAE, articles 235 and 236 of the Civil Procedures Law confirm that arbitral awards can be enforced in the UAE, provided a number of conditions are met. These conditions include procedural issues such as the proper notification and representation of the parties before the arbitral tribunal that issues the decision in the foreign country and procedural irregularities. In 2004, the UAE's Court of Cassation overturned an arbitration award in the ***Bechtel*** case, on the grounds that the witnesses had not been properly sworn in. UAE courts may also refuse the enforcement of a foreign arbitral award if it contradicts a previous judgment already issued by a UAE court (article 235(e) of the Civil Procedures Law) or if it includes elements that contradict public policy or morals. Article 3 of the UAE Civil Code, Federal Law No. (5) of 1985 provides that public policy considerations should include 'rules relating to personal status such as marriage, inheritance, descent, and rules concerning governance, freedom of commerce, trading in wealth, rules of personal property and provisions and foundations on which the society is based in a way that do not violate final decisions and major principles of Islamic shariah.

In 2012, Qatar's Court of Cassation ruled on the necessity for arbitral awards to be rendered in the name of His Highness The Emir of Qatar. This ruling set aside an arbitral award by the QICCA based on several legal texts including article 63 of the Qatari Constitution, which states that 'Judicial Authority shall be vested in the Courts in the manner prescribed in this Constitution and Judgments shall be issued in the name of the Emir' and article 69 of the Civil and Commercial Procedure Law that provides that 'Judgments are issued and executed

in the name of His Highness the Emir of the State of Qatar.' The court proceeded to analyse some of the legal provisions that govern arbitration in particular (articles 190-210 of the Civil and Commercial Procedure Law) and where the Arabic text of the law makes no distinction between the terms 'award' and 'judgment'. This controversial ruling has been criticised by arbitration practitioners in Qatar and has raised several concerns including whether the enforcement in Qatar of foreign arbitral awards rendered by arbitrators abroad may reject the idea to render an award in the name of a foreign head of state. Consideration should therefore be given to whether this mandatory requirement could form part of the law of arbitration in Qatar. In between June 2012 and August 2013, a small number of other arbitral awards had simply been set aside for the same reason by lower Qatari courts following the same rationale as the Court of Cassation. However, the Court of Cassation in Qatar recently clarified its previous decision and decided that international arbitral awards issued by arbitration institutions such as the ICC are considered foreign arbitral awards and thus enforceable in the Qatari courts without the need for them to be issued under the name of His Highness the Emir.

Iraq, alongside Libya and Yemen, is one of three Arab countries that have not ratified the Convention. Thus, direct enforcement of a foreign arbitral award in Iraq is problematic as the Civil Procedure Code is silent on its enforcement mechanism. Various Iraqi political figures have expressed reservations about Iraq becoming a member of the Convention owing to fears around legacy claims, which could have arisen during the previous regime's era, and are likely to be revived upon accession to the Convention. Foreign investors and practitioners welcomed a breakthrough in 2011 when the Iraqi Court of Cassation reconsidered its long-standing position to recognise the status of international commercial arbitral awards.

There are also indirect ways through which foreign arbitral awards can be enforced in Iraq. Recent court decisions are showing positive development, particularly in instances where the arbitral award originated from, or was enforced in, a country that is a member of the Riyadh Convention on Judicial Cooperation. In principle, this development now provides the construction industry with an arguable enforcement recourse via domestic courts that was not historically accessible. Nonetheless, a comprehensive statutory framework remains lacking. Until Iraq joins the rest of the world by acceding to the Convention, and more efforts and investment are directed to re-establishing existing arbitration centres, Iraq will remain an unfavourable forum for the resolution and enforcement of arbitration awards.

Jordan ratified the Convention in 1980. The Jordanian Parliament overhauled the arbitration law in 2001 to be more in line with the UNCITRAL Model law. While domestic arbitration, including enforcement of local arbitral awards, is governed by the Arbitration Law of 2001, enforcement of foreign arbitral awards is, however, governed by the procedure contained in the Enforcement of Foreign Judgments Law of 1952. This is because the decree that ratified the Convention has not expressly displaced the Enforcement of Foreign Judgments Law 1952, which governs the enforcement of foreign arbitral awards and foreign judgments.

REFORMS

Not surprisingly, arbitration developments continue to take place across the region owing to the evolving role of arbitration in the Middle East. The reforms are not directed specifically at the construction sector but would apply generally across all sectors. The developments are anticipated to open up arbitration as the preferred dispute resolution tool across the Middle East for all disputes.

In Qatar, the Draft Qatari Law is expected to introduce numerous positive changes and new concepts to the existing arbitration provisions. As currently drafted, the Draft Qatari Law unambiguously states that the decision to submit disputes to arbitration is solely that of the parties and the agreement to arbitrate may be documented in a separate stand-alone agreement or a clause contained in the contract. The Draft Qatari Law also suggests that the arbitration agreement could be evidenced through correspondence in paper or electronic form. This should put an end to any arguments that an arbitration clause in a contract is not sufficiently clear to satisfy the requirements of article 190 of the Civil and Commercial Procedure Law and that an agreement for arbitration should be a separate signed agreement. It may also eventually open up the possibility for parties to opt in, by agreement, to using arbitration as a method to resolve construction disputes where it was not envisaged when the contract was originally entered into. Where there is a valid arbitration agreement, the local courts are obligated not to accept jurisdiction over a dispute which the parties previously agreed should be resolved by arbitration. It is clear, however, that the Draft Qatari Law grants the court controlling power of the legitimacy and enforceability of such arbitration agreements but the courts are limited to this review because if the agreement is valid, the courts must honour it. Nevertheless, if such a claim was raised before a national court, this would not stop the arbitration proceedings from being commenced or continued.

There is also a draft UAE Federal Arbitration Law (the UAE Draft Law) that has been in circulation since 2006 with the latest draft being issued by the UAE Ministry of Economy in 2013. The UAE Draft Law intends to replace articles 203 to 218 of the Civil Procedure Code and introduce a modern legislative framework for arbitration in the UAE, in line with the UNCITRAL Model law. The UAE Draft Law includes an intention to provide that no arbitration order is issued without verifying that it is not 'in conflict with a ruling on subject of dispute passed by any UAE court of law'. Construed broadly, it may be interpreted to mean that an arbitration award may be prevented from being issued in a construction dispute where the nature of that dispute has already been tested by any UAE court of law. However, construed narrowly, it may only apply when dealing with the same cause of action between the same parties.

There are also rumours that influential Iraqi politicians are more likely to consider signing the Convention after 2020 as it becomes more challenging to enforce legacy-based claims in Iraq due to the statute of limitation.

CONCLUSION

Arbitration centres in the Middle East are growing in significance and are being used increasingly in construction disputes. This is reflective of the developments in legislation setting the framework for arbitrations and enforcement of awards and encouraging government bodies in the Middle East to use arbitration as a method of dispute resolution. Global construction companies are increasingly getting more comfortable dealing with disputes in the region as the arbitration centres embed international standards. This is a positive step, contributing to developing market confidence of the international business community and encourages foreign direct investment. This is critical for countries in the Middle East to diversify their economies.

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Notes

1.

Int'l Betchel v Dep't of Civil Aviation of the Gov't of Dubai, Dubai Court of Cassation, petition No. 503/2003, ruling dated 15 May 2003.

Developments in African Arbitration

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Summary

Arbitration in Africa has reached a tipping point. While Africa-related disputes have kept lawyers busy for a number of years in traditional arbitration centres, the market is steadily changing. The number of arbitral centres across the African continent is growing rapidly, and African lawyers are developing specialist arbitration skills to service this growth. As the market becomes more mature, notably in jurisdictions such as Kenya, Nigeria and Ghana, but also increasingly in francophone Africa, governments, arbitration lawyers and arbitrators are progressively calling for these disputes to be heard in Africa rather than 'exported' to international centres.

In May 2016, the International Council for Commercial Arbitration (ICCA) Congress, comprising both lawyers and government officials, is being held in Mauritius. This conference, run by one of the leading thought leadership organisations in the field, will for the first time be dedicated to arbitration in Africa.[1] The ICCA conference aims to provide a long-overdue platform to explore some of the challenges and showcase the opportunities for arbitration across Africa. Although some commentators might argue that Mauritius is not strictly speaking Africa, the island nation hosts a number of arbitral institutions and is an entry point for foreign investment into Africa, notably from India. Mauritius also played a key role in the development of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014).

The growth of arbitration in Africa is by no means restricted to an off-shore jurisdiction. Relatively mature arbitral centres already exist in a number of African cities including Kigali, Nairobi and Accra. To the north, in 2014 Morocco launched an annual arbitration conference – Casablanca Arbitration Days. In conjunction with a number of international arbitral institutions and organisations, this initiative seeks to establish Casablanca as a hub for international arbitration. Governments are getting wise to the fact that arbitration can be a source of economic activity, with conference centres, hotels and local lawyers all set to benefit. For any country, a recognised arbitral centre is also a great show of 'soft power', helping to underline broader messages about political and legal stability, and give comfort to foreign investors. In order to offer true competition to the established arbitral centres around the world, however, these centres in Africa will need to demonstrate that they can offer a reliable and efficient alternative for the users of arbitration – including by giving comfort that the local judiciary will actively support, or at least not interfere with, the arbitral process.

The growth of arbitration across Africa is further supported by a wide array of legal reforms gaining momentum across the continent. For example, OHADA's desire to modernise the Uniform Arbitration Act,[2] and recent ratifications of the New York Convention[3] all contribute to a more stable and reliable environment in which arbitration can flourish. Most African states have understood that this stability is key to facilitating and encouraging both domestic and foreign investment. When it comes to arbitration of investment disputes, however, not all states are aligned on the benefits of this method of dispute resolution. More on this below.

Against the backdrop of this largely positive outlook for arbitration in Africa, we explore in this article some of the challenges that the continent still faces and consider whether the steps that a number of key jurisdictions are taking will be sufficient to tip the balance in favour of arbitration.

RECENT TRENDS

Arbitration of business disputes in Africa continues to see year on year growth. This upward trajectory in disputes is, in large part, the corollary of vigorous economic growth in many African jurisdictions. According to a recent World Bank report, 'Sub-Saharan Africa's growth is projected at an average 3.7 per cent in 2015', partly in thanks to 'continuing infrastructure investment'.[4] Despite the global economic situation and marked reductions in commodities prices, particularly in the natural resources sector, which to date has contributed significantly to much of Africa's growth, the International Monetary Fund (IMF) continues to forecast sub-Saharan Africa's growth at an average of 4 per cent in 2016.[5]

In the next section, we reflect on how this economic growth has driven increased commercial and investment treaty arbitration across the continent and seek to identify certain trends which could shape the landscape over the next few years.

COMMERCIAL ARBITRATION

According to statistics from two of the leading global arbitral institutions, the ICC and the LCIA, the number of arbitration cases involving African parties, and in particular parties from sub-Saharan Africa, is on the rise. In its 2014 Statistical Report, the ICC noted that a record 113 parties from sub-Saharan Africa were involved in ICC arbitrations in 2014.[6] In its 2013 Statistics, the LCIA registered almost twice as many arbitrations involving African parties as it did in 2012.[7] Despite this strong growth in case load, however, it is notable that few of the arbitrators nominated to hear these disputes were African themselves.[8] The need for arbitral tribunals to be more diverse and to reflect the community of users is nowhere more stark geographically than in Africa.

To date, practitioners' experience suggests that the majority of commercial arbitration disputes in Africa have arisen in the telecoms, energy and natural resources sectors. The energy and natural resources sectors are, as ***The Economist*** illustrated in May 2015, two of the driving motors of the African economy, as resource-rich countries remain attractive targets for foreign investment.[9] However, investment paradigms are changing, with ***The Economist*** observing that '[i]nflows of capital are increasingly focused on less resource-rich countries, as investors target the continent's booming middle class. The amount of investment into technology, retail and business services increased by 17 percentage points between 2007 and 2013.'

Investment in Africa continues to attract investors not only in new sectors, but also from different jurisdictions. China became the key player for investment into Africa, challenging the investment model offered by investors from jurisdictions with long-standing ties to the continent (notably, the UK, France and Belgium). However, although Chinese investment into Africa increased exponentially over a very short period of time, it also gave rise to a number of salutary 'lessons learned' as projects turned sour and African governments started to re-evaluate their preferred business partners. Investors from other jurisdictions, India and South Korea, for example, each have their own approach to making investments, not least due to cultural differences. African host countries now have a much greater choice of partners with whom to do business. Although various recent reports indicate that China's investment will slow down this year,[10] the country has developed a strong foothold in Africa, providing the impetus for the creation of an arbitration partnership between China and South Africa (see below).

INVESTMENT TREATY ARBITRATION

Like commercial arbitration, investment treaty arbitration cases involving African state respondents have also seen a significant increase in recent years. According to the most recent statistics published by the ICSID Secretariat, African states are parties to 16 per cent of the arbitrations it currently administers.[11] Most of these disputes relate to the energy and natural resources sectors.[12]

The increasing number of investment disputes involving African states can be attributed to a number of factors. There is an inevitable corollary between increased investment activity anywhere and increased investment-related disputes. The past decade has also seen an increase in the number of bilateral investment treaties signed by African states, as well as an increasing number of investment codes that incorporate similar protections. In parallel, investors worldwide are increasingly both aware of both the availability of investment arbitration and willing to bring such claims. Finally, a further factor which has contributed to this growth is a renewed effort on the part of a number of African countries to crackdown on corruption. In a number of instances, these efforts have resulted in the cancellation of contracts and projects, with investors seeking remedies pursuant to bilateral investment treaties.[13]

Investment arbitration is thus increasingly in the spotlight in Africa. Concerns raised by civil society groups about transparency of investor-state arbitration proceedings coupled with concerns that poor and heavily indebted states are at a significant disadvantage in disputes against well-funded investors have led to questions about the balance of power in these disputes. These concerns are part of a global reassessment of investment arbitration that has given rise to changes in approach in Africa, as some states seek to modify the investment protection mechanisms available. For example, in November 2015, South Africa concluded its process for the termination of its bilateral investment treaties (BITs) with the approval of a new domestic law (not yet in force) that gives preference to mediation and state courts over international arbitration.[14] The law limits the South African government's consent to international arbitration to circumstances where domestic remedies have been exhausted. Even more radically, consent to arbitrate applies only to state-to-state arbitration, not investor-state arbitration.[15] This approach, which has been subject to criticism from both opposition parties and the international sphere, has been adopted to redress what South Africa's Trade Minister termed 'inconsistent and unpredictable outcomes'.[16]

DEVELOPMENT OF NEW INSTITUTIONS AND GROWTH OF EXISTING INSTITUTIONS

Alongside the growth in the number and importance of both commercial and investment arbitrations involving African parties, the proliferation of arbitral centres across Africa is testament to the increasing importance of arbitration as a means of dispute resolution on the continent. In the next section, we evaluate some of challenges and opportunities that these institutions face.

THE MAGHREB

Northern Africa has had a strong arbitration scene for a number of years, notably in Morocco and Egypt.

The recent inflow of foreign law firms to Casablanca demonstrates the keen interest in the Moroccan market.[17] Morocco benefits from its strategic gateway position between Africa and both Europe and North America, making it a favourable entry point for investment into Africa. Together, these factors create a persuasive narrative for the viability of Morocco to become a hub for African disputes.

The Casablanca International Mediation and Arbitration Centre (CIMAC),[18] for example, has set out its bold ambition to become the reference point for international dispute resolution, not only in the region but also for the entire African continent. In 2014, CIMAC organised an inaugural arbitration conference, Casablanca Arbitration Days, which attracted a number of high profile guest speakers from the global arbitration community. The event was supported by the ICC International Court of Arbitration (ICC), the International Centre for Dispute Resolution (ICDR) and the London Court of International Arbitration (LCIA).[19]

Casablanca's ambition to entrench itself as an arbitration hub is further illustrated by CIMAC's wish to elect a foreign chair, in order to strengthen the centre's independence, credibility, and its regional and international influence.[20] CIMAC is also looking to establish an experienced panel of arbitrators and experts who would be familiar with its rules and in a position to offer the international business community a viable alternative to arbitrating in Paris or London, which typically would be significantly more expensive.

For Casablanca to succeed as an arbitration centre, however, it will need to address several key issues. First, it would need to allow court submissions in arbitration-related matters to be submitted in French. Currently, all court submissions must be in Arabic, limiting international companies' and many states' willingness to use a Moroccan seat for non-Arabic language arbitrations. Second, Morocco will need to ensure that arbitration-related disputes will be directed to a specialised chamber of the courts such that local judges develop the requisite expertise through training and experience. Third, Morocco will need to amend its current arbitration law in order to make its provisions more consistent with those usually found in arbitration-friendly jurisdictions, for example, in respect of the grounds available for challenging an award.

To the east, the Egyptian capital is home to the oldest African arbitration institution, the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Created in 1979 by the Asian-African Legal Consultative Organisation,[21] CRCICA was ranked as one of the leading arbitration centres across the African continent by the African Development Bank in a survey published in April 2014.[22]

By 31 December 2015, CRCICA had registered over 1,000 cases.[23] In 2015, its caseload included disputes arising in a variety of sectors, ranging from media and entertainment to construction and M&A disputes. Its highest value claim to date is quantified at just under US$4 billion[24] and relates to a purely international dispute, between US and UAE parties.[25] The statistics indicate that CRCICA is able to attract and service high value international arbitrations: in 2015, 13 non-Egyptian parties were participating in arbitration cases under the auspices of CRCICA and 10 arbitrators appointed in CRCICA-administered cases were also foreign nationals.[26] Like Morocco, however, Egypt would also benefit from modifying certain aspects of its arbitral procedure, notably in respect of the scope of the grounds on which an annulment action can be brought, and ensuring a positive judicial approach to awards.

EAST AFRICA

East Africa has a promising story to tell when it comes to the growth of arbitration in Africa. Noteworthy progress in developing arbitration has taken place in Rwanda, Ethiopia, Tanzania and Uganda. For example, in Rwanda, Kigali has been making efforts to win a slice of the arbitration market, notably with the Kigali International Centre of Arbitration (KIAC).[27] Administrating cases under its own Rules and under the UNCITRAL Rules, it provides both a domestic and an international panel of arbitrators. KIAC actively seeks to attract

internationally renowned arbitrators.[28] However, despite these efforts, the centre has only registered 28 cases since its creation, the majority of which involved the government of Rwanda as a party.[29]

Kenya, however, is the shining star of the East Africa market. Since its amendment of the Arbitration Act in 2009,[30] and the drafting of the 2010 Constitution (which promotes arbitration and other ADR mechanisms),[31] Kenya has shown a strong appetite to be at the forefront of the development of arbitration in Africa. Kenya is on a steady path to build up a strong arbitration practice to match its position as the region's commercial and investment hub. A number of significant reforms have been achieved through the concerted efforts of both government and the private sector.

Drawing upon international best practice and the experience of some of the leading arbitration institutions across the world, Kenya established the Nairobi Centre for International Arbitration (NCIA) in 2013. The NCIA is governed by a board of directors comprising seasoned practitioners in the dispute resolution sector and leaders drawn from various institutions whose roles are central to international business and dispute resolution. The NCIA was established to support the renewed impetus for the use of arbitration and ADR, which was brought into the mainstream following the promulgation of Kenya's new constitution in August 2010. Beyond its broad mandate to administer domestic and international arbitration in Kenya, the NCIA also seeks to promote arbitration by organising international conferences, seminars and training programmes for arbitrators and scholars,[32] providing advice and assistance for the enforcement and translation of arbitral awards,[33] and by entering into strategic agreements with other regional and international bodies.[34] In December 2015, the NCIA published its own set of arbitration and mediation rules.[35] These detailed rules include modern mechanisms such as provisions for the appointment of an emergency arbitrator.[36]

Dispute resolution practitioners in the country are generally confident that the proactive steps so far taken will transform Kenya's international and investment arbitration landscape in thenear future. Speaking at the NCIA Stakeholder Review Forum, Kamau Karori of Iseme, Kamau & Maema Advocates, one of the country's leading arbitration practitioners, observed that the rapid growth of arbitration has seen many foreign investors and multinational organisations increasingly getting involved in Kenya's arbitration space. The rapid increase in commercial activities and cross-border business within the East African region and beyond suggests that Kenya's arbitration practice will continue on its upward trajectory in the years ahead.

SOUTH AFRICA

The development of arbitration in South Africa has been held back by its outdated arbitration laws, which have been unreformed since 1965. Although practitioners are keen to see the proposals for a new law adopted, the issue has become something of a political 'hot potato', in the context of the broader domestic debate concerning the use of arbitration as opposed to the national courts.[37]

Despite these challenges, South Africa's leading arbitral institution, the 20-year old Arbitration Foundation of Southern Africa (AFSA), has achieved a degree of success and has demonstrated a keen desire to develop further. Following an ambitious legal exchange program with China,[38] in August 2015, AFSA launched a new international arbitration centre dedicated to the resolution of commercial disputes between Chinese and African

parties –the China Africa Joint Arbitration Centre (CAJAC).[39] This new centre, established in Johannesburg, is the result of an agreement between AFSA, AADR, the Association of Arbitrators of Southern Africa, and the Shanghai International Trade Arbitration Centre.

WEST AFRICA

Given the significant international investment in West Arica, notably in the oil and gas sector, the region has been relatively slow to adopt the dispute resolution machinery typically sought by foreign investors.

Nigeria is the only country in the region to have a modern arbitration law, the Arbitration and Conciliation Act (ACA), based on the UNCITRAL Model Law.[40] Further, Nigerian courts have also developed a strong line of arbitration-friendly jurisprudence. Nigeria is home to various arbitral institutions, including the Lagos Regional Centre for International Commercial Arbitration (LCRICA),[41] the Maritime Arbitrators Association of Nigeria, and the Lagos Court of Arbitration (LCA). Established in 1989, the LCA amended its Rules in 2013 to introduce its own form of emergency arbitrator procedure.

A few hundred kilometres to the west, interest in arbitration has been growing in Ghana, especially in the business community, as the traditional court system can be considered to be slow, often ineffective and expensive. A recent corruption scandal has done little to assuage these views. In September 2015 a journalist released an undercover report into corruption of the judiciary resulting in a series of resignations, dismissals and the investigation of over 30 judges.[42] Arbitration is well-placed to be the beneficiary of the public's desire to see efficient and impartial decision-making in the country.

There are two main arbitration bodies in Ghana: the Ghana Arbitration Centre (GAC) and the Ghana Association of Chartered Mediators and Arbitrators (GHACMA). Both deal mainly with domestic arbitrations. The passing of the Alternative Dispute Resolution Act 2010 provides for both arbitration and mediation, and the courts themselves are empowered to encourage the use of ADR. Attitudes in the country are changing, and the business community is increasingly seeking the inclusion of arbitration and ADR clauses in contracts.

FRANCOPHONE AFRICA – DOES OHADA PROVIDE A MODEL?

OHADA (Organisation pour l'harmonisation en Afrique du Droit des Affaires) was set up in 1993 to harmonise commercial law in the African Franc zone. Seventeen African countries have signed the OHADA Treaty,[43] which sits at the heart of a project to increase the attractiveness of the region to potential investors. Increasing confidence in international arbitration as a means of resolution of commercial disputes across signatory states is among the core purposes of OHADA. OHADA has established a dual track for arbitration: institutional arbitration administered by the Cour Commune de Justice et d'Arbitrage (CCJA)[44] and ad hoc arbitration where the CCJA acts as the Supreme Court.[45]

The CCJA provides an administered arbitration mechanism. It has made considerable efforts towards modernisation and greater transparency, including the publication of a raft of documents relating to arbitration. This move towards transparency is welcome, as it shows the OHADA Supreme Court's wish to ensure that OHADA arbitration remains accessible and understandable to parties. It also comes as an encouragement for the development of OHADA arbitration, as parties – and their counsel – will turn to the published decisions as precedents and will gain a greater sense of legal certainty. The CCJA's pursuit of transparency was demonstrated in the recent setting-aside decision in ***GETMA v Republic of***

Guinea.[46] Although much criticised, the CCJA's decision has a number of positive aspects. First, the CCJA has emphasised the need to maintain transparency throughout the arbitration process. Second, it has shown that it will uphold its decisions on fees it sets for arbitrators. Given that the costs of many European-based arbitration institutions are deemed prohibitive in the region, the CCJA's decision will give parties comfort that the costs set by the CCJA will not be exceeded as a result of separate negotiations by the arbitrators.

The Uniform Act of Arbitration (UAA) provides a basic foundation for all arbitrations seated in the 17 OHADA countries and guarantees that all OHADA-governed arbitral awards – including ad hoc arbitration awards – will be enforceable in all member states. This is particularly useful as some OHADA state members are not party to the New York Convention.[47]

Indeed, article 25 of the UAA grants a final arbitral award the same status as a judgment of a national court in all OHADA member states.[48] However, the UAA does not define the applicable procedure to obtain exequatur. To enforce an arbitral award made in an OHADA member state, a competent judge in a member state must first grant an exequatur of the award. This process has the effect of converting the award into a judgment of the domestic court for enforcement purposes. As a result, three different sets of rules may apply when seeking to enforce an arbitral award in an OHADA country: the UAA, domestic legislation, and any international conventions that could apply. This situation gives rise to legal uncertainty. It is likely to be one of the key areas for the anticipated modernisation of the UAA.

In effect, as a central part of OHADA's structure, OHADA member states have adopted a series of Uniform Acts pertaining to various aspects of business law, including securities regulation, bankruptcy procedures and company law – as well as arbitration. These Uniform Acts are directly applicable in every member state.[49] Over the past few years, a number of these Uniform Acts have undergone review to enhance harmonisation between the texts and to iron out perceived inconsistencies or difficulties with the initial drafting.[50]

This same process of clarification is currently being considered for the UAA, unchanged since its promulgation in 1999. Identified shortcomings in the UAA relate both to lacunae in the original text (eg, giving rise, amongst other things, to difficulties regarding enforcement of awards) and to ensuring that the arbitration rules are updated to incorporate improvements adopted by other institutions (eg, the availability of an emergency arbitrator). To assist with this modernisation, OHADA has initiated a tender process for the revision of the UAA.[51] As part of this process, it is envisaged that the UAA will be made available in English, French, Spanish and Portuguese and therefore has the potential to have a broader international reach and offer a single uniform system for arbitration across Africa.

ATTITUDES TO ENFORCEMENT

Contrary to the widely held perception that arbitral awards are difficult to enforce in Africa, the situation is in fact more nuanced. A number of African countries have enforcement regimes that are not dissimilar to those available in a number of mature arbitration jurisdictions. Indeed, in many countries around the world, parties may face unexpected obstacles to enforcement – and Africa is no different in this regard. Where difficulties exist, these are often linked not only to particularities of the legal regime but also to judicial perception of arbitration. In each jurisdiction, national legislation contains varying grounds for annulment or the denial of exequatur. Some countries do not include the widely-accepted breach of public policy ground to refuse to grant exequatur or to set aside an award.[52] Moreover, the

judiciary in each country has its own approach to the integrity of arbitration proceedings and the enforcement of arbitral awards. For example, although South Africa is a signatory (without reservation) to the New York Convention, its domestic law has the additional requirement that the exequatur of certain foreign arbitral awards must be authorised by the Minister of Economic Development.[53] In practice, however, South African courts have the reputation of interpreting this law narrowly to permit enforcement.[54]

Given the number of jurisdictions in Africa and their different legal origins, there is benefit is seeking to establish a regional approach. This process of harmonisation has been led notably by OHADA, which, as noted, has implemented an ambitious mechanism to establish a common framework and reciprocity for the enforcement of arbitral awards across all signatory states.

In addition to this regional approach, many African states have taken or are taking steps to align themselves with the international approach provided for by the ratification of the New York Convention. While many African states have signed the New York Convention without making any reservations,[55] others have exercised their right to apply reservations.-[56] The latest African state to ratify the New York Convention, the Democratic Republic of Congo, issued a record number of four reservations when ratifying the treaty.[57] These include limiting applicability to awards issued in the territory of another contracting state, non-retroactivity of the treaty, applicability only to disputes arising out of legal relationships considered commercial under national law, and inapplicability of the Convention in cases concerning immovable property.

OPPORTUNITIES AND CHALLENGES

Arbitration is now firmly entrenched as a viable alternative to the courts in many jurisdictions across Africa. The developments seen in recent years have helped establish more reliable and consistent practices and procedures. There is, however, more work to be done. There are still relatively few international arbitration cases heard on African soil (in 2014, only eight ICC arbitration cases were heard in African countries),[58] and the number of African arbitrators appointed on international cases remains woefully small.

In order to cement the progress made to date, three key evolutions are needed. The first is the modernisation of domestic arbitration laws, which is one of the factors influencing the choice of an arbitral seat.[59] The second is that local judges and lawyers must acquire deeper knowledge of arbitration. The third is to ensure that states, and government lawyers in particular, are fully aware of the upsides – as well as the downsides – of arbitration as an effective means of dispute resolution.

This capacity building is being carried out across Africa and led, in large part, by non-profit organisations such as Africa International Legal Awareness (AILA) and the African Legal Support Facility (ALSF). Capacity building is also being implemented through international cooperation agreements, such as the one concluded between the Permanent Court of Arbitration (PCA) and the African Union. These cooperation agreements aim to assist with the development of arbitral infrastructure and engagement of the regional arbitration community by participating in educational outreach and training programmes throughout the continent.[60]

The creation and the modernisation of various arbitration institutions on African soil are obviously two very important steps to enable arbitrations to be heard on the continent. Communication remains a challenge, however, and a quick fix would be to ensure that

institutions maintain user-friendly websites where the latest arbitral rules and details of arbitrator panels can be found. According to a recent survey, the most commonly cited challenge by parties when conducting arbitration in Africa is the availability and experience of arbitrators.[61] According to Judge Abdulqawi Ahmed Yusuf, the Somali vice-president of the ICJ Court, 'African states have failed to appoint an African arbitrator or conciliator in 69 out of 85 existing ICSID disputes involving the continent'.[62] Training, in part, is the answer, but also the appetite for greater diversity in the pool of arbitrators is not solely an African problem – it is an issue with which the wider arbitration community continues to grapple.

Although to date international corporates may have been reluctant to have their disputes heard in Africa, arbitration in Africa now finds itself at a tipping point. With increased attention on the continent's arbitral centres, improved legislative frameworks underpinning international commercial and investment arbitration, and better resourcing and training, Africa can secure for itself a place on the global arbitration map.

Notes

1. http://www.iccamauritius2016.com.
2. http://www.ohada.com/actualite/2640/selection-de-consultants-pour-le-recrutement-d-un-cabinet-pour-la-realisation-de-l-etude-portant-revision-de-l-acte-uniforme-relatif-au-droit-de-l-arbitrage-en-lien-avec-la-mediation-commerciale-et-le-reglement-d-arbitrage-de-la-ccja-ohada.html.
3. For example, the ratifications by Burundi on 21 September 2014 and by the Democratic Republic of the Congo on 3 February 2015.
4. General overview of the World Bank from 22 October 2015, available at http://www.worldbank.org/en/region/afr/overview. The IMF updated this projection on 19 January 2016 and estimated sub-Saharan Africa's growth at 3.5 per cent in 2015 (available at https://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf-) 'Investment in Africa', ***The Economist***, 30 May 2015.
5. Following lower commodity prices, the IMF revised its initial projections of a 4.3 per cent growth rate from October 2015 and publishing an update on the World Economic Outlook on 19 January 2016 – available at https://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf.
6. 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1. By way of comparison, in 2004, only 53 parties were from Sub-Saharan Africa, of which 13 were state or parastatal parties.
7. Registrar's Report, Casework 2013, available at- http://www.lcia.org/LCIA/reports.aspx.
8. In 2014, only 17 arbitrators from Africa (including North African countries) were appointed to ICC arbitral tribunals – less than 1 per cent of the total arbitrators named that year. Figures are similar in investment arbitration – only 40 out of the 981 arbitrators nominated by states to the ICSID panel (ie, 4 per cent) have an African nationality. Amongst them, the great majority has never been appointed to sit on an arbitral tribunal. Further, the 2015 ***Chambers and Partners*** 'Most in Demand Arbitrators - Global Wide' does not mention a single African-national arbitrator.
9.

'Investment in Africa', ***The Economist***, 30 May 2015, available at http://www.economist.com/news/economic-and-financial-indicators/21652274-investment-africa.

10. 'Chinese FDI to Africa rose to $3.5 billion in 2013, and nearly all African countries are benefiting from China's participation today' (M. Diop, Y. Li, L. Yong, H.E. A. Ahmed Shide, 'Africa Still Poised to Become the Next Great Investment Destination', The World Bank, 30 June 2015, available at http://www.worldbank.org/en/news/opinion/2015/06/30/africa-still-poised-to-become-the-next-great-investment-destination).
11. 'The ICSID Caseload - Statistics (Issue 2016-1)', available on- https://icsid.worldbank.org/apps/icsidweb/resources/pages/icsid-caseload-statistics.aspx.
12. Eg, ***Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*** (ICSID Case No. ARB/15/29); ***Total E&P Uganda BV v Republic of Uganda*** (ICSID Case No. ARB/15/11); ***BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea*** (ICSID Case No. ARB/15/46); Standard Chartered Bank (Limited) ***Hong Kong v United Republic of Tanzania*** (ICSID Case No. ARB/15/41).
13. See for example the following cases where corruption are alleged in the investment proceedings, ***Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal*** (ICSID Case No. ARB/15/21) and ***BSG Resources Limited v Republic of Guinea*** (ICSID Case No. ARB/14/22). See also 'Crying foul in Guinea', ***The Economist***, December 2014, available at http://www.economist.com/news/business/21635522-africas-largest-iron-ore-mining-project-has-been-bedevilled-dust-ups-and-delays-crying-foul. The authors of this article are counsel in this case, the issue is thus simply mentioned here and will not be addressed in further detail in this article.
14. Protection of Investment Act 22 of 2015, Republic of South Africa, available at http://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf.
15. Article 13 (5): 'The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor.'
16. Minister Rob Davies : Debate on the Protection of Investment Bill, 2015, in Parliament by Minister of Trade and Industry, available at http://www.gov.za/speeches/minister-rob-davies-debate-protection-investment-bill-2015-17-nov-2015-0000.
17. Jean-Yves Gilg, 'Morocco: The new gateway to Africa', ***African Law and Business***, 7 May 2015.
18. http://cimacmaroc.org/Page_Centrale.aspx?Id_Page=1095.
19. See the 2015 Casablanca Arbitration Days program available at http://www.casablancaarbitrationdays.com/.

20. Laurent Gouiffès and Thomas Kendra, 'Launch of the Casablanca International Mediation and Arbitration Centre in Morocco', available on http://www.lexology.com/library/detail.aspx?g=a00e1d1f-632d-4e39-a626-71a76baa064f.
21. This organization also founded the Kuala Lumpur, Lagos, Tehran, and Nairobi Regional Centres.
22. Assessment Report of Arbitration Centres in Côte d'Ivoire, Egypt and Mauritius, prepared by Dr Werner Jahnel, at the request of the AFDB to assess various arbitration centres across the African continent. Full report at http://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%C3%B4te_d%E-2%80%99Ivoire__Egypt_and_Mauritius.pdf.
23. new cases were filed in 2014, and 54 in 2015 - see 'CRCICA Caseload in 2015: New Record Aggregate Sums in Dispute and Construction Disputes Regain Top Position', CRCICA Newsletter 4/2015, available at- http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html.
24. 'CRCICA's recent Caseload: A new Record sum in dispute', CRCICA Newsletter 2/2015, available at http://crcica.org.eg/newsletters/nl022015/nl022015a001t.html.
25. 'CRCICA Caseload in the Third Quarter of 2015: Two New Types of Disputed Contracts and One Purely International Case', CRCICA Newsletter 3/2015, available at http://crcica.org.eg/newsletters/nl032015/nl032015a001t.html.
26. 'CRCICA Caseload in 2015: New Record Aggregate Sums in Dispute and Construction Disputes Regain Top Position', CRCICA Newsletter 4/2015, available at http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html. In comparison, in 2014, 40 non-Egyptian parties and 17 non-Egyptian arbitrators were participating in CRCICA-administered cases (See 'CRCICA Recent Caseload: More Cases in 2014 than in 2013 and New Record for Purely International Cases', CRCICA Newsletter 4/2014, available at http://crcica.org.eg/newsletters/nl042014/nl042014a001t.html-).
27. http://www.kiac.org.rw/.
28. Call for Application to the KIAC Panel of International Arbitrators, available at http://www.kiac.org.rw/IMG/pdf/-17.pdf.
29. KIAC Online Newsletter, issue 3, January 2016, available at http://kiac.org.rw/IMG/pdf/-15.pdf.
30. E. Torgbor, 'Chapter 3.5: Kenya', in L. Bosman (ed), ***Arbitration in Africa: A Practitioner's Guide***, Kluwer Law International, 2013, pp. 219–222.
31. See articles 159 (c) and 189 (4) of the Constitution of Kenya, available at https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf.
32. Nairobi Centre for International Arbitration Act No. 26 of 2013, S. 5(e).
33. Ibid, S.5(k).
34. Ibid, S 5(o).
35.

The NCIA's Arbitration Rules (2015) were published by the Kenya Gazette Supplement No. 210 and were dated 24 December 2015. The NCIA's Mediation Rules were published in the Kenya Gazette Supplement No. 205, and were dated 18 December 2015.

36. Article 28 of the Arbitration Rules.
37. See the IBA's report on arbitration in South Africa at- http://www.ibanet.org/Article/Detail.aspx?ArticleUid=a646cf32-0ad8-4666-876b-c3d045028e64.
38. 'First China-Africa Legal Exchange Program for young legal professionals', AFSA @Work, February 2015, available at http://www.arbitration.co.za/module_data/a94a5d17-f642-4a68-b5d8-65df131dc197/downloads/march2015.pdf.
39. T. R. Snider, 'China Africa Joint Arbitration Centre established in Johannesburg', available at http://www.lexology.com/library/detail.aspx?g=4c1631fe-5a5b-4be9-847f-b1418340067f.
40. Ghana's Alternative Dispute Resolution Act 2010 incorporates only certain provisions of the Model Law.
41. http://www.rcicalagos.org/index.html.
42. Ruth Greene, 'Ghana gets tough on judicial corruption', International Bar Association, available at http://www.ibanet.org/Article/Detail.aspx?ArticleUid=2c8eb0c5-3ba2-4619-a7ac-b5c2d117633d.
43. Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo.
44. OHADA Treaty, Articles 21-26.
45. Uniform Act of Arbitration, Article 25 para. 3.
46. See https://globalarbitrationreview.com/news/article/34474/tribunal-criticises-court-treatment-guinea-award/; http://kluwerarbitrationblog.com/2016/02/10/a-step-back-for-ohada-arbitrations/.
47. 'Waiting on the sidelines', Commercial Dispute Resolution, November-December 2015, pp. 12-13.
48. Article 25 of the UAA reads: 'The award is not subject to any opposition, appeal or judgment setting it aside. It may be subject to a petition for nullity, which must be lodged with the competent judge in the member State. The decision of the competent judge in the member State can only be set aside by the Common Court of Justice and Arbitration. The award may be subject to opposition before the arbitral Tribunal by any third party, be he a natural person or corporate body, who had not been called and when the award is damaging to his rights. It may also be the object of an application for revision before the arbitral Tribunal by reason of the discovery of a fact capable of having a decisive influence and which, before the making of the award, was unknown to both the arbitral Tribunal and the party applying for revision.'

49. OHADA Treaty, Article 10.
50. Eg, the Uniform Acts on General Commercial Law, on Guarantees, and on Commercial Companies and Economic Interest Groups (GIE).
51. http://ohada.org/appels-doffres-sp/fr/sp/actualite/3828,avis-manifestation-interet-pour-la-revison-de-lacte-uniforme-sur-larbitrage.html.
52. For examples, the laws of Nigeria and Tanzania do not include this ground into their domestic legislation.
53. Patrick M. M. Lane and R. Lee Harding, 'National Report for South Africa (2015), in Jan Paulsson and Lise Bosman (eds.),***ICCA International Handbook on Commercial Arbitration***, Kluwer Law International, 1984 - Chapter VI, (1) (c). This condition applies to awards regarding matters 'connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership of any matter or material, of whatever nature, whether within, onto or from South Africa'.
54. Steven Finizio and Thomas Führich, 'Africa's advance', ***African Law and Business***, 7 July 2014.
55. According to the UNCITRAL database on International Commercial Arbitration & Conciliation, the African states that have signed the New York Convention without issuing any reservations are: Benin, Burkina Faso, Egypt, Guinea, Ivory Coast, Lesotho, Niger, Rwanda, Senegal, South Africa, Zambia, and Zimbabwe.
56. According to the UNCITRAL database, the African states which have issued reservations are: Algeria, Botswana, Burundi, Central African Republic, Djibouti, Kenya, Mauritius, Morocco, Nigeria, Tunisia, Uganda, and Tanzania. Generally, the reservations that are made relate to the application of the New York Convention only to awards issued in the territory of another contracting State.
57. This information is not found in the UNCITRAL database. However, the Congolese bill No. 13/023 of 26 June 2013 details that the state's adhesion to the New York Convention is limited and mentions four reservations, which is, according to the database as of 15 February 2016, the record number of reservations.
58. 2014 ICC Disputes Resolution Statistics, ICC Dispute Resolution Bulletin, 2015, No. 1.
59. Queen Mary School of International Arbitration, Survey 'Choices in International Arbitration', 2010, available at http://www.arbitration.qmul.ac.uk/docs/123290.pdf.
60. S e e http://www.au.int/en/newsevents/13170/african-union-and-permanent-court-arbitration-sign-cooperation-agreement. See also A. Ross, 'PCA teams up with African Union', ***Global Arbitration Review***, 6 August 2015. In this article, the author mentions that 'a further host country agreement is now planned with Ethiopia'.
61. http://www.simmons-simmons.com/~/media/Files/Corporate/External%20publications%20pdfs/Africa%20Insight.pdf ; p. 112.
62. Lacey Yong and Alison Ross, 'Africa must have more representation on tribunals, says Somali judge', ***GAR***, vol. 10, iss. 6, 15 October 2015.

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DIFC-LCIA

Mohamed ElGhatit and **Alec Emmerson**
DIFC-LCIA Arbitration Centre

Summary

The DIFC-LCIA Arbitration Centre (DIFC-LCIA) was originally established in 2008 and was described at that time by the Chief Justice Sir Anthony Evans as 'essentially a joint venture between the DIFC and the London Court of International Arbitration (LCIA), one of the leading players in the arbitration world'.

