

ARBITRATION IN ARAB COUNTRIES (MIDDLE EAST) WITH SPECIAL REFERENCE TO OIL CONTRACT – AN ANALYSIS

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INTRODUCTION

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.¹ 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.²

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.³ 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.⁴

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

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¹ Middle East Consumer Confidence Index-March 2015, www.bayt.com

² J.E. Peterson, Bahrain: Reform-Promise and Reality, page 157

³ Bahrain's economy praised for diversity and sustainability, Bahrain Economic Development Board, Archived from the original on December 28, 2010

⁴ Marcus Noland and Howard Pack, *Arab Economies in a Changing World*, Washington D.C.: Peterson Institute for International Economics, 2007, page 119

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.⁵

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.⁶ 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 have 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.⁷ 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, following Kuwait's accession to the Convention in 1978.⁸

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 UNCITRAL⁹ Model Law on International Commercial Arbitration (the Model Law) in arbitration centers throughout the region. The Model Law

⁵ Alan Richards and John Waterbury, *A Political Economy of the Middle East*, Boulder, CO: Westview Press, 2008, page 31

⁶ Global consortium to inject \$50m in Egypt commodity exchange, MUBASHER, 26 November 2015

⁷ World Economic Forum: Iran ranks 69th out of 139 in global competitiveness.

⁸ *Iran offers incentives to draw investors*, www.presstv.com

⁹ United Nations Commission on International Trade 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.¹⁰

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 centers 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.¹¹

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 favour arbitration as a suitable mechanism for alternative dispute resolution (ADR) and is home to the following arbitration centers.¹²

ABU DHABI COMMERCIAL, CONCILIATION AND ARBITRATION CENTRE (ADCCAC)

The ADCCAC were inaugurated in 1993 and oversee 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

¹⁰ The N-11: More Than an Acronym, Archived March 31, 2010, at the Wayback Machine, Goldman Sachs study of N-11 nations, Global Economics Paper No: 153, March 28, 2007

¹¹ Available at <http://www.siliconindia.com/finance/news/10-Most-Valuable-Currencies-in-the-World-nid-109953.html>

¹² Baten Jörg, *A History of the Global Economy From 1500 to the Present*, Cambridge University Press. page 226

modern arbitration practice to the ADCCAC arbitration process in an effort to encourage more parties to consider the ADCCAC as a forum for ADR.¹³

DUBAI INTERNATIONAL ARBITRATION CENTRE (DIAC)

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.¹⁴

DUBAI INTERNATIONAL FINANCIAL CENTRE-LONDON COMMERCIAL ARBITRATION CENTRE (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 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.¹⁵

The 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 arbitration to its jurisdiction. Anyone, from any jurisdiction, can opt for the DIFC as an arbitration seat. Pursuant to the Judicial Authority Law¹⁶, 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

¹³ Ibid at 216f

¹⁴ Ibid at 214ff

¹⁵ The Bayt.com Middle East Job Index Survey, February 2015

¹⁶ Law No. 12 of 2004

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.¹⁷

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 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, which currently govern arbitration in Qatar.¹⁸

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.¹⁹

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.²⁰

IRAQ

On paper, Iraq has established three arbitration centers 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 modernized in 1969 when the present Civil Procedure Code came into force. When compared to other Arab countries, this early legal development

¹⁷ N. Gregory Mankiw, *Principles of Economics*, (4th Ed.) (2007)

¹⁸ David Waugh, *Manufacturing industries (Chapter 19)*, *World development (Chapter 22)*, Geography: An Integrated Approach (3rd Ed.) (2000) pages 563, 576–579, 633, and 640

¹⁹ The World Bank: World Economic Indicators Database, GDP (Nominal) 2008, Data for the year 2008.

²⁰ Ibid

was hardly surprising as the British-backed monarchy that ruled Iraq during the 1920s to 1958 was interested in modernizing Iraq's legal system.²¹

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.²²

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 centers as foreign entities resorted to more developed institutions. Today, only Najaf's arbitration centre is somewhat active. While the arbitration centers in Baghdad and Basrah continue to exist on record, they are not really utilized.²³

SAUDI ARABIA

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-utilized 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.²⁴

OTHER COUNTRIES

Other arbitration centers in the Middle East include the following:

- The Bahrain Chamber for Dispute Resolution;

²¹ Press Statement - Un Humanitarian Coordinator: Gaza Blockade Suffocating Agriculture Sector, Creating Food Insecurity, UN Office for the Coordination of Humanitarian Affairs, OPT (OCHA)

²² *Supra* note 4

²³ Richards and Waterbury, 203

²⁴ Alt Robert, *Index of Economic Freedom*, www.heritage.org

- 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.²⁵

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, it 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. It 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

²⁵ *Supra* note 21

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 that has been in circulation since 2006 with the latest draft being issued by the UAE Ministry of Economy in 2013. It intends to replace Articles 203 to 218 of the Civil Procedure Code and introduce a modern legislative framework for arbitration in UAE, in line with the UNCITRAL Model law.²⁶ It 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.²⁷

There are also rumors 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 centers 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 centers 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.

²⁶ *Supra* note 4

²⁷ Iran offers incentives to draw investors, www.presstv.com