The Middle Eastern and African Arbitration Review 2021

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The Middle Eastern and African Arbitration Review 2021

A Global Arbitration Review Special Report

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Welcome to *The Middle Eastern and African Arbitration Review 2021*, one of *Global Arbitration Review*'s annual, yearbook-style reports.

Global Arbitration Review, for those not in the know, is the online home for international arbitration specialists everywhere. We tell them all they need to know about everything that matters.

Throughout the year, *GAR* delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live and GAR Connect banners) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a series of regional reviews – online and in print – that go deeper into the regional picture than the exigencies of journalism allow. *The Middle Eastern and African Arbitration Review*, which you are reading, is part of that series. It recaps the recent past and provides insight on what these developments may mean, from the pen of pre-eminent practitioners who work regularly in the region.

All contributors are vetted for their standing before being invited to take part. Together they provide you the reader with an invaluable retrospective. Across 128 pages they capture and interpret the most substantial recent international arbitration developments, complete with footnotes and relevant statistics. Where there is less recent news, they provide a backgrounder – to get you up to speed, quickly, on the essentials of a particular seat.

This edition covers Angola, Egypt, Lebanon, Mozambique, Nigeria, Qatar, Saudi Arabia, Turkey and the UAE, and has overviews on energy arbitration, investment arbitration, mining arbitration, damages (from two perspectives) and virtual hearings.

Among the nuggets you will encounter as you read:

- a helpful chart setting out the largest awards affecting Africa and the Middle East, recently;
- the admonition to expect a wave of restructurings of energy projects locally, and even formal insolvency proceedings;
- a data-led breakdown of investor-state disputes in Africa starting from 2013;
- the revelation that a number of Africa-related mining disputes-opted to pause proceedings rather than attempt virtual hearings when the pandemic struck;
- a brisk summary of the extra considerations that covid-19 has introduced into damages calculation;
- an in-depth analysis of Angola's BITs and the modernisation of BITs in the region more generally; and
- a clear-eyed commentary on recent Nigerian court decisions, some of which are 'not entirely satisfactory'.

Plus, much much more.

We hope you enjoy the review. I would like to thank the many colleagues who helped us to put it together, and all the authors for their time. If you have any suggestions for future editions, or want to take part in this annual project, *GAR* would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
May 2021

Damages in the Middle East and Africa: Trends from Recent Cases and Some Challenges

Fabrizio Hernández, Timothy McKenna and Ralph Meghames[1]
NERA Economic Consulting

In summary

The Middle East and Africa (MEA) region is particularly active in international arbitration. Among these cases, three main characteristics stand out. First, the majority of cases in the region are linked to large infrastructure-related disputes. Second, among recent cases, investor-state disputes appear to be more frequent in the region than commercial disputes. Third, the most frequent allegations for arbitration are expropriation and breach of contract, including breach of shareholders' agreements. Despite some similarities in the issues and the sectors affected by the cases mentioned above, from a quantum perspective, each displays features that need to be assessed in the specific context in which they arise. In this context, a correct understanding of the role of country risk, foreign exchange (FX) rates and fiscal regimes is key to the proper calculation and discounting of cash flows.

Discussion points

- Recent cases in the MEA
- Country risk and its impact on valuation
- Treatment of FX rates regimes and capital controls
- Fiscal regimes, transfer pricing, and shareholder disputes

Recent cases in the region

The MEA region is particularly active in international arbitration. Out of the 2,498 parties involved in cases filed with the ICC in 2019, 18 per cent were from the Middle East and Africa.[2] Countries such as the United Arab Emirates, Saudi Arabia, and Qatar are among the most frequent nationalities among parties, representing respectively 3.12 per cent, 2.24 per cent, and 1.32 per cent of the total number of parties in 2019 filings (the United States being the number one country with 7.85 per cent share). [3]

Among these cases, three main characteristics stand out. First, according to data collected from GAR covering the past three years, the majority of cases in the region are linked to large infrastructure related disputes, in particular in the energy, mining, and telecom sectors, with an average award value that exceeds US$500 million.[4] Table 1 below illustrates some of the recent cases involving the MEA region.

Second, among recent cases, investor-state disputes appear to be more frequent in the region than commercial disputes (around 60 per cent of investor-state cases versus 40 per cent commercial cases). Investor-state disputes in the MENA (Middle East and North Africa) region have, in fact, increased from 5 per cent to 9 per cent of ICSID's new caseload in the past years (while sub-Saharan new caseload decreased from 21 per cent to 12 per cent).[5] Also within the set of ICSID cases, most are related to energy and infrastructures.[6]

Third, the most frequent allegations for arbitration are expropriation and breach of contract, including breach of shareholders' agreement. In investor-state disputes expropriation is generally related to project cancellations, particularly in projects related to the exploration and exploitation of natural resources. In *Divine Inspiration Group v Democratic Republic of the Congo*, the South African oil exploration company was awarded damages over the African state's failure to honour two oil production-sharing agreements covering an area that contains 6 per cent of the country's oil reserves.[7] In commercial arbitration, similar issues arise in the context of the early termination of concession agreements. In *Damietta International Port Company (DIPCO) v Damietta Port Authority*, the dispute related to a long-term concession agreement awarded covering the development, building, and operation of a container facility on Egypt's Mediterranean coast. The project reportedly encountered several problems, notably in relation to the political upheaval that followed the Arab Spring of 2011. The port authority ultimately terminated the concession agreement in 2015, which gave rise to the claim. [8]

Breach of contract is also a recurring theme in the region. In *DP World v Djibouti*, the African state was found liable for breaching DP World's exclusivity rights by pursuing the development of container port facilities with a rival Chinese operator. The dispute revolved around a concession agreement for a container terminal at the port of Doraleh on the Red Sea – a strategically important hub for regional trade.[9] In *Unión Fenosa Gas, SA v Arab Republic of Egypt*, the tribunal has ordered Egypt to compensate a joint venture between Naturgy (Spain) and Eni (Italy) over the interruption of gas supplies to a LNG plant at the port of Damietta.[10] In *Privinvest Group v Greece*, the country lost a claim in favour of the Middle Eastern-owned operator of one of the country's largest commercial shipyards. The dispute started around Greece's default under its contractual obligations for the construction of submarines and evolved into a number of claims relating to breaches of commitments.[11] In *Turkmengaz v National Iranian Gas Company (NIGC)*, the national company failed to pay for gas it had imported from Turkmenistan, in the context of a long-term supply agreement.[12] The awards in these cases averaged more than US$1.4 billion.

Shareholder disputes are also observed in the region. The *Ansbury Investment v Ocean and Oil Development Partners BVI and Whitmore Asset Management* case involved shareholder loan repayment and transfer of shares disputes in the context of a joint venture holding stakes in the Nigerian oil and gas company Oando.[13] In *PT Ventures v Unitel*, a subsidiary of Brazilian telecoms group Oi won a case against its shareholders in Angola's largest mobile phone carrier Unitel. The dispute emerged after Oi had acquired a majority stake in PT Ventures (which owns 25 per cent of the shares in Unitel) as part of its merger with Portugal Telecom in

2014. The other Unitel shareholders were found liable for breaching the shareholders' agreement.[14] Shareholder dispute cases are sometimes tainted with corruption claims. In *Vale v BSGR*, which was related to the largest iron ore deposit in the world, the tribunal found that BSG Resources (a Guernsey mining company) made fraudulent misrepresentations on which Brazilian mining company Vale relied upon when entering into a joint venture to develop an iron-ore mining concession in eastern Guinea.[15]

Table 1: MEA region recent international arbitration cases

Case		Concluded	Award	Sector	Venue	Type
Vale v BSGR	An LCIA award worth US$2 billion that made findings of corruption in a dispute over an iron-ore mining project in Guinea has become public after being submitted to the US courts for enforcement.	2019	US$2 billion	Mining	LCIA	Commercial
DP World v Djibouti	An LCIA tribunal has ordered Djibouti to pay US$533 million to a subsidiary of Emirati port operator DP World after finding that the East African state breached the company's exclusivity rights by pursuing the development of container port facilities with a rival Chinese operator.	2017	US$533 million	Infrastructure	LCIA	Commercial
Divine Inspiration Group v Democratic Republic of the Congo	A South African oil exploration company, Divine Inspiration Group, has reportedly been awarded US$617 million in an ICC claim against the Democratic Republic of the Congo over the state's failure to honour two oil contracts.	2018	US$617 million	Energy	ICC	Commercial
Ansbury Investment v Ocean and Oil Development Partners BVI and Whitmore Asset Management	An LCIA tribunal has ruled that an investment vehicle linked to an Italian-Nigerian billionaire, Gabriele Volpi, is owed US$680 million in a shareholder dispute with fellow investors in a major Nigerian oil company. Ansbury is owed US$600 million by Ocean and Oil Development Partners (OODP) and US$80 million by Whitmore Asset Management, both of which are British Virgin Islands entities.	2018	US$680 million	Energy	LCIA	Commercial
PT Ventures v Unitel	In 2019, Isabel Dos Santos' British Virgin Islands-registered company Vidatel was among those ordered to pay US$646 million to Portuguese entity PT Ventures by a five-member ICC tribunal, in a shareholder dispute over Angolan mobile carrier Unitel.	2019	US$650 million	Telecom	ICC	Commercial
Unión Fenosa Gas, SA v Arab Republic of Egypt (ICSID Case No. ARB/14/4)	An ICSID tribunal ordered Egypt to pay US$2 billion to UFG in 2018 after holding the state liable under the Spain-Egypt bilateral investment treaty for the failure to deliver the gas.	2018	US$2 billion	Energy	ICSID	Investor state
Damietta International Port Company (DIPCO) v Damietta Port Authority (Cairo-seated ICC arbitration)	A Kuwaiti-led consortium named Damietta International Ports Company (DIPCO) has won over US$490 million in an ICC claim against an Egyptian state authority over a terminated concession for a container terminal facility at the port of Damietta – a dispute that has also given rise to a threatened treaty claim.	2020	US$490 million	Infrastructure	ICC	Investor state
Turkmengaz v National Iranian Gas Company (NIGC)	Turkmenistan's national gas company Turkmengaz has reportedly been awarded around US$2 billion in an ICC claim concerning payments for the supply of natural gas to Iran.					
The National Iranian Gas Company (NIGC) has been found liable for failing to pay for gas it had imported from Turkmenistan.	2020	US$2 billion	Energy	ICC	Commercial	
Privinvest Group v Greece	Greece has lost a challenge to an ICC award in favour of the Middle Eastern-owned operator of one of the country's largest commercial shipyards, known as Hellenic Shipyards (HSY) – and has disputed a recent statement by the investor that the award has a total commercial value of more than €1.2 billion.	2017	€1.2 billion	Infrastructure	ICC	Commercial