In 2008–2010 issues arose as to the constitutionality and jurisdictional reach of the DIFC-LCIA and its ability to provide services to the UAE and other companies incorporated outside the DIFC's territorial jurisdiction. In 2014 these issues were addressed by the passing of legislation to amend and restructure the DIFC so that the technical objections to the DIFC-LCIA would be put to rest (see below). Having carried out the legislative steps, DIFC-LCIA has been relaunched.

With the relaunch, businesses will start to hear more and learn about the DIFC-LCIA, and its advantages. The DIFC's jurisdiction is the only one in the UAE with an up-to-date arbitration law based on the UNCITRAL Model Law (DIFC Law 1 of 2008). Also the DIFC Courts, the curial courts for arbitrations seated in the DIFC (which is the preferred and default seat of DIFC-LCIA arbitrations), are arbitration friendly.

Promotion of the DIFC-LCIA will be a catalyst to Dubai's progress in becoming a regional hub for international commercial arbitration and mediation.

THE RELAUNCH

From its inception, the Dubai International Financial Centre (DIFC) was intent upon establishing a beacon for regional dispute resolution. In addition to the now well-known DIFC courts, an arbitration centre was to be created to provide alternative dispute resolution (ADR) services for local and foreign business in the region. In 2008 the DIFC negotiated an agreement with the LCIA pursuant to which arbitrations under DIFC-LCIA Rules would be managed and administered with the LCIA's assistance. The DIFC-LCIA's objectives are to promote and to administer effective, efficient and flexible arbitration and other ADR proceedings for parties doing business throughout the Gulf and MENA regions.

To deal with the alleged jurisdictional issues, Law 7 of 2014 was passed (the Amended Law) to amend Dubai Law 9 of 2004, the founding law of the DIFC. Pursuant to the Amended Law, the DIFC Dispute Resolution Authority (DRA) was created. The DRA replaces the DIFC Judicial Authority/DIFC Courts, as the third of the DIFC's 'pillars' (the other two bodies being the DIFC Authority and the Dubai Financial Services Authority). In turn, the DRA comprises the DIFC courts, the Academy of Law and the DIFC Wills and Probate Registry and the DIFC Arbitration Institute (DAI) funded by the Dubai government and with its independence secured as it is governed by an independent board of trustees comprising senior and well-known figures from the legal and arbitration sectors, namely Essam Al Tamimi (Chairman), Alec Emmerson, former partner and Consultant Clyde & Co (Chief Executive), Jacomijn van Haersolte van Hof (director general of the LCIA, J William Rowley QC (chairman of the board of the LCIA) and Reza Mohtashami (a partner at Freshfields).

In November 2015 DAI entered into agreements with LCIA for the management and administration of arbitrations and mediations in which the parties had selected the DIFC-LCIA Rules, leading to the relaunch of the DIFC-LCIA. Since then a new director and registrar, Mohamed ElGhatit, (formerly a senior associate with Hogan Lovells) has been appointed.

CASE WORK

The cases currently administered by the DIFC-LCIA reflect the diversity in the business sectors in which parties have opted for DIFC/LCIA administered arbitration. Leisure, maritime, construction, telecommunications, finance and banking, and media represent a few examples of the different sectors. As regards the nationality of the parties to current cases, this too reflects the attractiveness of the DIFC-LCIA as a neutral ground between American and European parties on the one hand and Middle Eastern and Asian on the other as well as for disputes between parties based in different parts of MENA and the Gulf.

DEFAULT SEAT

Pursuant to article 16 of the DIFC-LCIA Rules, parties may agree the seat of their arbitration. However, in the event they fail to agree a seat, the default seat of the arbitration shall be the DIFC. The most effective 'package' for DIFC-LCIA arbitrations is one that includes the DIFC as the seat. This is not the same as a Dubai seat and parties choosing DIFC/LCIA Rules should either choose no seat (so the default seat of DIFC applies) or should specifically designate the DIFC as the seat. If a Dubai seat is chosen the curial courts will be the local, Arabic-language courts that do not currently benefit from an up-to-date arbitration law.

JUDICIAL ASSISTANCE

A strong desire of the parties when opting for arbitration is to minimise judicial intervention in the running of their disputes. Parties expect that arbitrators will be able to deal with all interim matters that arise during the proceedings by issuing the appropriate orders, including ones relating to interim, protective and precautionary measures. There are, however, circumstances where judicial assistance becomes necessary to ensure the compliance of a defiant party.

The courts of the seat of the arbitration will be the competent courts to assist and support, and within limited areas, to supervise and control the arbitral proceedings. For DIFC-seated arbitral proceedings, the competent courts are the DIFC courts.

The DIFC's arbitration law adopts the Model Law approach as regards expanding the powers of arbitral tribunals and limiting the intervention of courts to specific issues. For example, the DIFC Court will intervene in proceedings where an application to enforce an interim measure ordered by the tribunal is made, where a party involved is defiant.

ENFORCEMENT

For purposes of international enforcement via the New York Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention), an award issued from a DIFC-seated arbitration (a DIFC award) will be treated as an award made in a contracting state (the DIFC courts being courts of the UAE). Recognition and enforcement will be subject to article 5 of the New York Convention. Article 5 of the New York Convention sets out an exhaustive list of grounds based on which a court can refuse the recognition and enforcement of an award, these being the following:

- the invalidity of the arbitration agreement pursuant to the governing law;
- the defendant not being given proper notice of the proceedings, or being otherwise unable to present his or her case;
- the arbitral award dealing with matters beyond the scope of the arbitration;

- the composition of the arbitral tribunal or the manner in which proceedings were conducted not being in accordance with the parties' agreement;
- the award not being binding or having been set aside 'by a competent authority of the country in which, or under the law of which, that award was made;
- if the subject matter of the arbitration is not capable of being settled by arbitration under the law of the jurisdiction where recognition or enforcement is sought; or
- if the recognition or enforcement of the award would be contrary to public policy of jurisdiction where recognition or enforcement is sought.

On the other hand, and save for one or two exceptions, the enforcement of a DIFC-seated arbitration (a DIFC award) against assets located outside the DIFC, whether situated in Dubai, another emirate in the UAE, or even regionally in the GCC or Arab League member states will generally be easier than enforcing an award issued from a locally or regionally seated arbitration (a local award) or one from outside the region.

For example, when attempting to enforce a DIFC award against assets in Dubai, a party may simply apply to the DIFC courts seeking the recognition and enforcement of the award. The grounds that a counterparty could rely on to oppose such an application pursuant to the DIFC Arbitration Law are set out in its article 44 sub-paragraphs (a) and (b). These mirror the grounds set out in article 5 of the New York Convention mentioned above. In addition, a decision by the DIFC courts is enforceable, even though it is subject to appeal on points of law to the DIFC Court of Appeal. Lastly, legal costs incurred in these proceedings are recoverable. If a judgment on the award, ordering its enforcement, is issued by the DIFC courts, it will be complied with by Dubai courts execution circuit, as dictated by Dubai Law No. 12 of 2004 as amended.

In contrast, when attempting to enforce a local award (eg, onshore, Dubai-seated arbitration) a party will be faced with the following difficulties.

Uncertainty

There have been numerous occasions where reported cases record inconsistent interpretation and application of law by the Dubai courts. A recent example was when a Dubai Court of First Instance refused the enforcement of an award because the applicant failed to evidence the approval of the award by the relevant arbitration centre;

Delays

A court of first instance judgment (of the local courts) is not immediately enforceable. Only if a party decides not to appeal a court of first instance judgment does it become enforceable. Rarely do parties not appeal against court of first instance judgments. An appeal is automatically granted, a party does not need to secure permission to appeal a court of first instance judgment. A further appeal can be made to the Court of Cassation. Ratification and enforcement proceedings in Dubai can take up to three years or more to be determined finally.

Costs

Legal costs incurred in the course of proceedings before the Dubai courts are not recoverable.

COSTS

The DIFC-LCIA's and arbitrator's fees for a DIFC-LCIA administered arbitration are calculated on an hourly rate system. The claim value is taken in consideration only when specifying the maximum hourly rates applicable to the Tribunal. This is different to the ad valorem system adopted by many of the other regional and global arbitration centres. A large but relatively straightforward claim may require simply analysis of uncomplicated matters. Conversely, small but complex claims might require close analysis and consideration of delicate and controversial issues of law and fact. Pursuant to the DIFC-LCIA costs rules, the first claim mentioned above will not cost the parties more for the DIFC-LCIA and the Tribunal's fees simply because the amount in dispute is greater. This is in stark contrast to other costs rules applicable in other leading arbitration centres. Pursuant to these costs rules, the parties will probably be required to pay more just because the amount in dispute is higher.

Although proponents of the ad valorem system argue it gives parties some certainty, the reality is that it is not cost effective. It has also been demonstrated in the recently released LCIA publication, 'Costs and Duration Data' (the LCIA Report) that proceedings administered under the LCIA rules cost considerably less than those administered under other leading arbitration centre rules and progress more efficiently and speedily. The analysis of the data compiled shows the median and mean of both costs and duration as follows: US$99,000 and US$192,000 and 16 months and 20 months. Both the International Chamber of Commerce (ICC) and the Singapore International Arbitration Centre (SIAC) operate on an ad valorem basis. Although similar data is not available for the ICC and SIAC, the LCIA Report did explain how a comparison between the costs of administering arbitrations in the three institutions was still conducted. This was done using the respective fees and costs calculators of the ICC and SIAC. The amount in dispute for each of the LCIA cases analysed was put in the ICC and SIAC calculators. When comparing the results, costs of the LCIA were clearly well below those of the ICC and SIAC for the cases analysed.

Additionally, for very large claims the parties will not have to make massive payments early in the proceedings. A series of lesser payments is more likely to be ordered depending on the development and scope of the particular arbitration. Although 'lump sum' type fee amounts have historically been quite popular in the region, many practitioners feel that such an ad valorem system is not fair.

It is a key objective of the DIFC-LCIA to administer cost effective and timely arbitrations. The new Registrar will be carefully monitoring and administering cases to ensure they proceed as expeditiously and cost effectively as possible. This is a feature of DIFC-LCIA (and LCIA) arbitration.

UPDATING OF THE CURRENT RULES

It is expected that the DIFC-LCIA will issue a new set of rules (the New Rules) in the first half of 2016. The New Rules will substantially mirror the 2014 LCIA Rules. The New Rules will help make the arbitral process more efficient and less costly.

The following are the key changes expected in the Rules.

Introduction Of The Emergency Arbitrator

At any time before the formation of the tribunal, a party may apply for the appointment of an emergency arbitrator to determine urgent matters or order emergency or protective measures pending the formation of the tribunal. Any order by the emergency arbitrator will

be subject to scrutiny by the arbitral tribunal once formed. The tribunal may confirm, vary or revoke the said order, upon its own initiative or the application of any party.

Multiparty Disputes

The New Rules will include provisions that address procedural difficulties that can arise in circumstances when there are multiple parties to the same dispute or multiple contracts. The New Rules will contain new provisions that will allow for the consolidation of multiple arbitrations subject to the satisfaction of a few conditions.

Sanctioning Legal Representatives Of Parties In Event Of Poor Conduct

The Rules will include a set of general guidelines that party representatives will be obliged to comply with. If these guidelines are breached, the tribunal has the power to impose sanctions on counsel including a written reprimand or any other measure the tribunal believes is necessary for it to ensure its ability to maintain its general duties is preserved.

Ensuring No Delays Are Caused By The Arbitral Tribunal

The Rules will include provisions that ensure that arbitrators who accept appointments not only confirm their impartiality and independence but also their availability and commitment to devote the requisite time for the arbitration and issuance of the award. Arbitrators' appointments can be revoked if they do not conduct proceedings with reasonable diligence and efficiency.

In addition to the key changes set out above, the New Rules will also clarify the DIFC-LCIA position in relation to certain matters including for example, confirming appointed arbitrators' ability to consult with parties when selecting the chairman of the tribunal.

CONCLUSION

The DIFC-LCIA combines the international best practices and reputation of the LCIA with the unique understanding of the local and regional legal and business cultures. Dubai aspires to become the regional hub for international commercial arbitration and mediation. DIFC-LCIA is well equipped to be Dubai's vehicle to help achieve this.

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Valuation in International Arbitration

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Summary

VALUATION IN INTERNATIONAL ARBITRATION

The value of a business or other asset depends on the expected future benefits from holding that asset and the uncertainty associated with those benefits. An expert valuer must often form an opinion on value based on their assessment of future benefits and uncertainty at a given date. This is a challenging task for many assets. It is often particularly challenging in the context of international arbitration.

In this article, we set out our views on how experts and tribunals should approach the valuation question in international arbitration given these challenges. We start with some fundamentals: what do we mean by value, and how do we define the valuation question, and what are the valuation standards frequently encountered in international arbitration. We then consider the application of common valuation methods and the ways in which a valuer can seek to navigate the uncertainty that can exist in valuing businesses and other assets.

DEFINING VALUE

In investment treaty arbitration, the standard of compensation is often referred to in the relevant treaty. This can set the parameters for determining value, and assessing damages, in contexts such as lawful expropriation.[1] In commercial arbitrations the parameters for determining value may be less clear and can be contingent upon the governing law if not specified in the contract between the parties.

However, before considering valuation in the context of arbitration (be that commercial arbitration or arbitrations brought under investment treaties), it is helpful to consider the meaning of the term 'value' in a broader context. Put in the simplest terms, 'value' is often understood as the sum of cash that would be exchanged for a particular asset. That sum depends not just on the characteristics of the asset, but also, critically, on the assumed context.

As an illustration: the sum that an owner of an asset would accept in exchange for that asset if he or she were to be deprived of it, could be quite different to the sum of cash that buyers might pay for that asset if the owner wanted to sell it on a given day. For example, the owner may benefit from synergies that are not available to the buyers in the market for the asset in question or there may not be many readily available buyers. This gives rise to the need to define the circumstances of the hypothetical exchange.

The International Valuation Standard Council (IVSC), states that:

> Value is not a fact but an opinion of either: (a) the most probable price to be paid for an asset in an exchange, or (b) the economic benefits of owning an asset. A value in exchange is a hypothetical price and the hypothesis on which the value is estimated is determined by the purpose of the valuation. A value to the owner is an estimate of the benefits that would accrue to a particular owner from ownership.[2]

This statement introduces two, connected, measures of value. The first, 'value in exchange', relates value to the hypothetical price that would be agreed upon for an asset in an exchange between a buyer and a seller. The second, 'value to the owner', relates value to the benefits that would accrue to the owner of the asset.

In some circumstances, these two measures will be the same. An owner of an asset would not voluntarily accept a price in exchange that is lower than his or her estimate of the value that would accrue to them from continuing to hold the asset. Conversely, a potential buyer of the asset would not pay a price that is higher than his or her estimate of the value that would accrue to them from holding the asset following the exchange. Providing the benefits of ownership are the same for both parties in the hypothetical exchange underlying the 'value in exchange' estimate, and those benefits are also the same for the owner of the asset in the 'value to the owner' estimate, then the two measures of value should in theory be the same.

This will not always be the case. The 'value in exchange' might be estimated on the basis of a hypothetical buyer and seller, neither of which generates any synergies through ownership of the asset. In contrast the 'value to the owner' might be estimated on the basis of an owner who generates significant synergy benefits through ownership of the asset that are particular to him or her. In those circumstances the 'value to the owner' would be higher than the 'value in exchange'.

This leads to an important and more general point: estimates of value depend on the assumptions underlying the valuation. Where value is linked to a price in a hypothetical transaction, the fundamental assumptions about that hypothetical transaction and its circumstances affect the resulting estimate of value. Those fundamental assumptions are usually about:

1. the date of the transaction;
2. the identity and characteristics of the potential participants in the hypothetical transaction;
3. their motivations; and
4. their knowledge of the subject matter of the valuation.

THE VALUATION QUESTION

Different sets of assumptions can lead to different valuations for the same asset. For example, the sale of an asset in an orderly transaction, between two knowledgeable parties who conduct an adequate amount of due diligence, whereby neither party is under financial duress, will yield a particular estimate of the price that would be agreed upon. That price would differ if instead it was assumed that, for the same asset, the transaction took place on 'fire sale' basis, with the vendor in financial distress and as a result, limited due diligence was conducted by the potential purchaser of the asset. Similarly, an estimate of 'value to the owner' will depend upon the characteristics of the owner of the asset, and the benefits that he or she would therefore enjoy from its ownership.

Consequently, before embarking on the valuation of any asset, it is important to set the parameters of the valuation question. Is the valuation of the 'value in exchange' or 'value to the owner'? And what are the other assumptions underlying the valuation? The answer to those questions will ultimately depend upon the purpose of the valuation, and the choice of parameters, which is often referred to as the 'basis of valuation'. Valuation standards provide a framework for common bases of valuation.

THE VALUATION QUESTION IN INTERNATIONAL ARBITRATION

'Market value' or 'fair market value' are probably the most frequently encountered valuation standards in international arbitration. Fair market value can be defined in the following terms: the price, expressed in cash or cash equivalents, that a willing and able buyer would pay a willing and able seller, acting at arm's length, in an open and unrestricted market, whereby each party had reasonable knowledge of relevant facts, each desired to maximise his or her financial gain, and neither party was under compulsion to buy or sell.[3] In our experience this is the standard that is most often applied, either implicitly or explicitly in the context of international arbitration.

The consequences of this definition are important for the valuer - and should always be borne in mind when considering the available valuation evidence. Whenever we are seeking to determine the market value of an asset, we are estimating a price: the price that would be agreed upon between a willing buyer and a willing seller.

FACTORS AFFECTING PRICE

It is therefore important to understand what factors affect the prices that a willing buyer and willing seller would be willing to pay or accept. The factors affecting the price agreed upon for an asset depend on the specific asset and the motivations of the parties to the transaction. For some assets, the motivation for acquiring the asset is the utility of the asset itself. For example, the price paid for a piece of art might reflect the utility, in the form of the pleasure of ownership that the owner of the art will receive. However, for the assets that we typically consider in an arbitration context, the principal motivations of buyers and sellers are financial. In particular, the motivation relates to the economic benefits, in terms of the cash generated, that can be obtained from ownership of the asset.

When the purpose of ownership is to generate economic benefits from the asset, there are three fundamental factors that affect the price that an asset transacts for. These are:

- The expected cash flows that the asset will generate. This in turn is linked to the current cash flows being generated by the asset, and the expected growth in those cash flows. The higher the cash flows generated, and the greater the expected growth in those cash flows then, all else being equal, the higher the value of the asset.
- The level of uncertainty, or risk, around the expectations of cash flow growth. Investors are generally risk averse, and therefore the greater the uncertainty around the expected cash flows, then all else being equal, the lower the value of the asset.
- The availability of other assets. Buyers and sellers do not consider prices of assets in a vacuum. They will consider other assets that are in a market with similar characteristics, in terms of risk and growth, and the prices of those assets.

Assumptions made – either implicitly or explicitly – about the growth and risk of the cash flows generated by an asset affect all valuations. An important consequence of this fact is that the price that two parties agree on for an asset is linked to expectations about the economic prospects, in terms of growth and risk that a buyer and seller have regarding the asset in question.

The price that any party would be willing to pay for an asset, or agree to sell it, depends on the expectations of that party. Different investors can have very different expectations. Even if those expectations are informed by a common set of information that is available to them (for example, about the asset, the market it operates in, and the overall economy), two investors might interpret the information differently. In other words, in the same way

that macro-economists have a wide range of views about the prospects of the economy, investors are likely to have an equally wide range of views about the prospects of a business.

This leads to an important – and sometimes under-appreciated – conclusion: outside well-functioning and liquid markets, assets do not have a single, objective value. Value is a function of price, and price is a function of expectations. Different investors can have different expectations even when they have the same information available to them. Further, expectations change over time as new information becomes available and conditions change. The price that an investor would pay for an asset (or agree to sell it at) therefore also changes. Value is not a constant, immutable fact. Perspectives on value can differ from person to person and over time.

UNCERTAINTY AND VALUE

The role of the valuer in arbitration is usually to estimate what price would have been agreed upon for an asset (the 'subject asset') between a buyer and seller at a particular point in time (the 'valuation date'). That means that the valuer must consider what expectations a hypothetical investor would have held at the valuation date regarding the economic prospects – in terms of both growth and risk – of the asset that is the subject of the valuation, and how a price would have been derived from those expectations.

There is a degree of uncertainty inherent in many valuations. However, the extent of that uncertainty depends on the available evidence. In circumstances where there are transactions involving the subject asset on the valuation date, then a valuer can – with certainty – identify prices at which parties were agreeing to buy and sell the subject asset.

If there are no transactions in the subject asset on the valuation date, but there are transactions involving the subject asset that were carried out prior to the valuation date, then the uncertainty starts to increase. The valuer must then assess how expectations have changed over time and how that would affect value. If there are no transactions involving the subject asset prior to the valuation date, then the uncertainty increases further. The valuer must then consider the extent to which expectations about growth and risk can be inferred from transactions in other assets (for example, transactions in the same industry) or alternatively build up their own view about the growth and risk prospects of the subject asset and consider the price that an investor would pay in light of those views.

The uncertainty is magnified in circumstances where assets have characteristics that make them either difficult to compare to other assets, or which make it difficult to formulate reliable expectations about their future performance. For example, this situation may arise due to the assets being relatively new (that is, they have no track record) or whereby the assets operate in a market that is volatile (such as, an emerging economy).

Sometimes the uncertainty in a valuation leads commentators to make the statement that valuation is 'more of an art than a science'. In our view that is an unhelpful analogy. While the definitions of 'art' and 'science' are manifold, one perspective is that 'art' is associated with fundamentally creative processes. 'Science', in contrast, is associated with a disciplined study of the world –observing facts and developing theories and predictions that can be tested. In our view, approaches that are likely to be associated with 'science' are much closer to good valuation practice. The very fact of the uncertainty present in many valuations is why a valuer should do all he or she can to study the available evidence, derive theories about value and test those theories carefully. All too often, labelling valuation as an 'art' can inappropriately be used as justification for paying insufficient attention to these principles.

VALUATION METHODS

In some circumstances, there is clear observable market data available to the valuer, for example, for transactions in the shares of the subject asset on a well-functioning and liquid stock market in a mature country. These types of data is likely to provide the best evidence of the most likely price that would be agreed upon between a willing buyer and a willing seller.[4] This is because such transactions reflect actual buyers' and sellers' assessments of the future benefits of holding the asset and the uncertainty in those assessments. In most circumstances in international arbitration, however, such data is not available and the valuer needs to rely on other evidence.

MARKET MULTIPLES BASED ON TRANSACTIONS IN COMPARABLE ASSETS

Where there are no, or insufficient, reliable data on transactions in the subject asset then an alternative method can be used based on market multiples. Market multiples can be calculated based on the observed prices of transactions in comparable assets.

Examples of market multiples are 'P/E multiples', which are the ratio of price per share to earnings per share, 'EV/EBIT multiples', which are the ratio of enterprise value (EV) to earnings before interest and tax (EBIT) and 'EV/EBITDA' multiples, which are the ratio of enterprise value to earnings before interest, depreciation and amortisation (EBITDA). The various ratios that are calculated from observed prices of transactions are reviewed, analysed and adjusted, and then a representative multiple, or often a range of multiples is thereby determined. That multiple, or range of multiples, is then applied to an appropriate corresponding measure of profitability of the company that is the subject of the valuation.

To apply market multiples, it is necessary to identify transactions in the shares of comparable companies. When identifying comparable companies it is necessary to identify companies that share similar economically relevant characteristics to the company that is the subject of the valuation. The economically relevant characteristics are those characteristics that determine the growth prospects and risk of the company. Examples of economically relevant characteristics include the industry and the geographic location of the business.

DISCOUNTED CASH FLOW ANALYSIS

Discounted cash flow (DCF) analysis involves determining the present value of future cash flows by discounting these cash flows back to the date of valuation at an appropriate discount rate. In practice, DCF analysis involves the valuer making a series of assumptions with respect to forecasted cash flows, and a series of assumptions with respect to the discount rate. Growth and risk are taken into account through the assumptions that the valuer makes about the forecasted cash flows and the discount rate.

Both the DCF and the market multiple valuation methods rely on market data. A market multiples valuation method relies on market data directly through the use of data on the price and financial performance of comparable companies. A DCF analysis relies on market data indirectly since the performance of comparable companies is often used as the basis for the growth forecasts and since market data provides the inputs to the discount rate (for example, the estimates of equity risk premium, a key input in most discount rates, are based on observed stock market returns). As the level of uncertainty associated with the prospects of the company at issue increases (such as a start-up business, or a company operating in an emerging economy), it becomes more difficult to develop appropriate assumptions for these inputs.

The key challenge when applying market multiples is identifying truly comparable companies. The key challenge when applying DCF analysis is identifying appropriate assumptions for the expected growth of the cash flows, and the level of risk that ought to be reflected in the discount rate.

ADDRESSING THE CHALLENGES OF VALUATION OF BUSINESSES IN DEVELOPING COUNTRIES

Assessing the value of a business in the context of international arbitration can be particularly challenging. Those challenges can arise because:
(i) the business has a limited track record of financial performance, making it difficult to use historical data as a basis for assessing expectations of future financial performance;
(ii) the economic and political environment in which the business operates is volatile, also making it difficult to form reliable expectations of future financial performance;
(iii) there is limited reliable market data available to assess the returns that investors require for investing in equity in the relevant economy, making it difficult to assess an appropriate discount rate; and
(iv) there are few, if any, comparable businesses with similar economically relevant characteristics, operating in similar environments.

Points (i) to (iii) above make it difficult to apply the DCF valuation method, whereas (iv) makes it difficult to apply the market multiples method.

Where available, evidence of indicators of value can provide a route through the uncertainty that these challenges create. This might include transactions in the asset or company under consideration at an earlier date than the valuation date, offers for the business or potential sales, or unsuccessful funding rounds or bids for the business that were not completed.

For example, suppose a DCF analysis yields an estimate of the value of a business of US$100 million at a particular date, say 1 January 2012, and a comparable company analysis yields an estimate of value of US$85 million. Based on this analysis an expert valuer might conclude on a valuation that lies in the range between the two estimates. However, the characteristics of the asset might mean there is considerable uncertainty around that range.

Suppose also that the business was acquired three years earlier, on 1 January 2009, for a price of US$50 million. That transaction represents the price a willing buyer and willing seller agreed upon for the asset, albeit three years prior to the valuation date.

By explaining the ways in which the characteristics of the business, and the environment it operates in, have changed between the 2009 and 2012, and understanding the associated changes in expectations of growth and risk, a valuer may be able to test the conclusions drawn from the DCF and comparable company analysis.

If it can be shown that over that period the prospects of the company have improved significantly, for example, through changes in commodity prices, an improved political environment or other macro-economic factors, that may increase a tribunal's confidence in a valuation in the range of US$85 million to US$100 million. Such analysis can be enhanced by also examining how the value of comparable companies has shifted over time.

Conversely, if the conditions in which the business operates have deteriorated between 2009 and 2012, that can potentially help to demonstrate that the DCF and comparable company analyses are unlikely to be reliable.

This kind of analysis can be particularly helpful in circumstances where tribunals are faced with experts positing very different valuation conclusions. In some circumstances, tribunals are faced with two DCF models: one yielding a very large value and one a small value (perhaps nil). The models are sensitive to changes in the input assumptions (for example, the addition of a country risk premium to the discount rate) and there is no middle ground between the experts. There may also be no reliable data to calculate market multiples based on comparable companies.

The history of the company or asset may help address this divergence. The available facts may 'anchor' the value or provide directional guidance such that it is clear that one of the asserted values is too low or too high. In our experience, experts can sometimes overlook, or underplay the importance of such evidence and instead focus too much on DCF models and arguments over the appropriate inputs to their respective models.

CONCLUSION

In summary, it is often necessary for arbitral tribunals to determine the 'market value' of an asset. Market value can be understood as the price at which a willing buyer and a willing seller would agree to transact the asset in question. That price reflects the expectations of risk and growth that are held by the buyer and sellers, which are informed by the characteristics of the asset and the market in which it operates.

Valuation methods assess value by considering expectations of risk or growth either explicitly through discounted cash flow analyses, or implicitly through observations of the prices at which comparable companies transact. For assets that are the subject of disputes in international arbitration, such methods can sometimes be difficult to apply. This might be because the asset has a limited track record, operates in an uncertain environment or lacks closely comparable companies.

In such circumstances, the history of the company or asset may help a valuer, and a tribunal, navigate the uncertainty this can create. Transactions in the subject asset at earlier dates, offers for the business, or attempts to market the business at a particular price can all provide indicators of value that help anchor the valuation, or provide directional guidance to its valuers. In our view, expert valuers should be aware of the availability of such evidence and make use of it wherever possible.

The views expressed herein are those of the authors and not necessarily the views of FTI Consulting, Inc, its management, its subsidiaries, its affiliates, or its other professionals.
Notes

1. Other considerations relevant to determining value and damages may be relevant in unlawful expropriations, but are not considered in the scope of this article.
2. International Valuation Standards Council – Framework and Requirements, paragraph 8.
3. Canadian Institute of Chartered Business Valuator's International Glossary of Business Valuation Terms – Practice Bulletin 2.
4. This assumes that the actions of the respondent have not adversely affected the trading price of the stock.

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Energy Arbitration in Africa

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Summary

The energy sector is a critical element in Africa's economic development. It includes traditional resources such as oil, gas and coal as well as a growing emphasis on renewable sources of energy.[1] Historically and today, the African energy sector has been dominated by the petroleum industry. According to 2015 estimates, 57 per cent of Africa's export earnings are derived from hydrocarbon revenues and Africa accounts for over 11 per cent of global oil production over the past decade.[2] As discussed below, the energy sector has generated a significant number of disputes that have been resolved through international arbitration, and this number appears to be increasing.

Energy resources and developments vary by region in Africa. Oil and gas reserves are concentrated in north and west Africa (Nigeria, Angola and Algeria are the continent's largest oil and gas producers).[3] A number of countries export natural gas by ship in liquefied form (LNG) or by pipeline.[4] Coal reserves are mostly found in the southern part of the continent (South Africa holds over 90 per cent of the proven reserves and accounts for virtually all of the continent's production). While Africa has abundant potential for renewable energies, these resources are not yet developed. To date, major hydropower projects have been concentrated in Malawi, Zambia and Lesotho; there have been large-scale wind generation projects in Morocco, Egypt and South Africa; and geothermal power projects in the East African Great Rift Valley in Kenya, Uganda, Ethiopia and Tanzania.

Historically, political instability, challenging environmental conditions and economic volatility have meant that fewer exploration projects have taken place in Africa than other resource-rich places. That has been changing, however, and increased global competition has brought new participants and investments into the African energy sector. Significant resource discoveries are giving rise to complicated, costly and risky energy investment projects. For example, oil discoveries in the Gulf of Guinea have created investment opportunities with new producer states such as Sierra Leone and Liberia.[5] Exploration companies are also moving into countries such as Somalia, which were until recently considered too risky due to conflict and political instability. Although the oil and gas industry continues to attract the most foreign investment, there have been increased investments in renewable energy. Investment in renewables is expected to continue to increase given the amount of currently untapped renewable resources and its potential to help solve the energy crisis in sub-Saharan Africa, where nearly 600 million people are without access to electricity.[6]

It is impossible to generalise about arbitration trends in Africa, even by region. However, along with foreign investment, interest in arbitration in Africa is growing across the continent; many jurisdictions have taken the key steps of ratifying the New York Convention and adopting modern arbitration legislation, and several are developing arbitral institutions. Disputes involving large-scale energy projects in Africa have typically been resolved through international commercial and investor-state arbitration. This article provides an overview of these arbitrations, and some of the recent trends in commercial and treaty cases.

GOVERNMENT CONTROL OF NATURAL RESOURCES AND THE CONTRACTUAL MODEL

Because of the wide variety of projects and participants, African energy projects involve a broad and diverse range of commercial agreements. Natural resources are usually owned by the state, which means that energy projects often involve a licence from the government (for example, for access to a defined geographic block) and require contractual arrangements between a government (or a state-owned entity, such as a national petroleum company)

and a private company (or a group of companies). Many projects also involve the creation of joint ventures to share the risks and costs associated with such large-scale endeavours, or to meet regulatory requirements.

For oil and gas projects, many governments initially entered into concession agreements with international oil companies (IOCs).[7] These agreements typically granted the IOC long-term exploration and development rights over large areas with complete control over the management of development and no obligation to produce. Today, the most common contractual form is a production sharing agreement (PSA). A PSA typically outlines the exploration and production rights and obligations between the parties and how the resource will be shared if discovered in commercial quantities. Host states prefer PSAs because they usually afford the government lower financial risk exposure and enable it to participate in the management of the project.[8]

In the PSA model, the IOC may be acting on behalf of a consortium of companies that will enter into a joint operating agreement (JOA) to define their respective rights and obligations in the project. Consortium members may be party to study and bid agreements and a number of other agreements with respect to the evaluation and acquisition phases of the project. Depending on how a project develops, there may be additional contracts for exploration, drilling, transportation and marketing of the oil or gas. Such arrangements may also involve farm-in and farm-out agreements, under which third parties acquire an interest under a JOA in return for financial compensation or the provision of exploration, drilling or other services. Most large projects necessarily involve other contracts as well. For example, there may be contracts with local and foreign companies to act as consultants, for the supply of goods and services, and the construction or use of facilities and equipment (including surveying and drilling equipment).

Given the variety of agreements and parties involved in these projects, and their scale and complexity, a wide range of issues can arise between some or all of the parties. The likelihood of disputes is often also increased by the existence of political, environmental and security issues.[9] Some of the many disputes that have arisen include issues concerning non-payment of invoices and royalty fees; delays, disruptions and cancellations (including force majeure claims); shareholder and joint venture disputes; disputes about the scope and transfer of rights; and issues about price as well as price adjustment claims in long-term supply contracts. Many contracts include stabilisation clauses to address potential legislative or regulatory changes, and disputes also arise regarding the application of those clauses. There have also been disputes involving allegations of corruption, including as a defence to payment claims under consulting agreements relating to licence agreements or PSAs.

THE USE OF INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICAN ENERGY CONTRACTS

Some disputes relating to energy contracts may be decided in local courts. However, when foreign parties are involved, these contracts generally provide that disputes will be resolved through international arbitration. Foreign investors almost always insist on arbitration under the rules of well-known international arbitral institutions. As a result, these agreements very often provide for arbitration pursuant to the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) or UNCITRAL Rules. Foreign parties also typically seek to provide that any arbitral proceedings will take place

outside of the host state and outside of Africa, with London, Paris and Switzerland being common seats for arbitrations relating to African energy projects.

It also is common for parties to agree that contracts relating to large-scale energy projects be governed by a foreign law, with English, New York, Texas or French law frequent choices. Thus, it is not unusual, for example, for a contract between a Spanish energy company and a Libyan service provider relating to a project in Libya to be subject to English law. At times, however, a state or state-owned party may insist that local law apply and a significant energy contract (and any resulting disputes) may therefore be subject to, for example, Nigerian, Algerian or Egyptian law.

The available data indicates that Africa-related arbitrations have increased significantly in the past decade, and that energy disputes, and in particular cases involving the oil and gas industry, account for a significant proportion of this increase. The number of Africa-related ICC arbitrations has more than doubled, from 72 cases in 2004 to 163 cases in 2014.[10] Disputes under the LCIA Rules have also increased, from two Africa-related cases in 2002 to 30 in 2013.[11]

While foreign participants in energy projects will generally try to avoid any possibility that disputes will be resolved in local courts by insisting on including arbitration agreements, and having the seat of arbitration outside Africa to avoid concerns about interference in the arbitral process by local courts, such agreements do not resolve all potential issues. There are ongoing concerns about the enforceability of foreign arbitral awards in many African jurisdictions. Only 33 out of 54 African states are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[12] Moreover, many African countries do not have modern arbitration laws.[13]

This means that in almost half of African jurisdictions a party seeking to enforce a foreign arbitral award must depend on provisions of national law that may not be as favourable as in those countries that have ratified and implemented the New York Convention. Moreover, even in countries that have signed the New York Convention, there may be issues with regard to the implementing legislation, and the local courts may be inexperienced and unreliable (particularly where a party may be seeking to enforce an award against a state or state-owned entity). Nonetheless, international arbitration remains the only choice for most foreign investors in the African energy sector.

INVESTMENT TREATY ARBITRATION RELATED TO AFRICAN ENERGY PROJECTS

A number of disputes relating to energy projects have also been subject to arbitrations arising under investment treaties. African states are currently party to nearly 500 bilateral investment treaties (BITs)[14] that include protection for the investments of foreign investors and offer arbitration for resolution of disputes between foreign investors and host governments under the ICSID or other arbitral rules.[15] In addition to BITs, regional trade agreements such as the South African Development Community (SADC) Protocol on Finance and Investment, the Economic Community of West African States (ECOWAS) Supplementary Act on Foreign Investment and the Common Market for Eastern and Southern Africa (COMESA) Treaty can also provide similar investment protections to BITs.

While 45 countries in Africa are member states of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), a number of prominent African countries, including Angola, which is a significant oil producer, are not party to the ICSID Convention.[16] Perhaps unsurprisingly

given its economic importance, a significant number of Africa-related ICSID cases have involved energy issues and a large percentage of the ICSID cases involving energy issues have involved African countries.[17]

As with disputes arising in commercial arbitration, ICSID arbitrations dealing with the African energy sector have involved a wide variety of projects and disputes. Treaty claims involving energy projects in Africa have related to, among other things, the imposition of new tax regimes and associated breach of stabilisation provisions;[18] suspension and interruption of midstream LNG operations;[19] the transfer of oil and gas concession exploration and development rights to third parties;[20] unpaid invoices under power purchase agreements;[21] and the cancellation of contractual rights or licence revocations.[22]

There is very little information about whether African states have voluntarily complied with the treaty awards issued against them or, if not, whether these awards have been successfully enforced. Although the lack of public reports to the contrary suggests that most African states have complied with arbitral awards, there is an increasing amount of criticism of the investment treaty system and certain African countries have taken steps to withdraw from treaty obligations including by cancelling BITs.[23]

CURRENT TRENDS AND POTENTIAL DISPUTES

There have been a number of developments in the African energy sector that have and will likely continue to be reflected in arbitrations.

'Resource Nationalism'

So-called 'resource nationalism' (ie, political policy promoting greater state intervention in the resource sector with the aim of harnessing resource wealth for socio-economic development)[24] can lead to conflicts between governments and international companies.

Many arbitrations relating to the African energy sector arise in connection with state actions treating energy resources as sovereign resources central to economic development. This can result in claims, particularly under investment treaties, when, for example, energy resources are nationalised after a period of political unrest and disturbance or when a new government seeks to change the terms of contractual obligations.[25]

Local Content Regulations

A number of African governments have amended their energy legislation, regulations and bidding practices to include 'local content' requirements and are increasingly requiring compliance with these regulations.[26]

These 'local content' regulations intend that a percentage of the goods and services required at each stage of the value chain be locally supplied. For example, the Nigerian Oil and Gas Industry Content Development Act 2010 requires minimum thresholds for the use of local services and materials, preference for Nigerian companies, and promotes the transfer of skills to the Nigerian workforce.[27] In particular, such regulations are intended to ensure opportunities for local participation in bidding rounds, prioritise local suppliers, and provide local employment. Among other things, this may lead to an increase in operating costs for foreign investors.

There has been an increasing number of disputes involving compliance with such requirements, including efforts by local companies to rely on local content requirements in disputes with foreign companies relating to large-scale energy projects.[28]

Commodity Price Volatility

Price volatility in the oil and gas sector can also result in disputes, particularly where it threatens the commercial viability of projects. The recent fall in oil prices may give rise to an increased number of disputes in the African energy sector.[29] For African governments dependent on hydrocarbon revenues, low oil prices may increase the detrimental impact of an unfavourable arbitral award on the state's budget.

On the one hand, during periods of depressed commodity prices, African governments will want to see that levels of investment and activity on energy projects are maintained in order to secure levels of production. Governments may also take steps to cushion themselves against a sustained price fall, for example, by introducing new taxation regimes or renegotiating contractual arrangements to attempt to increase their take from project revenues.

IOCs, on the other hand, may take steps to reduce operating costs and capital expenditure, delaying or cancelling their most expensive and risky projects.[30] Disputes may arise under PSAs in relation to participants' commitment to ongoing exploration and development.[31] The downturn in commodity prices may also result in cash flow problems for participants in joint venture projects, leading to disputes about payments of invoices and cash calls.[32]

CONCLUSION

Foreign investment in the energy sector in Africa will only grow, particularly in light of new oil and gas discoveries and the possibility of harnessing renewable energy sources. Existing investments have led to a wide range of disputes and, given the risks associated with many new projects, including the ongoing socio-political pressure on resource-dependent African states and the current volatile pricing environment, it is likely that the substantial increase in commercial and treaty arbitrations seen in the past decade will continue.

While the dispute resolution method of choice in contractual agreements for African energy projects will continue to be international arbitration, the nature and details of the arbitration agreements used in energy contracts may evolve as more investment in Africa comes from Asia and other places rather than western Europe and North America, and as African parties increasingly push to have disputes resolved locally; and to develop African arbitral institutions. For the near term, however, foreign investors will continue to insist on international arbitration outside of Africa and the significant number of cases being heard under the rules of arbitral institutions like the ICC and seated in places like London and Paris will continue.

The author thanks Kay Weinberg for her contribution to this chapter.

Notes

1. South Africa is currently the only country in Africa with a commercial nuclear power plant.
2. See KPMG Sector Report, Oil & Gas in Africa (2015) at pp.1-2, available at https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Oil%20and%20Gas%20sector%20report%202015.pdf.
3. According to 2014 figures, Africa holds 7.6 per cent of the world's proven oil and gas reserves and accounted for 9.3 per cent of total global oil production. West African oil production is sourced primarily from the Niger Delta Basin, the majority

of which lies in Nigerian waters. Natural gas production from Africa was 5.8 per cent of total global production, with Algeria the largest African gas producer. See BP Statistical Review of World Energy June 2015 at pp. 6-8, 20-22 available at www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2015/bp-statistical-review-of-world-energy-2015-full-report.pdf.

4. For example, Nigeria, Algeria, Egypt, and Equatorial Guinea export LNG, Algeria and Libya export gas by pipeline to the Iberian Peninsula and Italy in Europe, and Mozambique and Nigeria export gas to other countries in Africa. See KPMG Sector Report, Oil & Gas in Africa (2015) at pp.6-7, available at https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/General-Industries-Publications/Documents/Oil%20and%20Gas%20sector%20report%202015.pdf.
5. Major natural gas discoveries in Mozambique (mainly in the offshore Rovuma Basin) and Tanzania have also attracted interest in significant new projects and investments.
6. See Mckinsey & Company, ***Brighter Africa: The growth potential of the sub-Saharan electricity sector***, (February 2015) at p. 2. See also 'Working Group III of the Intergovernmental Panel on Climate Change', IPCC Special Report of the Intergovernmental Panel on Climate Change, (2011) (stating that the undeveloped hydropower potential in Africa may be as high as 95 per cent of total capacity).
7. See E Laryea, 'Contractual Arrangements for Resource Investment', in FN Botchway (ed.), ***Natural Resource Investment and Africa's Development*** at p. 109.
8. See E. Laryea, 'Contractual Arrangements for Resource Investment', in (ed. FN Botchway), ***Natural Resource Investment and Africa's Development*** (2011) at pp. 111-113, 121-123.
9. See eg, ***National Oil Corp (NOC) v. Libyan Sun Oil Co***, First Award of 31 May 1985, 29 I.L.M. 565, 584 (1990), 16 Y.B. Com. Arb. 54, 57 (1991) (an ICC arbitration concerning, in part, the applicability of a force majeure clause within the parties' Exploration and Production Sharing Agreement to excuse the operator's failure to complete an exploration program. The US operator Sun Oil had declared force majeure following political tensions between the US and Libya, which led to the US government prohibiting persons using US passports from travelling to Libya and issuing regulations prohibiting the export of certain technology).
10. See International Chamber of Commerce, '2014 ICC Dispute Resolution Statistics', ICC Dispute Resolution Bulletin 2015/No. 1 at p. 2.; The International Chamber of Commerce, '2004 Statistical Report', ICC International Court of Arbitration Bulletin, Vol 16/No.1 Spring 2005, at p. 6.
11. See London Court of International Arbitration, Registrar's Report 2013, at p.2, available at www.lcia.org/LCIA/reports.aspx; London Court of International Arbitration, Director General's Report 2002, at p.2, available at www.lcia.org/LCIA/reports.aspx. LCIA figures from 2013 indicate that 15 per cent of its Africa-related disputes were related to the oil and gas industry and an additional 7 per cent related to the broader energy and resources sector. See A Notaras and J Bartle, 'Arbitration in Africa: High Stakes and Big Claims in Resolving Disputes in Africa', in Legal Business (July/August 2015) at p.106, available at

www.simmons-simmons.com/~/media/Files/Corporate/External%20publications%20pdfs/Africa%20Insight.pdf.

12. In west and central Africa, 17 countries are member states of the Organisation for the Harmonisation of Business Law in Africa (OHADA), which also provides a system for the enforcement of foreign arbitral awards.
13. Around half of African countries have adopted modern arbitration legislation based on a model law: 13 countries in Africa have arbitration legislation based on the UNCITRAL Model Law and the 17 OHADA member states have adopted the Uniform Act on Arbitration. However, other countries have outdated arbitration legislation. For example, South Africa, Botswana, Namibia, Malawi, Lesotho and Swaziland all retain arbitration statutes based on the now-repealed English Arbitration Act 1950.
14. See UNCTAD International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA. The six North African countries, Egypt, Tunisia, Algeria, Morocco, Libya and Sudan, are party to approximately 200 BITs.
15. Many investment treaties provide for arbitration under the ICSID Arbitration Rules, and some provide for arbitration under other rules, most often the UNCITRAL, ICC or Stockholm Chamber of Commerce (SCC) rules.
16. Angola has also signed only nine BITs (and only four of those are in force) and it is not a member of a regional investment treaty such as OHADA.
17. Of the 134 pending or concluded oil, gas and mining arbitrations registered at ICSID (the ICSID website records cases related to 'oil, gas and mining' as forming part of one economic sector), 38 involve an African party. By comparison, only five of the 91 electric power and energy sector cases involve an African party and four of those are related proceedings involving Tanzania and its state-owned electricity company. See https://icsid.worldbank.org/.
18. See, eg, ***Texaco Overseas Petroleum Co et al v The Government of the Libyan Arab Republic***, Award, 17 I.L.M. 1 (1978); see also ***AGIP Company v People's Republic of the Congo***, Award, 30 November 1979, 21 ILM 726 (1982); ***Total E&P Uganda BV v Republic of Uganda*** (ICSID Case No. ARB/15/11); ***Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda*** (ICSID Case No. ARB/13/25); ***Total E&P Uganda BV v Republic of Uganda*** (ICSID Case No. ARB/15/11).
19. See, eg, ***Unión Fenosa Gas, SA v Arab Republic of Egypt*** (ICSID Case No. ARB/14/4); see also ***Ampal-American Israel Corporation and others v Arab Republic of Egypt*** (ICSID Case No. ARB/12/11).
20. See, eg, ***Shell Nigeria Ultra Deep Limited v Federal Republic of Nigeria*** (ICSID Case No. ARB/07/18); see also ***RSM Production Company v Republic of Cameroon*** (ICSID Case No. ARB/13/14).
21. ***Standard Chartered Bank v The United Republic of Tanzania*** (ICSID Case No. ARB/10/12).
22. See, eg, ***WalAm Energy Inc v Republic of Kenya*** (ICSID Case No. ARB/15/17) (related to the revocation of a licence granted to the Canadian claimant to explore and develop geothermal resources at the Suswa Geothermal Concession in Kenya); see also the related cases of ***African Petroleum Gambia Limited (Block A4) v Republic of the Gambia*** (ICSID Case No. ARB/14/7) and ***African Petroleum Gambia Limited***

(Block A1) v Republic of the Gambia (ICSID Case No. ARB/14/6) (regarding the Gambia's revocations of an Australian IOC's two offshore oil licences on the basis that the licences violated the state's national petroleum law. Settlement was reached November 2014 when the Gambia reinstated the two licenses); ***Togo Electricité and GDF-Suez Energie Services v Republic of Togo*** (ICSID Case No. ARB/06/7) (related to the termination of an electricity concession).

23. For example, in October 2012, South Africa cancelled its BITs with Belgium–Luxembourg, Spain, Germany, Switzerland, the Netherlands and Denmark. As an alternative to BIT protections, South Africa published a draft Promotion and Protection of Investment Bill for public comment in October 2013. The bill was tabled in parliament in July 2015 and has yet to be enacted. If it becomes law, foreign investors will be required to submit disputes before national courts or relevant authorities. Egypt also amended its Investment Law No. 8/1997 in 2015, including by removing reference to investor-state treaty arbitration.

24. See P Stevens, J Kooroshy, G Lahn and B Lee, ***Conflict and Coexistence in the Extractive Industries***, (Chatham House Report (November 2013)) at p. 22. Nationalist rhetoric has also become a prominent feature of resource-sector governance in South Africa and Zimbabwe. However, most African governments remain wary of deterring foreign direct investment. In Mozambique, Zambia and Guinea, for instance, government proposals for new ownership requirements or tax regimes have been scaled down or reversed under industry pressure. Id. at p. viii.

25. See, e.g.,***Sudapet Company Limited v Republic of South Sudan*** (ICSID Case No. ARB/12/26) (concerning the alleged seizure of the Claimants' equity interests in several joint ventures with IOCs).

26. Local content regulations have been codified as part of national petroleum laws in, for example, Nigeria, Kenya, Ghana, Mozambique and Angola and have been proposed in other countries.

27. See Nigerian Oil and Gas Industry Content Development Act 2010, available at www.eisourcebook.org/cms/January%202016/Nigerian%20Oil%20and%20Gas%20Industry%20Content%20Development%20Act%202010.pdf. The Nigerian Act states at Section 1(2) that '[a]ll regulatory authorities, operators, contractors, subcontractors, alliance partners and other entities involved in any project, operation, activity or transaction in the Nigerian oil and gas industry shall consider Nigerian content as an important element of their overall project development and management philosophy for project execution.' It also provides at Section 1(3) that '[c]ompliance with the provisions of this Act and promotion of Nigerian content development shall be a major criterion for award of licences, permits and any other interest in bidding for Oil exploration, production, transportation and development or any other operations in Nigerian Oil and Gas industry.'

28. See A Msimang and J Cull, 'Operators Must Carefully Navigate Nigerian Local Content Rules', Offshore Regulatory Perspectives, (December 2014) ('Local content obligations on operators across West Africa are becoming increasingly demanding and are having a major impact on the way oil companies do business there (and on the costs of doing business)').

29.

Oil prices have collapsed from over US$100/barrel in late 2014 to a 12-year low of US$27/barrel in January 2016. Low oil prices are forecast for the next several years and gas prices are also forecast to decline.

30. Recent delays in Mozambique's LNG development projects may reflect the difficulty of continuing with exploration projects during a period of low commodity prices.

31. For example, in January 2016, Hyperdynamics Corporation, a US-based IOC with an offshore block in Guinea, brought arbitration proceedings under the AAA/ICDR rules against Tullow Guinea Ltd and Dana Petroleum Ltd. Hyperdynamics alleges that Tullow and Dana have breached the terms of the parties' JOA and PSC with Guinea by causing repeated delays in exploratory well drilling. See PR Newswire, 'Hyperdynamics Announces Partner Impasse and Failure by Tullow to Resume Petroleum Operations Offshore Guinea,' 5 January 2016, available at www.prnewswire.com/news-releases/hyperdynamics-announces-partner-impasse-and-failure-by-tullow-to-resume-petroleum-operations-offshore-guinea-300199730.html.

32. For example, according to press reports, there are potential arbitration proceedings between Nostra Terra Oil & Gas Co PLC and Independent Resources PLC against the North Petroleum International Company in Egypt following cash calls between joint venture participants in relation to the East Ghazalat oil field. See Joshua Warner, 'Nostra Terra, Independent Resources to Challenge Partner in Egypt,' Alliance News, 25 January, 2016, available at www.morningstar.co.uk/uk/news/AN_1453732183424816900/nostra-terra-independent-resources-to-challenge-partner-in-egypt.aspx.

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Mining Arbitration in Africa

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Summary

Mining represents a significant proportion of economic output and inbound investment in Africa, accounting for the vast majority of export revenues in a number of sub-Saharan countries. Given perceived shortcomings of African domestic court systems, international arbitration is the dispute resolution mechanism of choice for mining investments in Africa. Mining disputes therefore represent a significant portion of international arbitration involving African parties or projects in Africa.

Given this prominence, there is much that could be said in an article about mining arbitration in Africa. One could address the development of arbitration law and institutions in Africa – for example, the growing role of the OHADA Uniform Arbitration Act, which governs arbitration proceedings in 17 west African countries.[1] One could consider corruption, which is still endemic to the African mining sector,[2] and the evolving arbitral case law on how corruption may be relevant to issues of jurisdiction and the merits in arbitral proceedings.[3] In light of the declining security situation in many parts of Africa, and the recent attacks involving Areva's Arlit uranium mine in Niger and the Tigantourine gas facility in Algeria,[4] one could consider how security issues might play out in arbitration. We note, for instance, the cases concerning the 'full protection and security' standard involving investments in Africa.[5]

There is, however, one phenomenon that will no doubt overwhelmingly define the nature of any disputes in the African mining sector in the near term, and that is the dramatic and sustained downturn in metals and minerals prices that has occurred over the past three years. Since their peak in 2012, metals prices have dropped significantly, with, for example, gold falling from a peak of US$1,800 per oz in July 2012 to a current price of US$1,100 per oz, manganese prices dropping from US$3.5 per kilo in March 2012 to US$1.45 per kilo now; iron ore pellets falling from a peak of US$180 per tonne in April 2012 to a current price of US$68 per tonne.[6] The consensus among analysts is that prices may not reach their nadir before 2017, at the earliest.[7]

This recent evolution has put significant pressure on both states and investors, in particular in that it follows an extended period of exceptionally high prices that spawned a surge in investment. With government budgets and economic growth highly dependent on metals and minerals earnings, and, in some instances, major infrastructure and community service projects left to investors, host states are under pressure to take measures that limit the budget shortfall and ensure that commitments are met. Mining investors, for their part, are contending with significantly altered project economics, and may as a consequence be seeking to decrease obligations or suspend investments altogether.

We consider the arbitration to which it might give rise involving the African mining sector from these two perspectives – that of host states and that of investors – in turn.

HOST STATE PERSPECTIVE

Although the mechanisms by which states earn revenues from mining investments vary – with legal, licence and contractual arrangements providing for a variety of revenue streams (up-front payments, royalties, various forms of taxes, etc) – lower metals and minerals prices will invariably mean that state revenues from investments decrease. African states that rely on mining revenues to fund their budgets and finance their socio-economic development are under considerable pressure to limit the budget shortfall caused by falling prices.

Faced with this kind of economic and political pressure, some governments may take measures to augment their share of more limited revenues from mining investments. The

mechanisms that may be used to achieve this goal may include unilateral tax increases, as well as contract reviews that may be more or less consensual.

In the past few years, various African governments have passed legislation and taken other measures that may be understood from this perspective. For example, in August 2014, Mozambique enacted a new Mining Law and Mining Tax Law, which introduces new taxes (including a 10 per cent special tax on mining exploration and a 32 per cent capital gains tax on transfer of mining titles, which secure early revenues for the state),[8] and also provides for the government's right to revoke mining title if the holder is indebted to the state.[9] In October 2014, Zambia adopted a new mining regime that increased royalty rates to 8 per cent for underground mining (from 6 per cent) and to 20 per cent for open pit mining (from 6 per cent), and now applies the 30 per cent income tax to tolling and processing (rather than just to production as before).[10] New legislation that increases the government's share of revenues has also been introduced or announced in the past few years in Zimbabwe, Kenya and Namibia.[11]

In particular given the financial pressure faced by investors, it is possible that such state measures will give rise to challenge through arbitration. Typically, investment contracts governing investments in Africa will provide for arbitration of any contractual disputes. Most investors in the African mining sector will also have the possibility of investor–state dispute settlement, should a dispute arise, given the hundreds of investment treaties linking African host states with typical capital-exporting countries (including the United States, the United Kingdom, China and the Netherlands).[12]

Here, we discuss the substantive claims that may be advanced by mining investors in the contractual and investment treaty contexts, and the procedural questions to which this possibility of parallel contractual and investment treaty proceedings gives rise.

SUBSTANTIVE CLAIMS TO WHICH STATE MEASURES MAY GIVE RISE

The claims to which measures to augment to a state's share of mining revenues may give rise will be similar but distinct in the contractual and investment treaty contexts. The difference arises notably from the different causes of action – in the contractual context, it will be breach of contract, whereas in the investment treaty context, it will be breach of the treaty. However, there will be considerable overlap between the matters that are considered in either context: notably, the merits of any dispute as to changed investment terms will often turn on the existence and extent of stabilisation commitments.

In the contractual context, the arguments available to the investor seeking to challenge measures affecting the fiscal or other terms of its investment will depend on the terms of the contract. In particular, the investor will point to stabilisation provisions, if these exist (and they typically will exist in some form in African mining investment contracts), and claim that they have been breached by the state measures. There are few publicly available awards addressing stabilisation clauses in the commercial context. That said, we know from leading cases such as *Lena Goldfields v Soviet Government*, the so-called 'Libyan cases', *Aramco v Saudi Arabia*,*Sapphire Petroleum v National Iranian Oil Co* and*Aminoil v Kuwait* that an attempt by a state to escape a stabilisation commitment by invoking sovereign prerogatives will fail, and that there is no reason in principle why such a commitment will not be given effect by a tribunal.[13] What information is available on other more recent cases confirms these general principles.[14] Beyond these general principles, the success of a claim

will depend on the specific factual matrix, including the terms of the commitment, related terms of the contract, and how it interacts with the applicable law more broadly.

In the investment treaty context, the arguments available to the investor seeking to challenge measures affecting the fiscal or other terms of its investment will depend on the terms of the applicable treaty. Thus, for example, an investor might seek to argue that the measures breach the fair and equitable treatment standard (assuming the application of that standard to the measures in question is not subject to a carve-out), or even constitute expropriation. The case law in relation to so-called 'windfall profits' taxes – taxes introduced by states with the intention of recouping a larger share of profits in high-return situations – may be instructive in this regard.

As a general matter, it is settled international law that taxation is an essential prerogative of state sovereignty, and that the imposition of taxes is an appropriate exercise of the state's regulatory powers as long as the taxes are neither discriminatory nor confiscatory.[15]

There have, however, been a number of cases in which investors have argued that 'windfall profits' taxes violate investment treaties, including the fair and equitable treatment standard and protections against expropriation.

The former cases have largely turned on the existence and extent of stabilisation commitments. Specifically, tribunals have found that stabilisation commitments can create a 'legitimate expectation' on the part of an investor that the fiscal regime applicable to the concerned investment will remain stable, and that 'windfall profits' taxes violate the fair and equitable treatment standard insofar as they are inconsistent with those commitments. Thus, for example, the ***Occidental v Ecuador*** tribunal observed that Occidental had made investments in Ecuador based upon explicit representations during the negotiation of the investment contract, and upon provisions in the contract itself, to the effect that Occidental's participation would not vary with price.[16] On this basis, the tribunal found that Occidental was justified in expecting that this contractual framework would not be modified unilaterally by the state, that Ecuador's 99 per cent windfall profits tax violated that expectation, and therefore that it breached the fair and equitable treatment standard.[17]

While the absence of an express contractual stabilisation provision will not necessarily be fatal to a fair and equitable treatment claim, the arbitral case law illustrates that it will be difficult to establish a protected expectation of stability in the absence of one. Thus, the ***Paushok v Mongolia*** tribunal found that the lack of a stabilisation agreement did not preclude a treaty claim relating to 'windfall profits' taxes. To prevail, however, the claimants still needed to demonstrate that they had legitimate expectations that were violated; in the event, the tribunal found that the claimants had failed to establish this.[18]

Since many investment treaties include 'carve-outs' precluding fair and equitable treatment claims based on taxation measures, a number of investors seeking to impugn 'windfall profits' taxes have had to argue that such measures constitute expropriation. Here, the analysis turns less on the whether the measure is inconsistent with a stabilisation commitment. Rather, it is well established that a finding of expropriation requires a demonstration of 'substantial deprivation',[19] and it is this principle that has been applied to determining whether 'windfall profits' taxes are expropriatory.

Thus, both the ***Perenco v Ecuador*** and ***Burlington Resources v Ecuador*** tribunals, who were considering the same 99 per cent Ecuadorian 'windfall profits' tax discussed above, found that a tax would constitute an expropriation if it effected a 'substantial deprivation',

meaning that that the 'investment's continuing capacity to generate a return has been virtually extinguished'.[20] Both tribunals found that this was not the case with Ecuador's 99 per cent tax, which was a tax on profits. In this respect, the majority of the ***Burlington*** tribunal noted that, by definition, a 'windfall profits' tax would be unlikely to qualify as an expropriation because 'by definition', such a tax would appear to apply only to a portion of the profits (the 'windfall').[21]

The analysis in relation to measures adopted in the present price context may, of course, look quite different. In particular, it may very well be that certain measures adopted by states to recoup a greater share of diminishing revenues do, for certain investments, 'virtually extinguish' the investment's capacity to generate a return.

PROCEDURAL QUESTIONS TO WHICH THE POSSIBILITY OF PARALLEL PROCEEDINGS GIVES RISE

As seen above, mining investors may have available to them both contractually agreed dispute resolution provisions and on investor–state dispute settlement mechanisms, creating at least the theoretical possibility of parallel proceedings. A number of issues arise in this regard.

First, to what extent can parallel proceedings be brought? That issue will turn, among other things, on whether there is some kind of 'fork in the road' provision in the applicable investment treaty. Such provisions come in various guises, but their common feature is that they are intended to prevent an investor from litigating the same dispute in multiple fora. Tribunals have typically found that such provisions will preclude parallel proceedings where there is a 'triple identity' between the parallel proceedings, that being an identity between parties, object and cause of action. Thus, for example, many tribunals have allowed treaty claims to be brought despite ongoing contractual arbitration or domestic litigation on the basis that the ongoing proceedings were brought by different parties (eg the local project company, as opposed to the parent investor) and/or were founded on different causes of action (eg, breach of contract rather than breach of the treaty).[22]

Second, if parallel proceedings are permitted, how should they be managed as a procedural matter – eg, when should a principle of lis pendens apply? Tribunals have considered that they have discretion to stay their proceedings if the dispute is being heard in another forum.[23] In determining whether to exercise this discretion, tribunals have tended to apply some form of the above-noted triple identity test.[24]

Third, should factual determinations in one proceeding bind in subsequent proceedings, and by virtue of what principle? Tribunals have applied the principle of res judicata in investment arbitration. However, they have typically found that the principle applies only where some form of the triple identity test is met, thus severely constraining its application (although earlier determinations by another tribunal or domestic court may, depending on the circumstances, bind by other legal means or as a matter of fact). Thus, the ***TECO v Guatemala*** tribunal found that decisions of the Constitutional Court of Guatemala did not have res judicata effect in international arbitration or dispose of the dispute, as the parties to the domestic and international proceedings were different, and the treaty tribunal was mandated to resolve a different dispute on the basis of different legal rules.[25] Similarly, in ***Desert Line v Yemen***, the tribunal held that while a domestic commercial arbitration award had res judicata effect, it nevertheless did not preclude the treaty claim, which was based on a different cause of action.[26]

In light among other things of this possibility of parallel proceedings relating to the same dispute, with the attendant possibility of conflicting decisions, certain authors have criticised such a 'strict' application of the triple identity test.[27] For the time being, however, to the extent that African governments adopt measures to recoup a greater share of dwindling mining revenues, there is a real possibility of arbitral challenge by investors in multiple fora.

MINING SECTOR INVESTOR PERSPECTIVE

Low metals and minerals prices have significantly altered the economics of many mining projects in Africa (as elsewhere). In response, some mining companies have sought (or will seek) to curtail production or suspend projects altogether. That said, given mining companies' unprecedented recourse to debt financing in recent years, there may be quite a few African mining investors who actually are forced to maintain or even increase production, despite unfavourable economics, to meet repayment obligations.

At the very least, investors will be looking to cut costs, and may be particularly eager to shed commitments not directly required for the extraction and development of the resource. Over the past decade, increased attention to the sustainability of extractive resource investments and their impact on overall development has meant that mining investment contracts now frequently contain important commitments to build or finance infrastructure or otherwise contribute to community development. This has been a particular characteristic of mining contracts with Chinese companies, and there have been a number of umbrella agreements between China or Chinese state-owned companies and African governments that contemplate the provision of infrastructure as the means of payment for the resource.[28]

Thus, African host states are faced with a double potential loss in the present low price context: not only may they be receiving less revenue from production, but also they may not be receiving ancillary infrastructure and community development benefits. To the extent that negotiated arrangements cannot be found to accommodate the needs of both investors and host states in this context, and host states are faced with investor non-performance, states may resort to termination of mining rights. This may give rise to arbitration, the claims that may be made in which we discuss below. However, termination of rights may not address the issue faced by states – specifically, if there is no investor willing to assume obligations under terminated arrangements. The question therefore arises as to whether states have other recourse in the face of investor non-performance, and could, for example, sue for damages. This is also addressed below.

TERMINATION OF MINING RIGHTS FOR FAILURE TO PERFORM

Faced with investor non-performance, a host state may wish to terminate the investment contract or licence. A state may seek a declaration that it is entitled to terminate rights from an arbitral tribunal.[29] More typically, however, a state will simply proceed to terminate rights if it feels it is entitled to do so under the applicable contract and/or law. An investor may then seek recourse from an arbitral tribunal if it feels this termination is unjustified; as with challenges to other state measures, this may be brought before a tribunal constituted under an investment contract or treaty.

In the contractual context, the question of whether a termination was justified will turn on the contractual and legal framework governing the project. What information there is on recent arbitral awards suggests that tribunals will not hesitate to find that termination for failure to perform agreed commitments can be justified. Thus, for example, in August 2015 an ICC tribunal reportedly dismissed a US$200 million claim filed by two mining companies against

Ghana seeking to challenge Ghana's termination of a gold mining agreement relating to the Dunkwa region for failure to perform.[30] Another tribunal reportedly rendered an award in favour of Senegal, who had sought a declaration that a series of contracts with ArcelorMittal to develop an iron mine in Falémé and to construct a new port near Dakar as well as a 750km railway line connecting the two. ArcelorMittal had suspended the project in 2009, citing its lack of viability in a low-price environment.[31]

In the treaty context, depending on the treaty, an investor might argue that termination violates various provisions. It might be a breach of the fair and equitable treatment standard. For example, the ***Occidental v Ecuador*** tribunal found that Ecuador's decision to terminate its contract with Occidental in response to Occidental's failure to obtain authorisation for the transfer of an interest in the contract was in breach of the fair and equitable treatment standard.[32] It may be in violation of an 'umbrella clause' if there is one in the applicable treaty, although there is debate as to when a contract breach can also constitute a breach of an umbrella clause. For example, the ***EDF v Argentina*** tribunal held that although not all contractual breaches necessarily rise to the level of a treaty breach, a serious repudiation of concession obligations by the host state breached the applicable umbrella clause.[33] A termination may also be expropriatory. Finally, to the extent that domestic courts have pronounced on the termination, there may be scope for arguing denial of justice.[34]

CLAIM FOR DAMAGES, WHETHER FOR LOST REVENUE OR OTHERWISE

As noted, termination of an investor's rights may not be a fully effective remedy for a state faced with non-performance, notably if there is no investor willing to assume rights and obligations under cancelled contracts or licences. The question, then, is whether states have other remedies in these circumstances. For example, can a state claim damages, whether for lost revenue or otherwise, from an investor who has not performed his or her obligations?

The answer to this question will depend on whether the non-performance constitutes a breach of contract (which might very well be the case to the extent that the contract provides for minimum levels of resource development, or infrastructure or community development projects), and what remedies are available for breach under the law applicable. Virtually all legal systems contemplate damages as the principal remedy for breach of contract.[35] The question is: what damages are compensable?

In civil law systems, damages are said to be due for the loss a claimant has suffered and the profit of which he has been deprived as a result of the breach.[36] To be awarded, damages must be foreseeable,[37] must be calculated with reasonable certainty, and must result directly from non-performance of the agreement.[38]

The approach is not dissimilar in result, if expressed somewhat differently, in common law systems. Damages are intended to place the injured party in the position that it would have been in 'but for' the breach. For damages to be awarded, there must be a causal connection between the defendant's breach and the claimant's loss,[39] and damages must have been reasonably foreseeable at the time of the contract.[40] Damages must also be proven with reasonable certainty.[41] Both 'reliance losses' (expenses incurred by the claimant in reliance on proper performance) and 'expectation losses' (gains the claimant expected to receive from performance) are compensated.[42]

Therefore, it seems entirely possible that there could be cases where states – whether in Africa or otherwise – could seek damages from mining investors who fail to perform under investment contracts. The question would be what amounts could be claimed, whether lost

state revenues, lost benefits of infrastructure or community projects, or otherwise. Issues of foreseeability and certainty would likely be the limiting factors, although much will depend on the facts of the case.

We are aware of at least one recent case in which such an argument has been made, in the event as a counterclaim by a state to an investor claim under a contract. Chinese energy investor PetroTrans has reportedly filed a claim against the Ethiopian Ministry of Mines challenging the 2012 termination of an oil and gas exploration agreement following PetroTrans' alleged failure to begin exploration work as scheduled. There was reportedly a counterclaim for damages for breach of the agreement. Both claim and counterclaim were reportedly dismissed.

Notes

1. Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), Acte Uniforme Relatif au Droit de l'Arbitrage, adopted 11 March 1999 and effective 11 June 1999.
2. See eg, ***BSG Resources Limited v Republic of Guinea*** (ICSID Case No. ARB/14/22); ***BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea*** (ICSID Case No. ARB/15/46); ***Rio Tinto PLC v Vale SA***, 14 Civ. 3042, NYLJ 1202743648065 (SDNY, Decided November 20, 2015).
3. See eg, ***World Duty Free Company Limited v The Republic of Kenya***, ICSID Case No. ARB/00/7, Award, 4 October 2006; ***Metal-Tech Ltd v Republic of Uzbekistan***, ICSID Case No. ARB/10/3, Award, 4 October 2013. See also, gen., Constantine Partasides, 'Proving Corruption in International Arbitration: A Balanced Standard for the Real World', Transnational Dispute Management 3 (2013).
4. See eg, France 24, Islamist groups claim twin attacks on Niger targets, 24 May 2013; Statoil, Publication of the investigation report on the In Amenas terrorist attack, 12 September 2013.
5. See eg,***American Manufacturing and Trading, Inc v Zaire***, ICSID Case No. ARB/93/1, Award, 21 February 1997.
6. Precious metals trading firm Kitco Metals Inc maintains a comprehensive metals and mineral prices database, available at www.kitco.com.
7. See eg, Moody's Global Credit Research, 'Global base metal prices will remain weak through 2016', 26 October 2015; Reuters, 'Goldman Sachs says metals set to underperform oil, cuts price forecasts', 9 February 2016.
8. Mining Tax Law No. 28/2014 of 23 September 2014. See also KPMG, Mozambique Fiscal Guide 2013/14 (2014), pp. 2, 5.
9. Mining Law No. 20/2014 of 18 August 2014.
10. Deloitte, ***State of Mining in Africa*** (2015), p. 7. Facing significant opposition from the mining sectors, the Zambian government recently announced that it would reduce royalty rates, and may abandon royalties altogether in order to revert back to a mining tax system. See Cecilia Jamasmie, Zambia to slash royalties, reinstate mining tax, Mining (24 June 2015).
11. 11 Deloitte, ***State of Mining in Africa*** (2015), p. 7.
12.

12 The United Nations Conference on Trade and Development (UNCTAD) maintains and regularly updates an online database of investment agreements. Available at: http://investmentpolicyhub.unctad.org/IIA.

13. See eg, ***Lena Goldfields Limited v USSR***, Award, (1929-1930) 5 ADIL 3 (Case No. 1); ***Libyan American Oil Co (LIAMCO) v Libya***, Award on Jurisdiction, Merits and Damages, 20 ILM (1981) 1, 62 ILR 140, 12 April 1977; ***Saudi Arabia v Saudia Arabian Oil Co (Aramco)*** (1958) 27 ILP 117; ***Sapphire International Petroleums Co v National Iranian Oil Co***, 35 ILR 136 (1967);***Kuwait v American Independent Oil Co*** (AMINOIL), Award, 21 ILM 976 (1982), 24 March 1982.
14. See eg, P Cameron, ***International Energy investment Law – The Pursuit of Stability*** (Oxford, 2010), pp. 91-92 (discussing a case concerning a concession agreement between an African state and a foreign investor, in which the tribunal rejected an attempt to evade the stabilisation commitment by arguing that the state was not able to fetter its future discretion).
15. For one leading statement of this principle, see Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by the Harvard Law School, 1961. For an example of its more recent confirmation, see ***Burlington Resources Inc v Republic of Ecuador***, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraphs 39-92.
16. See eg, ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador***, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraph 526.
17. See eg, ***Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador***, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraph 527.
18. ***Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia***, Award on Jurisdiction and Liability, 28 April 2011, paragraphs 301-02.
19. For a leading statement of this principle, see ***Pope & Talbot Inc v Canada*** (NAFTA (UNCITRAL)), Interim Award, 26 June 2000, paragraph 102.
20. ***Burlington Resources Inc v Republic of Ecuador***, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 399.
21. ***Burlington Resources Inc v Republic of Ecuador***, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 404.
22. 22 See eg, ***Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia***, ICSID Case No. ARB/99/2, Award, 25 June 2001, paragraph 31; ***CMS Gas Transmission Company v The Republic of Argentina***, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objection to Jurisdiction, 17 July 2003, paragraph 80.
23. See, ***Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt***, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, 3 ICSID Rep. 101, 129 (ICSID, 1985).
24. See eg, ***Azurix Corp v The Argentine Republic***, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 14 July 2006, paragraph 88; ***EDF International SA, SAUR International***

SA and León Participaciones Argentinas SA v Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012, paragraph 1132.

25. *TECO Guatemala Holdings, LLC v Republic of Guatemala*, Award, 19 December 2013, paragraphs 516-517.
26. See eg, *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, Award, paragraphs 136, 204 and 2015.
27. See eg, Audley Sheppard, Res Judicata and Estoppel, in Parallel State and Arbitral Procedures in International Arbitration, pp. 219-42, 233 (ICC Dossiers, 2005) at 235, 237 (arguing that '[s]trict application of the test can put 'form over substance' and ignore the underlying realities and be inconsistent with the strong policy grounds giving rise to the doctrine of res judicata (in particular, the avoidance of double jeopardy and of inconsistent decisions).')
28. See eg, Tanneke Heersche, Asian Investment in Africa: A Snapshot Rocky Mt. Min. L. Fdn., 2013.
29. See eg, the case reportedly brought by Senegal against ArcelorMittal discussed in Douglas Thomson, 'ArcelorMittal settles with Senegal', *Global Arbitration Review*, 9 June 2014.
30. Lacey Yong, 'Ghana defeats gold mine claim', *Global Arbitration Review*, 24 August 2015.
31. Douglas Thomson, 'ArcelorMittal settles with Senegal', *Global Arbitration Review*, 9 June 2014.
32. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 452, 527. See also, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award; 2 November 2005.
33. *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, paragraph 940. Cf. SGS *Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, paragraphs 89-91.
34. See generally Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005).
35. In relation to civil law systems, see eg, article 1147 of the French Civil Code; article 1147 of the Belgian Civil Code; article 1123 et seq. of the Italian Civil Code. In relation to common law systems, see eg, *Chitty on Contracts*, Vol 1 (General Principles), 30th ed. (London, UK: Sweet & Maxwell, 2008), Chapter 26 ('Damages').
36. See eg, article 1149 of French Civil Code.
37. See eg, article 1150 of French Civil Code.
38. See eg, article 1151 of French Civil Code.
39. *The Monarch Steamship v Karlshamns Oljefabrika* [1949] AC 196; *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20, 51, *citing Addis v Gramaphone Co* [1909] A.C. 488.

40. *Hadley v Baxendale* (1854) 9 Ex Ch 341; *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528; *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350.
41. *Chaplin v Hicks* [1911] 2 K.B. 786 CA; *Ratcliffe v Evans* [1892] 2 Q.B. 524 CA.
42. *Attorney-General v Blake* [2001] 1 A.C. 268.
43. Tom Jones, 'Ethiopia defeats claim by Chinese energy investor', *Global Arbitration Review*, 20 January 2016.

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Middle East

Joseph Chedrawe and **Sami Tannous**

Summary

Arbitration in the Middle East has a long, if complicated, heritage. Historically a favoured means of resolving disputes, its image was tainted and development stunted for decades following a string of decisions against states and state-owned entities throughout the 1950s and 1960s, epitomised by the infamous decision in *Petroleum Development (Trucial Coast) Ltd v Ruler of Abu Dhabi*.[1]

The Middle East has moved on. Recent years have seen significant developments in arbitration legislation, jurisprudence and practice across the Middle East, particularly in countries in the Gulf region. Looking forward, the recent lifting of many international sanctions against Iran, and Iraq's ratification of the ICSID Convention (and, hopefully in due course, the New York convention), bodes well for the development of arbitration in the region.

The positive by-product of these developments is a greater degree of certainty and predictability for users and an increase in trust in the region's ability to deliver world-class arbitration services. Even where the developments have been inconsistent or too recent to judge, they are nonetheless encouraging. From the modernisation of arbitration legislation to the decreasing intervention of local courts, the future appears bright for arbitration in the Middle East.

This article considers some of the most noteworthy recent developments and what they mean for arbitration in the Middle East.

UNITED ARAB EMIRATES

The UAE has for decades sought to position itself as a hub for global business, trade and finance. Instrumental to that ambition has been a gradual development of sophisticated mechanisms for international dispute resolution, be it via the establishment and promotion of international arbitration, the promulgation of new procedural rules or the creation of novel avenues for enforcement.

At the same time, the continued delay of the new Federal Arbitration Law – under discussion since 2008 – has stunted the attractiveness and growth potential of Dubai and other emirates as international arbitration centres. However, the winds are favourable and the determination of practitioners, arbitrators and policymakers to transform the UAE into a global arbitration centre on a par with the likes of London and Paris makes the adoption of a modern arbitration regime a question of 'when' and not 'if'.

ARBITRATION IN THE UAE

Onshore (ie, Outside The DIFC)

Arbitration in the UAE is governed by articles 203 to 218 of the Civil Procedures Code of 1992 (CPC).[2] Other than these articles, there is currently no dedicated arbitration law in the UAE, whether based on the UNCITRAL Model Law or otherwise. However, various drafts of a Federal Arbitration Law have been under discussion since 2008.

A weakness of the current arbitration regime lies in the hostility of some domestic judges towards arbitration, which is treated as an exception to the natural jurisdiction of the courts. Coupled with an outdated and non-prescriptive arbitration regime in the CPC, this has led courts to nullify arbitral awards on procedural technicalities such as a failure of arbitrators to sign each page of an award, narrow interpretations of the question of capacity to bind a company to an arbitration agreement and broad interpretations of public policy.

The latter has been a particularly uncertain and unpredictable area in UAE arbitration jurisprudence of late. In the 2012 decision in ***Baiti Real Estate Development v Dynasty Zarooni Inc***, the Dubai Court of Cassation nullified a DIAC award on the basis that registration of off-plan property units in the Real Estate Register involved 'rules of private ownership and the circulation of wealth', and therefore violated public policy as defined in article 3 of the UAE Civil Transactions Code.[3] The decision and the reasoning of the Court of Cassation was met with dismay by arbitration practitioners concerned with its potentially broad scope of application. Subsequent decisions in this area, however, have adopted a narrower interpretation of public policy, limiting the ***Baiti*** decision to the issue of registration of off-plan property units and explicitly confirming that disputes over breaches of private contracts and recovery of damages, even where real property is involved, do not encroach upon matters of public policy.[4]

Despite the inherent challenges and uncertainties, the domestic arbitration scene in the UAE remains buoyant, and seasoned practitioners have learned to navigate the potential procedural pitfalls.

DIFC

The Dubai International Financial Centre (DIFC) is an economic free zone created in 2004 as part of Dubai's long-standing effort to establish itself as a global financial capital. The DIFC boasts a modern, bespoke legal and regulatory framework governing activities within its territory and its own autonomous courts modelled on the systems of several common law countries, a marked contrast with the civil law system that applies outside the DIFC's half a square kilometre geographical borders. The DIFC also benefits from a modern arbitration law based on the UNCITRAL Model Law and its own arbitration centre, the DIFC-LCIA Arbitration Centre, and offers itself as a credible modern alternative to a seat located in 'onshore' UAE.

The DIFC-LCIA Arbitration Centre was relaunched in November 2015 to address concerns expressed by certain practitioners in Dubai regarding the jurisdictional reach and constitutionality of the centre and, therefore, the enforceability of awards issued under the DIFC-LCIA Rules.

The relaunch follows on from a wider restructuring of the DIFC in Dubai Law No. 7 of 2014 amending certain provisions of Dubai Law No. 9 of 2004, which established the DIFC Arbitration Institute and the DIFC Dispute Resolution Authority, both of which operate independently of the DIFC courts.

Now into its second decade the DIFC promotes itself as a leading arbitration hub and its courts have not shied away from adopting a strongly pro-arbitration stance. Indeed, as further explored below, the DIFC has recently confirmed jurisdiction over the ratification of foreign and domestic arbitral awards whether or not the DIFC has a nexus to the dispute,[5] thus agreeing to act as a conduit for jurisdiction for enforcement in onshore Dubai, and developed a novel (if somewhat unusual) mechanism by which its court judgments may be converted into arbitral awards that would, in theory at least, render them readily enforceable under the New York Convention.[6]

ADGM

Following in the footsteps of the successful DIFC project, the Abu Dhabi Global Market (ADGM) is a financial free zone that began operating in 2014. Like the DIFC, ADGM is an English language, common law jurisdiction. In December 2015, the ADGM enacted new

arbitration regulations based on the UNCITRAL Model Law. The ADGM does not have its own international arbitral institution. However, parties can choose the ADGM as the seat of arbitration, with the arbitration administered by an institution, such as the ICC or the LCIA. The ADGM courts, which consist of a court of first instance and a court of appeal and are modelled on the English judicial system, have supervisory authority over AGDM arbitrations. Pursuant to the English Law Regulations 2015, English common law (including the rules and principles of equity) is directly applicable in the ADGM, the first jurisdiction in the Middle East to adopt this approach.

ENFORCEMENT OF ARBITRAL AWARDS IN THE UAE

The New York Convention, Procedure And Public Policy

The UAE ratified the New York Convention in 2006 without making any reservations. However, UAE courts continued for several years to apply the outdated (and, more importantly, irrelevant) conditions for enforcement listed in the CPC to enforcement actions, disregarding the pro-enforcement bias enshrined in the New York Convention. All that changed through a series of decisions commencing in 2010 and culminating in the Court of Cassation's Decision No. 132/2012 in ***Airmech Dubai LLC v Macsteel International LLC***, which affirmed the primacy of the New York Convention to enforcement of foreign awards and lack of relevance of the CPC.

There was something of a setback in 2013 following the Dubai Court of Cassation's decision in ***Construction Company International (CCI) v Republic of Sudan*** in which it upheld a decision refusing jurisdiction of an action to enforce three ICC arbitral awards against the Republic of Sudan on the basis that neither party was domiciled in or connected with the UAE, a requirement contained in the UAE CPC.[7] Nevertheless, the decision was perceived to be an outlier, decided on its own facts, with a somewhat clumsy application of the forum non conveniens doctrine by the court.

Since then, however, the primacy of the New York Convention has been reaffirmed by all levels of the Dubai judiciary, up to the Court of Cassation, in the case of ***Al Reyami Group LLC v BTI Befestigungstechnik GmbH & Co KG***, which concerned the enforcement of an ICC award seated in Stuttgart.[8] The Dubai Court of Cassation endorsed the view of the Court of Appeal that the New York Convention was embedded in UAE domestic law by Federal Decree No. 43 of 2006 and article 125 of the UAE Constitution, and rejected any grounds for challenge that fell outside the scope of article V of the New York Convention.