Source: GAR, NERA Review

Challenges for the common valuation approaches

Despite some similarities in the issues and the sectors affected by the cases mentioned above, from a quantum perspective, each displays features that need to be assessed in the specific context in which they arise. The quantification of the damage usually requires the valuation of the companies or projects affected by the liable actions. The three main approaches commonly relied upon to value a business or an asset (the market approach,[16] the income approach[17] and the asset approach[18]) are often difficult to apply (see Table 2):

- The market approach is often impractical in countries with underdeveloped or illiquid financial markets. Data might simply not be available, and whenever available, might not be reliable.
- The asset approach could be deemed subjective whenever based on historical costs which depend on management decisions taken at a certain time, and that might not be optimal from the perspective of a rational investor at the time the damage was suffered. In addition, often historical costs are not helpful in estimating the replacement value of an asset or a business.
- The income approach, also known as the discounted cash flow (DCF) method, remains the most widely relied upon method, but it also faces challenges. It requires calculation of the cash flows associated with the project both in the actual scenario, namely after the liable action, and in the counterfactual scenario (ie, but for the liable action). Besides data availability and reliability of prior forecasts, the calculation of cash flows in both scenarios requires appropriate consideration of:
  - the country's uncertain business environment that may make it difficult to measure estimate future performance and expected cash flows; the associated risks are generally referred to as country risk and the results of most valuation exercises are sensitive to how it is treated;
  - the fact that cash flows are obtained in a currency different than the one in which the valuation is performed and this requires converting future cash flows into the currency of the valuation, often in countries with multiple rates and capital controls; and
  - the applicable fiscal regime, either because it is specific to the country or project in question, or due to the international tax implications on the value of intercompany transactions.

A correct understanding of the role of country risk, FX rates and fiscal regimes is key to the proper calculation and discounting of cash flows. The rest of this chapter is devoted to explaining some of the issues that must be taken into account when dealing with these factors in quantum exercises.

Table 2: Limiting factors for valuation approaches in Africa and Middle East

	Market approach	Income approach	Asset approach
Data availability	Markets may not be mature	Future performance may be uncertain	Historical cost information available
Other information	No comparable transactions	Prior forecasts may no longer be valid	Replacement value difficult to ascertain (intangibles)
Treatment of specific factors	Uncertainty and country risk may have an impact on the reliability of this method	Analysis of single risk factors is needed on a case by case basis to grasp the complexity of the business environment	Company-specific
Overall	Impractical (particularly in small countries)	Future scenarios could be seen as speculative	Affected by management bias

Country risk

In the DCF approach, the discount rate represents the opportunity cost of the capital employed to finance a business or a project. Calculating an appropriate discount rate for use in DCF calculations requires a logical support for the specific risks affecting the project. Different risk factors stemming from the specific jurisdiction where the project takes place generally imply different risk profiles and activities deployed in jurisdictions with risk factors that can enlarge the variability of potential outcomes for the project (such as changing its future costs or delaying its development) command inherently higher discount rates, reducing - all other things equal - the present value of such projects.

Two key issues to the consideration of country risk relate to: how to consider it in DCF methods; and how to derive a numerical value to quantify the risk.

In relation to the approach to include country risk in the DCF method, many analysts generally add a country risk premium to the discount rate. Besides, analysts often also structure the cash flow projections by modelling scenarios that reflect materialisations of the country uncertainties. It may then appear that country risk is accounted for twice: in the discount rate and in the (undiscounted) cash flows.

The discount rate reflects the time value of money, namely the correction to the current value that investors would attach to a monetary value in the future. The larger the uncertainties that can make such future value vary, the less will be the current value for risk-averse investors, given the same expected future value. As a result, if the conditions in a country A make the expected future value of a project more variable than in country B, even if on average the expected value of the projects is the same, then investors will rationally view the project in country A as less valuable today.

The same country risk premium should, however, not apply to all types of projects in a particular country. Some countries have a more developed and stable regulation and legal environment in some sectors than in others. Often, activities in sectors of strategic importance for the country (such as agriculture and extraction of natural resources) may be subject to more frequent interference by public authorities and more subject to political risk.

For this reason, an accepted principle in DCF analysis is that cash flow projections should reflect the characteristics of the project at hand. They will therefore reflect features of the sector where the project operates, the contracting arrangements it has signed to sell its production, the labour contracts in place for its workforce; many of these features may be sector-specific or

project-specific, particularly when the project is one of a kind. The cash flows the project delivers may then be more or less subject to change as compared to those in the average sector in the country.

As long as the cash flow projections reflect the project characteristics, they must consider all the likely scenarios for the project in the future, which reflect all the uncertainties related to the project, including those related to the country where it operates. Such scenarios would reflect the practical consequences on the specific project of the interaction between all risk factors, project-specific and country-specific. The scenarios are then weighted according to their probability of occurrence and the resulting average values reflect the expected stream of cash flows going forward.

While cash flow projections reflect all risks affecting the project, the inclusion of country risk in the discount rate must consider only the systematic (or non-diversifiable) part of country risk. Standard asset valuation models such as the capital asset pricing model (CAPM) attach a premium related only to the part of the risk that investors cannot avoid with diversification. The degree of diversification of the relevant investors must be analysed case by case as often global investors are well diversified and local investors are not, particularly in relation to investments in real assets and if restrictions to access capital markets exists.

Often country risk premiums are derived by comparing US dollar-denominated bond yields in the local country with those in reference countries (such as the United States or Germany) for the same maturities.[19] Adding such a premium to the risk-free rate implicitly assumes that: all country risk is systematic, and the risks related to the local government defaulting on its bonds is a relevant risk for the project under valuation. These assumptions do not hold in many cases and not correcting for these factors may lead to using country risk premiums that are unrealistically high for the project in question.

When country risk premiums are derived from bond rates, the question arises as to whether further adjustments are necessary to account for the greater risk inherent in equities than in debt. Often such equity risk differentials are reflected in the determination of equity discount rates, for instance by using market risk premiums that are then multiplied by the relative volatilities (the betas) of specific samples of companies with similar risk profiles relative to the overall market.[20] Attempts to use data from companies with comparable risk (such as multinational companies with a similar percentage of activity in countries with similar risk assessments) with equity-to bond country risk adjustments may lead to double counting country risk. In fact, for beta estimates to be reliable, local industry stock are often not very liquid or have a short history of public trading. These conditions are common in many emerging markets.

In sum, the assessment of country risk must be tailored to each particular environment. Cash flow projections need to include realistic assumption about all risks on a project if such risks exists at the time of valuation.[21] This includes political risk, such as expropriation risk.[22] However, it should avoid the temptation to excessively weigh bad outcomes to 'illustrate' how certain elements of country risk would impact the project if they were to materialise. Once expected cash flows reflect the market expectations at the valuation date, they need to be discounted with a rate that includes the systematic component of country risk and considers the effects of potentially illiquid local equity markets on the volatilities of companies used as benchmarks for risk purposes. This is because, in emerging markets, country risk is project-specific and not fully systematic, and it may not correlate well with the spread of government bonds of the country concerned.

Foreign exchange rates

In many cases project cash flows are earned in a currency that is different from the currency of the valuation. The question then arises as to whether it is preferable to:

- discount the cash flows using foreign discount rates and convert the resulting discounted value using the spot exchange rate; or
- convert the future cash flows into domestic currency values using expected future exchange rates and then discount using a domestic discount rate.

The two methods may seem equivalent and, in fact, they generally provide the same answer as this equivalence is the well-known interest rate parity result. The results might not, however, be exactly the same and there are many reasons why this may be, ranging from slight imperfections in market prices to theoretical issues.[23]

However, the valuation issues we address below go beyond questions related to the accuracy of interest rate parity. Rather, we consider how the non-existence of foreign exchange markets or the existence of currency controls affects the valuation of cash flows. These are significant concerns and apply to valuation in many countries around the world, including in the MEA region.

In the MEA region, there are a variety of FX regimes, with pegged currencies, floating currencies, and a variety of arrangements that seek to approximate a fixed exchange rate (see Table 3).

Table 3: FX regimes in the MEA region[24]

Countries	Today GDP ($, Billions)	Foreign exchange rate arrangement
31	2,107.86	Conventional peg
14	1,835.78	Stabilised arrangement
13	1,099.40	Floating
9	355.98	Crawl-like arrangement
8	586.26	Other managed arrangement
1	17.34	Crawling peg
1	3.73	Currency board

Moreover, capital controls (ie, restrictions on the ability to access FX) can lead to 'black market' exchange transactions, whereby participants exchange currency at rates other than the official rates. Capital controls can coexist with managed and stabilised currency regimes. For example, Iran has a black-market FX rate, an official FX rate, and another FX rate called the NIMA rate, which is the rate at which exporters are required to transact (when converting foreign currency into domestic currency). This is a complicated structure that has features of a floating exchange rate regime along with a controlled currency regime where conversion is restricted. Valuation of an asset in a home country like Iran would require considering not only these FX rules at present but how they are expected to evolve as well.