The UAE judiciary has therefore come a long way in its willingness to embrace and uphold the UAE's treaty obligations under the New York Convention. While exceptions may arise, Dubai (and probably other emirates as well) can now be considered a relatively safe jurisdiction in which to enforce a foreign arbitral award. The irony remains that the greatest enforcement risk lies with domestic awards, a risk that innovative practitioners have recently tried to address using the DIFC courts.

DIFC As A 'host' For Onshore Enforcement

Two recent significant judgments by the DIFC courts have potentially created a new route for award creditors seeking to circumvent a lengthy enforcement battle before the 'onshore' Dubai courts, by confirming the DIFC courts' willingness to act as a 'host' or 'conduit' jurisdiction for the enforcement of arbitral awards.

The first decision, *(1) X1 (2) X2 v (1) Y1 (2) Y2*, concerned efforts by two award creditors incorporated outside Dubai to enforce a foreign arbitral award against two award debtors incorporated in onshore Dubai through the DIFC courts.[9] The award debtors objected to the DIFC court's jurisdiction to recognise and grant leave to enforce the foreign award, there being no nexus between the dispute or the parties and the DIFC, including no assets within the DIFC.

The DIFC Court of First Instance upheld its jurisdiction, relying principally on article 42 of the DIFC Arbitration Law, which provides that:

> [an] arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44.

However, the court drew a line between recognition and enforcement where there were no assets located in the DIFC. In such cases, the DIFC court's jurisdiction extended only to recognition of the award, with enforcement in 'onshore' Dubai being within the gift of the Dubai enforcement judge who, pursuant to article 7(3) of the Judicial Authority Law,[10] is required to enforce the recognition order without reconsidering 'the merits of the judgment, decision or order'. A party looking to enforce a DIFC Court order recognising an award in onshore Dubai may also rely on the 2009 Protocol of Enforcement between the Dubai Courts and the DIFC Courts, which clarifies certain requirements for enforcement.

The DIFC Court of Appeal reaffirmed and expanded the approach taken in *(1) X1 (2) X2 v (1) Y1 (2) Y2* in the case of ***Meydan Group LLC v Banyan Tree Corporate PTE Ltd***,[11] which involved a DIAC award rendered in Dubai. The tribunal decided in favour of ***Banyan***, which then applied to the DIFC Court of First Instance for recognition and enforcement of the award. Meydan objected on the basis that the court lacked jurisdiction. The court (here presided over by HE Justice Omar Al Muhairi, a UAE national resident judge of the DIFC courts) found that it had jurisdiction on similar grounds as the court had decided upon in the ***X1*** case. Meydan appealed and lost. The DIFC Court of Appeal found unequivocally that there was no subject matter or in personam jurisdictional requirement for a DIFC court to hear an application for recognition and enforcement of an onshore Dubai award. To the contrary, the court found that article 42 of the DIFC Arbitration Law imposed an outright obligation upon the DIFC courts 'to recognise and enforce an award irrespective of the state or jurisdiction in which it was made'. While Meydan argued that this interpretation of article 42, coupled with article 7(2) of the Judicial Authority Law, should not be permitted as it would allow Banyan to circumvent a merits review by the onshore Dubai court, the DIFC Court of Appeal was unconvinced.

Following the decision of the DIFC Court of Appeal, Meydan shifted its efforts from the DIFC courts to the onshore Dubai courts, where thus far it has been unsuccessful. In nullification proceedings, it challenged the validity of the recognition and enforcement application on the grounds of forum non conveniens and a conflict between the CPC and article 42 of the DIFC Arbitration Law. The onshore courts have reportedly ruled against Meydan,[12] though an appeal is pending before the Court of Cassation. Meanwhile, within the DIFC, the Court of First Instance confirmed the validity of the DIAC tribunal's award and entered an order of recognition.[13]

Similarly, while the ***X1*** case was not appealed in the DIFC courts, the award debtor launched a collateral challenge in the DIFC Court of First Instance when it applied, in a new proceeding, for an order referring a 'conflict' between the Judicial Authority Law and Arbitration Law of the DIFC and the CPC to the Union Supreme Court of the United Arab Emirates.[14] The court dismissed the application, finding that the CPC did not apply to the DIFC, pursuant to article 3 of Federal Law No. 8 of 2004, that it was public policy in the UAE not to apply the CPC to the DIFC and that, as there cannot be a conflict between applicable law and inapplicable law, there was no constitutional conflict to refer to the Union Supreme Court.

It remains to be seen precisely how UAE courts will respond to award creditors' attempts to circumvent the recognition and enforcement difficulties faced by domestic award creditors by using the DIFC courts as a 'host' or 'conduit' jurisdiction. Nevertheless, even before the ***Meydan*** saga has reached its climax, practitioners are advising clients to route their enforcement actions through the DIFC. This is a reflection of the fact that, despite clear progress in relation to the enforcement of New York Convention awards, the onshore judiciary's approach to domestic arbitration remains inconsistent.

BAHRAIN

July 2015 saw substantial revisions to Bahrain's International Commercial Arbitration Act (ICAL) of 1994, including full incorporation of the UNCITRAL Model Law.[15] Additional provisions designate Bahrain's High Civil Court as the forum for all arbitration disputes, including enforcement;[16] confer immunity on arbitrators for acts carried out in the course of their official duties unless in bad faith or as the result of serious error;[17] and permit foreign qualified lawyers to represent parties to an international arbitration in Bahrain.[18] The 2015 law reflects Bahrain's trend of modern legislative responses to the needs of the international arbitration community and signals a commitment to establishing itself as a major arbitration centre.

Indeed, Bahrain has long been among the Middle Eastern and North African jurisdictions friendliest to arbitration, having acceded to the New York Convention in 1988 and adopted much of the UNCITRAL Model Law in the original ICAL of 1994. In 2009, through an initiative of the Bahrain Chamber for Dispute Resolution and the American Arbitration Association (BCDR-AAA), launched under a 2009 revision to ICAL,[19] Bahrain designated a specialist tribunal comprised of two judges from Bahrain's highest jurisdiction and a third member chosen from the BCDR-AAA's roster of neutrals, rather than trial by its local courts, as the primary dispute resolution mechanism in large cases (valued above 500,000 Bahraini dinar) involving licensed financial institutions or international commercial disputes involving either foreign parties or a significant foreign nexus.

Bahrain's proximity and close relationship with Saudi Arabia also means that it is perceived to be a safe alternative venue for arbitration and a means of increasing the prospects of enforcement there. As economic and political troubles dissipate in years to come, Bahrain's increasing role as a regional arbitration centre may well surprise its competitors in the Gulf.

QATAR

Over the past 15 years, Qatar has opened significantly to international arbitration. In 2002, Qatar acceded to the New York Convention without declarations or notifications. In 2005, it established the Qatar Financial Centre (QFC),[20] a separate jurisdiction along the lines of the DIFC, and in 2006 it launched the International Centre for Conciliation and Arbitration (QICCA).[21] Both the QFC and the QICCA have adopted rules based upon the UNCITRAL

Model Law, and Qatar is considering a new arbitration law that would closely follow it. As of July 2015, however, proposed legislation remains in committee.

For the moment, both domestic and international arbitrations are subject to the Civil and Commercial Procedure Code, which provides for appellate review of arbitral awards on the merits[22] and nullification on procedural grounds.[23] This has proved challenging for parties seeking enforcement of their awards in Qatar, whether domestic or foreign.

For example, in the well known decision in ***International Trading and Industrial Investment v DynCorp Aerospace Technology***, the Qatari Court of Cassation set aside a Paris-seated ICC award on the merits as if sitting in direct appeal from the arbitral tribunal rather than as an enforcement proceeding.[24]

More recently, in 2012, the Qatari Court of Cassation held that arbitral awards are null unless issued in the name of His Highness the Emir of Qatar, thus treating arbitral awards as indistinguishable from, and so subject to the same procedural requirements as, national court judgments.[25] However, in 2014, the Court of Cassation reversed several lower court decisions in which similar findings had been made, on the ground that they had improperly applied Qatari law.[26] Of particular interest are Qatar Court of Cassation – Appeals Nos. 45 and 49/2014, which found that, while Qatari law would normally require a domestic arbitral award to be issued in the name of His Highness the Emir of Qatar, the Doha-seated award in that case should be treated as foreign and thus subject to the New York Convention owing to the parties' choice of the ICC rules.

It is unclear whether these decisions mark a decisive shift in the approach of the Qatari courts to enforcement issues or a specific solution to a particular problem. Given the overall trend in favour of international arbitration, and particularly the drive towards adoption of a modern arbitration law, there is reason to hope the Qatari courts will henceforth adopt a more pro-arbitration stance.

Elsewhere, Qatar continues to develop a robust alternative dispute resolution framework through the promulgation of such innovative mechanisms as the Qatar International Court and Dispute Resolution Centre's 'Q-Construct' scheme, which aims to reduce the time and expense associated with adjudication of construction disputes via application of tailored, fast-track procedures designed to account for the particular needs of the construction industry. Parties opting to avail themselves of the Q-Construct mechanism will receive a binding award, but are not precluded from seeking additional relief before a full arbitral tribunal or national court.

SAUDI ARABIA

Saudi Arabia has been slower to warm to arbitration. Most famously, in 1958, after the tribunal in ***Saudi Arabia v Arabian American Oil Co*** refused to apply shariah to a dispute over Aramco's exclusive oil concession in Saudi Arabia and decided in Aramco's favour, the Saudi government prohibited its ministries and agencies from agreeing to arbitration without the prior approval of the president of the Council of Ministers or permission by a legal enactment. Eventually, Saudi Arabia adopted an arbitration law in 1983 and acceded to the New York Convention in 1994, but for decades its arbitration law permitted Saudi courts wide oversight authority over merits, procedure and enforcement, including a requirement that arbitration agreements be judicially approved prior to the commencement of arbitral proceedings.[27] It further imposed strict requirements, founded in Islamic law, for the appointment of

arbitrators, including that they be Saudi citizens or non-Saudi Muslims, conversant with Saudi rules and traditions and, at least in domestic arbitrations, male.

In 2012, however, the Saudi government appeared to shift its policy, enacting a new arbitration law based in part upon the UNCITRAL Model Law.[28] Among other developments, the new law eliminates the requirement of judicial pre-approval, offers guidance for determining the validity of an arbitration agreement (ie, it must be in writing, but may be created via correspondence or reference to other documents), loosens the arbitrator qualifications and permits parties to choose procedures, substantive law and seat, provided they do not violate the public policy of Saudi Arabia or shariah. Perhaps most critically, the new law circumscribes the supervisory powers of the Saudi courts over enforcement of arbitral awards. Where previously a court could, and frequently did, reconsider the merits during enforcement proceedings, the new law prohibits inspection of the facts and subject matter of the dispute.

The Council of Ministers issued a resolution in April 2014 establishing Saudi Arabia's first centre for commercial arbitration, the Saudi Centre for Commercial Arbitration (SCCA), however, it remains to be seen what form the SCCA will take or what the scope of its activities will be. Similarly, it will take time for both the government and the courts to signal how broadly the public policy and shariah exceptions in the new law will be applied. Nevertheless, these developments indicate that Saudi Arabia has taken serious interest in international arbitration, a positive sign for the international companies doing business within its borders.

Continuing its reformist policy, in 2015, the Council of Ministers also approved the long-awaited new Company Law, which is intended to reflect global best practices. This follows Saudi Arabia's membership of the WTO in 2005 and its commitment to modernise its legal and regulatory environment in line with international trends and standards. These developments, combined with its recent passing of arbitration and enforcement laws, are further signals of Saudi Arabia's efforts to modernise its economy and encourage foreign investment.

EGYPT

Egypt maintains one of the largest arbitration traditions in the Middle East. In addition to its ratification of the New York Convention in 1959 without any reservations or declarations, and the ICSID Convention in 1972, Egypt has ratified several regional arbitration conventions, including: the 1954 Convention on Enforcement of Decisions between the States of the Arab League, the 1974 Convention on the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States, the Amman Arab Convention on Commercial Arbitration of 1987, and the Unified Agreement on the Investments of Capitals in Arab States of 1980. Egypt has also signed 115 BITs, of which 30 have not entered into force and 13 were terminated.

In 1994, the Egyptian Law of Arbitration in Civil and Commercial Matters was enacted by Law No. 27 of 1994 adopting the UNCITRAL Model Law with limited modifications. The Court of Cassation ruled in Case No. 15912 of JY 76 that, pursuant to article III of the New York Convention, the 1994 Law governs the enforcement of foreign awards.

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was established in 1979 as an independent, non-profit international organisation for the administration of domestic and international arbitral proceedings, and adopted the UNCITRAL Arbitration Rules.

Despite being armed with a solid arbitration law and sophisticated court system, Egypt has struggled in recent years to compete with the emerging hub of Dubai. This is largely due to events following the Arab Spring and subsequent flight of capital investment. As stability returns, it is expected that Egypt will see a resurgence in activity, although too much ground may well have been lost.

IRAQ

Iraq has not yet acceded to the New York Convention, and little progress has reportedly been made in advancing draft legislation through the Iraqi parliament. The Iraqi courts, however, have taken the task of fitting international arbitration into Iraqi law upon themselves. In ***Iraqi Ministry of Finance v Fincantieri-Cantieri Navali Italiani SpA***, the Baghdad Commercial Court openly declared that Iraqi law was outdated and vague, and referred to the UNCITRAL Model Law and the New York Convention (despite neither applying in Iraq) in deciding that the Iraqi Civil Procedure Code applied to international arbitrations.[29] This permitted the Court to stay its proceedings pending the decision of a French court on the validity of an arbitral award, signalling that the Iraqi courts possess a certain degree of discretion in this arena. The decision was upheld by the Iraqi Court of Cassation.

In March 2014, in keeping with the recent creation of specialised commercial courts, the Iraqi government reportedly began organising workshops for senior judges on arbitration and other private dispute resolution mechanisms.[30] However, the climate in Iraq remains uncertain as its government struggles to address other priorities.

In November 2015, in an effort to show it was open for business, Iraq ratified the ICSID Convention, giving further comfort to investors looking to invest in Iraq, although for now the small number of BITs in force renders such ratification of lesser significance.

IRAN – THE NEW FRONTIER

The lifting of many international sanctions against Iran in January 2016 is expected to open Iran to much-needed foreign investment in a variety of industry sectors, including the oil and gas and automotive sectors, as well as the civil aviation industry. This will undoubtedly renew interest in arbitration in Iran.

Iran has a relatively modern, if untested, arbitration regime already in place. Domestic arbitration is governed by articles 454 to 501 of the Iranian Code of Civil Procedure and international arbitration (defined as arbitration proceedings where at least one of the parties was not Iranian when the arbitration agreement was concluded) is governed by the Law on International Commercial Arbitration of 1997 (LICA), which is based on the UNCITRAL Model Law.

Iran also boasts two arbitration centres, the Tehran Regional Arbitration Centre (TRAC) and the Arbitration Centre of the Iran Chamber (ACIC), whose caseloads will no doubt grow in years to come. In October 2015, TRAC hosted the first ever 'International Arbitration Day' in Tehran focusing on Iran as a key strategic seat for arbitration in the region in a post-sanctions world. The stage is set for Iran to make its mark on the MENA arbitration scene.

Iran is a party to the New York Convention with a reservation that if one party is of non-Iranian nationality, pursuant to article 139 of the Iranian Constitution, the submission to arbitration of disputes concerning public and governmental properties requires the approval of the Council of Ministers and of the Consultative Assembly (the parliament of Iran).

Regarding arbitration of investment disputes, Iran ratified 52 BITs to date with 14 more awaiting ratification, including a BIT with Japan in February 2016. The availability of BIT protection is likely to be important for investors considering investing in Iran, particularly considering that the Foreign Investment Promotion and Protection Act (FIPPA), while providing important substantive protections, only provides for resolution of disputes before the Iranian courts.

CONCLUSION

The Middle East is a diverse and complex region, which is evolving rapidly, albeit not always at the same pace. This is reflected in the evolution of arbitration legislation and jurisprudence across the region. Middle Eastern governments have understood that a modern arbitration regime is a critical component in sending the message to investors that their country is open for business. This is of particular importance in the Gulf states, whose governments are intent on diversifying their economies and ending their dependence on oil and gas revenues, a policy only reinforced by the current low oil price environment.

There is little doubt that the Middle East has a long road ahead of it to establish one or more truly global arbitration centres. Yet, it is all too easy for practitioners to highlight and criticise unhelpful decisions that occasionally emanate from the region, while forgetting their home state's approaches to arbitration a mere one or two decades ago. Arbitration in the Middle East is evolving rapidly as part of a wider social, political and cultural revolution. There will undoubtedly be setbacks and mistakes during the journey, but one thing is clear: arbitration in the Middle East has a bright future.

Notes

1. The 1952 ***Petroleum Development*** case involved a 75-year oil concession between the Sheikh of Abu Dhabi and Petroleum Development (Trucial Coast) Limited, a member of the Iraq Petroleum Company group. In considering the law applicable to the contract, Lord Asquith of Bishopstone held:
   This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.
   He applied English law instead.
2. UAE Law No. 11/1992, Chapter III.
3. Dubai Court of Cassation – Appeal Case No. 14/2012.
4. See, eg, Dubai Court of Cassation – Case No. 282/2012, 3 February 2013; Abu Dhabi Court of Cassation – Case No. 55/2014.
5. ***Banyan Tree Corporate PTE LTD v Meydan Group LLC***, DIFC Courts – Case No. ARB 003/2013; ***(1) X1 (2) X2 v (1) Y1 (2) Y2***, DIFC Courts – Case No. ARB 002/2013.
6. DIFC Courts Practice Direction No. 2/2015.
7. Dubai Court of Cassation – Case No. 156/2013.
8. Dubai Court of Cassation – Case No. 434/2014.
9. ***(1) X1 (2) X2 v. (1) Y1 (2) Y2***, DIFC Courts Case No. ARB 002/2013.

10. Dubai Judicial Authority Law, Law No. 12/2004 (as amended by Law No. 16/2011), article 7(3).
11. *Meydan Group LLC v Banyan Tree Corporate PTE Ltd*, DIFC Court of Appeals Case No. CA-005-2014.
12. Dubai Court of Appeal – Case No. 211/2014.
13. *Banyan Tree Corporate Pte Ltd v Meydan Group LLC*, DIFC Courts – Case No. ARB 003/2013, ruling of the Court of First Instance, 1 May 2015.
14. *(1) X1 (2) X2 v (1) Y*, DIFC Courts Case No. ARB 001/2014.
15. Bahrain Legislative Decree No. 9/2015.
16. Bahrain Legislative Decree No. 9/2015, article 3.
17. Bahrain Legislative Decree No. 9/2015, article 7.
18. Bahrain Legislative Decree No. 9/2015, article 6.
19. Bahrain Legislative Decree No. 30/2009.
20. Qatar Law No. 7/2005.
21. Qatar Emiri Decree No. 5/8.
22. Qatar Law No. 13/1990, article 205.
23. Qatar Law No. 13/1990, article 207.
24. *International Trading and Industrial Investment v DynCorp Aerospace Technology-*, Civil Appeal No. 33/2008.
25. Qatar Court of Cassation – Petition No. 64/2012
26. Qatar Court of Cassation – Appeals Nos. 45 and 49/2014; Qatar Court of Cassation – Decision No. 164/2014.
27. Saudi Royal Decree No. M/46.
28. Saudi Royal Decree No. M/34.
29. Presidency of the Federal Appeal Court of Baghdad – Case No. 288/B/2011.
30. Noor Kadhim, 'Between Iraq and a Hard Place', Kluwer Arbitration Blog, March 2014.

Angola

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Summary

INTRODUCTION

Since the end of the civil war in 2002, Angola has been experiencing an economic boom, attracting a multitude of foreign investors from all corners of the world.

These investors have been looking to profit not only from the extensive resources the country has – including oil (it is currently the second-largest African oil producer), natural gas, diamonds and agriculture – but also from participation in the gigantic state reconstruction programme that started after the end of hostilities. Roads, railways, ports and airports are being reconstructed or improved, and the same is happening to energy production facilities, notably dams (Angola has vast water resources) and the national grid. Hundreds of thousands of state-funded houses are also being built alongside schools and hospitals, etc. In the private sector, all sorts of projects are being developed, with the goal of replacing imports by national production. The evidence of that boom is clearly shown by the evolution of GDP which, according to the World Bank,[1] increased from US$15.3 billion in 2002 to US$138.4 in 2013.

The current fall in oil prices has been taking its toll on the Angolan economy and although the situation of the country is stable, projects are being delayed and situations of default have become more common.

It is easy to understand that a fast-growing economy, high-value/high-margin contracts, a multitude of foreign investors, investment contracts with the government and partnerships with local players, followed by a sudden shortfall in funds, constitute the perfect ingredients for disputes and, consequently, the perfect scenario for the affirmation of arbitration as a favoured dispute resolution method in Angola.

In this article, we propose to analyse the Angolan law on arbitration, the enforcement of arbitral awards, the situation on the ground, and practical challenges and trends. Finally, we will try to draw some conclusions.

THE ARBITRATION LAW

In General

Arbitration in Angola is currently regulated by Law 16/03 of 25 July, entitled the Voluntary Arbitration Law (VAL). The VAL was inspired by the Portuguese Arbitration Law from 1986-2 and, although it cannot be said that this law strictly follows the UNCITRAL Model Law, it includes many solutions that are common to the ones found in that Model Law. On the other hand, despite following the 1986 Portuguese text, in many aspects it went far beyond that statute, solving some of the problems or issues that had been raised in Portugal over a period of many years. Even if it cannot be dubbed a state-of-the-art law, it is clearly a modern law and, as we expect to demonstrate below, a law that allows arbitration proceedings to be conducted effectively in Angola.

The VAL regulates domestic and international arbitration and most of the provisions of the law are common to both, so regardless of the existence of some different provisions for each type of arbitration, the VAL should still be deemed a monist law. Although a separate section will be devoted to international arbitration, it is important to bear in mind that what will be said below applies in principle to both international and domestic arbitration.

Arbitrability

Any disputes relating to rights that may be exercised at the discretion of the parties can be submitted to arbitration (except if reserved by law to the state courts or to some other type of proceedings) (article 1 of the VAL). The concept of 'disposable rights' – as opposed to rights that cannot be waived – is not completely straightforward and has some grey areas, but it is still wide enough to allow us to say that virtually all commercial disputes are capable of being subject to arbitration.

There are, however, some relevant limitations, to the extent that, although the law admits arbitration, in many cases it requires the lex arbitri to be Angolan law, Portuguese as the language of the process and imposes Angola as the place of arbitration.

When it comes to state and public entities, they are entitled to enter into arbitration agreements provided that they relate to situations where the state acts as a private entity and in the case of administrative contracts.

Arbitral Agreement

The arbitral agreement has to be in writing, although the meaning of 'in writing' includes the exchange of any form of written correspondence directly referring to arbitration or some other document that contains an arbitration agreement (article 3).

If the above is standard, there are, however, some particular points relating to the survival of the arbitration agreement. Contrary to what happens in most laws, if an arbitral award is not rendered within the applicable time limit or if, for some reason, the tribunal becomes incomplete and a new arbitrator is not appointed, the proceedings will not only be dismissed, but the arbitral agreement itself will be deemed to have lost its validity (for that specific dispute) (article 5). In those cases, parties will have to resort to state courts.

The law allows the parties to agree the time limit to render the award, but if nothing is said until the acceptance of the first arbitrator, the said time limit will be six months and will only be extended by agreement of the parties (article 25). For this reason (and others) it is strongly recommended that instead of agreeing on a specific limit, the parties may refer the dispute to institutional arbitration (providing that the rules of the institution contemplate the extension of the time limit to render the award).

The Tribunal

Arbitrators must be independent and impartial and should disclose to the parties any circumstances that may raise doubts regarding their independence and impartiality (articles 10 and 15). In case of failure to appoint one arbitrator and unless the parties agreed on another appointing authority (as would be the case in institutional arbitration or proceedings in accordance with the UNCITRAL Rules), the missing arbitrator will be nominated by the president of the local state court (article 14). Tribunals may be constituted by any uneven number of arbitrators and failing agreement on the number (in the arbitration agreement or after), three arbitrators will be appointed (article 6).

Arbitrators can be challenged on the basis of not being impartial or independent, or because they do not have the qualifications agreed by the parties. If they do not step down, the decision on this is made by the Tribunal, with the possibility of an appeal to the state courts (article 10).

The Proceedings

In line with the Model Law, the parties are free to agree on the procedural rules and, in the absence of such an agreement, the Tribunal will have the power to determine the rules. In this instance, the law expressly states that the parties may opt to elect the rules of an institution administrating arbitrations (article 16). As to the place of arbitration, the parties are free to agree on this and, if they fail to do so, the Tribunal will decide. The law also makes it clear that, regardless of the place of arbitration, the Tribunal may hold meetings or hearings anywhere it deems appropriate (article 17).

In addition to the reference to the absolute equality of the parties and the need to give them a full opportunity to present their case, article 18 also mentions the adversarial principle and the need for the proceedings to being duly served on the respondent. These are the fundamental principles that must be respected in any procedure and their breach may lead to the setting aside of the award.

The law reproduces the original version of article 17 of the Model Law and entrusts the tribunal with the power to issue any interim measures, including asking for security (article 22), although it does not regulate the procedure for that. It also states that this power is without prejudice to the power of the state courts to order interim measures.

The law also states that the tribunal's fees must be expressly agreed with the parties, unless the parties have opted for institutional arbitration and that matter is covered by the rules of the institution (article 23).

Besides generally stating that the parties may produce all legally admitted evidence before the tribunal and regulating the assistance by state courts in the production of evidence (article 21), the law is silent on any other aspects of the proceedings (unlike what happens with the Model Law). This omission (which also existed in the former Portuguese law) often leads to the application of the civil procedure rules, with obvious damage to the purpose of arbitration. In particular, it should be highlighted that, according to the Civil Procedure Code, if the respondent does not file a defence, all allegations of fact may be deemed to be admitted to.

Representation Of The Parties

Among the provisions regulating the proceedings, there is one that has been raising some concern and thus deserves to be addressed separately.

It is the provision that deals with the representation of the parties (article 19). This provision states that the parties may be assisted or represented by lawyers. This provision was again inspired by the text of the former Portuguese law, which stated that the parties could designate anyone to assist them in the proceedings. In the Portuguese law, the goal was not to limit the representation of the parties in any way, but to explain that the parties were not obliged to be represented by lawyers. The text in the Angolan law has been interpreted to mean exactly the opposite, so that the parties either represent themselves or have to appoint a lawyer and, in that case, it must be a lawyer allowed to practise in Angola (ie, an Angolan lawyer). As membership of the Angolan Bar Association is limited to Angolan lawyers, the practical consequences of this interpretation may be substantial.

A debate has been going on around this subject and there are authors that propose a third way, arguing that it is enough that the party is assisted by at least one Angolan lawyer. This would not prevent the party from also being assisted by foreign counsel or other professionals. This third way has been gaining some strength and has been adopted, at least

once, by the Bar Association. It is hoped that this practice will evolve, otherwise there will be a trend to move the place of arbitration (or the hearing venue) outside Angola, not to mention the risk to the party that decides to prevent international lawyers from appearing as counsel, to the extent that if enforcement is to be made in other jurisdictions, such conduct may be construed as a case of violation of due process (a blatant one).

The Award

The law contains a number of provisions regarding the award and its preparation (articles 24 to 33). None of them raises any special concern (except the one addressing the time limit for the award, which has already been mentioned above).

In the same chapter, the law deals with the*Kompetenz-Kompetenz* principle, clearly enshrining it and establishing that any decision by the tribunal in this regard may only be challenged after the award is rendered (article 31). In parallel, the Civil Procedure Code contains a provision stating that state court judges should dismiss any proceedings filed before them if there is evidence that there is an agreement to arbitrate.

The last provision of this chapter states that (domestic) arbitral awards produce the same effects as court judgments and may be directly enforced (article 33).

Challenging The Award

For domestic arbitrations, the law establishes two challenge methods, appeal (article 36) and request to set aside (article 34). Appeal can be waived by the parties but the latter cannot.

An award can be set aside if:

- the dispute could not be settled through arbitration;
- the tribunal had no jurisdiction, provided that this matter has been raised in due time by one of the parties in the course of the proceedings;
- the arbitral agreement has lost its validity;
- the tribunal was not constituted in accordance with the law or will of the parties, provided that this matter has been raised in due time by one of the parties in the course of the proceedings;
- the award contains no grounds whatsoever, unless the parties expressly agreed on that (also, in case of an award rendered ex aequo et bono, the tribunal only has to provide grounds for the decision on the facts);
- the tribunal violated the fundamental principles established in the law (equality, right to present the case and adversarial), provided that such failure had a decisive influence in the decision;
- the tribunal decided ultra petita (but only this part will be set aside) or failed to decide matters that had been submitted to it (but only if such failure influenced the outcome of the dispute);
- the tribunal was authorised to decide ex aequo et bono but the decision does not respect the principles of public policy of the Angolan state.

Both the appeal and the request to set aside are lodged directly with the Supreme Court. However, if the parties have not excluded the possibility of appeal (in the case of domestic arbitration) or if they have agreed expressly on it (in the case of international arbitration), the

grounds for setting aside will have to be discussed within the appeal. Therefore, although two means of challenge are presented, in practice the parties may only resort to one.

In addition to these means of challenge, a party may also oppose the enforcement of the award, and is entitled to use a wide array of arguments (see below).

International Arbitration

As mentioned at the outset, the large majority of the provisions of the VAL are applicable to both domestic and international proceedings, but there are some provisions that are exclusive to international arbitration.

Beginning with the definition of what 'international' means, the VAL adopts the French definition referring to 'international trade interests', but then goes on to complete it along the lines of article 1 of the Model Law (article 40 of the VAL).

Besides this definition, the chapter contains a provision regarding the definition of the language of the proceedings (article 42), somehow implying the conclusion that the legislator did not consider the possibility of domestic proceedings being conducted in a foreign language.

Article 43 of the VAL deals with the law applicable to the merits and it is practically a translation of article 28 of the Model Law.

Finally, article 44 states that the award rendered within an international arbitration is not appealable, unless the parties have expressly agreed such possibility and regulated the terms of the appeal.

As to the rest, international arbitration is regulated by the same provisions applicable to domestic arbitration (article 41).

ENFORCEMENT OF ARBITRAL AWARDS

Awards Rendered In Domestic Arbitrations

Domestic awards are enforceable exactly as if they were decisions rendered by the state court, but the parties are allowed to invoke certain additional grounds for challenge. In fact, besides the list of grounds for opposition common to all Angolan enforcement proceedings (ranging from the forgery of the enforcement title to res judicata), article 814 of the Civil Procedure Code adds (1) the loss of validity or nullity of the arbitration agreement; and (2) the nullity of the award if the parties have waived the right to appeal. The causes for nullity appear to be the same as the ones that could ground a request to set aside and, therefore, we may find a third way to challenge arbitral awards in the opposition to the enforcement.

Awards rendered in Angola within international arbitrations

These awards are enforceable in exactly the same way as if they were domestic awards.

Awards Rendered Abroad

According to article 1094 of the Angolan Civil Procedure Code, no foreign award may be enforced in Angola without being reviewed and confirmed. Furthermore, Angola is not a signatory to the New York Convention of 1958.

Despite this daunting framework, from a legal point of view things are not as difficult (at least at the legal and procedural level) as they may seem. In fact, Angolan law contains provisions

regarding the enforcement of foreign decisions according to which cases will not be reheard and revision of the merits should not take place.

Under articles 1096 and 1097 of the Angolan Civil Procedure Code, in order for an arbitral to be reviewed and confirmed it is necessary that:

- there are no doubts regarding the authenticity of the decision;
- it is res judicata according to the laws of the country where it was rendered;
- lis pendens or res judicata cannot be invoked regarding any case judged by an Angolan court;
- the respondent has been duly served;
- it does not contain decisions contrary to the public policy of the Angolan state; and
- if rendered against an Angolan citizen, it does not violate Angolan private law when, according to Angolan conflict rules, the Angolan material law should have been applied to the merits of the dispute;

Except for the last paragraph, where a wider margin of discretion is granted to state courts, the grounds for refusal of confirmation are not, after all, substantially different from the ones listed in article V of the New York Convention.

The request for review is filed at the Supreme Court and once the exequatur is granted, the enforcement may be filed in the first instance court, as if it were a domestic award.

THE PRACTICE

Up to this point, we have been going through the provisions of the law. The aim is now to understand how matters are being dealt with in practice.

Decisions from the Supreme Court are neither published nor easily accessible. This means there is no information regarding the number of requests to set aside, appeals or revision and confirmation procedures ever filed or decided. The same applies to the enforcement of arbitral awards, so we have to rely on our experience in the field to provide some practical input.

Recourse To Arbitration And Institutionalised Arbitration

From a legislative point of view, one can see that the Council of Ministers adopted a resolution in 2006 recommending that the state and state companies should include arbitration clauses in the agreements they conclude and the Angolan state often includes arbitration clauses in the investment contracts it enters into with foreign investors.

In the same way, a number of laws have been passed making direct references to arbitration, even if in some cases arbitration is allowed only to the extent that it is regulated by the VAL, which has been interpreted as an imposition that the seat of arbitration must be Angola.

State courts have a poor record for efficiency and quality. This circumstance alone justifies recourse to arbitration and, as a matter of fact, it is very common to find contracts (even state contracts), even involving only Angolan parties, that refer disputes to arbitration.

The opening of an arbitration centre for institutionalised arbitration is subject to state authorisation and in 2012 and 2013 four centres were authorised. However, according to the information available, all the centres have engaged in little activity. An additional arbitration

centre, also involving a structure to promote arbitration and mediation, was created and started operating in 2015. The centre, directly administrated by the Ministry of Justice has been successful in dealing with mediation, but while it is still waiting for arbitration cases it is suffering the effects of the current economic downturn and its activity has been reduced.

Recent Developments

There is still little information available on what is happening on the ground.

There is a growing interest in the matter on the part of the legal community, which is a sign that arbitration is already – or, more likely, is expected to become – popular. In spite of this, Angolan doctrine on arbitration is very scarce.

Likewise, the level of expertise shown in arbitrations in Angola has yet to develop, as it is not uncommon to see parties resort to the state courts as soon as any problem arises, thus jamming the courts with requests for assistance or challenges and preventing the arbitration procedure from reaching an end.

Even in large international arbitrations, there is still a long way to go, and the level of sophistication is low, with parties still relying on the procedural framework established by the local procedural law.

Another downside is that Angola is an expensive country, with entry visa requirements that may not be easy to meet (at least quickly) and where there is not yet adequate infrastructure to hold arbitration hearings.

Finally, there have been situations in which it appears that state courts were sympathetic towards government entities to avoid arbitration proceedings reaching the stage of a final award.

Despite all this, we have no doubt that as a consequence of the high volume of foreign investment in the past decade associated with the still recent fall in the oil prices, the number of disputes is increasing and the same seems to apply to the number of arbitrations. For this reason, we are certain that we will start to hear more and more about major arbitration cases involving Angola in the not too distant future.

CONCLUSIONS

On the basis of the above, we are convinced that *GAR* readers will agree that the Angolan law is suitable to allow domestic or international arbitration proceedings in accordance with modern standards.

We would also go so far as to say that, in view of the internal rules applicable to the recognition of foreign awards, readers will not be too concerned about the fact that Angola is not a party to the New York Convention.

From the point of view of its legal framework, Angola is in the process of becoming an arbitration-friendly jurisdiction.

Clearly, arbitral proceedings are ongoing and the number of cases seems to be increasing.

There are, however, a number of question marks over how things are going to evolve: Will foreign lawyers be authorised to act in the proceedings? Will the entry visa constraints make the appointment of foreign arbitrators more difficult in practice? How will state courts

respond when their intervention is requested? Will they uphold arbitration awards? Will foreign awards be enforced?

What actually happens in practice will answer these questions and the coming years will be decisive.

Notes

1. http://data.worldbank.org/indicator/NY.GNP.PCAP.CD.
2. Law 31/86 of 29 August, replaced by Law 63/2011 of 14 December.
3. Nor to the Washington Convention.

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Botswana

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Summary

Arbitration in Botswana is governed by the Arbitration Act, herein after referred to as the Act. The Act is in need of reform, which is long overdue. Arbitration law in Botswana is currently not based on the UNCITRAL Model Law despite suggestions that it should be adopted for the purpose of international commercial arbitration. The Alternative Dispute Resolution Bill, which contains provisions that are based on the UNCITRAL Model Law, has been placed before Parliament, but has not been passed yet. The institution for arbitration in Botswana is the Botswana Institute of Arbitrators. The Institute publishes its own set of arbitral rules.

FORMAL REQUIREMENTS FOR ARBITRATION AGREEMENTS

Generally, an arbitration clause is included in a contract between parties specifying that in the event of a dispute, it will be resolved by arbitration and not by the courts of Botswana. An arbitration agreement is described in the Act as a written agreement, by the parties, to submit present or future disputes to arbitration.[1] The agreement remains valid whether an arbitrator has been named in it or not. Some clauses may specify any law other than domestic law to govern their agreement or contract. Arbitration clauses are generally reviewed by an attorney. If an arbitration clause does not exist, it is still possible for both parties to agree to have their dispute resolved by arbitration.

There is persuasive authority to the effect that, where there is a document that states that the parties have accepted or confirmed (even orally) that any disputes should be referred to arbitration, that document will be deemed as a valid arbitration agreement.

ENFORCEMENT OF ARBITRATION AWARDS

The courts in Botswana are pro-arbitration. Courts are greatly involved in arbitral matters, and this can be witnessed throughout the Act where the courts are vested with certain powers and roles pertaining to arbitration. For instance, where arbitration proceedings are misconducted, or awards are procured in a way which is not in accordance with the Act, the courts have been vested with the powers to intervene. The courts also have the discretion to make an order to stay arbitration where a party to an arbitration agreement requests for that to be done. Furthermore, the courts may also appoint or remove arbitrators or umpires, set aside arbitration awards and can also award costs.

Section 10(1) of the Act provides for limitations to the parties to select arbitrators. It states that where an arbitration agreement submits that the reference shall be to three arbitrators, each party is to appoint an arbitrator and the third is appointed by the two elected arbitrators. Further to this, section 10(2) provides that where an arbitration agreement states that reference shall be to three arbitrators to be appointed otherwise than as stated in section 10(1), the award of any two of the arbitrators shall be binding. Furthermore, the Act provides that in cases where the elected procedure for appointing arbitrators fails, a court of law can appoint an arbitrator for the parties in question. The procedure for this is outlined below:

Any of the parties may serve the other party with a written notice to appoint, or concur in appointing an arbitrator, umpire or third arbitrator. If the appointment is not made within seven days of the service of the notice, the court may, on application of the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have the same powers to act and make an award as if he had been appointed with the consent of all parties.

Further to this, the courts can intervene in the appointment of arbitrators. This is provided for by section 11 of the Act, which grants the court the power to appoint an arbitrator or umpire in any of the following cases:

- where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;
- if an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy;
- where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him, or where two arbitrators are required to appoint an umpire and do not appoint him;
- where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing an arbitrator, umpire or third arbitrator, and if the appointment is not made within seven clear days after the service of the notice, the court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator who shall have similar powers to act in the case and make an award as if he had been appointed by consent of all parties.

Section 12 of the Act deals with arbitrator independence, neutrality and impartiality. It stipulates that:

> An arbitrator must be and continue throughout the proceedings to be disinterested with reference to the matters referred and the parties to the case. He should have no interest (direct or indirect) in the matter referred or the parties to the reference, and he should know of nothing disqualifying him from being impartial and disinterested in the discharge of such duties.

The law regulates the practice of arbitration in all ways possible. In addition to the above-mentioned areas addressed by the law, it further imposes powers and duties on arbitrators as listed below.

The authority of an arbitrator or umpire appointed by or by virtue of a submission shall, unless a contrary intention is expressed in the submission, be irrevocable except by leave of the court or a judge thereof.

Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this part of the Act to an award includes a reference to an interim award.

The report or award of any arbitrator on any such reference shall, unless set aside by the court, be equivalent to a finding of fact by the court.

The arbitrator shall have the power to administer oaths or to take the affirmations of the parties and witnesses appearing.

The arbitrator shall have the power to correct in any award any clerical mistake or error arising from an accidental slip or omission.

The arbitrator shall have the duty, on the application of either party, to appoint a commissioner to take the evidence of a person residing outside of Botswana and forward the same to arbitrators in the same way as if he were a commissioner appointed by the court.

The requirements pertinent to arbitration awards are stipulated in different provisions of the Act as follows.

An arbitrator or umpire shall have power to make an award at any time.

Section 17 of the Act stipulates that the time limit, if any, for asking for an award, whether under this Act or otherwise, may be extended by order of the court or a judge thereof, whether that time has expired or not.

An award or submission may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment may be entered in terms of the award.[2]

The Act further states that the award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall, if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively.[3]

The Act further provides that fees made payable to any arbitrator or umpire by an award shall be subject to taxation at the expense of the parties requiring taxation by the taxing officer of the court, irrespective of whether such fees may have already been paid by the parties. This is subject to the right of appeal.[4]

THE ARBITRATION PROCEDURE

Parties to an arbitration agreement are at liberty to choose an arbitral procedure of their choice, this may be dependent on the kind of agreement the parties have.

Courts are entitled to grant preliminary or interim relief in proceedings pertaining to arbitration. The Act stipulates that:

> any party to a submission, or any person claiming through or under such party, may apply to that court to stay the proceedings. If the court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time that the proceedings commence, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. Only then can the court make an order staying the proceedings subject to such terms and conditions as may be just.[5]

The rules of evidence that apply to arbitral proceedings are similar to those observed in a court of law in Botswana. The Act provides for the issuing of a subpoena or a summons on a witness.[6] This provision states that the procedure to issue a subpoena or summons on a witness to compel his or her attendance or production of evidence or documents before an

arbitrator or umpire, officer of the court or official referee, may be procured in the same way and subject to the same conditions as if the matter were an action pending in court.

This can be done by:

- any party to the arbitration agreement, any arbitrator or umpire thereunder;
- by the parties to any reference under any order of court; or
- by any officer of the court, official or special referee hearing any reference under an order of court.