Differences in the FX regimes and in the rules specific to any asset may affect the best way to approach the valuation. To illustrate the challenges that arise, we refer to a numerical example below. An asset generates foreign currency (FC) cash flows and the aim is to derive its value in terms of the domestic currency (DC). Specifically, an asset generates a FC cash flow of FC 20 one year

in the future. The FC risk-free rate is 2 per cent and the DC risk-free rate is 10 per cent (including country risk of the domestic country), and the spot FC/DC exchange rate is five (ie, one unit of FC is valued at five units of DC). For simplicity the cash flows are assumed to be risk-free.

Data on expected future FX rates are often not available and, even when they are, the reliability of such data may be questionable. While it depends on the specifics of why future FX rates are not available, a straightforward approach that can be appropriate would be to discount the FC cash flows of the asset using FC risk-free rates and then convert the result to DC units using the spot exchange rate. In the example, that results in FC 19.6, which is the result of dividing FC 20 by (1 + 2 per cent). When converted using the spot exchange rate, this is equal to DC 98.0. The domestic risk-free rate of 10 per cent does not enter this computation. This is because the cash flows are earned in the future in FC.

When valuing an asset in a country with currency controls like Iran, the rules that apply to the cash flows of the asset must be considered. As a stylised example, again consider the valuation of an asset with FC flows of FC 20. The black-market FX rate remains 5 DC = 1 FC. If the expectation is to be allowed to convert FC into DC at the black-market rate, then the valuation remains the same as in the example above, that is, the value of the asset is DC 98. However, if the FC cash flows must be converted at a less favourable rate, the valuation in DC would be lower.

Each valuation must assess the rules that are expected to apply to the asset in question. In addition, what is important are the rules that are expected to apply when the cash flows are realised. While current rules can serve as guidance, what is relevant is the rules that are expected to apply in the future for conversion of FC into DC. If in a year all FC cash flows are expected to be converted at a less advantageous rate, then such a fact should be incorporated into the valuation.

In the example, if FC earned by the asset in one year is forced to convert at the official rate and by then the official rate is such that each unit of FC gets 20 per cent less DC than the black-market rate, then an expectation of a discount to the value of the asset should be built into the valuation. This is because 20 per cent of the value is diverted due to the use of the official exchange rate. If covered interest parity holds for black market rates, the value of the asset is worth exactly 20 per cent less than the value without the forced use of the official exchange rate.[25] In this case the forced use of the official exchange rate had a meaningful impact on the valuation.

Naturally there may not be easy answers for every situation. Market data on domestic assets that are expected to generate FC cash flows may provide some guidance. Analyst and market commentary may also help to understand what expectations are about conversion of FC into DC.

Under other FX regimes the valuation may require other approaches. Some countries operate with an exchange rate that is allowed to adjust only slowly. Other countries have a currency that is pegged to either the euro or the US dollar. What is important for valuation of future cash flows is the expectations for these regimes in the future, whether the peg will remain in place, or what FX regime will be adopted if the peg collapses. These are not necessarily easy questions to answer, but a proper valuation should consider them.

As an extreme example, since 2019 Lebanon has placed unofficial[26] restrictions on the withdrawal of currency from the country.[27] This makes it challenging to value an asset that generates cash flows in Lebanese pounds for a US investor. One approach could be to shift cash flows into future periods when the restrictions on transfers are expected to cease. Such an estimate is, however, difficult to make and might be highly subjective. In addition, several different currency exchange rates emerged in the country:[28] the Lebanese pound remains officially pegged at 1,517 to US$1, banks allow cash withdrawal at a rate closer to 3,900, the black-market rate at the time of writing stands at 13,000, and is subject to fluctuation, and businesses randomly apply their own exchange rate, which depends on the payment means (cash, foreign or local credit cards, etc). In such circumstances, a careful examination of the factors that are relevant to the project cash flows and to the valuation is necessary to decide on the most appropriate approach.

Fiscal regimes and transfer pricing

The applicable tax regime is a third potential driver of project or business value in both the actual and 'but for' scenarios.

In many cases involving joint ventures between local (often state-owned) entities and international companies, damage claims refer to the difference between the actual project value, which was reduced by the liable actions, and the continuation value of the project for the claimant. In these cases, the ability to restructure the project by the local entity or by the state after expropriation or after the cancellation of the concession contracts with the international investor, may lead to substantial value being diverted to the state in the form of fiscal revenues. If the possibility of these alternative arrangements is not considered, the continuation value of the project may appear low, when in fact the distribution of profits between the local entity and the state implicit in the original project structuring does not need to apply after cancellation of the concession. Post-cancellation values would be affected by changes in the fiscal treatment of the project and treatment does not necessarily remain the same after cancellation of the contract with the original investor or partner.

Many projects in the energy and infrastructure sectors span several segments of the value chain. Because different activities in different segments may face different effective tax rates, different project structures may imply differences in value. When, for example, upstream production is sold to a downstream affiliate at a transfer price, the distribution of profits along the value chain is affected. Often such transfer pricing rules are designed to: abide with international tax regulation; guarantee sound resource allocation decisions within the company, which maximise profits; and provide objective divisional performance measures for management purposes. By increasing the transfer price, the upstream affiliate would increase its post-tax profits and its net present value (NPV). Of course, if upstream activities face lower taxes, the profits and NPV of the downstream business would be reduced but by less than the increase in the upstream value because of differences in tax rates. The calculation of future cash flows must therefore assume the expected fiscal regime and consider any expected change that could affect the optimal structuring of an integrated project.

A second set of disputes in relation to transfer pricing relates to shareholder disputes about internal transactions among entities within the same multinational company. These include post-M&A disputes, breach of shareholder agreements, financial instruments valuation, compensation differences and dividend-related dispute.

In commercial arbitration, transfer pricing issues may arise in the context of shareholder disputes, whereby shareholders disagree on the level of profit made by the entities they own, as a result of intercompany transactions. This can for example be the case when an entity controlled by one shareholder sells products or charges

service fees or intangible related fees to an affiliate it co-owns with other shareholders.

In investor-state arbitration, transfer pricing issues may be linked to the current wave of regulations aiming at countering tax avoidance and tax optimisation schemes following the Base Erosion and Profit Shifting initiative led by OECD. While measures taken by tax authorities are legitimate, parties can call upon investment treaties to challenge fiscal measures.

A common topic of recent disputes in commercial arbitration relates to minority shareholders viewing the level of management fees paid by the entity they own to the majority shareholder as abusive.[29] Subsidiaries pay management fees to their parent company in return for centrally performed activities. The latter can be administrative and of low value, as well as strategic or operational and of high value. Moreover, such activities can lead to the development of intangibles, which need to be taken into consideration in assessing the right remuneration of the parent company at arm's length.[30] The diversity of headquarter activities and organisation structure translates into a diversity of transaction structure. Management fees can thus be charged on a cost-plus basis, on a revenue basis (royalty), on a lump-sum basis or following other mechanisms.

Minority shareholders are not indifferent to the level of management fees paid by the entity they own shares in, since those fees have an influence on the profit level of the entity, and in turn on dividends paid.

To assess the correct level of management fees, the OECD guidelines on transfer pricing clearly refer to the arm's-length principle and suggests the remuneration must be in line with what independent third parties would have agreed upon in similar circumstances. In this context, the assessment of the level of management fees that should be paid at arm's length – and that should satisfy both the minority and majority shareholders' interests – would likely account for the following factors:

- the roles and responsibilities of the parent company in performing centralised activities and of the subsidiary, in line with the functions they perform, the risks they assume and the assets they own, within the overall framework of the group's value creation;
- the actual benefits obtained by the subsidiary from the centralised activities, relative to its next best alternative;
- the contractual arrangements governing the overall relationship between the parent company and the subsidiary (this is not necessarily limited to the management services agreement between the parent company and the subsidiary, but could include other agreements that could have an impact on pricing);
- a comparison with similar market practices, and a specific pricing analysis, notably in cases where comparability is limited.

The last factor is often the case in the MEA region, where data availability can be an issue. In this case, whenever transactions amongst unrelated parties are not available to serve as a point of reference, it might possible, under certain conditions, to rely on similar transactions with other parties with different ownership interests. Such analysis requires, however, a careful review of the facts and circumstances surrounding each transaction.

Notes

1 Fabrizio Hernández is a managing director, and Timothy McKenna and Ralph Meghames are associate directors at NERA Economic Consulting.

2 Data from ICC Dispute Resolution 2019 Statistics, © International Chamber of Commerce (ICC), 2019.

3 Data from ICC Dispute Resolution 2019 Statistics, © International Chamber of Commerce (ICC), 2019.

4 NERA analysis of relevant GAR publications published over the past three years covering disputes in the Middle East and Africa. This is a general review of relevant GAR publications rather than a review of an exhaustive set of all disputes in the Middle East and Africa.

5 ICSID Caseload – Statistics Issue 2021-1. ICSID Caseload – Statistics Issue 2015-1.

6 ICSID Caseload – Statistics Issue 2021-1.

7 Jones, T, 2021. South African oil company wins ICC award against Congo. [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/south-african-oil-company-wins-icc-award-against-congo> [Accessed 24 February 2021].

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13 Sanderson, C, 2021. Nigerian shareholder dispute reaches partial award. [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/nigerian-shareholder-dispute-reaches-partial-award> [Accessed 24 February 2021].

14 Jones, T, 2021. Panel of five decides Angolan telecoms case. [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/panel-of-five-decides-angolan-telecoms-case> [Accessed 24 February 2021].

15 Perry, S, 2021. Award in Guinean bribery dispute made public. [online] Globalarbitrationreview.com. Available at: <https://globalarbitrationreview.com/bribery-and-corruption/award-in-guinean-bribery-dispute-made-public> [Accessed 24 February 2021].

16 The market approach assumes that the value of an asset or business can be obtained from observed market transactions involving comparable assets or businesses.