Still on the issue of witnesses and evidence, section 16 of the Act states that: any party to a submission may apply for process of the court in order to compel a witness to attend. Any party to a submission is entitled, subject to the law relating to procedure of the court, to obtain from the court an order:

- for the examination of a witness or witnesses before a special examiner either in Botswana or elsewhere;
- for the discovery of documents and interrogatories;
- for evidence to be given by affidavit in the same circumstances as in litigation;
- for another party to give security for costs in the same way as a litigant;
- for the inspection, or the interim preservation, or the sale of goods or property;
- for an interim injunction or similar relief;
- for directing an issue by way of interpleader between two parties to a submission for the relief of a third party desiring so to interplead; and
- for substituted service of notices required by this Act, including service upon an agent in Botswana of a party resident elsewhere.

Further to this, in dealing with false evidence, the Act provides that:

> Any person who willfully or corruptly gives false evidence before any such officer, referee, arbitrator or umpire shall be guilty of perjury in the same way as if the evidence had been given in open Court, and may be dealt with, prosecuted and punished accordingly.[7]

With regard to the issue of subpoena and summoning a witness, the Act stipulates the following:

> The issue of a subpoena or summons on a witness to compel his attendance and the production of evidence or documents before an arbitrator, umpire, officer of the Court or official referee, as the case may be, may be procured in the same way and subject to the same conditions as if the matter were an action pending in Court:
>
> - by any party to a submission, or any arbitrator, or umpire thereunder;
> - by the parties to the proceedings under any order of the Court; or
> -

by any officer of the Court, official or special referee hearing any reference under order of Court, provided that:

- no person shall be compelled on such subpoena to produce any document or thing the production of which would not be compellable on trial of an action; and
- the clerk of the court of any magistrate may issue such subpoena in the name and on behalf of the Registrar of the Court upon payment of the same fees as are chargeable for the issue of a subpoena in the magistrates' court.[8]

A court may intervene in matters of disclosure where a party is compelled to present a document that they would not ordinarily be compelled to present during trial of an action in court. Section 16 of the Act states that 'Any party to a submission may take out process of the Court for the attendance of witnesses, but no person shall be compelled under any such process to produce any document which he could not be compelled to produce on the trial of any action.'

In instances where an arbitrator or umpire has misconducted proceedings, or an arbitration award has been improperly procured, section 13(2) of the Act provides that the court may set the award aside, and may award costs against any such arbitrator or umpire personally.

The Act allows for parties who have previously agreed to arbitrate, to elect to litigate when a dispute arises. Section 6(1) of the Act provides that, if a party to an arbitration agreement (submission) commences legal proceedings in a court of law against any other party to the submission regarding any matter agreed to be referred to arbitration, the other party may, at any time before delivering pleadings or taking any step in the proceedings, apply to the court to stay the proceedings. In instances where the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration, it may stay the proceedings. The burden of establishing why the proceedings should not be stayed lies on the party pursuing litigation. This burden arises after a prima facie existence of a submission has been proved. The discretion to stay proceedings, lies on the court, thus it may hear the action regardless of proof of an arbitration agreement.

Botswana is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This convention only applies to the recognition of awards made in the territory of another contracting state. For a foreign arbitration award to be enforced, a party to the arbitration is required to bring an action on the award as is the requirement with foreign judgments. Statutory law in Botswana allows a person in whose favour an award has been made to enforce an award on an arbitration agreement in the same manner as a judgment with leave of court. The Recognition and Enforcement of Foreign Arbitral Awards Act[9] which governs arbitration in Botswana provides that:

> No arbitral award made in any country which is a party to the Convention shall be enforceable in Botswana unless a similar award made in Botswana would be enforceable in such country.

Arbitration awards can be set aside and this is provided for by section 13(2) of the Act. This provision allows for this on the grounds that:

- an arbitrator or umpire has misconducted the proceedings; or
- an arbitration or award has been improperly procured.

When it comes to appealing an arbitration award, the Act is silent on this, however, there is case law that stands as authority for the fact that arbitration awards may be reviewed by the High Court if the arbitrator acted in bad faith. Where there was a provision for the appeal of an award in an arbitration agreement, the procedure for this will be determined by the submission, or by the rules of the arbitration organisation administering the arbitration.

In some cases, an arbitrator is permitted to award interim or preliminary relief. The Act provides for this where it states the following:

> Unless a contrary intention is expressed therein, every submission shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, make an interim award, and any reference in this Part of this Act to an award includes a reference to an interim award.[10]

This does not require any assistance from the court. The approach of the national courts to requests of interim relief by arbitration agreements is dependent on the facts of each individual case. The Act makes provision for this where it states that:

> An award on a submission may, by leave of the Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.[11]

There are various matters that are not arbitrable in Botswana. Such matters are found in section 7 of the Act, and are listed below:

- criminal cases (so far as the prosecution or punishment is concerned);
- matters relating to status;
- matrimonial causes; and
- matters in which minors or other persons under legal disability may be interested.

In Botswana, arbitration is most commonly used in the resolution of employment disputes and this is provided for by the Trade Disputes Act. Arbitration appears to be gaining in popularity across Botswana lately, with more corporate entities incorporating arbitration clauses in their contracts, and not leaving the resolution of possible conflicts to litigation.
Notes

1. Section 2 of the Arbitration Act.
2. Section 20.
3. Regulation 13 of the Act.
4. Section 14.

5. Section 6.
6. Section 28.
7. Section 32.
8. Section 28.
9. Section 3.
10. Section 18.
11. Section 20.

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Egypt

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Summary

International arbitration in Egypt has continued to grow during the past year.

Since the 25 January revolution in Egypt, investment treaty claims against Egypt have increased. Egypt is a signatory to 114 bilateral investment treaties, 41 of which are currently in force.[1] Egypt is also a contracting state to the International Centre for Settlement of Investment Disputes Convention (ICSID).[2] In 2014, four new investment treaty cases were registered with ICSID against Egypt. In 2015 an additional case was registered against Egypt, and in 2016, two more cases were registered with ICSID against Egypt. To date, a total of 28 cases against Egypt have been registered with ICSID, a significant number of which were registered following the Egyptian revolution: 16 cases since the revolution of 25 January 2011. Ten of these 16 cases remain pending. A number of cases registered after the revolution have been discontinued. Egypt has been active in settling claims filed against it by investors. For that purpose, several committees were established to negotiate these settlements. In 2012, faced with an increasing number of investment disputes, the Prime Minister issued decree No. 1115/2012 establishing an Investment Dispute Settlement Ministerial Committee, which is presided by the Minister of Justice. This committee addresses investors' complaints, requests and disputes with any governmental entity. In addition, in applying the new amendments of the Investment Law, the Prime Minister established another ministerial committee headed by the Prime Minister (Decree No. 3412/3015 dated 31 December 2015). This most recent committee is competent to negotiate amicable settlements for disputes arising out of investment contracts to which the government or an affiliated (public or private) government entity are parties. Both committees report to the Cabinet of Ministers and their decisions are binding on all governmental entities upon the approval of the Cabinet of the Ministers.

The settled claims include three claims by a Jordanian investor, Ossama Al Sharif.[3] Also, on 4 February 2015, the Cabinet of Ministers agreed to settle with MAK Holding Company for Industry (Al-Kharafi Group's company) by reimbursing 108 million Eyptian pounds formerly paid by MAK for obtaining a license to set up a pelletising iron ore project.[4]

THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) is the main arbitral centre in Egypt. It was established in January 1978 by a decision of the 19th Session of the Asian African Legal Consultative Committee. It is an independent, non-profit international organisation.

The number of cases filed with the CRCICA until 31 December 2015 totalled 1,070 cases. In 2015, 54 new arbitration cases were filed. In the first quarter of 2015, 14 new cases were filed with the CRCICA. The CRCICA's caseload in the first quarter of 2015 involved disputes relating to construction, services, lease, while 12 cases were filed in the second quarter of 2015. The third quarter of 2015 witnessed the filing of 11 new arbitration cases, while 17 new cases were filed in the last quarter of 2015. The largest sum in dispute filed in 2015 amounted to US$971,587,461 and related to the construction of an industrial and commercial project in Damietta Port, Egypt.[5]

The 17 new cases filed in the fourth quarter of 2015 involved disputes relating to services, construction, media and entertainment, supply, real estate, lease agreements, sale and purchase of shares, concession and franchise agreements. According to the statistics of 2015, construction disputes rank on top of the disputed contracts referred to the CRCICA

(13 cases) followed by media and entertainment disputes (eight cases) and services (eight cases). Cases arising out of lease and supply agreements filed in 2015 amounted to four cases each, while the number of cases arising out of real estate and sale and purchase of shares amounted to three cases each. Two cases arising out of both hotel management and franchise agreements were also filed in 2015. The other seven cases filed in 2015 related to agency agreements, cooperation agreements, concession agreements, factoring agreements, settlement agreements, shareholders agreements, and telecommunications (one case each).[6]

The total sums in the CRCICA arbitration disputes during 2015 reached US$6,435,713,084, representing a new record for the aggregate annual sums in dispute.[7]

In 2015, parties from Saudi Arabia ranked highest with regards to Arab parties referring their disputes to the CRCICA followed by parties from Lebanon, Libya and the UAE. Parties from the United States rank top of the non-Arab parties referring their disputes to the CRCICA, followed by parties from Turkey, the British Virgin Islands, Russia, Spain, Taiwan and the Cayman Islands.

In 2015 non-Arab arbitrators came from the United States, the United Kingdom, Germany, France and Spain, while Arab arbitrators came from Egypt, Lebanon, Saudi Arabia, Libya and Tunisia.[8]

Since it was established, the CRCICA has adopted, with minor modifications, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The CRCICA amended its arbitration rules in 1998, 2000, 2002, 2007, and 2011. The amendments of 2011 are based on the UNCITRAL Arbitration Rules as revised in 2010, with minor modifications, and apply to arbitral proceedings commenced after 1 March 2011.

One of the key developments in 2013 was the issuance by the CRCICA of Practice Notes for the first time since its inception in 1979. These notes determine the CRCICA's policies regarding its decisions under the Arbitration Rules in force since 1 March 2011. The Practice Notes have been prepared based on the decisions taken by the CRCIA's Advisory Committee during its quarterly meetings in 2012 and 2013 including:

- the decision of the CRCICA not to proceed with arbitral proceedings in accordance with article 6 of the Rules;
- the application of article 10(3) of the Rules regarding multiparty arbitrations and its correlation with article 9(2);
- notification to the parties and the arbitral tribunals of submissions made by the parties in light of article 17(4) and (5) and article 48 of the Rules;
- the termination of already suspended arbitral proceedings due to failure of payment of the costs of arbitration;
- the determination of the fees of the arbitral tribunal based on sums in dispute exceeding US$3 million in accordance with the scales set out in table 3 annexed to the Rules;
- the determination of the costs of arbitration according to article 42(5) of the Rules in the case of the arbitral tribunal's decision to terminate the proceedings before the issuance of a final award according to article 36 of the Rules;
- partial payment of fees to the resigning arbitrators; and

- the advance partial payment of the arbitrators' fees after the oral hearing under article 45(8) of the Rules.

EGYPTIAN ARBITRATION ACT

The Egyptian Arbitration Law No. 27/1994 (the Arbitration Law) was enacted based on the UNCITRAL Model Law on International Commercial Arbitration (1985). The Arbitration Law applies to arbitrations conducted in Egypt or where the parties to an international commercial arbitration conducted abroad agree to subject the arbitration to the Arbitration Law.[9]

The arbitration is considered to be international if the subject relates to international trade and, inter alia, if the parties to arbitration agree to resort to a permanent arbitral organisation or center having its headquarters in Egypt or abroad.[10] The Arbitration Law is applicable without prejudice to the international conventions to which Egypt is a party[11] and applies to all arbitrations between public or private law persons, irrespective of the nature of the legal relationship around which the dispute revolves.[12]

THE ARBITRATION AGREEMENT

The Arbitration Law defines an arbitration agreement as an agreement by which the parties agree to resolve by arbitration all or part of the dispute which arose or may arise between them in connection with a specific legal relationship, contractual or otherwise.[13] In 2005, the Cairo Court of Appeal held that the arbitration agreement is considered to be the legal basis for arbitration and its constitution and determines its scope, extent and the subject of the dispute. Where there is an arbitration agreement, the arbitrators derive their powers from it and the dispute will be outside the jurisdiction of the courts.[14] An agreement to arbitrate may take three different forms:

- the arbitration agreement may be embodied as a clause or as an annex to the agreement between the parties before a dispute arises between them;
- the parties may enter into an arbitration agreement after a dispute has arisen. If so, the parties must determine in the arbitration agreement the matters or disputes subject to arbitration, otherwise, the agreement shall be null and void.[15] This form of arbitration agreement is referred to as a 'submission agreement'; or
- the arbitration agreement may be incorporated by reference.

However, the validation of such incorporation requires an explicit reference to an existing document with a valid arbitration agreement therein.[16] Pursuant to article 10(3) of the Arbitration Law and Egyptian jurisprudence, the following conditions must be satisfied:

- the reference should be made to an existing document or contract that includes an arbitration clause;
- the document or contract to which the reference is made should be known to all the parties against whom such document or contract and the included arbitration clause will be invoked; and
- the reference should be explicitly made to the arbitration clause itself and to the fact that is an integral part of the contract (a general reference to the existing document or its terms is not sufficient).[17]

CONDITIONS OF VALIDITY OF THE ARBITRATION AGREEMENT

In addition to contractual requirements such as consent, capacity and the existence of a legal relationship, the following requirements must be satisfied for there to be a valid arbitration agreement:

- the arbitration agreement must relate to matters that are amenable to compromise;[18]
- the arbitration agreement must be in writing; otherwise, it shall be null and void.[19] It will be written if it is included in written communication exchanged between the parties. This requirement is widely interpreted to include an arbitration agreement concluded by electronic offer and acceptance.[20] The silence of agreement in this regard may be considered as acceptance of the arbitration agreement if there are continued transactions between the parties where the arbitration agreement is part thereof;[21] and
- in accordance with article 702 of the Egyptian Civil Code and article 76 of Civil and Commercial Procedures Law, the arbitration agreement may not be concluded by an agent except by virtue of private and specific written delegation;[22] otherwise, the arbitration clause will not be effective in relation to the principal.

ADMINISTRATIVE CONTRACTS

Arbitration with respect to administrative contracts was a matter much debated before finally being settled by an amendment to the Arbitration Law in 1997.[23]

Arbitration in relation to administrative contracts is permissible provided the arbitration agreement is approved by the competent minister or by whomever assumes his or her authority with respect to public entities.[24] The power to approve the arbitration agreement may not be delegated. Approval may be rendered subsequent to the conclusion of the administrative contract and does not need to be written or expressed in a specific form.[25] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[26] A recent CRCICA award held that approval may be implicit, inferred from the circumstances of the case.[27]

The Egyptian courts have held that the absence of ministerial approval invalidates the arbitration agreement.[28] In 2010, the Cairo Court of Appeal held that ministerial approval is a legislative requirement for the validity of the arbitration clause and is addressed to both parties.[29] Similarly, in 2011, the Administrative Supreme Court upheld the principle that ministerial approval of the arbitration clause is addressed to both parties.[30] While some CRCICA tribunals have applied this principle, others have not. Some tribunals have held that the arbitration agreement is not invalidated due to the absence of ministerial approval because this requirement should not be applicable to international commercial arbitrations conducted with foreign investors,[31] the Arbitration Law does not provide for an annulment sanction for violation of article 1, and such requirement needs to be fulfilled by the administrative entity and not the other party (ie, it is the sole responsibility of the administrative entity and it should bear the liability for not obtaining ministerial approval).[32] Other tribunals have, as recently as 2011, taken the view that the arbitration agreement is void in the absence of ministerial approval.[33] It is sufficient for the validity of arbitration clauses in administrative contracts that the relevant public entity expressly admits in the contract that it has ministerial approval of the arbitration agreement.[34]

ARBITRAL PROCEEDINGS

Number Of Arbitrators

Parties are free to choose the number of arbitrators, provided that the number is odd; otherwise, the arbitration shall be null and void. The arbitral tribunal is to be formed of three arbitrators if the parties fail to reach an agreement.[35] The same principle applies in the CRCICA Rules whereby the parties are free to choose the number of arbitrators. In case the parties fail to agree on the number of arbitrators, the arbitral tribunal shall be formed of three arbitrators.[36]

Truncated Tribunals

In situations where a tribunal conducts arbitration proceedings with only two arbitrators, the tribunal is referred to as a 'truncated tribunal'. This situation typically takes place when one of the co-arbitrators refuses to participate in the deliberations or resigns in the very late stages of the arbitration proceedings.[37]

According to the general rules of substitution of arbitrators, a substitute arbitrator shall be appointed by the same mechanism used to appoint his predecessor.[38] However, the party that appointed the resigning arbitrator may take this opportunity to delay the proceedings.

In an attempt to overcome this, the CRCICA Rules expressly provide that if, and at the request of a party, the CRCICA determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the CRCICA may, after giving an opportunity to the parties and the remaining arbitrators to express their views, and upon the approval of the advisory committee, either appoint a substitute arbitrator or, after the closure of the hearings, authorise the other arbitrators to proceed with the arbitration and make a decision or award.[39]

In 2011, the Cairo Court of Appeal held that in certain situations where the behaviour of an arbitrator is unjustified or in bad faith, and provided that the arbitrator has resigned or failed to undertake his mission after the conclusion of all hearings and pleadings, an award rendered by a truncated tribunal shall not be annulled.[40] More recently, in 2013, the Cairo Court of Appeal held that there is nothing in the Egyptian Law that would prevent the adoption of the CRCICA Rules in this regard and the arbitrator's refusal to participate in the deliberations with no acceptable reason and his consequential refusal to sign the award are not sufficient reasons to annul the award as provided for by article 43 of Arbitration Law No. 27/1994.[41]

Recently, the Court of Cassation held in 2015 that awards rendered by a truncated tribunal can be annulled. The Court stressed the importance, pursuant to the Arbitration Law of the fact that a tribunal needs to be composed of an odd number of arbitrators and that there must be deliberations between the arbitrators before issuing the award. When those requirements are not met due to the fact that the third arbitrator did not participate in the deliberations, that renders the award subject to annulment.[42]

Impartiality And Independency Of Arbitrators

The Arbitration Law provides that an arbitrator may not be challenged unless there are serious doubts as to his or her neutrality or independence. The request to challenge shall be submitted in writing to the tribunal, including the reasons for challenge, within 15 days of the party becoming aware of the composition of the tribunal or the circumstances justifying the challenge.[43] The CRCICA Rules provide that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality

or independence.[44] The CRCICA may, with the approval of its advisory committee, reject the appointment of an arbitrator due to the lack of legal or contractual requirements or his or her past failure to comply with certain duties under the rules. The arbitral tribunal is obliged to refer the dispute of recusal to the competent court;[45] however, under the CRCICA Rules, such recusal request shall be adjudicated by a decision of a triple special impartial and independent committee to be formed by the CRCICA from members of the advisory committee.[46] If an arbitrator's mission is terminated by recusal, discharge, abstention or for any other reason, a substitute shall be appointed according to the same procedures of choosing the arbitrator whose jurisdiction had been terminated.[47]

Procedural Law

The Arbitration Law grants parties the freedom to choose the applicable procedural law that will be applied by the arbitral tribunal, including their right to subject such arbitration to the applicable rules of any institution or arbitration centre in Egypt or outside. However, if the parties fail to agree on such matter, the arbitral tribunal will be granted the freedom to select the applicable procedural law.[48]

It is established through judgments of the Egyptian courts that, except for rules related to public policy, arbitral tribunals are not bound by norms considered mandatory in domestic litigations.[49]

Suspension

Pursuant to article 46 of the Arbitration Law, the tribunal has the right to suspend the arbitral proceedings if, in the course of the proceedings, a matter falling outside the scope of the arbitral tribunal's jurisdiction is raised, or if a document submitted to it is challenged for forgery, or if criminal proceedings are undertaken regarding the alleged forgery or for any other criminal act provided that such preliminary matter is essential or necessary for the tribunal to be able to review the arbitral dispute.[50] In such case, the arbitral tribunal shall suspend the proceedings until a final judgment is rendered in this respect by the competent authority.[51] This will include suspension of the time limit for the making of the arbitral award.[52]

The Role Of Egyptian Courts In Arbitral Proceedings

The Arbitration Law provides for certain instances whereby the local courts may intervene in the arbitral proceedings subject to the request of either party to the dispute. For example, the local court may order that provisional or conservatory measures be taken, whether before the commencement of arbitral proceedings or during the procedure on the basis of an application from one of the parties;[53] the president of the Court referred to in article 9 of this law shall, upon request from the arbitral tribunal, be competent to:

- pass judgment against defaulting or intransigent witnesses imposing the penalties prescribed in articles 78 and 80 of the Law of Evidence in Civil and Commercial Matters; and
- order a judicial delegation.[54]

ARBITRATION AWARD

Time Limit

The Arbitration Law grants parties the right to agree upon the time limit of arbitration proceedings. In case of absence of the parties' agreement, arbitration proceedings are limited to 12 months from the commencement date of the proceedings. This term may be extended by an additional six months by the tribunal, unless the parties agreed otherwise.[55] In this regard, if the parties agree to certain arbitration rules to be applied that provide for a different time limit or give the tribunal the authority to extend the time limit according to its discretion, such rules shall be applied. For example, if the parties agree to subject the dispute to the CRCICA Rules, which do not include any time limits for arbitration proceedings, such proceedings shall not be subject to the time limit set forth in the Arbitration Law and shall not be limited to a certain time limit unless otherwise by the agreement of the parties.-[56]

In all cases, if the proceedings exceed the determined time limit, either of the parties may have recourse to the competent court for the purpose of terminating the proceedings or determining a new time limit.[57] If the arbitration proceedings exceed the determined time limit, the arbitration agreement shall be considered terminated and the arbitral tribunal shall have no jurisdiction to proceed further.[58] However, the parties' continuance in the proceedings is considered as an implied extension to the time limit.[59]

Setting-aside Of Arbitral Awards

Pursuant to article 53 of the Arbitration Law, arbitral awards may be annulled for several reasons including, inter alia, absence of a valid arbitration agreement, violation to the right of defense of one of the parties. In a recent and heavily publicised case, the Court of Appeal clarified equally its stance regarding article 53, by annulling an arbitral award rendered against a famous Egyptian television personality. The Court stated that the correctness of the reasoning of an arbitral award is not subject to its supervision pursuant to article 53. Yet, the courts may annul an arbitral award if the reasoning is completely ambiguous, illogical, based on unfounded facts and assumptions, and full of flagrant discrepancies and unsubstantiated statements to the extent that renders the award without reasoning.[60]

Article 53 further provides that the court adjudicating the nullity action should decide ipso jure the nullity if it is in conflict with Egyptian public policy. The Egyptian courts have refrained from defining public policy and this has resulted in some uncertainty.

In a very recent case,[61] after the arbitral award was issued and annulment was refused by the Court of Appeal, the losing party petitioned for review based on the article 241(1) of the Civil and Commercial Procedures Law, which provides that the parties may, even after a final judgment is rendered, petition for review of the final judgment, if fraudulent conduct of one of the parties is established and the judgment relied unknowingly on the fraudulent conduct to reach its final decision. The losing party claimed that the existence of fraudulent conduct committed by the other party that influenced the outcome of the dispute. The Court of Appeal found in favour of the plaintiff and annulled the award in question based on that procedure for the first time.

Enforcement Of Arbitral Awards

Pursuant to article (55) of the Arbitration Law, all arbitral awards rendered in accordance with the provisions of this law have the authority of the res judicata and shall be enforceable in conformity with its provisions.[62] The enforcement of domestic arbitral awards is governed by article 56 of the Arbitration Law, which requires a request for enforcement to be submitted to the president of the competent court, along with the required documents.[63] The enforcement order shall be submitted after the lapse of the 90-day period prescribed for

filing the nullity action and this order will be issued after verifying that certain conditions have been met.[64] The enforcement of foreign arbitral awards in Egypt is governed by the New York Convention on the Enforcement of Foreign Arbitral Awards.[65] The New York Convention was signed by Egypt on 2 February 1959 and entered into force on 8 June 1959.

Moreover, the Egyptian Court of Cassation recently held that if the provisions of the New York Convention on the Enforcement of Foreign Arbitral Awards were in contradiction with the provisions of domestic Egyptian law, the provisions of the New York Convention would prevail.[66]

Under article 54(2) of the ICSID Convention, the recognition and enforcement of an award may be obtained from the competent court or other authority designated by a contracting state on presentation of a copy of the award certified by the secretary general of the ICSID. The Ministry of Justice has been designated by Egypt as the competent authority for the recognition and enforcement in Egypt of arbitral awards rendered pursuant to the ICSID Convention. Execution of the award is, in accordance with article 54(3) of the ICSID Convention, governed by the law on the execution of judgments in force in the country where execution is sought, which in Egypt is the procedures law. ICSID awards should be enforced in Egypt without prejudice to the Egyptian law provisions regarding the immunity of Egypt or any foreign state from execution (article 55 of the ICSID Convention). Article 87 of the Egyptian Civil Code provides that public assets of the Egyptian state are immune from enforcement and attachment procedures.

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Notes

1. http://icsid.worldbank.org (Publications/Search Listing of Bilateral Investment Treaties/Egypt, Arab Republic of (91)). The data, which is not conclusive, is based on information provided to ICSID by governments.
2. Egypt signed the ICSID Convention on 11 February 1972, and the convention was entered into force on 2 June 1972. See ICSID published 'List of Contracting States and Other Signatories of the Convention'.
3. https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Arab%20Re
4. http://www.cabinet.gov.eg/Media/CabinetMeetingsDetails.aspx?id=1383.
5. CRCICA Annual Report 2015. 4th Quarter http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html.
6. CRCICA Annual Report 2015. 4th Quarter http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html.
7. CRCICA Annual Report 2015. 4th Quarterhttp://crcica.org.eg/newsletters/nl042015/nl042015a001t.html.
8. CRCICA Annual Report 2015. 4th Quarter http://crcica.org.eg/newsletters/nl042015/nl042015a001t.html.
9. Article 1 of Arbitration Law No. 27/1994.
10. Article 3 of Arbitration Law No. 27/1994.
11. Article 1 of Arbitration Law No. 27/1994. See also Court of Cassation Judgment, Challenge No. 966/73 JY, hearing dated 10 January 2005; Court of Cassation

Judgment, Challenge No. 10350/65 JY, hearing dated 1 March 1999; and CRCICA Arbitration Case No. 495/2006, award dated 17 May 2007, published in ***Journal of Arab Arbitration***, Issue No. 12, pp. 121–123.

12. Article 1 of Arbitration Law No. 27/1994.
13. Article 10(1) of Arbitration Law No. 27/1994.
14. Cairo Court of Appeal Judgment, Circuit 91 – Commercial, Case No. 95/ 120 JY, session dated 27/4/2005.
15. Article 10(2) of Arbitration Law No. 27/1994.
16. Article 10(3) of Arbitration Law No. 27/1994.
17. Court of Cassation Judgment, Challenge No. 495/72 J, session dated 13 January 2004.
18. Article 11 of Arbitration Law No. 27/1994. Public policy matters are not subject to compromise and are therefore non-arbitrable (see article 551 of the Egyptian Civil Code). Non-arbitrable matters include, inter alia, the personal status of individuals, criminal matters, bankruptcy claims, public assets and for the sole purpose of requesting interim measures (see Cairo Court of Appeal Judgment, case No. 29/117 JY, session dated 25/02/2002).
19. Article 12 of Arbitration Law No. 27/1994.
20. Fathy Waly, Arbitration Law in Theory and Practice, 2014, p. 162.
21. Professor Mahmoud El Briery,***International Commercial Arbitration***, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 59.
22. Cairo Court of Appeal Judgment, case No. 31/128 JY, session dated 26/06/2012, referred to in the Journal of Arab Arbitration, Issue No. 19, p. 190; and CRCICA Arbitration Case No. 795/2012.
23. Article 1 of Law No. 9/1997, which amended some provisions of the Arbitration Law No. 27/1994 including the permissibility to arbitration in relation to administrative contracts after the approval of the competent minister.
24. Article 1 of the Arbitration Law as amended by Law No. 9/1997.
25. CRCICA ad hoc Arbitration Case No. 793/2012, award Sharkawy, International Commercial Arbitration – Legal Comparative Study, 2011, Dal El Nahda Al Arabia, p. 81; Abdel Aziz Abdel Mena'em Khalifa, Arbitration in Contractual and Non-Contractual Administrative Disputes, 2011, Monsha'at El Ma'aref, p. 127.
26. Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, Lawsuit No. 11492/65 JY, session dated 7 May 2011.
27. CRCICA Arbitration Case No. 676/2010, award dated 21/08/2011, Journal of Arab Arbitration, Issue No. 17, pp. 263-264.
28. Id and Also See Administrative Court judgment No. 18628/59 JY, session dated 19 February 2006; Administrative Supreme Court Judgment No. 6268/46 JY, session dated 31 May 2005; Cairo Court of Appeal Judgment No. 76/177 JY, session dated 08 May 2002 referred to in Walid Mohamed Abbas, ***Arbitration in Administrative Disputes of Contractual Nature***, 2010, Dar El Gama'a El Gadida, pp. 217-219.
29.

Id and Also See Cairo Court of Appeal Judgment No. 111/126 JY, hearing dated 30 March 2010 referred to in Mohamed Amin El Mahdy, 'Return to the Problematic Arbitration in Administrative Contracts Disputes', ***Journal of Arab Arbitration***, Issue No. 19, p. 26.

30. Id and Also See Administrative Court Judgment No. 11492/65 JY, session dated 7 May 2011.
31. Id and Also See CRCICA Arbitration Case No. 382/2004, session dated 7 March 2006 referred to in Walid Mohamed Abbas, supra 28, pp. 221–222.
32. Id and Also See CRCICA Arbitration Case No. 464/2006, session dated 2 July 2006; CRCICA Arbitration Case No. 553/2007, session dated 5 November 2009 referred to in ***Journal of Arab Arbitration***, Issue No. 13, December 2009, p. 237; CRCICA Arbitration Case No. 567/2008, session dated 12 September 2009 referred to in ***Journal of Arab Arbitration***, Issue No. 13, December 2009, p. 237; CRCICA Arbitration Case No. 495/2006, award dated 17 May 2007, referred to in ***Journal of Arab Arbitration***, Issue No. 12, pp. 121–123.
33. Id and also see CRCICA Arbitration Case No. 292/2002, session dated 29 May 2003 and CRCICA Arbitration Case No. 390/2004, session dated 12 March 2005 referred to in Walid Mohamed Abbas, supra 28, pp222–223; CRCICA Case No. 676/2010, award dated 21 August 2011,***Journal of Arab Arbitration***, Issue No. 17, p. 262.
34. Id and Also See CRCICA Arbitration Case No. 793/1201 (Ad Hoc) Award dated 18 July 2012, published in the ***Journal of Arab Arbitration***, December 2012, Issue 19, p. 193, referred to in Fathy Waly, supra note 20, p. 138.
35. Article 15 of the Arbitration Law No. 27/1994.
36. Article 7(1) of CRCICA Rules.
37. See, Gary B Born, ***International Arbitration: Law and Practice***, 2012, p. 142.
38. Article 21 of Arbitration Law No. 27/1994.
39. Article 14(2) of CRCICA Rules.
40. Cairo Court of Appeal, Circuit 7 Commercial, Case No. 64/127 JY, session dated 7 September 2011, referred to in***International Arbitration Journal***, issue 16, October 2012, p. 585.
41. Cairo Court of Appeal, Circuit 7 Commercial, Case No. 32/129 JY, session dated 5/3/2013, referred to in Professor Fathy Waly, Supra, note 20, p. 359.
42. Cairo Court of Cassation, Case No. 2047/83 JY Session dated 26/05/2015.
43. Articles 18 and 19 of the Arbitration Law No. 27/1994.
44. Article 13 of the CRCICA Rules.
45. Article 19(1) of the Arbitration Law No. 27/1994; Court of Cassation, Challenge No. 9568/79 JY, session dated 14 March 2011.
46. Article 13(6) of CRCICA Rules.
47. Article 21 of the Arbitration Law No. 27/1994; article 14(1) of CRCICA Rules.
48. Article 25 of the Arbitration Law No. 27/1994.
49.

Court of Cassation, Challenge No. 547/51 JY, session dated 23 December 1991; Court of Cassation, Challenge No. 1259/49 JY, session dated 13 June 1983.

50. Prof Fathi Wali, ***Arbitration in the Domestic and International Commercial Disputes***, 2014, p. 488.
51. Professor Mahmoud El Briery, ***International Commercial Arbitration***, Fourth Edition 2010, Dar El Nahda El Arabi'a p118; Court of Cassation, Challenge No. 1479/53 JY, hearing dated 19 November 1987.
52. Article 46 of Arbitration Law No. 27/1994.
53. Article 14 of Arbitration Law No. 27/1994.
54. Article 37 of Arbitration Law No. 27/1994. More examples are set out in articles (9), (17), (19), (45), (20) and (24) of the Arbitration Law.
55. Article 45(1) of the Arbitration Law No. 27/1994; Cairo Court of Appeal, Circuit 91 Commercial, Case No. 55/2005 JY, session dated 27 February 2005.
56. Professor Mahmoud El Briery,***International Commercial Arbitration***, Fourth Edition 2010, Dar El Nahda El Arabi'a, pp. 516–517.
57. Article 45(2) of the Arbitration Law No. 27/1994.
58. Professor Mahmoud El Briery, ***International Commercial Arbitration***, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 525.
59. Article 8 of the Arbitration Law No. 27/1994; Court of Cassation, Challenge No. 3869/78 JY, session dated 23 April 2009.
60. Cairo Court of Appeals Judgment, Case No. 11, 12, 14/132 JY, Session dated 6 January 2016, the ***Bassem Youssef*** case.
61. Court of Appeal Judgment, Case No. 2/132 JY, Session dated 3 February 2016.
62. Article 55 of Arbitration Law No. 27/1994.
63. Article 56 of Arbitration Law No. 27/1994.
64. Article 58 of Arbitration Law No. 27/1994.
65. Some jurists take the view that the Arbitration Law and the Egyptian Civil and Commercial Procedures Law No. 131/1948 (articles 296–301) also apply.
66. Court of Cassation Judgment, Case No. 5000/78 JY, Session dated 6 April 2015.

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Summary

INTRODUCTION

The governing statutory framework for arbitration in Israel is the Arbitration Law 1968. The Law was amended twice. In 1974, the Law incorporated specific provisions relating to the enforcement of foreign arbitration agreements and awards, and in 2008, it expanded the limited control of courts over arbitration awards, by enabling parties to agree that the award will be subject to appeal before the court. When the parties so agree, the court has discretion to grant a leave for appeal, if it deems that there is a fundamental legal mistake in the award, which may cause a miscarriage of justice.

There are no separate legislative frameworks for domestic and international arbitrations in Israel. However, the Arbitration Law includes specific provisions relating to the recognition and enforcement of international arbitration agreements and awards, different from the provisions regarding domestic arbitration agreements and awards.

Israel was one of the first countries to sign the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. It signed the Convention in 1959 and in 1974 the Convention became the law of the land. Consequently, the Regulations for the Execution of the New York Convention (Foreign Arbitration) that govern procedural matters regarding the recognition and enforcement of foreign arbitral awards were enacted in 1978.

While the Arbitration Law does not define the term 'international arbitration', it defines the term 'foreign arbitration award' as an award that was made outside of the state of Israel. Thus, it could be inferred that an arbitration seated outside Israel is considered international. Interestingly, however, some court decisions fail to recognise the international character of arbitrations seated outside Israel, and as a consequence apply in relation to them those provisions in the Law that relate to domestic arbitrations.

Israeli courts play a role during the various stages of arbitration – before the tribunal is constituted, during the arbitration proceedings and after the award has been rendered. With respect to international arbitration the role that the courts play relates to enforcement of arbitration agreements and the recognition and enforcement of international arbitral awards. The following provides an analysis of current Israeli law on these matters.

ENFORCING ARBITRATION AGREEMENTS IN ISRAEL

Under the Arbitration Law, when a party breaches the arbitration agreement and brings a claim to court, the other party may file a motion to the court for stay of proceedings. The jurisdiction of the courts to enforce arbitration agreements is set in the Arbitration Law in two separate arrangements: the general arrangement applies to domestic arbitrations and the specific arrangement concerns international arbitrations.

ENFORCEMENT OF DOMESTIC ARBITRATION AGREEMENTS

Stay of proceedings in an arbitration seated in Israel is governed by article 5 of the Arbitration Law. The article grants the court discretionary power to refuse to stay proceedings if it finds a 'special reason that the matter should not be decided in arbitration'. 'Special reason' is a broad term, which is subject to the court's interpretation. There are broadly three categories of special reasons applied by the courts: the first concerns the arbitration agreement, the second relates to procedural efficiency, and the third embodies reasons of judicial policy. The category focusing on the arbitration agreement includes cases in which courts have justified

their refusal to stay proceedings on the ground of impossibility of enforcement. The category of 'special reasons' concerns procedural efficiency and involves cases where enforcing the arbitration agreement would obstruct the purpose of settling the dispute quickly and efficiently. One such reason is the imminent delay in arbitral proceedings. If the delay is caused by the party applying for the stay, a motion for stay of proceedings will be denied. Another cited reason is the avoidance of multiple proceedings in arbitration and in court. Where some parties to the court proceedings are not parties to the arbitration agreement, the court may deny the motion for stay. The category of 'special reasons' involving judicial policy includes reasons directly related to the legal system, such as public policy reasons that justify that the dispute should be heard before a public court and not in a private arbitration. Another reason for refusing to stay of proceedings is when the court deems that the dispute should be decided according to substantive law (and not independently of it).

ENFORCEMENT OF INTERNATIONAL ARBITRATION AGREEMENTS

Stay of proceedings in international arbitration is governed by article 6 of the Arbitration Law. The article incorporates the enforcement provision of article II(3) of the New York Convention, which denies the court any discretionary power and directs it to 'refer the parties to arbitration' unless it finds that the agreement 'is null and void, inoperative or incapable of being performed'.

Despite broad international acceptance of the mandatory referral rule in article II(3) of the Convention, Israeli courts have not fully recognised it. Although there are instances where a court's rhetoric suggests recognition of this principle, a close analysis of the case law reveals that, in fact, Israeli courts have failed in various instances to follow a uniform discourse on the issue. Hence, it is not possible to construct a single narrative of all legal decisions showing a clear and consistent approach on the matter. While one could expect the courts to take a clear stand on the matter and follow a uniform approach denying discretionary power and mandating referral to arbitration once the conditions of Article II(3) are met, not all decisions follow this approach.

In order to make sense of the diverse judicial opinions, I will offer a short typology of the different approaches taken by the courts regarding the mandatory character of referral to arbitration. The typology is structured along three distinctive lines, which centre on the different approaches of the court toward the lack of discretionary power in the enforcement of arbitration agreements.

The first approach adheres to a strict application of the Convention, and acknowledges the mandatory character of the referral to arbitration. The decisions that fall under this approach can be divided into two groups: those which follow the literal application of article II(3) of the Convention, and those that leave leeway for the court in its application of the article. The decisions that follow the literal application hold that courts lack any discretion on the matter, as the Convention calls for mandatory referral. The decisions that follow a broad approach apply broadly the three exceptions to the mandatory referral to arbitration set in the article. By broadening the borders of this exception the court demonstrates a tendency to endow itself with discretionary power to refuse to stay proceedings in cases where not all the parties to the court proceedings are parties to the arbitration agreement, even though no discretion has been granted to it.

The second approach uses a rhetoric that allegedly suggests acknowledgment of the lack of discretionary power of the court, but refrains from acting upon it. This line of thought

states at the outset that the court lacks any discretion in the application of article II(3) of the Convention, but then in the application of the Convention it ignores this statement and proceeds to subject the article to further conditions or additions, such as requiring the applicant for stay of proceedings to prove that he was ready to pursue arbitration, or to subject the application for stay to the domestic doctrine of good faith. Interestingly, the court did not question the appropriateness of its decisions. In other words, the court did not even consider the fact that those further conditions and additions are contrary to the uniformity principle of the Convention and, thus, hurt the certainty of its implementation.

The third approach explicitly endows the court with broader discretionary power than the limited one provided in article II(3) of the Convention. As shall now be explained, the Israeli Supreme Court added a fourth exception to the exceptions in article II(3) of the Convention, namely - the public policy exception.

In a landmark case *LA 4716/04 Hotels.com v Zuz Tourism Ltd*, the Supreme Court (Justice Grunis) held that the list of exceptions in article 2(3) of the Convention is not exhaustive as 'there may be exceptional cases in which the court may refrain from staying proceedings, even if none of the exceptions above apply. However, these cases will be rare.'

In *LA 1817/08 Teva Pharmaceutical Industries Ltd v Pronauron Biotechnologies, Inc*, a claim concerning pharmaceutical experiments that were allegedly conducted negligently was filed in court in breach of an arbitration agreement. In deciding on a motion to stay proceedings, the Supreme Court held that public policy is a ground for denying the motion for stay, even if none of the exceptions stated in article 2(3) of the Convention exists. Justice Rubinstein held that there is a public interest in having a public hearing on the matter, since the dispute has broader implications than those on the disputing parties. He added that since the applicable substantive law was Israeli law, denying the motion for stay will not cause any harm to the parties' expectations. Justice Procaccia, who was in agreement with Justice Rubinstein, held that there may be special reasons that justify refusal to stay proceedings. In Justice Procaccia's opinion, when the matter in dispute exceeds the parties' interests, the court has discretion to refrain from staying proceedings. Justice Danziger, who was in minority, held that the fact that the matter in dispute may have an effect on third parties is not a justifiable ground for departing from the strict provisions of the Convention. In his opinion, public policy grounds are not relevant to the enforcement of foreign arbitration agreements.

In a later decision, *LA 3331/14 Siemens Ag v Israel Electric Company Ltd*, the Supreme Court (Justice Amit) stressed again that the Court has discretion to refuse staying proceedings even when none of the exceptions in article II(3) of the Convention exists. In this case, Justice Amit held that when a party claims that the other party acted fraudulently, it is in the public interest that the claim be heard in an open court and not in arbitration.

There is no doubt that denying the mandatory character of referral to arbitration stands against the clear wording of the Convention and hence hurts the uniformity of its worldwide application.

A question arises as to the reason for the courts' failure to apply article II(3) of the Convention in the same manner expected from all courts of contracting states. What is the rationale for denying the court's lack of discretionary? My contention is that the court's attitude stems from an emotive disposition toward the denial of its discretionary power. In other words, the court felt uncomfortable with the denial of its discretionary power. This contention is supported by the words of Justice Strassberg-Cohen of the Supreme Court in*LA 1407/94*

Mediterranean Shipping v Credit Lyonnais holding that 'depriving the court of its discretionary power, which is at the very heart of the art of judging, causes some discomfort'. Therefore, while the Court was aware of its lack of discretionary power, its awareness was not translated into decisions applying the Convention strictly, and this was because it simply chose not to do so.

THE ARBITRATION AWARD

The Arbitration Law provides for separate procedures regarding the enforcement of domestic and foreign arbitral awards and the recourse against them. These will be analysed separately.

CONFIRMATION AND MEANS OF RECOURSE AGAINST DOMESTIC AWARDS RENDERED IN ISRAEL

A domestic award is subject to confirmation proceedings before the court. Once the award is confirmed it is treated as a judgment of the court, and it can be submitted to the execution office for enforcement.

There are two means of recourse against domestic awards – setting aside the award and an appeal on the award. Each shall be discussed briefly.

Setting Aside Domestic Arbitral Awards

The Arbitration Law provides for a closed list of grounds for setting aside the award. When a party files a motion to set aside the award, the court may set aside the award, wholly or in part, supplement it, correct it, or remit it to the arbitrator. Thus, setting aside is not the only remedy for challenging the award. In fact, setting aside is a remedy of last resort. Article 24 of the Arbitration Law provides that the court may set aside the award on any of the following grounds: (1) there was no valid arbitration agreement; (2) the award was made by an arbitrator not properly appointed; (3) the arbitrator acted without authority or exceeded the authority vested in him in the arbitration agreement; (4) a party was not given a suitable opportunity to state his case or to produce his evidence; (5) the arbitrator did not decide one of the matters referred to him for determination; (6) it was stipulated in the arbitration that the arbitrator shall state the reasons for the award and the arbitrator did not do so; (7) it was stipulated in the arbitration agreement that the arbitrator shall decide in accordance with the law and the arbitrator did not do so; (8) the award was made after the period for making it had expired; (9) the content of the award is contrary to public policy; (10) there is a ground on which a court would have set aside a final, non-appealable judgment.

The court's authority to set aside the award is discretionary. In fact, pursuant to article 26 of the Law, the court may refuse to set aside the award, even if any of the grounds in article 24 exists, when it finds that no miscarriage of justice was caused. Thus, the court may confirm the award, even if there is a ground for setting aside, when it is of the opinion that there was no miscarriage of justice. Once confirmed, the award can be executed.

The list of grounds for setting aside the award is exhaustive and the parties cannot agree to limit or expand it. However, following the amendment to the Arbitration Law in 2008, the parties may agree that their award will be subject to appeal before an arbitrator. In this case, the list of grounds for setting aside the award is limited to the 9th and 10th grounds of article 24, namely, the award is contrary to public policy, and there is a ground on which a court would have set aside a final, non-appealable judgment.

An application for setting aside the award must be brought within 45 days from the day the award was delivered to the applicant. However, when the application for setting aside the award is based on the ground set in article 24(1), namely, that there was no valid arbitration agreement, there is no time limit. Additionally, where the application is based on the ground set in article 24(10), namely, that and there is a ground on which a court would have set aside a final, non-appealable judgment, the time limit of 45 days begins on the day when the facts were discovered (article 27(b) and (d)). The court may extend these periods, even if they have already expired, if it considers that there are special reasons to do so. When an application for confirming the award is filed, the time limit for filing an objection to the application for confirmation is 15 days. Once the award is confirmed by the court, there is no possibility to set it aside. The only exception is an application based on the 10th ground, which can be made even though the award was confirmed (article 27(d)).

Appeal On Domestic Arbitral Awards

The amendment to the Arbitration Law introduced in 2008 enables the parties to choose between two forms of appeal – appeal before a second arbitral instance and appeal before the court.

APPEAL TO A SECOND ARBITRAL INSTANCE

Article 21A of the Arbitration Law sets out the conditions for an appeal to a second arbitral instance. The parties may agree on the appeal when entering the arbitration agreement or any time afterwards. If the parties so agree, the award has to be reasoned.

The arbitrator hearing the appeal may hold meetings in the presence of the parties and request written submissions. However, the arbitrator shall not hear witnesses, unless otherwise agreed by the parties. The award, which has to be reasoned, could be then subject to a setting-aside procedure before the court on two grounds only: the content of the award is contrary to public policy; or there is a ground on which a court would have set aside a final, non-appealable judgment. That is, once the parties agree that the award shall be subject to appeal before a second arbitral instance, the award in the appeal could be set aside on the above two limited grounds only.

APPEAL TO A COURT

Article 29B of the Arbitration Law provides for the possibility of parties to agree that their award shall be appealed before the court. In this case, the arbitrator has to be bound by substantive law (interestingly, the default rule in the Arbitration law is that the arbitrator is not bound by substantive law). It should be stressed that the appeal is not as of right. The court may grant leave to appeal if it finds that there is a fundamental mistake in the application of the law in the award which may cause miscarriage of justice. Thus, the appeal could be heard only with the leave of the court, provided that the two conditions specified appear. This leaves the court to hear appeals on awards in rare occasions. Simple mistakes of law or mistakes that may not cause miscarriage of justice are not grounds for granting leave to appeal. Therefore, parties that agree that the award shall be subject to appeal cannot know in advance whether the court will grant leave to appeal or not. Put differently, when entering an arbitration agreement and agreeing that the award will be subject to appeal before the court, the parties are not certain that such appeal shall be heard.

Where an appeal on the award has been filed to the court, the court shall not hear an application for setting aside the award, as the parties may raise arguments during the appeal

which relate to setting aside of the award pursuant to any of the grounds in set out in section 24.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article 29A of the Arbitration Law provides that 'an application for the confirmation or the setting aside of a foreign award which is subject to an international convention to which Israel is a party, and the convention lays down provisions as to the matter in question shall be filed and heard in accordance with and subject to those provisions'. While the article refers to an application for the 'confirmation or the setting aside of a foreign award' it actually concerns an application for the enforcement or refusal to enforce a foreign award.

There is little case law concerning the enforcement of foreign arbitral awards. Interestingly, unlike in the case of enforcement of foreign arbitration agreements, the attitude of Israeli courts towards the enforcement of foreign arbitral awards is to adhere strictly to the provisions of the Convention and not to interpret the grounds for refusal of enforcement widely.

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Summary

Mauritius boasts a unique legal regime. Its substantive and procedural laws are inspired by English common law and French civil law; it has a legal community that is conversant in common and civil law, and a bilingual population.

Mauritius has ratified both the New York Convention and the Washington Convention through its enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (the New York Convention Act 2001) and the Investment Disputes (Enforcement of Awards) Act 1969, respectively.

In 2008, Mauritius enacted its first modern international arbitration law, the International Arbitration Act 2008 (the Act), on which it has built its ambition to become a seat of choice for regional and international disputes. Until then, domestic and international arbitrations seated in Mauritius were governed by the Mauritius Code of Civil Procedure, the application of which resulted in arbitrations being conducted in a litigation-like manner applying Mauritius procedural law. The Code of Civil Procedure continues to apply today to domestic arbitration.

In order to assure international users that all appointing and other important administrative functions under the Act would be dealt with by a neutral, highly reputable and experienced body, the Act provides an innovative solution by giving certain powers, traditionally entrusted to the courts, to the Permanent Court of Arbitration at the Hague (PCA). In 2010, the PCA set up a permanent office in Mauritius (its first and only overseas office), following the conclusion of a host country agreement with the government of Mauritius in 2009.

In 2011, Mauritius set up its first international arbitration centre in joint venture with the LCIA, the LCIA Mauritius International Arbitration Centre (LCIA-MIAC).[1] The LCIA-MIAC Arbitration Rules, which came into force in 2012, are an adapted version of the LCIA Arbitration Rules and incorporate certain amendments that were subsequently made to the 2014 version of those rules.

In 2013, Mauritius completed its legislative reform with the enactment of the International Arbitration (Miscellaneous Provisions) Act 2013 (which amended the Act and the New York Convention Act 2001), and the Supreme Court (International Arbitration Claims) Rules 2013 (the Court Rules). Both came into force on 1 June 2013. The Court Rules lay down rules of procedure for use in applications made to the Mauritius courts under the Act or the New York Convention Act 2001 (court applications).

The Act is comprised of nine parts and three schedules.[2] It is based on the UNCITRAL Model Law as amended in 2006 (the Amended Model Law), although it departs from it in a number of instances, for it borrows from the English, the Singaporean and the New Zealand arbitration acts and from the works of UNCITRAL on the amendment of the UNICTRAL Arbitration Rules, a number of principles considered by the legislator at the time to be best practice in the field. Importantly, the Act allows parties in international arbitrations to be represented by any person including non-law practitioners and foreign law practitioners.

All court applications made to the courts in Mauritius are heard by a specially constituted court (the Designated Court) comprising three judges selected by the Chief Justice out of six international arbitration specialist judges of the Supreme Court (designated judges), save for applications for interim measures, which are heard first by a judge in chambers (also a designated judge), and is returnable before a panel of three designated judges, including the designated judge who initially heard the matter.

The Act sets out a very pro-arbitration regime, which allows Mauritius and foreign courts to intervene in relation to international arbitrations only to the extent so provided by the Act (section 2A). Courts in Mauritius are required to have regard to the specific features of international arbitration (section 23(1)(b)) and not to disrupt the arbitral proceedings. Until now, none of the attempts made before the Mauritius courts or the Mauritius Designated Court to either seek a disguised review of the merits of an award, to oust the jurisdiction of the tribunal or to challenge the enforcement of foreign or non-domestic awards has been successful. In ***Cruz City 1 Mauritius Holdings v Unitech Limited & Anor***,[3] the Designated Court held that the enforcement of foreign arbitral awards did not undermine the institutional integrity of the Supreme Court nor breach any of the fundamental rights protected by the Constitution of Mauritius, thereby reasserting firmly its non-interventionist approach.

APPLICATION OF THE ACT AND ARBITRABILITY

The Act applies as of right to all 'international arbitrations' seated in Mauritius commenced after 1 January 2009 (sections 3 and 3.A(1)). There are, however, three exceptions to this rule. Section 3A(2) provides that sections 5, 6, 22 and 23 (which deal with the Designated Court's power in support of international arbitration) apply to all international arbitrations, irrespective of their seat. Section 2(1)(c) states that the Act may also apply to arbitrations irrespective of whether it is seated in Mauritius and notwithstanding the fact that it may not satisfy any of the criteria of internationality set out in section 2(1), if the parties agree to opt in to it. Finally, the provisions of the First Schedule only apply to arbitration proceedings if the parties so agree 'by making express reference to that schedule or to that provision' (section 3B), save in disputes arising out of the constitution of global business licence companies (GBL companies) (offshore companies incorporated in Mauritius), to which it is of mandatory application (section 3D(2)). The First Schedule deals with the parties' right to apply to the Designated Court for the determination of a preliminary point of Mauritius law, an appeal on a question of Mauritius law, or the joinder of third parties, or to the tribunal for consolidation of arbitral proceedings.

The Act applies to all 'international arbitrations' (section 3A), with no requirement that the underlying dispute be of a commercial nature, thereby allowing for the arbitrability of non-commercial disputes, including investment disputes. Whereas disputes arising out the constitution of domestic companies are not arbitrable in Mauritius, the Act renders arbitrable disputes arising out of the constitution of GBL companies (section 3D(1)), although the Act imposes in such GBL company constitution disputes that the arbitration be seated in Mauritius (section 3.D(2)).[4] Since 2015, the existence of an arbitration agreement in the constitution of a Category 1 GBL company may be taken into account by the Financial Services Commission to reinforce the 'substance' requirements of those companies seeking eligibility for tax residency purposes.[5] The Act clarifies, for the avoidance of doubt, that disputes between shareholders of GBL companies pursuant to shareholders agreement, and disputes between GBL companies and third parties are also arbitrable (section 3D), irrespective of the seat of the arbitration (section 3D(4)(a)). In case of parallel arbitral proceedings dealing with the same issue under the constitution of a GBL Company and a shareholders' agreement relating to that GBL Company, the consolidation provision of the First Schedule may be of great assistance to parties wishing to reduce costs and the risk of obtaining inconsistent awards.

ARBITRATION AGREEMENTS AND JURISDICTION

Requirements Of Form

Section 4 enacts variant 1 of the new article 7 of the Amended Model Law, and adopts its liberal requirements of form, which agreements need to satisfy to validly constitute 'arbitration agreements' for the purposes of the Act. Section 4 adds that arbitration agreements may be in the form of 'another legal instrument', in addition to an arbitration clause in a contract or in a separate agreement, thereby ensuring that investment treaties are also covered by the Act.[6]

Consumer contracts may only be subject to arbitration if a separate written agreement entered into between the parties to it after the dispute has arisen certifies that the consumer has read and understood the arbitration agreement and agrees to be bound by it (section 8(1)).

Kompetenz-Kompetenz And Separability

The principles of ***Kompetenz-Kompetenz*** and separability are contained in section 20 of the Act, which is adapted from article 16 of the Amended Model Law. The tribunal may decide on its own jurisdiction, including on any objection relating to the existence or validity of the arbitration agreement. A finding by the tribunal that the underlying contract is invalid should not ipso jure affect the validity of the arbitration agreement.

A challenge to the tribunal's jurisdiction may be raised as a preliminary question or together with the merits (section 20(6)). If it is raised as a preliminary question, section 20(7) provides that a party who is not satisfied with the tribunal's ruling may, within 30 days of receipt of that ruling, request the Court 'to decide on the matter'. Although based on article 16(3) of the Model Law, section 20(7) goes further, by enabling parties to challenge before the Designated Court rulings finding against the jurisdiction of the tribunal (in addition to those finding in favour of it).

If the Act is silent on the extent of the powers of the Designated Court under section 20(7), as a matter of logic and established practice, the Designated Court is empowered to rehear and reconsider in full the merits of the matter, for the tribunal cannot itself finally resolve any matter going to its jurisdiction.[7] This principle was upheld in ***Liberalis Limited And Anor v Golf Development International Holdings Ltd and Others***,[8] where the Designated Court found in favour of the jurisdiction of the tribunal constituted in an international arbitration seated in Mauritius (court application No. 1 in support of the 'Massilia Arbitration'): the Designated Court stated that, although it 'may take into account the ruling of the tribunal and express its agreement or disagreement with any views expressed therein, it is not sitting on appeal as such against the said ruling'. It clarified, however, that the principle applied in appeals that findings of facts are not lightly interfered with, shall apply a fortiori to section 20(7) applications, where the Designated Court has not had the benefit of hearing the witness evidence heard by the tribunal.

A party dissatisfied with the tribunal's ruling on jurisdiction is not obliged to make an application under section 20(7), which is subject to a 30-day time limit from the receipt of the award. It may choose instead to apply to the Designated Court to set aside the tribunal's ruling under section 39 within three months of receipt of the tribunal's ruling. While a section 20(7) application is pending before the Designated Court, the arbitral proceedings may continue and the tribunal may make one or more awards.

In ***Massilia Limited v Golf Development International Holdings Limited & Ors***[9] (court application No. 2 in support of the Massilia Arbitration), the Designated Court had to decide

whether the stay of arbitral proceedings by the tribunal pending the determination by the Designated Court of the tribunal's jurisdiction in ***Liberalis***[10] had caused the tribunal to become functus officio, so that it ceased to have jurisdiction to issue interim measures once the stay had been ordered. The Designated Court held that, in light of the fact that no final award had yet been rendered in the arbitration and that only a final award could have had the effect of rendering the tribunal functus officio, the tribunal did have jurisdiction to issue the interim measure granted after and despite the stay of the arbitral proceedings.

Preliminary Issues

Any determination on whether an arbitration is an international arbitration; the juridical seat of an international arbitration is in Mauritius; or the First Schedule applies must, if the tribunal has been constituted, be referred to the tribunal (so that if either of the PCA or a court is seized of the matter, it must decline to hear the matter and refer it to the tribunal) or, if the tribunal has not yet been constituted, the PCA or the Designated Court may make a provisional determination pending the determination by the tribunal (sections 3C and 10(1)).

Substantive Claims Before The Designated Court

Section 5 of the Act is a modified version of article 8 of the Amended Model Law, which gives effect, inter alia, to Mauritius' obligations under article II.3 of the New York Convention and to the principle of ***Kompetenz-Kompetenz***. If a matter is brought before any court in Mauritius, and a party contends that it ought to be referred to arbitration, that court shall automatically transfer the matter to the Designated Court (as specifically constituted under the Act), which shall refer the parties to arbitration. The only instance in which the Designated Court may refuse to refer the matter to arbitration is if it can be shown on a 'prima facie basis' that there is a 'very strong probability that the arbitration agreement is null and void, inoperative or incapable of being performed'. The prima facie test prevents the Designated Court from engaging in a full trial or summary trial of the matter. In case of doubt on a prima facie analysis of the matter, that doubt must be resolved in favour of a referral to the tribunal, which has jurisdiction under section 20 to determine the matter. It is only if the Designated Court is satisfied that the high threshold of strong probability on a prima facie basis has been met, that it may then decide the point on the merits with a full hearing. In ***UBS AG v The Mauritius Commercial Bank Ltd***,[11] the Designated Court highlighted that the 'very strong probability' on a 'prima facie basis' threshold was a 'very high one', and was more stringent than the test of article 8 of the Amended Model Law and that applied in the Canadian case of***Dell Computer Corporation v Union Des Consommateurs and Olivier Dumoulin***.[12]

Appointing The Arbitral Tribunal

Section 11 of the Act that enacts in part article 10 of the Amended Model Law contains a number of provisions relating to the appointment of arbitrators, which apply by default of the parties' agreement, including that the default number of arbitrators shall be three. Section 12 is a modified version of article 11 of the Amended Model Law. It entrusts to the PCA all appointment functions in case of dispute between the parties. If the procedure for appointment agreed by the parties has failed, section 12(4) states that 'any party may request the PCA to take any necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment'. If a party wishes to seek assistance to resolve the appointment difficulties contemplated by section 12(4), it is bound to refer the matter to the PCA. The use of the term 'may' in section 12(4) is only to express

the option available to the parties to seek (or not) assistance to resolve the difficulties and is not the expression of a choice of forum between the PCA and the Designated Court.[13]

The nationality of an arbitrator shall not, of its own, preclude an arbitrator from being appointed, unless otherwise agreed by the parties (section 12(1)). However, when the PCA appoints an arbitrator, section 12(7) requires of it that it shall have regards to any qualification required by the arbitration agreement and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. It shall also take into account the advisability of appointing an arbitrator of a nationality other than those of the parties when appointing a sole, third or presiding arbitrator. Section 13 sets out the grounds for challenging the appointment of arbitrators (based on article 12 of the Amended Model Law), applying the standard test of 'circumstances giving rise to justifiable doubts as to the impartiality or independence of the arbitrator' and standard disclosure requirements. The procedure for replacing or dealing with arbitrators who have become unable to perform their functions (sections 14 to 16) is done in accordance with articles 13 to 15 of the Amended Model Law. A number of additions have been made at sections 16(2) to 16(4), notably the right for a party or members of the tribunal to request the replacement of an arbitrator who has resigned 'for unacceptable reasons or refuses or fails to act without undue delay'.

Parties are jointly and severally liable to pay to the arbitrator(s) such reasonable fees and expenses as are appropriate in the circumstances and in the event that the tribunal's fees would otherwise be the subject of no scrutiny by an arbitral institution, any party may apply to the PCA, which may order that the amount of an arbitrator's fees and expenses be adjusted and fixed in such manner and upon such terms as it may direct (section 18). Finally, arbitrators, arbitral institutions and the PCA are immune from suit, unless bad faith on their part is proved (section 19(1)).

THE ARBITRAL PROCEEDINGS

The Tribunal's Powers

Section 24 of the Act enacts articles 18, 19 and 22 of the Amended Model Law, with amendments. The tribunal has a duty to provide the parties with a 'reasonable' rather than 'full' opportunity of presenting their case (in line with section 33(1)(a) of the English arbitration act), thereby reducing the risk of awards being challenged on unmeritorious grounds (section 24(1)(a)). Section 24(1)(b) expressly sets out the tribunal's duty to adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay and expenses, by reference to section 33(1)(b) of the English arbitration act. Section 24(3) states that failing agreement by the parties, the tribunal may conduct the arbitration 'in such manner as it considers appropriate and determine procedural and evidential matters', including a list of matters expressly set out therein (taken from section 34 of the English arbitration act). Pursuant to sections 24(2) and 24(3), the parties are otherwise free to agree on their own procedure, and although section 24(1) is not expressly stated to be of mandatory application, there is no doubt that the parties cannot derogate from the essential safeguards set out therein.[14]

Section 29(1) enacts article 27 of the Amended Model Law, with no substantive modification. It specifies, without limitation, the powers available to the Designated Court to assist in the taking of evidence. The Designated Court may grant such assistance as is within its powers and subject to its own domestic rules on the taking of evidence.

PCA's Powers To Extend Time Limits

Section 30 is derived from sections 12, 50 and 79 of the English arbitration act. It gives the power to the PCA, on its own initiative or on request from a party and on notice, to extend time limits agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in the Act, as having effect in default of such agreement, including any time limit for commencing arbitration proceedings or for making an award. The PCA has the power to act only if any available recourse to the competent forum has first been exhausted and if a substantial injustice would otherwise occur. This provision may assist the process where deadlines previously agreed by the parties would otherwise frustrate the process.

The Award

Irrespective of the place of signature of an award, the award will be deemed to have been made at the seat (section 36(5)). Decisions of the tribunal are taken by a majority, failing which the presiding arbitrator shall decide (sections 34(1) and 34(3)). In matters of procedure, the presiding arbitrator may decide alone if the parties or all members of the tribunal agree (section 34(2)).

Pursuant to section 38, which enacts article 33 of the Amended Model Law with minor modifications, parties are entitled to ask the tribunal to make an additional award within 30 days of receipt of the award in case of omission of a claim presented to the tribunal, but omitted from the award (with the possibility of holding further hearings). A party may also request the tribunal to correct in its award (or in an additional award) any typographical errors or to interpret such award within the same time frame, although in the case of a request for interpretation, the agreement of all parties is required.

RIGHTS OF RECOURSE

Setting Aside Of Awards

Section 39 of the Act enacts article 34 of the Amended Model Law, which in turn imports into setting aside proceedings the grounds for refusing enforcement under the New York Convention, although it adds two grounds, in line with the modifications made in Singapore and New Zealand, namely if the making of the award was induced by fraud or corruption, and breach of natural justice. There are no mandatory rights of recourse similar to those contained in sections 67 and 68 of the English arbitration act (appeal against award on jurisdiction and appeal on grounds of serious irregularity). However, parties are free to opt in to sections 1 and 2 of the First Schedule,[15] which allow applications to be made to the Designated Court in Mauritius to determine a preliminary question of Mauritius (not foreign) law or to appeal an award on a question of Mauritius (not foreign) law, subject to certain conditions.

As explained below,[16] the Act is silent on whether interim remedies issued by tribunals may be set aside under section 39, leaving it to the Designated Court to determine whether, and if so to what extent, interim measures issued by tribunals may be set aside under section 39.

Recourse Against Decisions Of The PCA

In order to avoid delays in the arbitral process and the use of dilatory tactics by recalcitrant parties, the Act expressly provides that 'all decisions of the PCA under the Act shall be final and subject to no appeal or review', 'subject only to the right of recourse under section 39 against awards rendered in the arbitral proceedings' (section 19(5)). Decisions of the PCA cannot therefore themselves be challenged, although if for instance, the PCA has appointed

an arbitrator in breach of the parties' agreement, the irregularity in the appointment may give rise to a challenge of an award rendered by the tribunal under section 39 on the ground that 'the composition of the arbitral tribunal… was not in accordance with the agreement of the parties'.

Recourse Against Judgments Of The Designated Court

Any final decision rendered by the Designated Court under the Act or the New York Convention Act 2001 is appealable as of right to the Privy Council (section 42(2)), which appeal shall be made in accordance with the procedure applicable to appeals as of right under the Mauritius (Appeals to Privy Council) Order 1968.

Recognition And Enforcement

Section 40 of the Act states that all awards rendered under the Act may be enforcement in Mauritius pursuant to the New York Convention Act 2001, which gives effect in Mauritius to the New York Convention, in particular, the limited grounds on which recognition and enforcement of an award may be refused under article V. While the New York Convention Act 2001 is stated to apply to awards rendered in a state other than Mauritius only, the reference in section 40 to 'awards rendered under the Act' is clearly intended to extend the scope of application of the New York Convention Act 2001 to awards made in Mauritius in international arbitral proceedings (ie, non-domestic awards). In interpreting the New York Convention Act 2001, regard must be had to the interpretation of articles II(2) and VII(1) of the New York Convention adopted by UNCITRAL on 7 July 2006. Further, awards made in English and French are both conveniently deemed to have been made in an official language of Mauritius for the purposes of article IV(2) of the New York Convention.

In ***Cruz City***,[17] the Designated Court held that in enforcement proceedings it would not usually reconsider a ground of objection that has already been considered and rejected in setting aside proceedings before the courts of the seat outside of Mauritius, unless it was 'in the presence of exceptional circumstances'. It also clarified that 'public policy' under article V(2)(b) of the New York Convention was a reference to international public policy of the place of enforcement, not to domestic public policy, nor to international public policy of the law governing the underlying contract.

INTERIM MEASURES

Tribunal's Powers To Issue Interim Measures

The powers of the tribunal to issue interim measures and the rules governing their enforcement are dealt with under section 21 of the Act, which enacts articles 17 and 17A of the Amended Model Law. The Act did not adopt articles 17B and 17C of the Amended Model Law and does not therefore allow tribunals to grant ex parte preliminary orders. Tribunals are otherwise given wide powers under section 21(1) to issue interim measures, but only to the extent such measures order a party to:

- maintain the status quo pending determination of the dispute;
- take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the tribunal process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied;
-

preserve evidence that may be relevant and material to the resolution of the dispute; and

- provide security for costs.

Although not expressly stated in the Act, it is expected that tribunals would be allowed to subject their preliminary orders to any conditions they deem fit, for instance, by requiring an express undertaking as to damages or fortification of that undertaking through the provision of an appropriate bank guarantee or other security.[18]

An interim measure granted by a tribunal shall be recognised as binding and may be recognised and enforced in Mauritius through an application made to the Designated Court under section 22 (enacting articles 17 and 17I of the Amended Model Law), irrespective of the country in which it was issued. Section 22(2) sets out the grounds on which recognition and enforcement may be refused, namely all grounds allowed for setting aside under section 39; breach of an order to provide security; termination or stay of the measure by the competent forum; and incompatibility of the measure with the Designated Court's powers. In case of incompatibility with the Designated Court's powers, the Designated Court may, instead of refusing recognition, vary the terms of the tribunal's order to adapt it to its own powers or procedure, but may not modify its substance. In all cases, the Designated Court is not empowered to undertake a review of the merits of the interim measure (section 22(5)). Section 22 therefore provides a stand-alone regime applicable to the recognition and enforcement in Mauritius (only) of interim measures, which allows parties to circumvent the difficulties that they would otherwise encounter in attempting to apply for recognition and enforcement under article V of the New York Convention.

The Act is silent on whether interim measures granted by tribunals may be set aside under section 39. While section 39 states that only 'awards' may be set aside at the seat, section 22 makes no mention of whether an interim measure granted by a tribunal shall be considered an 'award' for the purpose of the Act and the Act does not define this term. The legislator appears to have wilfully left this issue to be decided by the Designated Court.

Designated Court's Powers To Issue Interim Measures

In line with article 17J of the Amended Model Law, the Designated Court is empowered to grant interim measures in support of arbitration and has the same powers as Mauritius courts have in court proceedings (whether those powers are usually exercised by the judge in chambers or otherwise) and irrespective of the seat of the arbitration (section 23(1)).

If there is no urgency, the application must be made on notice to the other party and the Designated Court requires the permission of the tribunal or the agreement in writing of the other parties to the arbitration (sections 23(3) and 23(4)(b)). If the matter is urgent, the application may be made ex parte and permission of the tribunal is not required, but the Designated Court is only allowed to act if the tribunal or the forum in which the powers are vested is unable for the time being to act effectively (section 23(5)). The Designated Court may, if it wishes, hand over control back to the tribunal once it becomes able to act effectively again (section 23)(c)). In ***Amana Middle East Holdings Limited & Anor v Al Churair Abdul Aziz Abdulla & Ors***,[19] the Designated Court found that it had jurisdiction to issue an interim injunction under section 23 in light of the fact that the tribunal had not yet been constituted and ordered that the order shall cease to have effect 'upon order of the tribunal'.

The Designated Court's powers to grant interim measures are strictly limited to the powers set out in sections 23(3) to 23(6) of the Act and exclude any other powers, which it may otherwise have under domestic legislation, for instance, pursuant to its inherent jurisdiction or other powers. The Travaux Préparatoires clarify that the Designated Court should not follow the approach of the English courts, which have used their inherent jurisdiction and/or section 37 of the English Supreme Court Act 1981 to justify the grant of measures in cases where the section 44 conditions of the English Act (courts' powers in support of arbitration) had not been fulfilled.[20]

Court Rules

The Court Rules provide for a new procedural regime applicable to all court applications made under the Act or under the New York Convention Act 2001. This new regime is aimed at importing into court proceedings relating to international arbitration, rules and practices which are better suited to the expectation of parties in international arbitrations, than those used in pure domestic court proceedings. The Court Rules impose, for instance, the use of witness statements with minimal formality, time limits to ensure good case management, rules on services out of jurisdiction, and a new costs regime.

Costs

The rules on costs in arbitral proceedings seated in Mauritius are in line with standard international arbitration practice and are inspired from the English, Singaporean and New Zealand arbitration acts. By default of the parties' agreement, section 33(2)(a) provides that 'the costs of the arbitration shall be fixed and allocated by the arbitral tribunal in an award, applying the general principles that "cost should follow the event", except where it appears to the tribunal that this rules should not apply fully in the circumstances of the case'. The amount which a party is entitled to recover under section 33(2)(a)(ii) is a 'reasonable amount reflecting the actual costs of the arbitration and not a nominal amount only'. In the absence of an award on costs, each party shall bear its own costs and shall share those of the tribunal, the PCA and of any institution in equal share (section 33(2)(b)).

As for the recovery of costs in court applications, although the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party, the Designated Court is given very wide powers to 'make a different order', taking into account all of the circumstances (including the conduct of all parties, whether a party has succeeded on part of his case, and settlement offers) and to decide on the type and amount of costs that a losing party may be ordered to pay (Rule 19 of the Court Rules).

Confidentiality

The Act is silent on the question of confidentiality of international arbitrations. This allows tribunals and courts to cater for the different expectations and needs that may arise in commercial and investment arbitrations. Despite this silence, tribunals and courts are expected to protect the confidentiality of arbitral proceedings, which has long been implied in arbitral proceedings as a matter of law, practice or expectation of the parties, save where exceptional circumstances would justify otherwise.[21] In 2015, Mauritius took a firm commitment towards allowing for more transparency in investment arbitrations by ratifying the Mauritius Convention on Transparency.

As regards confidentiality in court applications, section 42(1B) of the Act makes it a principle that hearings shall be held in public, while allowing the Designated Court discretion to exclude

persons other than the parties and their legal representatives from the proceedings, where publicity would prejudice the interests of justice (taking into account the specific features of international arbitration, including any expectation of confidentiality, which the parties may have had when concluding their arbitration agreement, or any need to protect confidential information). Section 42(1C) of the Act also allows the Designated Court to prohibit the publication of all information relating to court proceedings, which is otherwise public.

Notes

1. Until then, only one local arbitration centre affiliated with the Mauritius Chamber of Commerce and Industry (MARC), provided administration services to the then predominant domestic arbitration market. MARC now also administers international arbitrations seated in Mauritius. Mauritius has also attracted the interest of the Chartered Institute of Arbitrators, which set up a local branch in Mauritius in 2009.
2. The Third Schedule to the Act provides a useful table of corresponding provisions between the Act and the Amended Model Law.
3. [2014] SCJ 100.
4. The Second Schedule to the Act provides a model arbitration clause for use by shareholders of GBL companies wishing to incorporate an arbitration agreement in the constitution of their company.
5. This change was brought about following amendments made in 2013 to Chapter 4 of the Financial Services Commission's Guide to Global Business. Note however that this only applies to Category 1 GBL companies.
6. See Travaux Préparatoires, paragraph 39.
7. See Travaux Préparatoires, paragraph 76.
8. [2013] SCJ 211.
9. [2014] SCJ 188.
10. Supra fn 8.
11. [2016] SCJ 43.
12. (2007) 2 section C.R. 801.
13. See comments from Anne-Sophie Jullienne and Salim Moollan QC to this effect at the Mauritius International Arbitration Conference 2012, Conference Paper, pp. 86 and 99.
14. See Travaux Préparatoires, paragraph 97.
15. Save for shareholders of a GBL companies who agree to arbitrate disputes arising out of the constitution of a GBL company, to which the First Schedule is of mandatory application.
16. See section on interim remedies.
17. Supra, footnote 3.
18. See Travaux Préparatoires, paragraph 84.
19. [2015] SCJ 401.
20. See Travaux Préparatoires, paragraph 93.
21. See Travaux Préparatoires, paragraph 108.

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Mozambique

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Summary

INTRODUCTION

The trend of high levels of foreign investment in Mozambique since 2010 was recently confirmed by the statistics released by the World Bank which show that the net foreign investment in Mozambique in 2014 amounted to US$4.9 billion (the third-largest foreign investment receiver in Africa after South Africa and the Republic of Congo). The existence of these high levels of foreign investment is critical to understand the role that arbitration has gradually been given by the Mozambican government as the preferred dispute resolution method provided in contracts with foreign investors and, more generally, in the legislation that regulates some of the more important sectors for Mozambican economy.

Arbitral tribunals are today expressly recognised by the Constitution of Mozambique as part of the judicial organisation. Though only in 2004 did arbitration receive constitutional recognition, references to arbitration in the Mozambican legal system already existed by then. The Civil Procedure Code of 1961 had already regulated arbitration by admitting arbitration agreements on matters that were not related to inalienable rights.

The legal framework regarding arbitration went beyond the aforementioned and original recognition, being based today primarily on the following provisions: (1) the Arbitration, Conciliation and Mediation Law (ACML), approved by Law No. 11/99, of 8 July; and (2) the Administrative Procedure Law, approved by Law No. 7/2014, of 28 February.

The main principles applicable to arbitration in Mozambique correspond to those which are widely accepted in the modern arbitration laws worldwide and although the ACML is not based in the UNCITRAL Model Law, it is clear that a large number of the legislative solutions are inspired in that Model Law.

These above referred two pieces of legislation have a cross-sector approach in arbitration matters – regulating its essential aspects – but there is also separate legislation that recognises arbitration as the appropriate mechanism for the resolution of certain disputes in specific sectors. In this regard, three specific regimes should be noted as particularly relevant to international investors:

INVESTMENT LAW

According to the Investment Law (approved by Law No. 3/93, of 24 June), the final resolution of any dispute involving the state and foreign investors in the context of investments authorised and carried out in the country takes place by means of arbitration, unless otherwise agreed.

THE LEGAL FRAMEWORK OF PUBLIC-PRIVATE PARTNERSHIPS

Another example of the importance of arbitration in Mozambique is the legal framework of public-private partnerships (approved by Law No. 15/2011, of 10 August), which includes specific provisions allowing for the use of arbitration for the resolution of disputes arising under that type of project.

PETROLEUM LAW

With relevance in the oil sector, the Petroleum Law (approved by Law No. 21/2014, of 18 August) provides that disputes arising out from agreements or concessions falling within its

scope, if not resolved through amicable means, must be submitted to arbitration or to the competent state courts, on the basis of what is set forth in the relevant contractual terms.

The existence of a number of special arbitration regimes is perhaps the most distinctive feature of Mozambican arbitration and is one that should be carefully considered in the drafting of arbitration agreements in view of some degree of overlapping that sometimes exists between some of existing regimes and also in view of some ambiguities caused by mechanisms of mandatory arbitration in some sectors.

The importance of arbitration as a dispute resolution mechanism in Mozambique is undoubtedly clear, and stems directly from the existence of cross-sector legislation applicable to large investment projects that are taking place in the country and that clearly indicates a preference for arbitration as a method of resolving disputes. The favourable approach of the Mozambican state in relation to arbitration is also confirmed by the fact that it ratified the New York Convention in 1998 and the Washington Convention in 1995.

INTERNATIONAL, DOMESTIC AND ADMINISTRATIVE ARBITRATION

In the light of the legislation currently in force, arbitration in Mozambique can be categorised into three types: domestic, administrative and international arbitration.

Domestic arbitration corresponds to arbitration proceedings that present connection elements only with the Mozambican state and covers the majority of disputes that do not show specificities that justify their inclusion in the remaining categories. In this context, Mozambican legislation provides for a wide definition of disputes that may be resolved by arbitration, opting for a general rule of admissibility that entails only two exceptions: (1) on the one hand, all disputes that are subject to special regimes that set aside the rules provided for in Law No. 11/99, of 8 July; (2) on the other, disputes relating to inalienable or non-negotiable rights, being that this limitation can be primary or supervening. This means that if the dispute involves initially inalienable or non-negotiable rights, it cannot be brought to arbitration at any stage. However, if questions of such nature are raised during the dispute, the arbitral tribunal should refrain from issuing a decision and refer the parties to the state courts for resolution of this particular issue.

The use of arbitration under the above-mentioned law is available to private and public entities. The latter, however, can only resort to arbitration in relation to private law or private contractual disputes. For any other disputes, public entities may only enter into arbitration agreements if allowed by law. It is in this field that administrative arbitration becomes relevant, as discussed below.

The definition of international arbitration includes all disputes relating to international trade interests, namely (1) when the parties to an arbitration agreement have, at the time of conclusion of that agreement, their business domicile in different countries; (2) the place of arbitration or the place in which a substantial part of the obligations resulting from the underlying agreement is to be performed outside the country in which the parties have their place of business or the place with which the subject matter of the dispute is deemed to be closely connected is also located outside the country in which the parties have their place of business; or (3) the parties have expressly stipulated that the subject matter of the arbitration agreement has connections with more than one country. If no specific stipulation is set forth by the parties, the provisions applicable to domestic arbitration are also applicable to international arbitration. The arbitral tribunal shall decide in accordance with the rules of law chosen by the parties or, failing such provision, the rules of law determined by the conflict of

laws rules deemed appropriate by the arbitral tribunal. In any case, the arbitral tribunal shall take into account the usages of the trade applicable to the transaction.

Finally, regarding administrative arbitration, the respective legal framework (approved by Law No. 7/2014, of 28 February) is applicable to the resolution of disputes arising from administrative legal relations, which typically are executed with the intervention of the state or legal entities subject to a public law regime. In this context, administrative arbitration does not cover the entirety of disputes that can be triggered within the mentioned administrative legal relationships, but surely covers disputes of central importance in the economic activity. In fact, and with greater relevance, disputes that have as their object administrative contracts, such as contracts for public works, public service concessions or public works concessions, concessions for the operation of particular economic activities, are included within the scope of this type of arbitration procedure.

MAIN FEATURES

Legal Principles

In one of its initial articles, the ACML identifies and defines the set of core principles applicable to arbitration. These are the principles of liberty, flexibility, privacy, integrity, promptness, equality and due process and they are the main pillars of arbitration in Mozambique.

On this regard, a special reference should be made to the principle of integrity as an overarching principle to the functioning of the arbitral tribunal. It applies to arbitrators and seeks to capture the well-established prerequisites of arbitrators' independence and impartiality throughout the dispute. It is in the context of the implementation of this principle that arbitrators are required to remain in a position of equidistance from the parties and from the interests underlying the position of each of the parties, by observing the ethical rules set forth in Law No. 11/99, of 12 July, apart from fulfilling any requirements laid down in the arbitration agreement. And it is also in the context of the implementation of this principle that the same piece of legislation ensures procedural mechanisms for refusal of arbitrators, enforceable by either party along the course of the arbitral proceedings and with the possibility of appeal to the state courts.

Mention should also be made to the relevance that the principles of equality and due process are given by the ACML, which requires that the parties are given, throughout the process, equal treatment, with identical possibilities of intervention and presentation of their case. The ACML expressly provides that both parties should be given the possibility of intervening, in oral hearings or in writing, before a decision is granted by the arbitral tribunal. These are guarantees of a fair trial, applicable to any decision of a jurisdictional nature and its non-observance may compromise the validity of the arbitration award.

Arbitration Agreement

The submission of any dispute to an arbitral tribunal is made through an arbitration agreement, that can have the nature of a specific agreement to arbitrate, while respecting to a (existing) specific dispute, or of an arbitration clause when covering disputes that could (potentially) arise in the context of a concrete legal relationship.

In the light of Mozambican law, the arbitration agreement should always be executed in writing, otherwise it is considered to be null and void. It shall be executed in any document signed by the parties, including exchange of letters, telex, fax or other means of

communication to prove its existence, or in which the existence of an agreement has been alleged by one party and has not been challenged by the opposing party. The agreement can also be incorporated by reference to another document that includes an arbitration agreement, as long as the reference is made in (and to) a written document and in terms that make clear the intention to incorporate the arbitration agreement on the contractual instrument at stake.

ARBITRAL PROCEDURE

Beginning Of The Proceedings

Arbitration is triggered through a written communication sent by (at least) one of the parties in the arbitration agreement to the other(s). This communication must accurately describe the object of the dispute and, where appropriate, designate the arbitrator to be appointed by the requesting party.

The regime will be different if the arbitration agreement so provides or if autonomous rules providing for a different mechanisms of constitution of the arbitral tribunal are expressly incorporated into the arbitration agreement.

Arbitrators' Appointment

The arbitral tribunal may consist of a sole arbitrator or of several, in an uneven number. Should the parties fail to agree on the number of members of the arbitral tribunal, it shall be composed of three arbitrators. In the case of a collective tribunal, the appointment of the first arbitrator must be accompanied by an invitation to the counterparty to carry out its respective appointment, failing which this appointment shall be made by the appointing authority identified by the parties as competent for that purpose or, in the absence of such indication, by the state courts.