17 The income approach views the commercial value of an asset as the discounted value of the expected returns (or cash flows) attributable to the asset or business.

18 The asset approach assumes a rational investor would not pay more than the expected costs to create the asset or business.

19 When a country has not issued sovereign debt for comparable

maturities or it is not traded, country risk ranking models can be used on the basis of qualitative assessments of country risk in different countries, which are transformed in relative scores that can then be compared to known yields of traded bonds.

20 A common methodological option consists in calculating the opportunity cost of capital for an average company undertaking an investment with a similar risk profile. This approach often is based on a detailed calculation using objective data on companies whose main activity is representative of the same type of investment.

21 In Flughafen Zürich AG and IDC SA y Gestión e Ingeniería IDC SA v Venezuela (ARB/10/19), the Tribunal considered that investors were well aware of the existence of political and legal uncertainties at the time of investing and that therefore the political and regulatory risk existed before the investment.

22 See for example, Mobil v Venezuela (ARB/07/27), Tidewater v Venezuela (ARB/10/5) and Saint-Gobain Performance Plastics Europe v Venezuela (ARB/12/13), where Tribunals considered that confiscation and expropriation risk remained part of the country risk and had to be taken into account in the determination of the discount rate.

23 See Andreas Shuler, Cross-border DCF valuation: discounting cash flows in foreign currency, Journal of Business Economics, 2020 .

24 Definitions from the IMF's Annual Report on Exchange Arrangements and Exchange Restrictions.

25 The maths are the same, but the FC in one year is converted to DC at the rate of FC 0.232 = 1 DC, not FC 0.185 = 1 DC. The expected amount of DC in one year is thus 20 per cent lower, as is the resulting value of the asset.

26 Staff, R, 2021. Lebanese MPs await IMF remarks on capital control law - MP. [online] U.S. Available at: <https://www.reuters.com/article/lebanon-crisis/lebanese-mps-await-imf-remarks-on-capital-control-law-mp-idUSL8N2DA4MO> [Accessed 17 February 2021].

27 Al-Mahmoud, F, 2021. Lebanon's informal capital controls explained: Why can't Lebanese access their money?. [online] Al Arabiya News. Available at: <https://english.alarabiya.net/features/2020/11/15/Lebanon-economy-Lebanon-s-informal-capital-controls-explained> [Accessed 17 February 2021].

28 Frakes, N, 2021. As Lebanon enters hyperinflation, the black market currency exchange has many faces. [online] Al Arabiya News. Available at: <https://english.alarabiya.net/features/2020/07/25/As-Lebanon-enters-hyperinflation-the-black-market-currency-exchange-has-many-faces> [Accessed 17 February 2021].

29 Management fees are not the only subject of dispute between shareholders. Other concerns can relate to profit shifting claims through product transactions among several joint ventures or legal entities.

30 The arm's-length principle is the founding principle in transfer pricing and consists in assessing what independent third parties would have done in similar circumstances, namely that the pricing of transactions between affiliated entities should reflect what would have been agreed between third parties in terms of a transactional framework, and how this would translate into formal transactions, remuneration and ultimately allocation of profits.

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NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigour, objectivity and real-world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance and litigation.

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Energy Arbitrations in the Middle East

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In summary

This article introduces the reader to the manner in which energy is produced, managed, preserved and treated in the Middle East, before undertaking an in-depth analysis of arbitration trends in the context of energy disputes. Finally, the areas of dispute that cause or impact current energy arbitrations and future energy disputes are explored.

Discussion points

- Ownership and management of natural resources in the Middle East
- Arbitration trends in the context of energy disputes in the Middle East
- Current and potential areas of dispute in energy arbitration in the Middle East

Referenced in this article

- UAE Federal Law No. 6 of 2018
- Qatar Law No. 2 of 2017
- DIFC-LCIA
- SCCA
- ICC

Introduction

The Middle East is synonymous with energy. It has just under half of the world's oil reserves and just above one third of the world's gas reserves.[1] In terms of oil reserves, Saudi Arabia has the largest reserves in the region and the second largest reserves in the world.[2] Thereafter, the second-largest oil reserves in the region are in Iran (fourth globally), followed by Iraq (fifth globally), Kuwait (seventh globally) and the United Arab Emirates (UAE) (eighth globally).[3]

The Middle East is the world's largest oil producing region.[4] It accounts for around a third of global oil production[5] and is responsible for roughly a third of global oil exports.[6] Saudi Arabia is the largest oil producing nation in the region (third globally), followed by Iraq (fifth globally), the UAE (seventh globally) and Iran (eighth globally).[7]

The Middle East is also home to the largest natural gas reserves in the world.[8] Within the region, Iran has the largest proven gas reserves (second globally), followed by Qatar (third globally), Saudi Arabia (eighth globally) and then the UAE (ninth globally).[9]

The region is the third largest producer[10] of natural gas in the world. In 2019, and notwithstanding the imposition of sanctions, Iran remained the largest producer of natural gas in the region (third globally), followed by Qatar (fourth globally) and then Saudi Arabia (ninth globally).[11]

This richness in resources and success in production has underpinned much of the economic development in the region in recent decades.

Prior to the crisis caused by the covid-19 pandemic, global energy demand was estimated to increase by 25 per cent by 2040[12] and by 12 per cent between 2019 and 2030.[13] Unsurprisingly, the growth in global energy demands have dropped by 5 per cent in 2020.[14]

While global energy demands are estimated to be lowered in the short term, some analysts have estimated them to return to pre-covid-19 levels between 2021 and 2023.[15]

In line with this, the Middle East is expected to retain a significant share of oil and gas in its primary energy demand, with oil production remaining constant and gas production increasing by 50 per cent.[16]

Owing to the significance of the size and proportion of its oil and gas resources, and the likely increase in demand for energy in the near future, the Middle East has started to look to other sources of energy, including nuclear,[17] coal[18] and renewables.[19]

As the nature of the Middle East's energy resources expands, the nature and scope of disputes arising from projects relating to these resources will also be impacted.

Ownership and management of resources

Of fundamental importance in relation to the region's energy sector, and disputes that may flow from it, are how rights to own and manage resources are allocated by local law and through various contractual structures involving the state, state-owned entities and international partners.

Ownership

As a starting point, natural resources in the region are generally owned by the relevant state. In Qatar, Law No. 3 of 2007 regarding the Exploitation of Natural Wealth and Resources, which regulates the ownership of the state's natural resources, stipulates that natural resources are deemed the public property of the state.[20] Saudi Arabia, Kuwait, Bahrain, Syria, Yemen and Oman also vest ownership rights to natural resources in the state.[21] In the UAE, which is made up of seven emirates, the Constitution stipulates that the natural resources and wealth in each emirate are the public property of that emirate; that is, the energy resources of the UAE are not owned at the state level and, instead, each individual emirate owns its own energy resources.[22] As a result, and for the most part, there is little dispute as to the ownership of a state's resources in the Middle East.

However, there is scope for disagreement as to who may exercise that right on behalf of the state or its peoples. In Iraq, the state's oil and gas resources are owned by 'all the people of Iraq in all the regions and governorates'.[23] The federal government in Iraq takes the position that it is the sole representative of the people and has the exclusive right to explore, develop, extract, exploit and

utilise Iraq's oil and gas resources. The governing authority of the federal Kurdistan region of Iraq (the KRG), disagrees with this view and considers that it is the federal regions and provinces (as defined in the Iraqi Constitution) that have the right to explore, develop, extract, exploit and utilise Iraq's oil and gas resources within their territories. While this issue could have been clarified with the entering into force of the Iraqi Federal Oil and Gas Law, which has existed in a draft form from as early as 2007,[24] its failure to come into effect continues to leave this issue unresolved.[25]

The complexities surrounding the question of who has the relevant rights to explore, develop, extract, exploit and utilise Iraq's oil and gas resources in the areas controlled by the KRG has led to disputes. For example, Iraq commenced an International Chamber of Commerce (ICC) arbitration, claiming more than US$250 million in damages, against Turkey and its state-owned pipeline operator, BOTAS, because, among other things, BOTAS purchased oil directly from the KRG, without consent from the Iraqi ministry.[26]

Management: the role of national oil companies

In respect of oil and gas resources, for the most part, states in the Middle East have created national oil companies (NOCs) to manage, at the least, their upstream requirements. Notable examples of NOCs include the following:

- Saudi Arabian Oil Company (Aramco): Saudi Arabia's state-owned national petroleum company manages the upstream, midstream and downstream components of Saudi Arabia's crude oil and natural gas. Aramco is the world's largest oil and gas company.[27] Following its historic initial public offering (IPO) in 2019, it raised approximately US$25.6 billion to become one of the world's most valuable listed companies.[28] Despite oil prices falling during the pandemic, Aramco appears to have navigated its way through the carnage better than the rest and notably continued its commitment to pay shareholders an annual dividend of US$75 billion.[29]
- Abu Dhabi National Oil Company (ADNOC): Abu Dhabi, which has the vast majority of hydrocarbon reserves in the UAE, created ADNOC to produce, manage, preserve and trade these reserves.[30] ADNOC manages approximately 95 per cent of the UAE's proven oil reserves and 92 per cent of the country's gas reserves.[31] ADNOC's board of directors is comprised of members of the recently created Supreme Council for Financial Economic Affairs, responsible for all matters related to the financial investment and economic, petroleum and natural resources affairs in Abu Dhabi.[32]
- Qatar Petroleum: Qatar's NOC manages upstream, midstream and downstream oil and gas operations in Qatar[33] and acts as the state's investment arm in the oil and gas sector both domestically and internationally.[34]
- Iraqi Ministry of Oil/Iraqi National Oil Company (INOC): INOC was reconstituted in 2018[35] and a decree transferred the ownership of nine state-owned oil companies from the Ministry of Oil to INOC.[36] In January 2019, however, the law establishing INOC was challenged before Iraq's Federal Supreme Court and was declared, in part, to be unconstitutional.[37] At present, the Iraqi Ministry of Oil continues to control and supervise the oil and gas exploration process in Iraq.[38] INOC is expected to be operational by the third quarter of 2021 or the first quarter of 2022,[39] and in September 2020, Iraq's oil minister was named as the head of INOC.[40]
- Iranian Ministry of Petroleum: the Iranian Ministry of Petroleum controls all issues pertaining to the exploration, extraction, exploitation, distribution and exportation of crude oil and oil products with a number of NOCs (including the National Iranian Oil Company, National Iranian Gas Company, National Iranian Oil Refining and Distribution Company and the National Petrochemical Company)[41] that enter into contracts on behalf of the state.