Following the appointment of the second arbitrator, directly by the counterparty or by a different entity, the two appointed arbitrators will appoint the third arbitrator (or the arbitrators already appointed will appoint the presiding arbitrator, when the composition of the arbitral tribunal does involve more arbitrators), being therefore concluded the constitution of the arbitral tribunal. From that moment on, the deadline for the arbitral tribunal to issue a decision begins.

The two legal regimes described above, related to the ACML and the law applicable to administrative arbitration, also differ in terms of the deadline for issuing a decision. Both are consistent with regard to the supplementary nature of the regime provided for in such pieces of legislation, allowing the parties to agree on specific deadlines. However, in the absence of such agreement, the rules are distinct. In the case of administrative arbitration, the deadline for a decision is of six months and can be extended by a period corresponding to half of its initial duration. In contrast, according to the ACML the deadline is also of six months but its extension can be determined by the arbitral tribunal or agreed between the parties for a period up to twice the initial term.

Procedural Rules

In terms of the applicable procedural rules, parties are free to design the procedure they wish to adopt for their arbitration. In case the parties fail to provide for such rules, the arbitral tribunal will be given the power to determine the applicable procedural rules.

The procedural rules must comply with the principles mentioned above and it is unequivocal that such rules are widely flexible. In terms of evidence, any means of evidence which are accepted by civil procedure law are admissible, which means that, in the context of arbitration, all means of evidence that are not prohibited by an imperative legal provision may be used. In general, the rule is that the admissible evidence is always presented in a context of an adversarial hearing.

State Courts' Intervention

Although the arbitral tribunals are constitutionally recognised as actual courts, there are several circumstances in which state courts intervention is required in disputes covered by an arbitration agreement. The ACML provides for the typical cases of state court intervention in the context of arbitration.

Injunctions And Provisional Measures

In the context of interim remedies, the parties may request state courts to order interim measures in respect to a dispute covered by an arbitration agreement. In this respect, it should be noted that the request before the state courts and its subsequent decision in no way interferes with the competence of the arbitral tribunal to decide the underlying dispute, nor implies the waiver by the requesting party to the arbitration agreement entered into previously. In fact, where there is an arbitration agreement, it is to the arbitral tribunal to issue the first binding decision in matter of competence (Kompetenz-Kompetenz). As a consequence, the filing for interim measures before the state courts, which may also be required within the arbitration, has no impact on the delimitation of the scope of the arbitration agreement. As a result, the choice of the appropriate court to ensure precautionary remedies is influenced only by the specific circumstances of the case and the stage at which said dispute is.

State Court Assistance In Taking Of Evidence

Intervention of the state courts may still take place in the presentation of evidence, by way of assistance to arbitral tribunals where one of the parties or a third-party is resistant or unwilling to observe the duty of collaboration with the arbitral tribunal. This position of resistance should not mean the impossibility of access to relevant evidence, reason why, in these situations, state courts may be requested to assist in taking evidence, using their coercive powers if necessary. To such effect, it is only required that this request is made by the relevant arbitral tribunal or authorised by it in cases where the request is made by one of the parties.

Setting Aside And Enforcing An Arbitral Award

Following an arbitral award, state courts may also be called to intervene. In this case, intervention may relate to two distant realities: in the context of an appeal for annulment; or for the purposes of its enforcement.

On the first point, the award is in principle final. Its respective challenge is only permissible by way of an action for annulment, whose major pleas, in turn, are quite limited and do not involve the examination of the merits of the arbitral award (except for one specific situation). In this sense, appeal for annulment (set aside) of the award can only be based on the following grounds:

- the parties to the arbitration agreement were under some incapacity;

- the said agreement is not valid under the law to which the parties have subjected it to or, failing any indication thereof, under the law of the Mozambican state;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
- the award deals with a dispute not referred to in the arbitration agreement or not contemplated in the submission to arbitration or contains decisions on matters beyond the terms of the arbitration agreement or of the submission to arbitration, provided that if the provisions of the award in respect of matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedures are not in accordance with the agreement of the parties, unless such agreement is in conflict with a provision of the ACML that the parties cannot derogate from; and
- the subject matter of the dispute is not subject to settlement by arbitration under the laws of Mozambique.

Apart from this grounds for annulment, the ACML also admits the challenge of an award contrary to the public policy of the Mozambican state.

In terms of enforcement, the arbitral award is considered as having the same degree of enforceability of a state court decision. Enforcement procedures should be brought before state courts, under the terms of the specific procedure provided for in civil procedural legislation.

CLOSING REMARKS

Mozambican law does promote arbitration as a dispute resolution mechanism. In fact, the Mozambican state acceded to international conventions that present in essence the relevance of arbitration as an alternative dispute resolution mechanism. Similarly, the procedural legislation in force is in favour of arbitration and in implementing it there are several sectoral pieces of legislation in relevant and strategic areas that identify arbitration as a central mechanism, and surely with a very significant margin for growth in resolving disputes.

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Summary

The limitation laws of various states[1] in Nigeria are applicable to arbitration in the same manner that they apply to actions in court. Among other considerations, limitation laws reflect the public policy that there must be an end to litigation and so a party who is tardy and does not use his right of action before the limitation period is over loses that right for ever as his cause of action is extinguished. The consequence of a successful plea of the defence of limitation to a claim is, therefore, quite drastic as such a suit is liable to be dismissed.[2] The interaction of limitation law with arbitration is on different levels and often raises difficult questions. For instance, what is the time frame within which a party must initiate arbitration proceedings in order not to lose its right of action? What is the time limit within which an arbitral award must be enforced? When does that time begin to run? Does it begin to run from the date the award was rendered or from the date of the breach of the underlying contract?

In this article, we have examined the issue of the limitation period for the enforcement of an arbitral award in Nigeria, and, specifically, the question of when does time begin to run for the purposes of an application to enforce an arbitral award? As already indicated, Nigeria is a federation of 36 states and the Federal Capital Territory, Abuja, and each state has enacted its own limitation law. While the limitation laws of the various states in Nigeria are in many respects similar to the Limitation Law of Lagos State, we have based our presentation mainly on the Limitation Law of Lagos State because of the pre-eminent status of Lagos as the commercial nerve centre of Nigeria and the entire West African sub-region as well as an emerging seat of arbitration in Africa.[3] However, where necessary, we also make reference to the limitation laws of other states in Nigeria.

LEGAL FRAMEWORK OF ARBITRATION IN NIGERIA

Nigeria is a common law country and the principal law on commercial arbitration is the Arbitration and Conciliation Act (ACA).[4] Nigeria is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (otherwise known as the New York Convention) and has, in the ACA, domesticated the Convention. The ACA is in substantial conformity with the UNCITRAL Model Law, which was adopted at the Convention of the United Nations Commission on International Trade on 18 June 1985, and recommended to member countries by the General Assembly of the United Nations on 11 December 1985. Although the UNCITRAL Model Law was revised in 2006, Nigeria has not yet amended the ACA to incorporate the revised provisions of the Model Law. It should be mentioned that the government of Lagos State in Nigeria has enacted its own Arbitration Law, which substantially conforms with the revised provisions of the Model Law.

LIMITATION PERIOD FOR ENFORCEMENT OF AN ARBITRAL AWARD IN NIGERIA

Lack Of Provision In The Nigerian ACA On The Limitation Period For Enforcement Of An Arbitral Award

The ACA does not provide for a limitation period for the enforcement of an arbitral award in Nigeria. However, the limitation laws of the various states in Nigeria provide that the limitation laws shall apply to arbitration as they apply to court actions (for example, in section 62 of the Limitation Law of Lagos State (the Lagos Limitation Law))[5].

Generally, however, the limitation period for the enforcement of an action based on contract is either five or six years, depending on the applicable limitation law.[6] For instance, the Lagos Limitation Law provides that an action founded on simple contract shall not be brought after the expiration of a period of six years from the date on which the cause of action accrued.

In relation to enforcement of an arbitral award, the Lagos Limitation Law goes further to provide that an action to enforce an arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the ACA cannot be commenced after a period of six years from the date of the cause of action. The Law provides as follows[7]:

> The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued–
>
> a actions founded on simple contract
>
> [....]
>
> d
> actions to enforce arbitration award, where the arbitration agreement is not under seal or where the arbitration is under any enactment other than the Arbitration and Conciliation Act.

Section 7(1)(d) of the Limitation Act of the Federal Capital Territory, Abuja,[8] (the Limitation Law of the FCT) is similar to section 8(1)(d) of the Lagos Limitation Law. Under the limitation laws of some other states in Nigeria, actions founded on breach of contract are required to be commenced within a period of five years from the date the cause of action accrued. For example, section 16 of the Limitation Law of Rivers State provides that no action founded on contract shall be brought after the expiration of five years from the date on which the cause of action accrued.[9] It is to be noted that while, as shown above, the Lagos Limitation Law specifically lists an action to enforce an arbitral award among causes of actions that cannot be litigated after the expiration of a period of six years from the date of the accrual of the cause of action, the limitation laws of most states only provide for the time limit within which to commence an action founded on a contract (which includes arbitration) while also providing that the limitations law shall apply to arbitration as it applies to court actions.

While there is no question that an arbitral proceeding must be commenced within the time limit provided in each applicable limitation law (ie, five or six years depending on the applicable limitation law), the crucial question is when does time begin to run for the purposes of an application to enforce an arbitral award? Is it from the date of the initial breach of the underlying contract or from the date of publication of the award?

The Supreme Court of Nigeria was confronted with this question in the case of Murmansk State Steamship Line v Kano State Oil Millers Ltd.[10] The plaintiff had entered into a charter party agreement with the defendant to provide a cargo of groundnuts. The charter party included an agreement to refer any dispute to arbitration under Russian law. The defendant defaulted under the charter party by failing to load the cargo of groundnuts when the ship was presented at the port by the plaintiff to be loaded on the agreed date – 28 February 1964. The dispute was referred to a Moscow arbitral tribunal, which made an award in favour of the plaintiff against the defendant on 28 February 1966. The plaintiff brought an action on 2 February 1972 in the High Court of Kano State to enforce the arbitral award. The High Court dismissed the plaintiff's claim and the Court of Appeal affirmed the High Court's decision. Dissatisfied with the decision of the Court of Appeal, the plaintiff further appealed to the Supreme Court.

In its decision, the Court held that the limitation period for the enforcement of an arbitral award begins to run from the date the cause of action accrued and not the date when the award was issued and that the statutory limitation period[11] for the enforcement of the award began to run in 1964 when the underlying agreement between the parties was breached and not from the date of publication of the award in 1966.

The Supreme Court restated its position on this point in the case of City Engineering. (Nig.) Ltd v Federal Housing Authority.[12] In that case, the Supreme Court in interpreting section 8(1)(d) of the Lagos Limitation Law, held that since the arbitration agreement between the parties in that case was not under seal and the arbitration was not under any enactment other than the ACA, the limitation period for enforcement of the award was six years, starting from the date of the breach of the underlying contract, which is the date of accrual of the cause of action.

Briefly, the facts of that case were that the parties entered into a written agreement dated 17 December 1974 whereby the appellant (City Engineering Nig. Ltd) was to build a number of housing units in a town in Lagos State. The agreement contained an arbitration clause by which all matters in dispute in connection with the execution of the contract were to be submitted to an arbitrator. A dispute arose between the parties and on 12 December 1980, the respondent terminated the contract. The dispute was later submitted to an arbitrator on 11 December 1981. The arbitration ended in November 1985 when an award was issued in favour of the appellant. Upon the respondent's failure to pay the award debt, the appellant applied to enforce the award in November 1988.

The respondent resisted the enforcement of the award on the ground that the award had become statute barred and, therefore, unenforceable. The High Court of Lagos State held that the cause of action arose on or around 12 December 1980 and expired six years after that date; and that the time limit for enforcement of the cause of action was six years, which ran out on 12 December 1986. The appellant was dissatisfied with the decision and appealed to the Court of Appeal, which upheld the decision of the High Court.

On a further appeal to the Supreme Court, it was agreed by both parties that section 8(1)(d) of the Lagos Limitation Law was the applicable limitation law and that the limitation period was six years. The point of divergence, however, was in relation to the date that the limitation period began to run (ie, whether on 12 December 1980 when the cause of action arose or November 1985 when the arbitrator made his award). In its decision, the Supreme Court upheld the decisions of both the High Court and the Court of Appeal and held that the limitation period began to run from the date of the accrual of the cause of action in 1980 and not from the date of the award. It is noteworthy that the decision of the Supreme Court on this matter was handed down by a full panel of the Supreme Court that was constituted to review all the previous decisions of the Supreme Court that were thought to be in conflict with the position adopted by the Supreme Court in the case of Murmansk State Steamship Line v. Kano State Oil Millers Ltd. It is equally important to note that the Supreme Court took the opportunity to robustly consider both academic and English judicial decisions that were cited in the brief of argument that was submitted by the appellant and that tended to suggest that a new cause of action is created upon the publication of an arbitration award and that for purposes of an action to enforce such an award time begins to run from the date of the award and not from the date of the underlying cause of action.[13]

It has been argued that the provision of section 7(1)(d) of the Limitation Law of the FCT, which is in pari materia with section 8(1)(d) of the Lagos Limitation Law fails to draw a line

between commencing an action in arbitration and enforcing an arbitration award and that it is a fresh action under the common law to enforce the implied agreement of the parties to give effect to a valid arbitration award that the aforesaid sections 7(1)(d) of the Limitation Act of the FCT and 8(1)(d) of the Lagos Limitation Law but not an application under section 31 of the ACA to enforce an arbitral award.[14]

The current position of Nigerian law to the effect that the time limit for enforcement of an arbitral award begins to run from the date of the breach of the underlying contract that gave rise to the award as opposed to the date of the award creates practical difficulties and could potentially lead to bizarre and disastrous outcomes. For instance, it would mean that if arbitral proceedings are commenced within the statutory limitation period but for whatever reasons the award is issued after the expiration of the applicable limitation period, the person in whose favour the award has been made would only have an unenforceable award and therefore, a pyrrhic victory. We submit that the better view is that the publication of the award gives rise to a fresh cause of action and, therefore, the time to enforce the award should be reckoned from the date of the award.[15] There is, therefore, an urgent need for a legislative reform or amendment of the ACA to correct the anomaly.

It is noteworthy that the Lagos State Arbitration Law[16] is already ahead of the curve on this issue as it has introduced significant changes to ameliorate the effect of section 8(1)(d) of the Lagos Limitation Law and its interpretation by the Supreme Court. The Lagos State Arbitration Law contains two very important provisions relating to the application of limitation laws to arbitral proceedings. First, it provides that in calculating the time prescribed by the applicable limitation laws for the commencement of actions in courts, arbitral and other proceedings in respect of a dispute that was the subject of either an award that the Court orders to be set aside or declares to be of no effect, or the affected part of an award that the Court orders to be set aside or declares to be of no effect, the period between the commencement of the arbitration and the date of the order of the court shall be excluded. Second, the Law provides that in calculating the time limit for the commencement of proceedings to enforce an award, the period between the commencement of the arbitration and date of the award shall be excluded.

This provision, which has no equivalent in the ACA, has addressed, with respect to arbitration conducted under the Lagos State Arbitration Law, the concerns of arbitration practitioners and the business community regarding the effect of the decisions of the Supreme Court in the Murmansk and City Engineering cases (see above). Although section 64 of the Lagos Limitation Law provides that 'Where the court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration will cease to have effect with respect to the dispute referred, the court may further order that the period between the commencement of the arbitration and the date of the order of the court will be excluded in computing the time fixed by this Law or any other limitation enactment for the commencement of the proceedings, including arbitration',[17] it should be observed that this provision has two defects. First, it does not address the problem of when time begins to run for the purposes of enforcement of an arbitral award. Second, on the issue of an award that the court orders to be set aside, the power of the court to order the exclusion for limitation purposes of the period between the commencement of arbitration and the date of the order is discretionary because of the use of the word 'may'. Under Nigerian law the use of the word 'may' in a statute connotes discretion compared with the use of the word 'shall', which is imperative.[18]

In light of the foregoing we also recommend an urgent review and amendment of the Lagos Limitation Law and the limitation laws of the various states of the federation in order to include provisions similar to those contained in section 35 subsections 2(a) and (b) and (5) of the Lagos State Arbitration Law.

CONCLUSIONS AND RECOMMENDATIONS

The objective of the parties when submitting their disputes to arbitration is to completely and finally resolve their disputes by obtaining enforceable awards. The hallmark of a modern arbitration law is, therefore, to enhance the efficiency and effectiveness of an arbitral award by removing roadblocks to enforceability of the award. The current state of Nigerian law regarding the time limit within which an arbitration award can be enforced is not pro-arbitration to the extent that the limitation period is reckoned from the date of the original breach as opposed to the date when the award is issued. While the Lagos State Arbitration Law has moved ahead of the curve in this regard, there is a significant need for reform in the ACA, a federal statute, because the modern and commendable provision contained in the Lagos State Arbitration Law would only apply to arbitrations conducted under or pursuant to that Law but not to those conducted under the ACA.[19] Most arbitration agreements in Nigeria or involving Nigerian counterparties are made subject to the ACA. Unless this lacuna in the law is urgently addressed, parties to an arbitration agreement may be unwilling to subject their arbitrations to the ACA. This is more so because section 8(1)(d) of the Lagos State Limitation Law and section 7(1)(d) of the Limitation Law of the FCT seem to recognise two exceptions to the rule therein provided, namely (1) when the arbitration agreement is under seal; or (2) where the arbitration agreement is under any enactment other than the Arbitration and Conciliation Act.

Endnotes

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Saudi Arabia

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Summary

INTRODUCTION

Sources Of Law

The paramount body of law in Saudi Arabia is the shariah. The shariah comprises a collection of fundamental principles derived from a number of different sources, which include the Holy Quran and the Sunnah.[1] There are four primary Islamic schools of jurisprudence - Hanbali, Hanafi, Maliki and Shafi.

There are no statutory enactments with respect to many areas of law. For example, there is no relevant statutory body of law in Saudi Arabia that governs mortgages or other security interests in general.

In addition to the shariah, law in Saudi Arabia is derived from promulgated legislation. Legislation is adopted in various forms, the most common of which are royal orders, royal decrees, Council of Ministers resolutions and ministerial resolutions and departmental circulars. All such laws are ultimately subject to, and may not conflict with, the provisions of the shariah.

The Basic Law came into force in 1992. Royal orders may be made by the King dealing with any matter. For example, the Basic Law, the Consultative Council Law, the Council of Ministers Law and the Provincial Councils Law were all adopted pursuant to under royal order and ministers are appointed and removed by royal order. Royal decrees are made to approve international treaties, concessions, enactments and amendments recommended by the Council of Ministers. The Council of Ministers is also permitted (pursuant to the Council of Ministers Law) to adopt resolutions to regulate specific issues without any requirement for approval by royal decree. Ministerial resolutions may be adopted by a minister pursuant to the powers conferred upon him by a specific law. Ministerial resolutions are usually used to set out rules of implementation of a specific law. Ministerial circulars are also promulgated by ministers pursuant to the powers conferred by a specific law.

All courts and adjudicatory bodies are required to interpret secular legislation in accordance with shariah principles and the Board of Grievances and, naturally, the shariah courts, will do so. The SAMA Committee has, however, exhibited some flexibility to the extent referred to later in this article.

Previous decisions of Saudi Arabian courts and adjudicatory bodies are not considered to establish binding precedents for the decision of later cases. As a result of this, the courts and other adjudicatory bodies have considerable discretion in their interpretation and application of the shariah and the secular laws.

The Board of Grievances Law, which grants the Board of Grievances jurisdiction over administrative law matters, including claims or compensation from the government or challenges to a minister's decision, contains no provision for sovereign immunity. The concept of sovereign immunity is not recognised under the shariah. The shariah is perceived as the word of God, to Whom all human beings are subordinate. Accordingly, there is no provision in the laws of Saudi Arabia for the immunity of the state's assets from attachment. In practice, however, were any attachment required, it could only be effected by government officials.

DISPUTE RESOLUTION

Shariah Courts

The shariah courts, generally, have jurisdiction over all civil claims, except where jurisdiction has been reserved to one of the other adjudicatory bodies established in the Kingdom (ie, the Board of Grievances or one of the specialised committees, such as the labour committees, the Banking Dispute Committee or the SAMA Committee). In particular, the shariah courts have jurisdiction over all family law, real property matters and the majority of criminal matters. The balance of criminal matters are within the jurisdiction of the Board of Grievances.

Board Of Grievances

The Board of Grievances was established and laid out under article 8 of the Board of Grievances Regulations promulgated under Royal Decree No. M/51 dated 17/7/1402 H. (10 May 1982) (the Board of Grievances Law). Further, pursuant to Council of Ministers Resolution No. 241 dated 26/10/1407 H. (23 June 1987), confirmed by Royal Decree No. M/63 dated 26/11/1407 H. (23 July 1987), the commercial disputes between private sector litigants caem under the jurisdiction of the Board of Grievances. Such jurisdiction is exercised by the Board of Grievances' commercial divisions.

There are also secondary divisions or sub-divisions of the Board of Grievances located at the Board's headquarters and branches. These sub-divisions exercise the Board's jurisdiction over applications for the enforcement of foreign judgments and arbitral awards, proceedings relating to the rights of government officials and under the Civil Service Law and the Civil Service Pensions Law, proceedings relating to claims for relief against government financial claims and disputes of limited significance referred to any such subdivision by the President of the Board.

ARBITRATION

National Arbitration Rules

Arbitration in Saudi Arabia is governed by the Arbitration Regulation issued under Royal Decree No. M/34 dated 24/5/1433H corresponding to 16/4/2012G (the Arbitration Regulation) and its Rules are yet to be finalised.

The Arbitration Regulation sets out over 58 articles a comprehensive set of provisions that govern, among other things, agreements to arbitrate existing or future disputes, the appointment and removal of arbitrators and their powers and qualifications, the conduct of arbitration proceedings, and the annulment and enforceability of the award.

Although the rules governing Saudi arbitration are in many ways comparable to those of other countries, there are few important differences. A key characteristic of arbitration in Saudi Arabia is the extent to which arbitration is supervised by the Saudi court or administrative tribunal with original jurisdiction over the dispute, which the Arbitration Regulation calls under article 54 the 'court of jurisdiction' (the Authority). The Authority in most commercial disputes will be the Board of Grievances, the administrative court with jurisdiction over both private commercial disputes and claims against the Saudi government as elaborated earlier. In other cases the Authority might be a shariah court (these are courts of general jurisdiction in the Kingdom) or another more specialised judicial or administrative body (ie, the Banking Settlement Committee or the Committee for the Resolution of Securities Disputes).

Since the primary role of the Authority is to ensure that arbitrators adhere closely to Saudi Arabian substantive and procedural law, this aspect of Saudi arbitration tends to make it more similar to litigation than may be the case in respect of arbitration in other countries. However, it is noteworthy that article 54 clearly mandates that a challenge against the validity of the award in relation to shariah and Saudi public policies does not automatically trigger estoppel against enforceability of the award. The award will remain enforceable by the concerned parties unless the claimant includes in their challenge and claim a request to stop enforceability and the Authority decides on it. Article 8 designates the appeal level of the competent court to be the relevant tribunal in such instances and not to litigate at first instance.

International Arbitration Conventions

Saudi Arabia adhered to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958 (the New York Convention) with effect from 18 July 1994. Saudi Arabia is also a party to the International Convention on Settlement of Investment Disputes (ICSID), subject to a reservation with respect to oil-related disputes, as well as the 1952 Convention on the Enforcement of Foreign Judgments and Awards entered into by certain members of the Arab League, and the Convention on the Enforcement of Judgments, Disputes and Judicial Summonses in the Arab Gulf Co-operation Council States.

Agreements To Arbitrate

The Arbitration Regulation recognises two types of agreements to arbitrate. The parties may agree to submit a specific existing dispute to arbitration even if a litigation has already started and can thus be stopped, or the parties may agree in advance to submit to arbitration any dispute arising from a specific contract. In any event, any arbitration agreement must be in writing or it loses the protection of the Arbitration Regulation pursuant to article 9, which requires all arbitration agreements to be documented.

Arbitration is not permitted in matters that may not be the subject of conciliation. These include criminal matters, particularly those for which fixed penalties are stipulated under Islamic Law, other matters involving public policy, and certain matrimonial disputes of a non-financial nature. In general, most commercial and financial disputes can be conciliated and thus can also be resolved by arbitration.

The Arbitration Regulation continues under article 10 a long-standing prohibition against resort to arbitration by Saudi governmental authorities for the settlement of disputes they may have with third parties. Saudi government agencies may only agree to arbitrate after having obtained prior approval from the Chairman of the Council of Ministers, or Cabinet, a position which is currently held by His Majesty the King. In practice, such permission is seldom sought. However, it is noteworthy that certain entities controlled by the government of the Kingdom of Saudi Arabia but operate primarily in the private sector are not considered subject to this restriction and do engage in arbitration.

Article 10 And The Council Of Ministers Resolution No. 58

Council of Ministers Resolution No. 58 dated 17/1/1383 H. (9 June 1963) stipulates that no government authority is permitted to accept arbitration as a means of settling disputes between it and any individual, company or private organisation, other than in 'exceptional' circumstances in which the state grants a concession and in doing so considers that it is in

the best interests of the state to include a provision for arbitration in such concession. This stand has been reinforced by article 10 of the most recent Arbitration Regulation.

Therefore, the Council of Ministers Resolution No. 58 provides the following.

The choice of law governing any dispute to which a government authority is party is to be determined 'in accordance with the established general principles of private international law', the most important of which, according to Council of Ministers Resolution No. 58, is the principle of the application of the law pertaining to the place of execution.[2]

Government authorities are not permitted to choose a foreign law to govern their relationship with individuals, companies or private organisations.

No government authority is permitted to conclude a contract that contains any clause subjecting such authority to the jurisdiction of any foreign court or other adjudicatory body.

Subject to the restrictions on choice of governing law and submission to jurisdiction contained in Council of Ministers Resolution No. 58, parties to contracts may, without violation of any provision of Saudi Arabian law, agree that a foreign law governs disputes arising thereunder, or submit to the jurisdiction of a foreign court. Notwithstanding any choice of a foreign law as the governing law or submission to the jurisdiction of any foreign court, if a dispute relating to such contract comes before a Saudi Arabian court or other adjudicatory body such court or other adjudicatory body will regard itself as not bound by any such choice of law or submission and will apply Saudi Arabian law, which does not recognise the doctrine of conflicts of law. In the case of an agreement that provides for dispute resolution by arbitration in a state that is a member of the New York Convention, a Saudi Arabian court or other adjudicatory body, which one party wishes to deal with a dispute under such agreement, may decline to deal with such dispute and require the parties to abide by their agreed mode of dispute resolution, even though the governing law to be applied to the substantive (ie, non-procedural) aspects of the dispute being dealt with in such arbitration is not Saudi Arabian law.

Foreign Arbitration Clauses

The scope of the Arbitration Regulation is not expressly limited to arbitrations in Saudi Arabia. It actually extends to extraterritorial arbitration and recognises international arbitrations and international conventions under articles 2 and 3.

The enforceability of arbitration clauses calling for arbitration outside the Kingdom under arbitration rules other than those set forth in the Arbitration Regulation must be considered in light of article 11 of the Arbitration Regulation, which states:

> The court to which a claim is brought and there is an agreement to arbitrate should dismiss the case provided the defendant argued for such dismissal before submitting any other arguments.

THE AWARD

The Harams

A haram under shariah is something that is forbidden and against shariah principles. Therefeore the arbitrators are required to issue an award that complies with the principles of shariah and the provisions of any applicable Saudi Arabian legislation and to avoid awards

against shariah principles, haram. Among the more significant substantive shariah principles that apply in connection with commercial disputes are those that prohibit the payment of interest or the recovery of 'speculative' damages, eg, loss and future profit.

Under the shariah as applied in Saudi Arabia, interest in any form is not recoverable, regardless of whether it is called by a different name (eg, a 'commission' or 'service charge') or whether the contract in question requires interest payments. Any payment of the same general nature as interest or calculated by reference to prevailing interest rates is similarly prohibited.

Saudi courts, and most arbitrators as well, are also reluctant on shariah grounds to award certain types of indirect or consequential damages that might be recoverable in other countries but are deemed overly speculative by the Saudi courts. These include damages for loss of future profits or loss of goodwill. In general, recovery is limited to compensation for direct, actual losses.

Form Of Award And Modifications

The Arbitration Regulation specifies that the award must summarise the dispute, the evidence submitted and the claims and defences presented by the parties. The reasons for the award must be stated along with the award itself. Once the award is issued, the arbitrators on their own motion may correct any material typing or arithmetical errors. They may also issue interpretations of any ambiguity in the text of the award, but only if so requested by one or both of the parties within 30 days of such party's receipt of the award. Article 44 stipulates that the tribunal within 15 days from delivering the award shall lodge a copy of the award with the component court with a certified Arabic translation if it was in a foreign language.

Judicial Review And Enforcement

As a general rule, all judgments of Saudi Arabian courts, other adjudicatory bodies and specialised committees and confirmed arbitration awards are enforced only once they are final (ie, after exhaustion of all rights of appeal). Further, one of the most significant differences between the Arbitration Regulation and arbitration laws in many other countries is that the Arbitration Regulation contains no express limitations on the extent to which the Authority may review an arbitration award on the merits.

The Arbitration Regulation requires at least some level of review of an award by the Authority. Previously, the Authority must review the award before issuing an order for its execution so as to 'confirm that there is nothing to prevent its execution legally'. However, the Enforcement Regulation issued under Royal Decree No. M/53 dated 13/8/1433H (3 July 2012) (the Enforcement Regulation) came into the picture to further strengthen the Arbitration Regulation.

Certainly, the Authority's review of the award is likely to be more extensive if an objection has been filed as previously stated pursuant to article 54. However, the Enforcement Regulations stipulates in article 9 that forcible enforcement shall be based on certain enforcement resolutions and documents among which are arbitration awards. The Enforcement Regulation's Implementing Regulation was adopted by the Minister of Justice on 17/4/1434H (27 February 2013). It provides that any enforcement document must be verified by the enforcement judge for validity and enforceability. This is in line with article 55 of the Arbitration Regulation, which also mandates that any request to enforce an award shall

be filed only after the lapse of the appeal period to annul the award and the relevant judge must confirm validity in relation to any parallel or prior judgments by competent authorities or public policy and shariah principle issues. Any certain provision of the award that is not enforceable can be eliminated on its own and segregated from the remainder of the enforceable award.

Having the Enforcement Regulation adopted and effective, the enforcement judges now have full autonomy to enforce against defendants' assets and can further request extraterritorial enforcement on a reciprocal basis.

DOMESTIC AWARDS

Article 52 of the Arbitration Regulations states that an arbitration award 'shall have the force and validity of a final judgment and shall be enforceable'. Upon the completion of an arbitration, the award of the arbitrators must be submitted to the court or other adjudicatory body that would otherwise have entertained the dispute for its approval and confirmation. Once an arbitral award has been confirmed, it may be enforced as an order of such body.

In the case of a private arbitration, the unsuccessful party is responsible for complying with the arbitration award. If the unsuccessful party is unwilling to comply with the arbitration award, the successful party may seek enforcement of the arbitration award by applying to the enforcement court.

CROSS-BORDER AWARDS

Arab Gulf Cooperation Council (GCC) Arbitration

The Gulf Cooperation Council Convention was entered into in May 1981 by Saudi Arabia, Kuwait, Bahrain, Qatar, the United Arab Emirates and Oman, and provided mainly for the establishment of the Gulf Cooperation Council, citing the special relations between member states as one of the main reasons for establishing it (the GCC Convention).

Pursuant to the Gulf Cooperation Council Arbitration Charter and the Arbitration Rules of the Commercial Arbitration Center in Bahrain, agreements where at least one party is a national of a Gulf Cooperation Council member state may refer disputes arising from contracts to which they are party to arbitration before the Gulf Cooperation Council Commercial Arbitration Center in Bahrain in accordance with the GCC Arbitration Rules.

By Royal Decree No. M/3 dated 28/4/1417 H (11 September 1996) Saudi Arabia ratified the GCC Convention on the Enforcement of Judgments and Judicial Representation and Notices among members of the GCC.

The Convention includes provisions with respect to the reciprocal recognition and enforcement of judgments of the courts of member states and arbitral awards of arbitrators made in member states which are not substantially different from those of the Arab League Convention.

The Arab League Convention For The Enforcement Of Judgments Of 1952

In 1953 Saudi Arabia signed, and in 1954 ratified, the Arab League Convention for the Enforcement of Judgments of 14 September 1952.

The Arab League Convention applies to judgments deciding 'civil or commercial rights or requiring [the payment of] compensation by [virtue of any sentence imposed by] criminal courts or relating to personal status.' With regard to such matters, the Arab League

Convention provides that the final judgment of a court in a member state shall be 'capable of execution' in any other member state of the Arab League.

Under the Arab League Convention, the judicial body in the country in which enforcement of the judgment is sought may not re-examine the subject matter of the underlying case. Judicial review is limited to ensuring compliance with fundamental legal principles (eg, the public policy of the country in which enforcement of the judgment is sought) and specified procedural requirements (eg, the jurisdiction of the country that issued the judgment and due notice).

The Arab League Convention requires each member state to designate the appropriate judicial body to which applications for enforcement should be submitted. Pursuant to Council of Ministers Resolution No. 251 of 28/12/1379 H (22 June 1960), Saudi Arabia has designated the Board of Grievances for such purposes.

Several foreign judgments have been submitted to the Board of Grievances for enforcement in Saudi Arabia under the terms of the Arab League Convention and, in at least one reported decision, a judgment has been recognised and enforced. Other Arab League judgments may have been enforced, but have not been reported.

The Arab League Convention also provides for recognition and enforcement of arbitral awards made in member states.

Riyadh Convention

Saudi Arabia has signed the Riyadh Convention on Judicial Cooperation (the Riyadh Convention). The Riyadh Convention will supersede the Arab League Convention when Saudi Arabia effectively accedes to the Riyadh Convention.

With respect to the reciprocal recognition and enforcement of judgments and arbitral awards of member states, the provisions of the Riyadh Convention are not substantially different from those of the Arab League Convention.

Like the Arab League Convention, the Riyadh Convention permits the judicial body of the country in which enforcement of the judgment is sought to inquire into the competence of the court in the country that issued the judgment. The Riyadh Convention also provides limited grounds for denying enforcement of a foreign judgment. These grounds are similar to the criteria provided in the Arab League Convention for determining whether the formal prerequisites for enforcement of the judgment in the country in which such enforcement is sought have been satisfied (eg, compliance with certain procedural requirements of the country issuing the judgment, such as jurisdiction and notice and with fundamental legal principles, such as the public policy of the country in which such enforcement is sought).

Saudi Arabia is further signatory to:

- the Unified Convention for the Investment of Arab Capital in Arab Countries of 1980;
- the Convention for the Settlement of Investment Disputes between the Hosting Countries and the Investors of other Arab Countries of 1974; and
- the Amman Arab Convention for Commercial Arbitration of 1987.

NON-ARAB LEAGUE

The New York Convention

Saudi Arabia acceded to the New York Convention by Royal Decree No. M/11 dated 16/7/1414 H. (29 December 1993), with effect from 1994. The authorising decree incorporates the requisite reciprocity requirement, but limits such reciprocity to awards rendered in other signatory states. The decree specifies that jurisdiction over actions seeking enforcement of foreign arbitral awards is vested in the Board of Grievances.

The New York Convention permits signatory states to deny recognition and enforcement of a foreign arbitral award on certain limited grounds. In reliance on this provision of the New York Convention, the Board of Grievances would be able to refuse recognition and enforcement of any foreign arbitral award contrary to the laws or public policy of Saudi Arabia (ie, contrary to the shariah). Saudi Arabia did not make the commercial reservation that, if invoked, limits application of the New York Convention to awards arising out of disputes that are commercial in nature.

Washington Convention

By Royal Decree No. M/8 of 22/3/1394 H. (28 September 1979), Saudi Arabia ratified to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the Washington Convention. The Washington Convention was initiated by the International Bank for Reconstruction and Development (the World Bank).

The Royal Decree, in ratifying the Washington Convention, expressly excluded investment disputes relating to 'oil and pertaining to acts of sovereignty'.

The Washington Convention was designed to promote private foreign investment for economic development by making it possible for a member state and a foreign investor, who is a national of another member state, to settle investment disputes before an impartial international forum. Under the Washington Convention, the parties waive local jurisdiction and agree that arbitration awards of the International Center for Settlement of Investment Disputes (ICSID), a branch of the World Bank, are legally binding in the courts of any member state. The jurisdiction of ICSID is limited to investment disputes between a state and a private contracting party.

The Washington Convention specifies the circumstances under which disputes may be submitted to ICSID, the methods by which conciliation commissions and arbitral tribunals are to be constituted and to conduct their proceedings and the form and effect of the resulting conciliation reports or arbitral awards. ICSID maintains panels of conciliators and arbitrators who are designated by the member states and by the President of the World Bank, who acts as Chairman of the ICSID's Administrative Council. The parties to a dispute are free to choose the form and method of constituting their conciliation commissions set out in the Convention. If they are unable to agree, the Convention provides machinery for constituting such bodies.

The Washington Convention imposes no obligation on the governments of member states to submit disputes with foreign investors to the ICSID arbitral mechanism. Under article 25(3) of the Washington Convention, a governmental subdivision or agency may not give its consent to arbitration under the ICSID rules without the approval of the state, unless the state has notified the ICSID that no such approval is required. Saudi Arabia has given no such notification and, accordingly, no government entity may submit to ICSID arbitration without government approval. This requirement for approval has been explicitly included in article 3 of the Arbitration Regulations, which provides that government authorities may not submit

their disputes to arbitration with third parties except after having obtained the approval of the Prime Minister.

Endnotes

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Turkey

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Summary

International arbitration in Turkey, which is currently regulated by the International Arbitration Law No. 4686 (IAL), has been slowly evolving. The most recent decisions made by Turkey's Court of Appeals regarding international arbitration illustrate how the field has developed in the decade since the implementation of the IAL.

The IAL, which came into effect on 5 July 2001, is largely based on the UNCITRAL Model Law on International Commercial Arbitration dated 1985, although it does include certain principles not codified in the Model Law. Having replaced the previous legislation pertaining to international arbitration codified in the Code of Civil Procedure (CCP) No. 1086, the question of how to determine the applicable law has been placed before the Turkish courts. In a 2007 decision, the Court of Appeals saw a case where the arbitration agreement was signed by the parties in 1993, at which time the CCP No. 1086 governed international arbitration. However, the dispute arose in 2005, after the IAL had come into effect. The Court of Appeals ruled that the date of the arbitration agreement, regardless of when the dispute began, determined the governing law. Furthermore, the Court stipulated that proceedings initiated or agreements made before the IAL was passed would require explicit accord from the parties in the form of a new arbitral agreement in order for the IAL to be the governing legislation.[1]

When it comes to the matter of arbitrable subjects, article 1 of the IAL provides that disputes regarding issues independent of the parties' wills may not be arbitrated. Therefore, commercial matters may be referred to arbitration, yet disputes that concern criminal issues, family law or issues related to employees' payments arising from labour contracts are not eligible.[2] Furthermore, article 1 also provides that disputes relating to rights in rem over immoveable properties located in Turkey are not arbitrable. Thus, any disputes regarding ownership of real estate may not be submitted to arbitration, a position that the Court of Appeals has upheld. In one case regarding the cancellation of title deeds, the Court ruled that a dispute requiring a change in the land register is non-arbitrable as such a matter pertains to public order.[3] It has also been held by the Court of Appeals that only disputes capable of being settled by the parties' agreement without requiring a court decision are arbitrable. In this particular decision, dated 2012, the Court found that the arbitration clause in the company's articles of association was invalid because general assembly resolutions may only be cancelled by the courts.[4]

The IAL also governs a number of procedural issues, including the form and validity of the arbitration agreement, the appointment of arbitrators and any challenges to arbitrators. Moreover, the IAL codifies the procedure for challenging awards and determining arbitration expenses.

FORM AND VALIDITY OF THE AGREEMENT

Article 4 of the IAL, which governs the form and validity of the arbitration agreement, states that agreements to arbitrate may either be included in a contract as an arbitration clause or in the form of a separate agreement, whether or not the legal relationship between the parties is contractual in nature.

The form of the arbitration agreement is also regulated by article 4 of the IAL. It is provided under this article that the agreement to arbitrate must be in writing, even though there are a number of ways to record it. As a result, the agreement to arbitrate may range from a written, signed document to a 'letter, telegram, telex, or fax exchanged between the parties

or in an electronic medium'. Pursuant to article 4, a valid arbitration agreement is considered to have been made in cases where a party advances the existence of a written arbitration agreement in a statement of claim and the other party fails to respond and object to this in its statement of defence, or where there is a reference to a document containing an arbitration clause that is intended to constitute a part of the main contract. In a 2013 case, the Court of Appeals affirmed the decision of a lower court, which found that the charter party agreement executed between the parties in an electronic medium gave rise to a valid arbitration agreement, as the agreement contained a reference to the GENCON 1994 Charter, which provides for an arbitration clause.[5]

As regards validity, the Court of Appeals has held that for an arbitration agreement to be binding there must be clear intent, without any doubt, that the parties intended to submit the issue to arbitration.[6] In this case, the parties had agreed that the dispute would be submitted to arbitration, but also that 'the dispute shall be resolved at the courts'. Since it was unclear whether the parties actually intended to submit the dispute to the courts or to arbitration, the Court of Appeals ruled there was insufficient intent to arbitrate and, as a result, the arbitration agreement was invalid. This requirement of unambiguous party agreement to arbitration has been and continues to be applied by Turkish courts.[7] On the other hand, in a recent case, the Court of Appeals affirmed the decision of a lower court that found an arbitration clause providing arbitration under the IAL to be valid despite the fact that the agreement also stated that '[i]n the event of a dispute, the Bursa Courts and Execution Offices shall have jurisdiction'.[8] The lower court dismissed the case after the defendants raised an arbitration objection as per article 5 of the IAL,[9] finding that the provision granting jurisdiction to the Bursa courts and execution offices was only related to those procedural matters of arbitration that must be resolved by the courts (such as interim injunctions), and thus did not invalidate the arbitration clause. The Court of Appeals affirmed this decision by stating that the arbitral tribunal has competence to determine whether the arbitration agreement is valid.