These NOCs will, for the most part, enter into commercial agreements with private, often international, entities in order to assist with some or all of their upstream, midstream and downstream needs.

In respect of upstream arrangements, these agreements take a variety of forms. Middle Eastern countries use different types of structures for their upstream contracts. States are free to choose the type of contractual structure that suits their needs and reflects the strength of their bargaining position (with contracts sometimes developing as a hybrid of different forms). Structures that have typically been adopted in the region are:

- concession agreements in the UAE, under which the state has permanent sovereignty over hydrocarbons and only grants legal title to petroleum to the international oil company (IOC) partner once recovered at the wellhead;[42]
- risk service contracts in Iraq, including technical service contracts for producing fields and production service contracts for development and producing fields under which the contractor is not entitled to any share of production, but can elect to have the service fee paid in kind in oil;[43]
- production sharing agreements in the KRG,[44] under which the contractor is entitled to a share of production to recover the costs of petroleum operations and a proportion of remaining production, which is shared with government;
- exploration and production sharing agreements in Qatar, or, particularly in respect of gas projects, development and production sharing agreements;[45] and
- historically, risk service 'buy-back' contracts in Iran, but more recently, contracts have been modelled on the Iran Petroleum Contract, a new generation of upstream oil and gas contracts that are more incentivising to foreign investors.[46]

The terms of these agreements vary significantly across states and, in some cases, within states themselves. They will generally, however, contain some form of dispute resolution clause.

The type of dispute resolution clause will vary depending on the relative strength of the parties and their sophistication and experience in dealing with disputes. For the most part, dispute resolution clauses in energy-related contracts typically provide for some form of arbitration.[47]

Arbitration of energy disputes in the Middle East

Types of arbitration

The precise nature of the arbitration agreements contained in the contracts between states or their NOCs, and the relevant counterparty, is often confidential. In the Middle East, few states make their model agreements, or the agreements once entered, publicly available. As a result, it is not possible to identify specific and clear trends in relation to arbitration agreements in energy contracts related to the Middle East. However, some documents are publicly available. From these, a preference for arbitration under the ICC is evident.[48]

Reflecting this preference, energy disputes accounted for approximately 16 per cent of the ICC's 2019 caseload.[49] However, parties to energy agreements are not only choosing ICC

arbitrations. In 2019, energy and resources disputes constituted 22 per cent of the London Court of International Arbitration's (LCIA) caseload.[50]

Energy arbitrations involving Middle Eastern parties or otherwise relating to the region are also commenced through the investor-state dispute settlement processes found in bilateral or multilateral investment treaties (BITs and MITs).

Currently, there are 471 BITs in force in the Middle East.[51] Arbitrations under the ICSID Convention and the UNCITRAL Arbitration Rules are the most preferred options for investor-state disputes.[52]

Three notable MITs for the region are the Organisation of Islamic Cooperation Agreement of Promotion, Protection and Guarantee of Investments (the OIC Agreement), the Arab League's Unified Agreement for the Investment of Arab Capital in the Arab States (the Arab League Agreement) and the Energy Charter Treaty (ECT). Both the OIC Agreement[53] and the Arab League Agreement[54] provide that, in certain circumstances, disputes relating to them shall be resolved through arbitration. Neither agreement specifies any arbitral institution or rules. To date, there have been 15 reported arbitrations relating to the OIC Agreement[55] and six relating to the Arab League Agreement.[56]

The ECT is notable for its lack of Middle Eastern state signatories. From the region, only Jordan and Yemen are contracting parties to the ECT. However, Iran, Iraq and the UAE have signed the International Energy Charter,[57] which is often seen as the first step towards acceding to the ECT.[58] If more states from the Middle East do sign the ECT, a spike in the number of investor-state disputes brought against Middle Eastern states can be expected.[59]

Trends

Arbitration, the energy industry and the Middle East are all undergoing significant changes. Some likely key trends are discussed below.

Increasing ties to the relevant state jurisdiction

There is an increasing desire among states and state-owned entities to 'localise' arbitration clauses where possible. The extent that this localisation of arbitration clauses will happen in practice will depend, in large part, on the nature of the deal, the parties and their relative bargaining power. An example of this localisation is found in Egypt's model concession agreement. This model agreement requires that disputes are either dealt with in the Egyptian courts or, in respect of certain matters between the Egyptian General Petroleum Company and the relevant contractor, resolved through arbitration according to the rules of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and, unless otherwise agreed by the parties, the place of the arbitration will be Cairo. This requirement to use either the national courts of Egypt or arbitration under CRCICA is a clear step away from the use of the more traditional arbitral institutions. It remains to be seen how far the Egyptian government will be willing to move in respect of adopting Cairo as the seat of any arbitration.

Jordan's model production sharing agreement also demonstrates a desire to localise arbitrations. Unlike Egypt's model agreement, Jordan's model production sharing agreement does not require the use of any domestic arbitral institution (it refers to the ICC Rules). However, it does require that any arbitration be seated in Amman, Jordan, such that the Jordanian arbitration law is applicable and the Jordanian courts have supervisory jurisdiction over the arbitration.

In Saudi Arabia, a high order issued by the president of the Council of Ministers in 2019 declared that government bodies and state-owned companies that wished to settle their disputes with foreign investors through arbitration, and who had the necessary approvals to do so, should, in certain circumstances, have the arbitration conducted within Saudi Arabia at the Saudi Center for Commercial Arbitration (SCCA) or at another licensed Saudi arbitration centre.[60]

As NOCs and governments in the Middle East become more familiar with arbitration and more confident in their dispute resolution choices, it is likely that this trend towards the localisation of arbitration will continue in respect of energy arbitrations in the region.

Enhancing the appeal of international arbitration in the region

At the same time as wanting to localise their arbitration clauses where possible, some states in the Middle East are taking significant steps to increase the appeal of arbitration in their jurisdiction.

Legislative changes

Most notable in this regard are the efforts of the UAE government, which has introduced a series of far-reaching legislative changes designed to increase the appeal of arbitration in the UAE.

These include the long-awaited new arbitration law, the Federal Law No. 6 of 2018 (the Federal Arbitration Law), which came into force on 16 June 2018. It replaces the 15 articles of the UAE Civil Procedure Code, articles 203 to 218, which had previously governed arbitrations seated in the UAE. The Federal Arbitration Law, based on the UNCITRAL Model Law, has had the effect of modernising the UAE's arbitration framework and, in many ways, bringing it in line with international standards. The Federal Arbitration Law applies to any arbitration seated in 'onshore' UAE (unless otherwise agreed by the parties), including any arbitrations already on foot when the law came into effect.[61] One of the significant changes brought about by the Federal Arbitration Law is the inclusion of express provisions relating to interim measures.[62] In addition, the Federal Arbitration Law clarifies the process for enforcing UAE arbitral awards with a fast-tracked and overhauled procedure.

In February 2019, new regulations came into force regarding the enforcement of foreign arbitral awards in the UAE.[63] These regulations are a positive step, and they are being put into effect by the relevant UAE courts. In March 2019, for example, the Sharjah Court recognised a foreign arbitral award as being capable of enforcement pursuant to these new regulations.[64]

In addition to the Federal Arbitration Law, the UAE government also made another significant arbitration-related legislative change in September 2018 when the UAE repealed article 257 of the UAE Penal Code. Article 257 had placed arbitrators in the UAE at risk of imprisonment if they did not maintain 'integrity' and 'impartiality' in their capacity as arbitrators. Its chilling effect on arbitrations in Dubai was significant – some of the most experienced arbitration practitioners refused to sit as arbitrators in Dubai-seated arbitrations while the law was in place.

With a modern and UNCITRAL Model Law-based arbitration law in place, and the risk of criminal conviction and imprisonment now abated, it seems likely that there will be an increased push by domestic companies, whether private or public, to try and use Dubai as the seat of their arbitrations more frequently, including in the energy sector.

There have also been notable legislative changes in Qatar. In 2017, Qatar introduced a new arbitration law that applies to all arbitrations taking place in Qatar.[65] Based on the UNCITRAL

Model Law, Qatar's new arbitration law modernises the previously outdated arbitration legislation and aligns it with international standards. The new arbitration law clarifies the position in respect of interim measures, just as the UAE's Federal Arbitration Law does.[66]

In 2018, the Iraqi government announced its intention to accede to the New York Convention.[67] In November 2019, the Cabinet of Iraq approved a recommendation to expedite the legislation on Iraq's accession to the New York Convention.[68] On 4 March 2021, the Iraqi parliament ratified Iraq's accession the New York Convention.[69] Given that this is a recent development, it is yet to be seen how the Iraqi courts will apply the principles of the New York Convention.[70] This is a significant step taken towards improving perceptions of Iraq as an arbitration-friendly jurisdiction and may well result in an increase in energy arbitrations connected to Iraq.

Saudi Arabia has made a sustained effort over the course of the past decade to make itself a more arbitration friendly jurisdiction. In 2012, Saudi Arabia passed a new arbitration law issued under Royal Decree No. M/34, and, in 2013, enacted a new enforcement law pursuant to Royal Decree No. M/53. In 2016, Saudi Arabia established the SCCA, and, in 2017, enacted executive regulations aimed at clarifying certain key provisions of the arbitration law. Thereafter, in April 2020, the Commercial Franchise Law came into force in Saudi Arabia. This piece of legislation expressly gives parties the option to arbitrate their disputes arising out of franchise agreements, among other dispute resolution forums.[71] These moves have signalled the Kingdom's increased acceptance of international arbitration as a forum to resolve disputes relating to Saudi Arabian parties and disputes pertaining to Saudi Arabia.

Institutional progress

As well as legislative changes, arbitral institutions in the region have continued to develop and flourish such that it is becoming more realistic for parties to choose to seat or otherwise connect their arbitration clauses in energy contracts to the region.

In the UAE, the financial free zones, which are empowered to create their own specific legal and regulatory framework in respect of all civil and commercial matters,[72] continue to flourish. These zones are an integral tool in ensuring that the UAE is perceived as an arbitration-friendly jurisdiction. One financial free zone, the Dubai International Financial Centre (DIFC), has its own system of laws based on common law. Where there are gaps in the DIFC law, or where there are conflicts, English law applies. In particular, the DIFC has its own arbitration law, DIFC Law No. 1 of 2008, as amended by DIFC Law No. 6 of 2013.[73] The key arbitral institution within the DIFC is the DIFC-LCIA. The DIFC-LCIA is 'essentially a joint venture between the DIFC and the London Court of International Arbitration'.[74] In 2021, the DIFC-LCIA released updated rules of arbitration, which closely follow the LCIA Rules as amended in 2020.

The Abu Dhabi Global Market (ADGM) is another financial free zone with its own common law legal system[75] and an independent court system.[76] The ADGM has incorporated English common law and certain English statutes into its own legal system.[77] Like the DIFC, the ADGM has its own arbitration law, the ADGM Arbitration Regulations 2015, as amended by Amendment No. 1 of 2020.[78] The ADGM contains the ADGM Arbitration Centre: a state-of-the-art hearing centre open to all arbitrations regardless of the institutional rules that govern the underlying arbitration[79] and has also enacted its own arbitration guidelines.[80] In 2021, the ICC opened up its fifth case management office in the ADGM.[81] The courts of both the DIFC and the ADGM are known to be arbitration-friendly.

Parties to energy contracts who wish to connect their arbitration clauses with the region in some way, but who remain sceptical of the onshore courts and their attitude to arbitration, can and do localise their arbitration agreements by electing to use the DIFC-LCIA rules or by seating their arbitrations within the DIFC or the ADGM. This trend is likely to continue.

In Saudi Arabia, the SCCA has made substantial progress. From its launch in 2016, it has dealt with claims amounting to over 375 million Saudi riyals with parties from France, the United Kingdom, the United States and Germany.[82] Although still in its early stages, considering the amount of state support that the SCCA is receiving, and the dominance of the energy sector in Saudi Arabia, it seems likely that the SCCA will handle an increasing number of Middle Eastern-related energy arbitrations in the future.

There have also been positive modernising developments at arbitral institutions in Iran and Bahrain, though it remains to be seen whether these will have any material effect on energy arbitrations related to the region.[83]

Third-party funding

Historically, the provision of third-party funding (TPF) in respect of disputes where the substantive or procedural laws pertain to the Middle East or where enforcement actions could be carried out in the Middle East, be it in litigation or arbitration, has not been common.

However, this position is changing. The recent global changes towards TPF of disputes, the rise of the use of arbitration in the Middle East, the development of certain parts of the Middle East as arbitration-friendly jurisdictions and the ever-increasing cost of international arbitration, all point to a likely increase in the use of TPF for Middle East-focused international arbitrations. In view of the potential amount of recovery for funders, energy arbitration and construction arbitration pertaining to energy projects are expected to remain particularly attractive to funders.

The DIFC has already made some provisions in respect of TPF[84] and, in April 2019, the ADGM issued its litigation funding rules.[85]

Areas of dispute in the energy sector

The nature and scope of the rights and obligations of the parties pursuant to the underlying contracts between them will continue to form the basis for energy arbitrations related to the Middle East. While the disruption to the global economy caused by covid-19 will be the predominant feature of energy disputes in the short to mid-term, the region will continue to see disputes on the scope of rights and obligations in respect of payment (including take-or-pay clauses), stabilisation clauses, local content requirement clauses, price review clauses, termination rights and *force majeure* clauses. In addition, it is likely that some of the following factors will have some impact on future energy disputes within the region.

Covid-19

The effects of covid-19 have had and will continue to have a reverberating impact in the energy sector. These have resulted in disputes where parties attempt to attain relief from their contractual obligations by invoking *force majeure*, termination provisions, frustration and change in law. To what extent parties will be allowed to avail of these legal remedies in arbitration is yet to be

seen. However, it is worth noting that the threshold for the parties to avail of *force majeure* under the region's civil code laws does warrant that the obligation must be rendered wholly impossible, rather than merely excessively onerous. While the former would result in extinguishing parties' obligations completely, the latter may result in a moderation of the parties' obligation to the extent that the arbitral tribunal deems reasonable, at its discretion.[86] Both of these legal provisions are likely to be extensively relied upon and invoked by disputing parties in energy arbitrations in the region post covid-19.

Covid-19 has also delayed expansion plans of NOCs in the region. Qatar Petroleum, for example, pushed back its North Field LNG Expansion Project by up to six months due to the pandemic[87] and has recently awarded the EPC contracts for this to a joint venture of Chiyoda and Technip for the construction of four LNG mega-trains, and to Samsung C&T for the LNG storage and loading facilities.[88] Similarly, Aramco has delayed two large expansion projects at the Marjan and Berri Complexes in an attempt to tighten its capital spending.[89] In Kuwait, the impact of covid-19 led to the government's decision to cancel plans to construct the Al Dabdaba solar plant to be developed by the Kuwait National Petroleum Company, although there are reports that this suspended project will now be merged with an existing plant.[90] In tandem with delays of expansion plans, social distancing measures may also result in slower progress on ongoing construction and infrastructure projects in the energy sector, which will likely to lead to disputes between subcontractors and contractors on account of such delays.

The global economic recession triggered by covid-19 along with the looming uncertainties on China's economic recovery has also invariably led to a decrease in oil prices. The knock-on effect of the tighter finances of the oil-producing and oil-exporting countries in the region is discernible. For example, Saudi Arabia's prioritised efforts to combat and mitigate the effects of covid-19 towards its citizens, residents and businesses meant that it was not able to offer financial assistance to Lebanon's deteriorating economy, as initially planned.[91] This resulted in Lebanon defaulting, for the first time in history, on a US$1.2 billion bond payment.[92] Jordan could have potentially followed this trend, but was timely assisted by the International Monetary Fund's four-year Extended Fund Facility programme of US$1.3 billion.[93] Notwithstanding the various financial packages offered, the economic crisis of the hard-hit countries could only worsen in the post covid-19 recovery period, likely leading to an uptick in disputes in the region.

Politics

The current political context will continue to shape the basis and form of future Middle Eastern energy arbitrations.

The recent rapprochement between Qatar and Saudi Arabia, the UAE, Egypt and Bahrain from the political situation that commenced in July 2017 will likely have a positive impact in serving to reduce potential disputes between Qatar and the other nations involved in the diplomatic crisis. This is especially true in circumstances where Qatar had continued to export LNG to these states and the region throughout the crisis.[94]

Other political developments that will also affect the energy industry in the Middle East and may cause disputes include:

- the oil price war between Saudi Arabia and Russia in 2020, which led to an unprecedented drop in global oil prices;[95]
- the continuing conflict in Syria;[96] and
- civil unrest in Iraq.[97]

Prior instability in the region has led to energy-related arbitrations. For example, three Indian companies successfully brought ICC proceedings against Yemen and its Ministry of Oil and Minerals in relation to *force majeure* declarations that they made as a result of the Arab Spring protests in Yemen.[98] Investor-state claims have also been made in relation to regional instability. For example, in 2019, a UAE investor, Trasta Energy, commenced arbitration against Libya claiming that Libya failed to protect its investment in an oil refinery during the Arab uprising.[99]

The resolution of ongoing border disputes will also have an effect on future energy relations and disputes. The unresolved maritime border dispute between Israel and Lebanon has made oil exploration in the disputed area impossible.[100] Given the recent normalisation deal signed between the UAE, Bahrain and Israel at the time of writing, there is also a possibility for ADNOC to become involved as 'a significant part of the solution to the Lebanon-Israel maritime dispute.'[101] A similar dispute between Saudi Arabia and Kuwait was drawn to a close in December 2019, which enabled the renewed production of 500,000 barrels of crude per day.[102]

Sanctions

The withdrawal of the United States from the Joint Comprehensive Plan of Action (JCPOA) in 2018, led to the reimposition of US sanctions on Iran that same year. The sanctions included, among other things, prohibitions on the purchase of petroleum, petroleum products or petrochemical products from Iran, conducting or facilitating any significant financial transactions with the Central Bank of Iran or any other Iranian financial institution, and investments in or dealings involving Iran's energy industry.[103]

There is no doubt that the reimposition of these sanctions caused disruption to the energy industry. Notwithstanding the advance notice and the temporary waivers that were given to eight countries (China, Greece, India, Italy, Taiwan, Japan, Turkey and South Korea),[104] it will not be surprising for arbitrations to be commenced relating to the impact of these sanctions on energy transactions. The introduction by the European Union of its own blocking statute in respect of the US sanctions may further complicate any disputes arising from this.

With the recent change of administration in the United States, the scene is set for the revival of the JCPOA and, concomitantly, for the relaxing or lifting of sanctions on Iran.[105] While there has not been any conclusive steps taken to relax or lift those sanctions at the time of writing, this is likely to follow in the coming months. If indeed so, this would necessarily follow steps taken by the members of the JCPOA to reverse the economic harm caused by the sanctions.