The Court of Appeals has also dealt with the question of whether a representative can sign an arbitration agreement and, if so, under what conditions. In a 2007 decision, the Court applied article 388/3 of the Code of Obligations, which legislates that an arbitration agreement signed by a representative not granted special powers regarding his or her power of attorney will be invalid, to a case where an attorney had signed an arbitration agreement on behalf of his client.10 Thus, it was ruled that if a representative signs an arbitration agreement, the power of attorney authorising him to act on behalf of his principal must clearly specify that the attorney has been granted the authority to sign an arbitration agreement or to bind his or her principal to arbitrate.

In the same vein, amendments to arbitration agreements signed by representatives have also been examined by the Court of Appeals.11 In one case, the Court of Appeals held that the power of attorney conferred to the legal representative who signed the terms of reference was limited to claims, defences and the appointment of arbitrators in the arbitral proceedings, and did not cover amending arbitration agreements or entering into arbitration agreements on behalf of the parties.[10] It further stated that the terms of reference cannot be considered as either an amendment to an arbitration agreement or a new arbitration agreement. Likewise, the Court of Appeals ruled in a similar case that amendments to arbitration agreements may not be made through the terms of reference.[11] According to these decisions, arbitration agreements may only be entered into or amended by the parties themselves or by a representative clearly granted this special power.

JURISDICTIONAL CONCERNS

Observing the principle of competence-competence as codified in the model law, article 7(h) of the IAL governs the procedure for jurisdictional challenges to be brought before the arbitral tribunal. Since a jurisdictional objection is decided by the tribunal as a preliminary matter, any objection should be made with the first reply brief at the latest. A party is required to submit an objection as soon as they believe that the arbitral tribunal has exceeded its powers, or else the objection will not be entertained. However, if the arbitral tribunal concludes that the delay in filing an objection is justified, it may admit jurisdictional objections at a later stage. Finally, in case the arbitral tribunal decides that it has jurisdiction, it will continue the arbitral proceedings and render an award.

Article 7(h) goes on to provide further parameters for jurisdictional challenges. When ruling on the tribunal's jurisdiction, an arbitration clause shall be treated as independent from the other terms of the contract. Therefore, even if the main contract is decided by the tribunal to be null and void, the arbitration clause is not invalidated. Furthermore, the fact that a party chose an arbitrator or participated in the formation of a tribunal does not invalidate its right to raise a jurisdictional objection.

The IAL presents the issue of jurisdictional objections as one to be contested within the confines of arbitral proceedings. In a case where the validity of an arbitration agreement was contested before a court, the Court of Appeals ruled that, under the IAL, challenges of this sort should first be brought before the arbitrator or the arbitral tribunal.[12] The Court of Appeals also stated that the decision of the arbitrator or the arbitral tribunal on jurisdiction would be subject to review in an annulment action brought against the final award.

One such review was undertaken after an annulment action was brought before the Turkish courts. In this instance, the Court of Appeals annulled an award in which the arbitral tribunal denied that it had jurisdiction despite the existence of an arbitration agreement.[13] The Court noted that the dispute between the parties was within the scope of the contract and that the procedure outlined by the arbitration agreement had been properly followed. As a result, the tribunal's award denying its jurisdiction was found to be invalid and, consequently, set aside.

In another decision on the issue of the arbitral tribunal's jurisdiction, the Court of Appeals found that arbitrators are bound by the requests of the parties and they cannot render a decision exceeding those requests.[14] In this dispute, the defendant requested in its defence for an amount to be deducted from the claimed receivables and stated that it reserved its right to file a counterclaim regarding this deductible; however, the defendant did not file such a counterclaim. The arbitrators ruled for the collection of the deductible amount in favour of the defendant as if a counterclaim had been made, instead of deducting this amount from the plaintiff's receivable. The Court of Appeals determined that the award may be annulled because the arbitrators exceeded their authority.

ANNULMENT OF ARBITRAL AWARDS

In accordance with the IAL, challenges to an arbitral award may only take the form of an annulment action, although the court's decision regarding annulment may be appealed. Article 15 of the IAL states that an arbitral award may be annulled if one of the following grounds is proven by the party filing an annulment action:

- invalidity of the arbitration agreement stemming from incapacity of one or both of the parties subject to the arbitration agreement, invalidity of the agreement to arbitrate

under the law the parties chose or, if the parties did not make a choice of law, under Turkish law;

- non-compliance in arbitrator appointment procedure under either the IAL or, if the parties had agreed otherwise, as defined in the parties' agreement;
- failure to make a timely award during the arbitration period;
- unlawful decision of the arbitrator or the tribunal regarding the competence of the arbitrator or the tribunal;
- the decision by the arbitrator or the arbitral tribunal on a matter that falls beyond the scope of the arbitration agreement, that does not decide the entirety of the claim or that exceeds the arbitrator or the arbitral tribunal's authority;
- non-compliance with the procedures set out in the parties' agreement, or with the procedures set out in the IAL in the absence of such an agreement, which affected the final award; or
- unequal treatment of the parties.

Or if the Court ex officio determines that:

- the subject of the arbitration is non-arbitrable under Turkish law; or
- the award violates and is contrary to public order.

The Court of Appeals has issued decisions relating to the partial annulment of an arbitration award and the scope of a potential re-adjudication in such circumstances. In one case, the Court held that an arbitration award may be partially or wholly annulled. If only partially annulled, those parts not annulled will be considered to be procedural rights enjoyed by the party that has prevailed on the non-annulled parts. Arbitrators will then re-examine only the annulled parts and issue an award regarding them.

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Any annulment actions against a final arbitral award must be filed at the appropriate civil court of first instance within 30 days, which commences after the notification of the award or the notification of any decision correcting, interpreting or supplementing the award. Initiation of annulment actions halts the enforcement of arbitral awards.

In one dispute where it was found that the defendant did not have a residence, habitual residence or place of business in Turkey, the Court of Appeals ruled that the Istanbul commercial court of first instance was the competent court to hear the annulment action.-

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First, the Court held that the location of a subsidiary incorporated in Turkey cannot be considered as the place of business of the defendant itself, which was a French company with its headquarters in France. Thus, as the defendant did not have residence in Turkey, the Court found that pursuant to article 3 of the IAL, which states that any reference to a court in the IAL will refer to the Istanbul Civil Court of First Instance in those cases where the respondent is not domiciled in Turkey, the Istanbul Civil Court of First Instance would be competent to hear the annulment case. However, the Court then took the provisions of the Turkish Commercial Code into account, which provide that where commercial courts of first instance are established, they should hear disputes of a commercial nature since there is a division of work between these courts. Consequently, it ruled the Istanbul Commercial Court of First Instance to be the competent court to hear the annulment case in question rather than the Istanbul Civil Court of First Instance.

In another case, it was held by the Court of Appeals that, as per article 15 of the IAL, the civil courts of first instance were specifically competent to hear annulment cases, even though the dispute was commercial in nature.[17] According to a recent amendment made to article 5 of the Law on the Establishment, Competence and Jurisdiction of the Courts of First Instance and the Regional Appeal Courts (Law No. 5235), which regulates the establishment of the civil courts of first instance, cases regarding objections to arbitration clauses, applications for annulment of awards, selections of and challenges to the arbitrators and the recognition and enforcement of foreign arbitral awards shall be heard by commercial courts of first instance (in places where commercial courts are established) composed of a panel of judges with a president and two members.[18]

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The majority of foreign arbitral awards enforced in Turkey are subject to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which Turkey ratified on 2 July 1992. Consequently, the Court of Appeals has issued a number of decisions regarding enforcement under the New York Convention.

In a 2014 decision, the Court of Appeals ruled on interim attachment requests made prior to the enforcement of foreign arbitral awards. In this case, the Court held that an interim attachment order may be granted in the enforcement proceeding of a foreign arbitral award even if an enforcement decision has not yet been issued on the basis that the assets or rights of the debtor are only temporarily attached by the interim attachment orders. Consequently, an enforcement decision of a foreign arbitral award is not a condition required to grant an interim attachment order.[19]

The issue of court fees to be collected when applying for an enforcement decision is clarified by a 2009 Court of Appeals' decision. According to the Court, a decision fee shall be collected from the party requesting the enforcement pursuant to the nature of the arbitral award. Therefore, in cases that are subject to a proportional fee, a proportional decision fee shall be collected.[20] Likewise, in another case, the Court of Appeals held that if a foreign arbitral award requested to be enforced in Turkey is for the collection of a receivable, the enforcement proceedings must be subject to a proportional decision fee.[21] In this instance, the Court of Appeals ruled that because the award related to the collection of a debt, the application for enforcement is subject to proportional court fees.

For those arbitral awards rendered in countries that are not party to the New York Convention, enforcement in Turkey is regulated by the International Private and Procedural Law No. 5718 (IPPL). The grounds for enforcement as codified in the IPPL are very similar to those in the New York Convention. Under article 62 of the IPPL, the court will reject enforcement of a foreign arbitral award if:

- there is no arbitration agreement, or there is no arbitration clause in the contract;
- the arbitral award is contrary to morals or public order;
- the dispute resolved in the award is not one that can be resolved through arbitration under Turkish law;
- one of the parties was not represented before the arbitral tribunal in accordance with due process and said party does not accept the tribunal's award;
- the party against which enforcement is requested was not informed of the appointment of an arbitrator (or arbitrators) in accordance with due process;

- the arbitration agreement (or clause) is invalid under the law to which it was subject or, where there is no agreement, the arbitral award is invalid under the law of the state in which it was made;
- the appointment of the arbitrators, or procedural rules applied by the arbitrators, is contrary to the parties' agreement, or if there is no agreement, is contrary to the law of the country in which the award was made;
- the arbitral award relates to a matter that was not in the arbitration agreement (or clause), or it exceeds the scope of the arbitration agreement (in which case the court only refuses to enforce the part that exceeds the scope of the arbitral agreement);
- if the arbitral award has not become final or enforceable or binding under:
- the law under which it was issued;
- the law of the state where it was made; or
- the procedural rules to which it was subject; or
- the arbitral award was annulled by the competent body of the place where it was made.

According to article 56(1) of the IPPL, the court may decide to enforce the whole or a part of the award, or refuse to enforce it. In a case where one of the three agreements between the parties did not include an arbitration clause, the Court of Appeals stated that the partial enforcement of the foreign arbitral award, as decided by the court of first instance, was impossible and the request for enforcement should be rejected. The Court of Appeals ruled that it was not possible to determine which portion of the damages awarded resulted from the agreement that did not contain an arbitration clause.[22]

Decisions on enforcement requests can be appealed and be subject to rectification; appeal stays the execution of the enforced award according to IPPL article 57(2).

PUBLIC ORDER

Recent decisions by the Court of Appeals provide insight into when an arbitral award seated in Turkey may be annulled or when a foreign arbitral award may be denied enforcement for violating or contravening public policy.

In a 2012 decision, the Court of Appeals ruled that customs and tax laws pertain to public policy and, as a result, foreign arbitral awards calling for receivables that contravene the tax legislation may be denied enforcement on the basis of the public policy clause found in article V of the New York Convention. According to the Court of Appeals, in such cases the merits of the dispute may be partially examined by the Court, but only to the extent necessary to determine whether the award is contrary to public policy; thus, the merits of the case would not technically be reviewed. The Court of Appeals reversed the court of first instance's decision to enforce the foreign arbitral award stating that the investigation conducted was not sufficient to determine whether enforcement would result in tax evasion and violate the tax legislation.[23]

Subsequent to this 2012 decision, the Court of Appeals ruled that an arbitral award regarding receivables in violation of the tax legislation may also be annulled on the basis that customs and tax laws are a matter of public policy, while stating that partial review of the merits may be necessary to examine objections relating to public policy.[24] In this case, which concerned a dispute between a Turkish governmental agency and a telecommunications company, the Court found the arbitral award to violate public policy because the award ruled that it was

no longer mandatory for the telecommunications company to make previously agreed-upon payments to the state for its expenses. The Court of Appeals held that even though these payments for the authority's expenses are not taxes, they represent an important and continuous form of income deriving from the transfer of public services by the state and, thus, cannot be left to the discretion of the telecommunications company. Also of note in this decision was the Court's finding that compliance with public policy shall be evaluated pursuant to the governing law chosen by the parties, which was Turkish law in this particular case. Consequently, the award was annulled pursuant to article 15 of the IAL.

In a recent case regarding the enforcement of a foreign court decision, however, the Court of Appeals came to a different conclusion. The Court held that, during the examination of whether a foreign judgment is contrary to public policy, the prohibition to review the merits of the content cannot be removed by discretionary right.[25]

In another enforcement decision, the Court of Appeals examined the extent to which an arbitration agreement may be contrary to public policy if such agreement grants a superior position to one of the parties during the arbitral proceedings. In this case, the Court ruled that an arbitration agreement or clause granting the right to appoint the arbitral tribunal to only one of the parties would be invalid and, as a result, not enforceable. However, since the arbitration agreement in this case granted the right to choose the arbitral tribunal to both parties, the agreement is valid and cannot be considered against public policy.[26] The Court also found that an arbitration agreement providing the choice between two alternative arbitration centres is valid since the parties clearly intended to submit any dispute to arbitration. On the other hand, in a different decision, the Court of Appeals refused enforcement of an arbitral award rendered in a different arbitral institution than the one determined in the arbitration agreement.[27]

Finally, in a decision regarding the enforcement of a foreign court decision, the Court of Appeal's General Assembly for Unification of Judgments addressed the issue of whether a foreign judgment that does not contain reasoning violates public policy.[28] The Court held that, although it is mandatory for all Turkish court decisions to contain the court's reasoning, this cannot be a ground on which to deny the enforcement of a foreign judgment. Such a requirement would contravene the principle of lex fori, whereby a judgment is subject to the procedural laws of the country where it is rendered. During the course of determining whether a lack of reasoning violates public policy, the Court provided examples of what would constitute a public policy violation:

- the violation of fundamental principles of Turkish law, Turkish morals and public decency;
- the basic notion of justice and general policy behind the Turkish legislation, fundamental rights and freedoms in the Turkish Constitution;
- the general principles of international law;
- the good faith principle of private law; and
- the violation of human rights and freedoms.

THE ISTANBUL ARBITRATION CENTER

Concrete steps, including the drafting of legislation, have been taken for the establishment of an arbitration centre in Istanbul. The purpose of the Law on the Istanbul Arbitration Center

No. 6570 (LIAC), which was published in the Official Gazette on 29 November 2014 and came into effect on 1 January 2015, is to establish the Istanbul Arbitration Center (ISTAC) and regulate the procedures and principles regarding the organisation and operations of the ISTAC. Pursuant to article 1 of the LIAC, the ISTAC shall oversee the settlement of disputes, including those containing a foreign element, through arbitration or alternative dispute resolution methods.

It is stated in article 2 of the LIAC that the ISTAC, which has legal personality and is subject to private law provisions, is established in order to perform the duties assigned to it by law.

Pursuant to article 4 of the LIAC, the duties of the ISTAC are as follows:

- to determine the rules regarding arbitration and alternative dispute resolution methods;
- to ensure the conduct of services;
- to promote and issue publications regarding arbitration and alternative dispute resolution methods and to incentivise, support and realise scientific works on this subject; and
- to cooperate with relevant individuals, institutions and organisations that are inside and outside Turkey.

The LIAC provides in article 5 that the ISTAC shall be composed of the General Assembly, the board of directors, auditors, the Advisory Board, national and international arbitration tribunals, and the Office of the Secretary General.

One of the duties of the board of directors, as stated in article 9, is to draft the rules applicable to arbitration and alternative dispute resolution methods, and the procedures and principles regarding the operation of the ISTAC. The board of directors shall then submit them to the General Assembly for approval after obtaining the opinion of the Advisory Board.

According to provisional article 1/3 of the same law, the above-mentioned rules, procedures and principles shall be drafted and put into effect by the ISTAC within six months after the establishment of the board of directors.

The General Assembly, board of directors, auditors and the Advisory Board have been established as of May 2015, and the ISTAC Arbitration and Mediation rules went into effect on 26 October 2015.[29]

CONCLUSION

There have not been any fundamental changes in the Turkish international arbitration system since its enactment in 2001. However, there have been changes to domestic legislation; namely, the ratification of a new CCP, which entered into force on 1 October 2011, in addition to a new Code of Obligations and new Commercial Code, which entered into force on 11 July 2012 and 1 July 2012, respectively. The new CCP governs domestic arbitration, specifically those disputes that do not contain a foreign element and for which Turkey is designated as the place of arbitration, while the IAL remains the governing legislation for international arbitration. The arbitration provisions of the new CCP (articles 407-444), which are being drafted along the lines of the UNCITRAL Model Law, are mostly parallel to the provisions of the IAL.

Endnotes

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Summary

This past year has seen arbitration continue to be the most popular dispute resolution mechanism across the Middle East for parties involved in complex projects and disputes. The UAE's arbitral offerings have, in recent years, increased and improved: the Abu Dhabi Global Market (ADGM), Abu Dhabi's answer to the Dubai International Financial Centre (DIFC), introduced the ADGM Arbitration Regulations 2015 at the end of last year and, in response to users' demands, the Abu Dhabi Centre (ADCCAC) Rules received a complete overhaul in late 2013. These developments demonstrate the UAE's ambition to be the undisputed centre for dispute resolution in the region.

However, while arbitration is becoming increasingly popular in the UAE, common procedural issues continue to be raised that threaten the efficiency of proceedings and the enforcement of final awards. A recurring theme in enforcement proceedings in the local courts is the effect of a signature; parties and arbitrators must ensure that contracts, powers of attorney, arbitration deeds and awards are executed properly to ensure that arbitration agreements and awards do not fail as a result of an avoidable procedural flaw. It can sometimes be difficult to be certain what is and is not acceptable. With uncertainties threatening to invalidate an often long-awaited decision, it is best to remain cautious.

As there remains no stand-alone federal arbitration law in the UAE (as distinct from the DIFC's, and now ADGM's laws), domestic arbitral proceedings (outside the DIFC and ADGM) are governed by a limited number of articles in the UAE Civil Procedure Code (CPC). Enforcement of awards can be a lengthy process, irrespective of which rules the arbitration was conducted under. Arbitrations concerning real estate disputes still face the possibility of being annulled by the local courts on the grounds of public policy, but a number of recent cases have shed some light on this point and restricted the public policy exclusion to much narrower grounds than the courts had initially indicated.

Finally, one of the most significant developments this year relates to the DIFC and its courts, which have expanded their scope further to act as a host jurisdiction for the enforcement of foreign arbitral awards in the UAE. Parties with no geographical connection to the DIFC are theoretically able to elect to utilise the effective enforcement procedures of the DIFC courts. In addition, the DIFC courts have introduced a novel system whereby winning parties may be able to convert DIFC court monetary judgments into arbitral awards, aiding their enforceability in other jurisdictions. It remains to be seen how popular these new enforcement routes will be.

The themes referred to above are examined in further detail in the remainder of this article.

IRREGULARITIES IN THE PROCEDURAL REQUIREMENTS OF ENFORCING DOMESTIC ARBITRAL AWARDS

Enforcement Of Domestic Awards

There is still no stand-alone arbitration law in the UAE. New legislation in the UAE specifically – but the region more generally – has been mooted for several years. Other MENA states (eg, Bahrain) are developing their own arbitration legislation, so it is likely that the UAE will follow suit shortly.

In the meantime, arbitration law relating to domestic UAE awards remains as set out in articles 203–218 of the CPC – 15 articles that barely cover four sides of paper. These articles are not harmonised with other jurisdictions that have enacted specific legislation to deal

with arbitration and enforcement of arbitral awards, and are not based upon the UNCITRAL Model Law. Combined with the UAE courts' inconsistent interpretation of these articles, the lack of stand-alone and updated arbitration legislation continues to cause uncertainty in relation to the enforcement process. It can also provide losing parties with ammunition to advance procedural arguments for annulment of the award even when these arguments seek to stretch the legislation to (and beyond) its limit, making arbitration in the UAE a procedural minefield. We examine in this article the most topical of such arguments.

Before a successful party can enforce a domestic arbitral award, the award must be ratified by a UAE court. New court proceedings are commenced and, once the claim is filed, it is up to the court to either ratify or annul the award. When examining the award, the court will consider its validity according to the general provisions contained in articles 215 and 216 of the CPC.[1] While the court cannot reconsider the merits of the case, it will treat procedural irregularities and contravention of public policy as recognisable grounds for annulment.

It is common for losing parties to challenge awards on procedural grounds that they have not raised previously and are only loosely connected to the CPC; this may appear to be spurious and unjust. Many parties seek to stretch the wording of the CPC far beyond what it was intended to guard against in an attempt to establish some defective procedural issue. However, despite this seeming manipulation of the system, the UAE courts continue to be prepared to hear these questionable arguments. Furthermore, it is clear from reported case law that the courts interpret the CPC provisions inconsistently and have been known to annul awards because of only a minor technicality. Any party involved in arbitral proceedings in the UAE must therefore be aware of this so that those with conduct of the arbitration (both counsel and the tribunal) can take steps throughout the arbitral process to mitigate the potential for such challenges. Forewarned is most definitely forearmed.

Connected Contracts

There can be various separate documents that form one main contract, particularly in construction contracts. It is common for the contractual agreement to incorporate various letters, conditions and schedules defined together as the 'contract'. Examples of such ancillary contractual documents include, in construction contracts, tender documents (and clarifications and further offers), specifications, and sets of general and particular conditions. Despite contracts comprising a plethora of documents, parties frequently simply sign an execution page; it is likely that the other ancillary documents have also been signed or at least initialled or stamped, possibly on a different occasion, but this is not always the case.

Problems can arise when a document included in the contract is not signed by both parties as its validity can be debated. This problem is intensified when the unsigned document contains important clauses, such as the arbitration agreement.

A recent case in the Dubai courts considered this issue. A signed contract included a standard terms and conditions document that, in turn, incorporated the arbitration agreement. The standard terms and conditions were not signed. The Dubai Court of First Instance held that, as the terms and conditions were not signed, the arbitration agreement was not binding on the parties.

The Court of Appeal subsequently upheld this decision on the basis that an unsigned arbitration agreement was inconsistent with article 203 of the CPC.[2] Article 203 requires arbitration agreements to be recorded in writing, and while there is no express wording to indicate that the written agreements must be signed, a second case in the Dubai Court of

Cassation in 2014 held that validity was established by the parties' signatures – initialling documents was not sufficient.

A separate case in the Dubai Court of Appeal also held that an unsigned document invalidated an arbitration agreement by virtue of article 11 of the Federal Evidence Law.[3] Article 11 indicates that a valid document must be considered to originate from the person signing it. The Court questioned how an unsigned document could 'originate' from a party.

With this final case and article 11 in mind, however, perhaps a more pertinent question is what evidences agreement and whether the physical signature itself is necessary. Under the UAE Electronic Transactions and Commerce Law,[4] parties can confirm their agreement to contract electronically, absent of physical signature. Why should this not also apply to arbitration agreements? The accepted logic is that the UAE courts consider arbitration to be an exceptional dispute resolution forum and hence the presumption is against the fact that parties will have chosen to give up the right to bring a claim in the national courts in favour of an arbitration provision. However, arbitration in the UAE should no longer be considered exceptional. This issue should be clarified in legislation (and hopefully will be in any arbitration law that is introduced). Until then, to avoid uncertainty and to ensure all components of a contract are valid and enforceable, including the arbitration agreement, it is advisable that all pages of documents comprising the contract are signed by both parties.

Authority To Arbitrate

Having established that arbitration agreements (and connected contractual documents) should be signed to ensure validity, it is also important that the person who signs such documents has the capacity to do so. The new UAE Commercial Companies Law[5] has affirmed the rules on capacity to sign for a public joint stock company (PJSC); introducing articles that reinforce the previous law.

Article 154 of the new law states that a board of directors may not agree on arbitration unless specifically authorised to do so under the company's articles of association. If there is no express authority contained in the articles, the company must pass a special resolution to grant a director the relevant authority.

Article 154 of the new law bears significant resemblance to article 103 of the previous commercial companies legislation;[6] the key principle being that the board of directors must have express authority in the company articles to sign. The previous law did not, however, require the passing of a special resolution in the absence of express authority. Instead, only 'specific authorisation' was required.[7]

The additional requirement for a special resolution to authorise potential signatories, a higher threshold than the previous 'specific authorisation' requirement, could cause problems; UAE companies often have complex share structures as under federal law.[8] With a majority local shareholding, and a perhaps more piecemeal share structure, it may not be straightforward to obtain a 75 per cent majority. Due to this potential uncertainty, it is recommended that companies authorise their directors to sign arbitration agreements in the articles of association. This would give the directors scope to insert an arbitration clause into a contract if it is appropriate to do so without also needing a special resolution granting authority to do so.

Location, Location, Location

A procedural challenge often invoked by a losing party relates to the seat of arbitration. Arbitrations seated in the UAE will result in a domestic arbitral award. Article 212(4) of the CPC[9] states that arbitration awards must be issued in the UAE in order to be considered a domestic award and benefit from domestic enforcement proceedings. No guidance is given as to what 'issued' is intended to cover. Is it enough for the award to state that it is issued in the UAE or, for example, do all arbitrators need to be physically present in the UAE when signing the award? If the latter, what is the reasoning behind this and is it practical or proportionate, for example, for all three members of a panel to convene in the UAE to sign the award even if one or more of them may be based outside the region and will no doubt have written the award in his or her home jurisdiction long after the hearing was conducted in the UAE?

If the award is issued (or maybe even just signed by one of the tribunal) outside the UAE, foreign law principles apply and enforcement of such awards are governed by international protocols. This domestic and foreign award distinction could therefore apply regardless of where the arbitration seat is located. For example, if parties agree to seat the arbitration in Abu Dhabi but a member of the tribunal signs the award in Egypt, it is arguable that the legal place of arbitration will have been 'moved' and that this has been done in contravention of party agreement. This will give rise to questions as to the award's validity. If the legal place of the arbitration has been moved by an external signature, the UAE will no longer hold jurisdiction to hear annulment claims. This jurisdictional capacity will lie with the new legal place of arbitration and country in which the award was signed. This gives rise to uncertainties and undermines the original choice of the seat.

The obvious counter argument is that article 212(4) of the CPC refers to the issue of awards and not signature. Therefore, as long as the award states that it is issued in the UAE, the location at which the award was signed is irrelevant. Unfortunately, however, the courts continue to give credence to such arguments: we have recently been involved in enforcement proceedings where the court permitted the proceedings to be delayed while information as to an arbitrator's whereabouts on the date the award was purported to be signed in the UAE was sought from the general directorate of residence and foreign affairs in the relevant emirate. With uncertainty surrounding the consequences of the location of signature on which the enforcement regime is triggered, it is advisable that domestic awards are signed in the UAE itself.

Each Page?

A final point regarding award signatures concerns which pages of the award should be signed. There is no express legal requirement for arbitrators to sign every page of an award, and none of the region's arbitration centres stipulate such an obligation in their respective rules. The position should be straightforward. In practice, however, UAE courts have taken an inconsistent approach and there is some confusion as to the correct procedure.

A recent case in the Dubai Court of Cassation[10] held that an arbitrator's signature does not have to be signed on every page of an award, only the pages containing the decision and judgment reasoning. In contrast, a similar case in the Abu Dhabi Court of Cassation[11] found that an arbitrator's signature is only required on the very last page of an award, regardless of whether that page contains the decision and reasoning of the case.

With conflicting guidance from the various UAE courts, arbitrators should (and no doubt will) continue to sign all pages of an award; this alleviates the risk of an appeal court invalidating

the award, but seems a very old-fashioned requirement that is out of line with modern practice (as well as being a burden on the arbitrators if the award runs to many hundreds of pages).

In Practice: Pre-empt And Prevent

Two of our clients have recently had first-hand experience of these issues when seeking to enforce arbitral awards in the UAE. Both involved receiving awards in their favour that were not complied with, forcing our clients to commence ratification and enforcement proceedings which were challenged by the respondent.[12] The grounds for challenge across both cases mirrored the issues discussed in this article:

- the respondent's signatory to the original contract did not have authority to enter into the contract;
- the terms of reference was not signed by an authorised signatory;
- the arbitrators did not sign the award while they were all in the UAE – no evidence was provided, but the respondent argued that, though the award stated that it had been signed in the UAE, the fact that two of the three arbitrators were based in Europe meant that it was likely that the award was signed in the arbitrators' own jurisdictions, not in the UAE, and then sent on in a round-robin format; and
- not all of the pages of the award were signed – the respondent argued that, because the arbitrators only signed the final page of the award and not the reasons for their decision, the award was invalid and should be annulled.

The above issues, if not pre-empted and prevented, cause significant problems in practice for a winning party seeking to enforce an award in the UAE courts. If the discussed formalities are not evidenced, it is likely that the losing party will challenge the validity of an award and commence annulment proceedings on the above procedural grounds, even if they have no merit. Enforcement, and dealing with procedural challenges, however unmeritorious, is a lengthy and costly process. UAE courts continue to react unpredictably to these challenges, and therefore we recommend that parties always take a cautious approach regarding formalities and ensure there is evidence to support what has been done that can be used if such procedural challenges are later made.

Public Policy In The UAE

Recent legislative development has meant that all real estate dispositions must now be registered, and failure to do so may void a disposition.[13] There have been several cases that have considered how this obligation to register may impact the arbitrability of real estate disputes on the basis that they are issues of public policy that cannot be resolved privately by the parties and are not therefore arbitrable. Article 3 of the UAE Civil Code defines public policy to include matters that refer to the 'circulation of wealth' and 'rules of private ownership'.[14]

Baiti Real Estate Investment Company LLC V Dynasty Zaroonilic15

The Dubai Court of Cassation annulled three DIAC awards on the grounds of public policy. It held that the registration of contracts for the sale of off-plan property was a matter of public policy as it related to the 'rules of private ownership and the circulation of wealth'. Such a broad application of public policy caused concern that any real estate dispute would therefore also be held to be non-arbitrable. We have commented on the potential

wide-reaching ramifications of their discussion in previous articles.[16] Recent cases have, thankfully, lessened the likely impact of the Baiti Real Estate case, including a recent case from the Abu Dhabi Court of Cassation.

Abu Dhabi Court Of Cassation Case No. 55 Of 2014

In this case, the Abu Dhabi Court narrowed the definition of what category of real estate disputes were not eligible for arbitration. The facts of this case concerned a dispute between a seller and buyer for a residential unit. The claimant and respondent had entered into a sale and purchase agreement but the respondent had failed to hand over the property on time. The parties' agreement contained an arbitration clause and an award was eventually issued in the claimant's favour. The claimant requested reimbursement of the sums it had paid for the unit under the original agreement.

Following an unsuccessful challenge by the respondent to annul the award in the Court of First Instance, the Court of Appeal considered the dispute's eligibility for arbitration. Relying on the definition of public policy in article 3 of the Civil Code,[17] the Court of Appeal held that matters concerning individual property ownership were not arbitrable and hence that the award was invalid.

However, on appeal, the Abu Dhabi Court of Cassation (the highest court in Abu Dhabi) held that as the dispute in question concerned the termination of a contract and a claim for payments resulting from breach of that contract, there was no public policy issue. Public policy and the rules contained in article 3 of the Civil Code were explained as relating to the creation and registration of rights in private ownership. Specifically, it was held that arbitration is not permitted for dispositions of property involving existing rights or the creation of new rights if a registration obligation concerning the property cannot be complied with. This scenario would be contrary to public policy. Consequently, this case did not concern an issue of public policy. The Court of Cassation decided that the arbitration award was issued to order the termination of a sale and purchase agreement and compensation by the respondent. Although all dispositions of property must be registered with the relevant authorities and therefore dispositions themselves primarily remain governed by public policy, if disputes involve breach of contract and claims for money owed from that breach, such matters will be eligible for arbitration as they are outside the remit of article 3 of the Civil Code.

Expanding Ambit Of The DIFC Courts

A significant development in the UAE this past year has been that of the ever-increasing ambit of the DIFC courts. Following on from its successful launch of the DIFC Courts Arbitration Institute last year, and the DIFC courts' new Courts Enforcement Department, the DIFC courts have further demonstrated their judicial forward thinking by creating a conduit for the enforcement of foreign arbitration awards. This expansion in scope is best illustrated by two recent cases.

Case No. ARB 002/2013 – (1) X1, (2) X2 V (1) Y1 (2) Y2

In this case the DIFC court confirmed that it could be used as a 'conduit' or host jurisdiction for the enforcement of foreign arbitration awards. Enforcement of a foreign arbitration award against assets in mainland Dubai can involve lengthy proceedings through the mainland Dubai courts. However, the DIFC Court of First Instance held that an international creditor is able to enforce an award through the DIFC courts against assets of a debtor located in

mainland Dubai, irrespective of any geographical nexus to the DIFC. The award can then benefit from the 'mutual recognition' regime between the Dubai and DIFC courts by virtue of article 7 of the Judicial Authority Law.[18]

A perceived advantage of adopting such an enforcement strategy is that the DIFC courts and its judges are considered to be more familiar with arbitration and enforcement of foreign awards. They may therefore be more 'pro-arbitration' than the Dubai courts and less inclined to give credence to spurious procedural arguments advanced to delay enforcement. Whether or not this speeds up enforcement of foreign awards will depend, in part, on how the 'mutual recognition' regime continues to be operated by the Dubai courts; if the Dubai courts consider that the DIFC enforcement followed by the 'mutual recognition' regime is being utilised simply to bypass the Dubai courts and its validation process, it may reconsider the appropriateness of the 'mutual recognition' regime and article 7 of the Judicial Authority Law.

CFI 043/2014 – DNB Bank ASA V (1) Gulf Eyadah Corporation (2) Gulf Navigation Holding PJSC (DNB Bank Asa)

Following the above case, the DIFC Court of First Instance in DNB Bank ASA affirmed the DIFC courts' position as a conduit for foreign arbitration awards' enforcement, but not foreign court judgments.

In the present case, the judgment creditor sought recognition by the DIFC courts for a court judgment order requiring the debtor to pay more than US$8.7 million. While the DIFC courts held that a foreign arbitration award could be enforced in the DIFC courts, it confirmed that the same could not be said for foreign court judgments. Justice Al Madhani cited the wording of article 7(2) of the Judicial Authority Law as the basis of his decision. This article states that:

Where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside DIFC in accordance with the procedure and rules adopted by such entities in this regard, as well as with any agreements or memoranda of understanding between the Courts.

Justice Al Madhini explained that this article included no reference at all to any foreign judgment being recognised by the DIFC courts. He concluded that the DIFC court cannot be seen as a conduit jurisdiction court when matters before it pertain to a foreign court judgment.[19]

This case therefore clarifies the position for parties wishing to utilise the DIFC courts to enforce decisions against potential judgment debtors with assets in mainland Dubai: it is only possible for foreign arbitration awards, not foreign court judgments.

Challenges To The New Scope

There have been a number of challenges to the DIFC courts' apparent authority to ratify arbitration awards that have no geographical nexus to the DIFC. The most significant examples of such challenges are seen in the cases of Banyan Tree v Medan Group LLC (Banyan Tree)[20] and X1 and X2 v Y1 and Y2 (X v Y).[21] The case of Banyan Tree concerned a domestic arbitration award relating to a judgment debtors' assets located in mainland Dubai. In contrast, X v Y concerned a foreign arbitral award issued outside the UAE.

Both Banyan Tree and X v Y centred on jurisdictional challenges concerning the DIFC court's capacity to hear an application to ratify and enforce an arbitration award. Neither award had a geographical nexus to the DIFC. It was argued in both cases that, under article 42 of the DIFC Courts Arbitration Law,[22] the DIFC courts have jurisdiction to recognise and enforce arbitration awards 'irrespective of the state or jurisdiction'; this therefore applied to awards seated both in mainland Dubai and outside the UAE.

In response to the above arguments, the judgment debtors of both cases made three key points:

- articles 31(1) and (3) of the CPC[23] provide that jurisdiction to ratify and enforce arbitration awards shall be vested in the court of the area in which the defendant is domiciled or the area in which the contract was initially made – this would therefore not award jurisdiction to the DIFC courts as, in neither case was the judgment debtor domiciled or the contract signed in the DIFC;
- the DIFC courts were created as an exception to the rules of the UAE federal legal system and to avail of their jurisdictions claimants must show that some special requirement has been met to undermine the authority of the mainland courts (eg, the location of key assets within the DIFC courts); and
- the arguments put forward by the claimants in both cases could result in the Dubai courts being starved of any jurisdiction over arbitration award enforcement. This situation would be 'wholly absurd'.

Despite these arguments, the DIFC Court of First Instance maintained its position that it could be utilised as a conduit jurisdiction for enforcement of non-DIFC arbitration awards. The presiding judges in both cases held that article 31 of the CPC was irrelevant to a question of DIFC court jurisdiction; the DIFC court is an autonomous jurisdiction and its capacity to determine disputes and enforce awards is defined elsewhere.

Following the first instance decisions in these two cases, the DIFC Court of Appeal has since confirmed the decision of Banyan Tree. Subsequently, the DIFC courts have continued to reinforce their position as a conduit jurisdiction and remain undeterred by challenges raised by award debtors.

A New (practice) Direction For The DIFC Courts

The DIFC courts in recent months have flexed their jurisdictional muscles even further. Earlier in 2015, the DIFC courts adopted new Practice Direction No. 2 of 2015 regarding the Referral of Payment Judgment Disputes to Arbitration (PD). This confirms that a DIFC courts' money judgment can be converted into a DIFC-LCIA arbitration award that allows it, for example, to take advantage of international protocols. This means that the creditor of a DIFC court money judgment may be able to elect to enforce its successful result through arbitration. There are a number of reasons a creditor may choose to do so:

- Arbitration awards benefit from international enforcement protocols and agreements. These agreements arguably have greater geographical and jurisdictional scope for enforcement compared with the options available for the enforcement of court judgments. For example, the 156 signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards are able to benefit from its wide-reaching and well-established enforcement procedures.

- By converting the DIFC court judgment into an arbitral award, the judgment creditor is able to invoke a unilateral arbitration option over the judgment debtor. Such action is binding and effectively obliges the debtor to submit to arbitration and payment of the debt. (An important point to note, however, is that to invoke this unilateral arbitration option and oblige the debtor, both parties must have effected a standard DIFC-LCIA arbitration agreement at the time of the original contract.)
- The terms of the PD do not offer an alternative channel of enforcement for judgment creditors, but an additional method of enforcement for parties battling against recalcitrant judgment debtors. A creditor is able to benefit from the PD and arbitration award conversion mechanism, notwithstanding any ongoing exercise of other means of enforcement for the outstanding debt. In other words, a party wishing to avail of the new PD for a DIFC courts' money judgment does not need to have exhausted all other avenues of enforcement first.

Together with the DIFC courts' affirmed role as a conduit for foreign arbitration awards, the PD broadens the DIFC courts' enforcement scope even further, offering parties genuinely attractive alternatives to the lengthy procedures of the mainland Dubai courts. The most recent and amended version of the PD entered into force on 27 May 2015, and therefore with no practical examples to date, it is unclear to what extent foreign courts will be willing to recognise converted DIFC courts' money judgments. What is clear, however, is that the DIFC court has asserted itself as a strong-minded autonomous jurisdiction within the UAE, unafraid to create and offer parties to a dispute attractive alternatives to the overworked and, at times, cumbersome existing system.

COMPETITION FROM THE ADGM

An equally important and exciting development in 2015 was the enactment of the ADGM Arbitration Regulations 2015 (the Regulations). The ADGM is Abu Dhabi's 'offshore' free-zone that has a separate civil and commercial legal regime broadly independent of the 'onshore' Abu Dhabi legal regime. Established only in 2013, the ADGM is in its infancy and has a long way to go to catch up with the established and globally recognised DIFC, but the Regulations are an important step in its development.

The Regulations establish a legal framework for the conduct of arbitrations with an ADGM seat. Like the DIFC, the ADGM Regulations are based on the UNCITRAL Model Law, ensuring that arbitrations seated in the ADGM will benefit from modern international arbitration practice and procedure. However, unlike the DIFC, the ADGM does not yet have its own arbitration centre. This means that arbitrating parties may still decide to adopt the institutional rules of an arbitration centre such as ADCCAC, DIAC or DIFC-LCIA. The Regulations are nevertheless comprehensive and parties may choose to conduct ad hoc arbitrations within the ADGM.

The ADGM's own website promotes the Regulations as being modern and intended to encourage parties to use the ADGM as the seat for arbitration in the region. The main characteristic of the Regulations are that they seek to:

- limit the scope of court intervention;
- give the Tribunal the power to determine its own jurisdiction (Kompetenz-Kompetenz); and
-

limit the grounds by which the parties can challenge an award with no review of the merits of the case.

In light of the first section of this article, the emphasis in the Regulations on the limited grounds by which parties can challenge an award is, in our view, applauded. However, at this stage, unlike the DIFC, the ADGM does not yet have a mutual recognition regime with the 'onshore' Abu Dhabi courts. This means that if a party has an ADGM award in its favour, unless it can enforce that award against assets in the ADGM, then the enforcing party must enforce in the local courts – such enforcement may be open to some of the challenges highlighted in this article.

Despite these shortcomings, it is clear that the ADGM is fast developing as a real competitor to the DIFC. It will be interesting to see how readily parties in the region chose the ADGM as the seat for their arbitrations. Competition between the DIFC and ADGM will be healthy for regional arbitration.

CONCLUSION

The DIFC and its courts has continued its emergence into the domestic and international arbitration communities as a key player in dispute resolution. It certainly seems that the ADGM will look to challenge the DIFC as the most arbitration-friendly jurisdiction in the UAE with its new arbitration Regulations.

While the DIFC courts are moving forward, there are still procedural issues that hold back arbitration in the UAE: process and procedural uncertainty have long plagued parties seeking to enforce domestic awards. Parties must continue to act cautiously when drafting and effecting arbitral agreements and awards to ensure they are safe from challenge and resulting delays, and unnecessary costs should enforcement proceedings be necessary. The courts attempted in 2015 to clear up confusion regarding the ambit of public policy issues in arbitration in the UAE but, while a number of judgments have helped clarify the position, public policy remains a widely used and widely interpreted tool for a losing party, and so continues to cause a party seeking to enforce an arbitration award sleepless nights!

Despite a welcome expansion in the UAE's arbitral scope and effectiveness, the greater need at present is for clarity on procedure. While the UAE continues to make admirable advances into the international arbitration community, its domestic procedures remain unclear and inconsistent. The UAE has undoubtedly emerged onto the worldwide dispute resolution stage in recent years but, at present, it offers its tradition of procedural inefficiency and legal uncertainty as part of the package. Bring on a federal arbitration law.

Endnotes

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