Infrastructure development

The infrastructure required to service the levels of oil and gas production coming from the Middle East is vast. Power plants, offshore platforms, drilling rigs, LNG terminals and trains, oil and gas pipelines, refineries, transport vessels and roads are all integral parts of the energy infrastructure. Infrastructure requirements for coal and renewable developments are also significant. Issues relating to the time, costs, quality and scope of the works with respect to energy-related infrastructure projects and the subsequent decommissioning of these projects have consistently led to arbitrations. In particular, questions relating to the design and construction of facilities are issues that frequently emerge in such disputes. Indeed, as recently as 2018, Qatar Petroleum's subsidiary, Barzan Gas Company, brought ICC arbitration proceedings

against Hyundai Heavy Industries regarding alleged problems with the pipeline that Hyundai had installed.[106] Where infrastructure, such as pipelines, cross international borders, the complexity of the project increases due to the need for the participation or consent of multiple states.

Environmental issues

Climate change and other environmental concerns are having an increasing impact on the energy industry. Climate change-related disputes (both commercial and investment),[107] including disputes related to increased environmental regulation, will likely increase. Bahrain has already faced a claim in respect of the construction of the state's first recycling plant in which it alleged, among other things, that the construction company failed to obtain the necessary environmental permits.[108]

Disputes may also arise from transitions within the oil and gas industries to address environmental challenges. Among other things, it is likely that disputes may arise in or involving Middle East parties connected to carbon capture and storage (CCS) technology. The UAE boasts the world's first commercial-scale industrial CCS project in Abu Dhabi[109] and in Saudi Arabia, Aramco has set up a pilot project that uses CCS technology.[110] The increased application of CCS in the region may result in disputes, especially in the context of transboundary CCS projects.[111]

In addition, disputes in or involving Middle East parties connected to carbon trading schemes may also develop. In 2019, the Dubai Regulatory Committee for Petroleum Products Trading was formed and, in 2018, Saudi Arabia announced plans to launch its own carbon trading scheme.[112] The use of such schemes in other parts of the world has already resulted in disputes relating to over-registration, issuance or revocation of carbon credits, decisions and disagreements over bookkeeping and the erroneous transfer of credits;[113] accordingly, it is not unlikely that similar disputes may arise in relation to any Middle East-based carbon trading schemes that are developed.

Technology

The energy industry, like many others, is being reshaped by new technologies. The pace at which the industry is adopting these technologies varies. In the Middle East, many key participants in the energy industry have been keen supporters and adopters of emerging technologies.

ADNOC in particular is keen to promote and adopt technological change. Working with IBM, ADNOC has piloted a block chain-based automated system to track quantities and financial values of the transactions among ADNOC's operating entities.[114]

Aramco has similarly embraced technology. One of its subsidiaries, Saudi Aramco Energy Ventures (SAEV), is dedicated to investing in companies that develop technologies that are of importance to Aramco.[115] In 2019, SAEV invested in Data Gumbo, a company that developed a blockchain platform to streamline smart contracts and reduce disputes relating to payments among other things.[116]

Considering the focus on technology in the energy industry in this region, an increase in the number of technology-related energy disputes is to be anticipated. In particular, a mismatch in expectations from parties to these sorts of deals[117] may well lead to disagreements that result in arbitrations.

Belt and Road Initiative

China's Belt and Road Initiative (BRI) is having a significant impact in the Middle East.

Energy makes up a significant part of the China's trade and investment in the Middle East.[118] In 2019, for example, China State Construction Engineering Cooperation Middle East signed a deal with Petrofac Emirates to work on phase two of ADNOC's Qushawira Field Development.[119] In the same year, China National Offshore Oil Company signed an agreement with ADNOC relating to upstream exploration and development, refining and the LNG trade.[120]

China's energy investments do not just relate to oil and gas. In 2019, it was announced that a coal power plant was under construction in Dubai and would be owned, pursuant to a joint venture, by Dubai Electricity and Water Authority, Saudi Arabia-based ACWA Power, China's Harbin Electric and the Silk Road Fund.[121] Financing is said to have come from, among others, the Industrial and Commercial Bank of China, Bank of China, Agricultural Bank of China, China Construction Bank and the Silk Road Fund.[122]

It is inevitable that there will be some disputes resulting from these economic ties. Notwithstanding China's obvious commitment to mediation as a form of dispute resolution,[123] it seems likely that some of these disputes, which will likely relate to large-scale cross-border projects, will result in international arbitrations. Investor-state disputes will likely be resolved according to the disputes procedures set out in the applicable treaties. In addition, certain arbitral institutions have positioned themselves to be well-placed to administer BRI-related arbitrations. For example, the ICC, which now has a case management office in the region in the ADGM, has created a Belt and Road Commission to support BRI disputes.[124]

Funding

In this region, both governments and the private sector play a significant role in financing energy projects.

Financing related to energy projects will continue to be the subject of arbitrations in the region. This is particularly the case where finance is provided through complex arrangements by multiple and international parties. Moreover, novel forms of financing for energy projects in the region are emerging. For example, a UAE solar utility company based in Dubai was able to raise approximately US$700,000 through a Middle East-based crowdfunding platform.[125] These platforms, especially in the early period when investors and owners are exploring new ground, are likely to lead to disputes.

Conclusion

Energy and the Middle East has been and will remain synonymous for the foreseeable future. The underlying nature of Middle Eastern energy disputes will likely remain, for the most part, the same, albeit the triggers may be different. The impact of covid-19, coupled with the collapse of oil and gas prices juxtaposed against the need to preserve cash flow, will translate to companies in the energy sector operating under heightened insolvency risks. While an uptick in the number of energy disputes in the region is expected, there is also likely to be an increase in the restructuring of companies taking place during and in the aftermath of covid-19, be it through internal agreements or by way of formal insolvency proceedings.

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Investment Arbitration in Africa

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In summary

This article provides an overview of recent trends and developments in investment arbitration across Africa. It discusses the rise of investment disputes on the continent and the various initiatives to reform the ISDS system, notably efforts to increase the representation of arbitrators of African origin and to modernise investment instruments. The article considers the salient features of this new generation of investment instruments, which focus on sustainable economic development, as well as the multiplication of African dispute resolution forums. Finally, it concludes by reviewing the current status of the African Continental Free Trade Area Agreement, as well as a recent declaration by the African Union regarding ISDS in the wake of the covid-19 pandemic.

Discussion points

- General overview of recent investment case statistics
- The modernisation of investment instruments
- Developments regarding diversity initiatives involving Africa
- Updates regarding the African Continental Free Trade Area Agreement

Referenced in this article

- The African Continental Free Trade Area Agreement (AfCFTA)
- The Draft Pan-African Investment Code (PAIC)
- 2008 ECOWAS Supplementary Investment Act; 2018 ECOWAS Common Investment Code
- 2006 SADC Protocol on Finance and Investment
- 2017 Revised COMESA Investment Area Agreement
- 2016 Nigeria-Morocco BIT
- 2012 Mali Investment Code
- 2018 Ivory Coast Investment Code
- 2020 Benin Investment Code

Africa can rightly claim to be the birthplace of investment arbitration. In 1964, the World Bank convened the first of four regional conferences in Addis Ababa to discuss the creation of a new international institution: the International Centre for the Settlement of Investment Disputes (ICSID). As Aron Broches, then general counsel for the World Bank, main drafter of the ICSID Convention and founding secretary-general of ICSID, noted at the time:

> *[I]t was very fitting that the first of four regional meetings to be held by the Bank should take place in Africa. African countries had an urgent need to encourage the international flow of capital and skills and had shown a willingness to create an atmosphere conducive to financial and economic cooperation.*[1]

The system for resolving investment disputes has been in place for over 50 years. That system is not without its critics, and some of the most active voices arguing for change are African. In this article, we will look at some of the key recent trends in investment arbitration in Africa and initiatives to reform the system – from the negotiation of new investment treaties and codes, to the demand for more diverse tribunals through the greater representation of African arbitrators. We will also reflect briefly on how covid-19 might give rise to investment claims.

Recent trends in investment arbitration in Africa

General overview of recent case statistics

Investment disputes involving African states have steadily increased over the last two decades.[2] Despite the economic downturn caused by the covid-19 pandemic, the ICSID, the leading forum for settling investment disputes, registered 58 cases in 2020 – the most since its creation.[3] Of these cases, nine involve an African state: Algeria, Cameroon, Zambia, Benin, Tanzania, South Sudan, Nigeria and Egypt.[4] ICSID is on track, moreover, to surpass its 2020 caseload of African disputes in 2021. Indeed, just in the first quarter of 2021, investors have already initiated claims against three African states: Tanzania, Nigeria and Mauritania,[5] and several more have been intimated, with investors threatening the Republic of Congo with a US$27 billion claim over a revoked mining licence, as reported by *Global Arbitration Review*.[6]

The ICSID's case statistics show that, while those African states that have been sued the most continue to feature in its registry (eg, Egypt, the Democratic Republic of Congo (DRC) and Algeria),[7] there are also 'newcomers' to ICSID disputes, notably Benin and Zambia.[8] Similarly, while the construction, oil and gas, and mining sectors each account for a substantial portion of cases, there has been a rise in disputes in the telecommunications sector in Africa. Finally, ICSID's recent case data confirms an increased use by African states of amicable modes of dispute resolution.

Recent investment disputes involving African states

Over the last few years, African states have been involved in a growing number of investment disputes. Statistics show that 28 out of 54 African states have been sued by investors before international arbitral tribunals.[9] However, more than half of these investment disputes involve just four states: Egypt, Libya, Algeria and the DRC.[10] While statistics of investment disputes vary slightly, ICSID has recorded similar trends. In the last 10 years, ICSID statistics show a steady rise in disputes involving African states (see Chart 1 below), with certain states frequently appearing as respondents (ie, Egypt and Algeria):[11]

2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
8 cases	12 cases	13 cases	8 cases	10 cases	6 cases	9 cases	12 cases	10 cases	9 cases
Cameroon (1)	Algeria (2)	Burundi (1)	Burundi (1)	Cabo Verde (1)	Egypt (3)	Egypt (1)	Algeria (2)	Cameroon (1)	Algeria (1)
Egypt (4)	Egypt (3)	Cameroon (1)	Egypt (1)	Cameroon (1)	Ghana (1)	Gambia (3)	Egypt (2)	DRC (1)	Benin (1)
Guinea (1)	E. Guinea. (3)	Egypt (6)	Gambia (1)	Egypt (1)	Ivory Coast (1)	Ivory Coast (1)	Gabon (2)	Egypt (2)	Cameroon (1)
Liberia (1)	Guinea (2)	Madagascar (1)	Guinea (1)	Guinea (1)	Mauritius (1)	Madagascar (2)	Gambia (1)	Morocco (2)	Egypt (1)
Niger (1)	S. Sudan (1)	Mali (1)	Mauritania (1)	Kenya (2)		Mozambique (1)	Morocco (2)	Rwanda (1)	Nigeria (1)
	Uganda (1)	Nigeria (1)	Mozambique (1)	Libya (1)		Tanzania (1)	Rwanda (1)	S. Leone (1)	S. Sudan (1)
		Tunisia (1)	Senegal (1)	Senegal (1)			Senegal (1)	Tanzania (2)	Tanzania (2)
		Uganda (1)	Sudan (1)	Tanzania (1)			Togo (1)		Zambia (1)
				Uganda (1)					

Though Egypt is the African state that has been sued the most before ICSID, it appears to be an outlier, as these claims were often filed in the aftermath of the crisis in the country following the Arab Spring. A spike in investment disputes is not uncommon following political or economic unrest. But what is more noticeable is the steady increase in investment disputes in African states with no ongoing exceptional crisis.

The rise of disputes in the telecommunications sector across Africa

African states have been subject to investment claims across a growing numbers of sectors, particularly the construction, manufacturing and mining sectors. A report by the Transnational Institute, an international research and advocacy institute, indicates that, as at January 2019, the number of investments claims per sector against African states was the following (see Chart 2 below):[12]

Sector	Number of claims
Construction	25
Manufacturing	16
Mining and quarrying	14
Transport	10
Information and communication	9
Agriculture, forestry and fishing	8
Real estate	6
Water supply-related activities, waste disposal, sewerage	6
Financial activities	5
Extraction of crude petroleum and natural gas	4

These trends are largely corroborated by ICSID's statistics, which show that the distribution of cases by economic sectors is that the oil, gas and mining, electric power and other energy, and construction sectors account for most of the disputes (24 per cent, 17 per cent, and 9 per cent respectively) (see Chart 3 below)):[13]

Sector	%
Oil, gas and mining	24%
Electric power and other energy	17%
Other industries	12%
Construction	9%
Transportation	8%
Finance	8%
Information and communication	7%
Water, sanitation and flood protection	4%
Agriculture, fishing and forestry	4%
Tourism	4%
Services and trade	3%

However, there is reason to suggest that this case distribution will evolve to include more telecoms-related disputes.

As it stands, these ICSID statistics indicate that disputes in the 'Information and communication' sector, which includes telecoms-related investment disputes, account for 7 per cent of disputes. However, the telecoms sector is one the fastest-growing sectors around the globe,[14] including across Africa, and is poised to become the source of an increasing number of disputes. Though the first telecoms-related investment dispute was only registered in 1994 at ICSID,[15] it is reported that there have been 70 telecoms-related disputes filed at ICSID and other institutions around the world since.[16] ICSID statistics alone indicate that it has registered 54 disputes in the 'Information and communication' sector, including seven involving an African state.[17] Importantly, these statistics indicate that nearly half of all cases in the 'Information and communication' sector were registered in the past five years.[18]

The potential for growth of telecoms-related investment disputes in Africa is to be followed closely. While telecoms-related cases involving African states are fewer than those in other sectors, the amounts in dispute can be exorbitant and reach into the billions of US dollars.[19] As access to internet and mobile telephones expand across Africa, states and investors should be mindful of their investment obligations in this sector.

Propensity of African states to resort to amicable modes of dispute resolution

Recent ICSID statistics confirm the propensity of African states to resort to amicable modes of dispute resolution, notably

conciliation. Indeed, since 2018, ICSID has registered two conciliations involving African states: one in 2019, *La Camerounaise des Eaux (CDE) v Cameroon*, which is currently pending; and one in 2018, *Société d'Energie et d'Eau du Gabon v Gabon*. Of the 13 conciliation proceedings registered by ICSID in its history, 10 have involved an African state (see Chart 5 below)[20]:

Case No.	Claimants	Respondents	Status
CONC/20/1	Barrick (Niugini) Ltd	Papua New Guinea	Pending
CONC/19/1	La Camerounaise des Eaux (CDE)	Cameroon	Pending
CONC/18/1	Société d'Energie et d'Eau du Gabon	Gabon	Concluded
CONC/16/1	Xenofon Karagiannis	Albania	Pending
CONC(AF)/12/2	Equatorial Guinea	CMS Energy Corporation and others	Concluded
CONC(AF)/12/1	Hess Equatorial Guinea, Inc and Tullow Equatorial Guinea Ltd	Equatorial Guinea	Pending
CONC/11/1	RSM Production Corporation	Cameroon	Concluded
CONC/07/1	Shareholders of SESAM	Central African Republic	Concluded
CONC/05/1	Togo Electricité	Togo	Concluded
CONC/03/1	TG World Petroleum Limited	Niger	Concluded
CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie mbH	Madagascar	Concluded
CONC/83/1	Tesoro Petroleum Corporation	Trinidad and Tobago	Concluded
CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für dieTextilindustrie mbH	Madagascar	Concluded

A factor that explains why states use amicable modes of dispute resolution is the fact that such mechanisms are frequently integrated into the dispute resolution clauses of their investment instruments.[21] More critically, as some scholars suggest, this propensity may be due to the fact that investment disputes involving African states often arise from contracts.[22] Indeed, to explain this propensity and African specificity, certain scholars contend that contractual provisions are more clear than provisions in investment treaties, and that this facilitate negotiations and therefore dispute settlement.[23] In sub-Saharan francophone Africa, the region that accounts for most ICSID conciliations, over 50 per cent of disputes are contract-based.[24] As at 2019, contract-based disputes account for around 40 per cent of all investment disputes in Africa; whereas, for the rest of the world, they only constitute around 17 per cent of investment disputes.[25]

In 2018, ICSID began working on a new set of mediation rules to complement its conciliation and arbitration rules and the United Nations adopted the 'Convention on International Settlement Agreements Resulting from Mediation'.[26] In keeping with this trend, the largely francophone sub-Saharan African states of the OHADA space adopted a Uniform Act on Mediation (UAM) in 2018, which will provide a more structured format for mediations.[27] Indeed, the UAM is part of a larger trend in Africa to diversify the mechanisms for settling investment disputes.

An evolving investment law landscape

The investment landscape in Africa is rapidly evolving. Scholars have characterised this evolution as the 'Africanisation' of investment law.[28] Africanisation conceives African states increasingly as 'investment rule makers', rather than 'rule takers'.[29] Its aim is to situate the resolution of investment disputes on African grounds, both in terms of substantive and procedural rules, but also in terms of where these disputes physically take place, and who the arbitrators are.

This evolution is punctuated by the diversification and Africanisation of investment instruments on the continent. A feature accompanying this evolving trend, moreover, has been the multiplication of dispute resolution forums on the continent to administer or settle investment disputes. Similarly, this trend is characterised by a distinct shift towards more balanced investments instruments.

The diversification and 'Africanisation' of investment instruments

Consistent with trends observed around the world, over the past few years, African states have signed and ratified considerably fewer investment instruments that include investor-state dispute settlement (ISDS) mechanisms: African states only signed one BIT in 2020, five in 2019 (see Chart 6 below), and a trade agreement, the China-Mauritius Free Trade Agreement, which contains ISDS provisions.[30] Not to be overlooked, since deciding to leave the European Union, the United Kingdom has been quite active in signing trade agreements, styled as 'economic partnership agreements' or 'partnership, trade and cooperation agreements', with African states.[31] However, none of these agreements include ISDS.

The appetite of African states for signing and ratifying investment instrument that include ISDS has waned in recent years. But based on the treaties they have signed, African states have clearly diversified their treaty partners. As the table below indicates, African states have increasingly signed more 'South-South' BITs and intra-African BITs since 2015 (see Chart 6 below).

2015	2016	2017	2018	2019	2020
Angola-Mozambique BIT	Ivory Coast-Mauritius BIT	Angola-UAE BIT	Congo-Morocco BIT	Burkina Faso-Turkey BIT	Morocco-Japan BIT
Angola-Brazil BIT	Ivory Coast-Turkey BIT	Burundi-Turkey BIT	Ethiopia-Brazil BIT	Burkina Faso-Canada BIT	Ivory Coast-Japan BIT
Comoros-UAE BIT	Equatorial Guinea-UAE BIT	Burundi-UAE BIT	Kenya-Singapore BIT	Cabo Verde-Hungary BIT	
Guinea-Canada BIT	Ethiopia-UAE BIT	Cabo Verde-Mauritius BIT	Mali-UAE BIT	Gambia-UAE BIT	
Guinea Bissau-Morocco BIT	Ethiopia-Morocco BIT	Chad-Turkey BIT	Mali-Turkey BIT	Morocco-Brazil BIT	
Malawi-Brazil BIT	Gambia-Mauritius BIT	Ethiopia-Qatar BIT	Mauritania-Turkey BIT		
Mauritania-UAE BIT	Ghana-Turkey BIT	Morocco-Zambia BIT	Rwanda Singapore BIT		
Mauritius-UAE BIT	Kenya-Japan BIT	Morocco-South Sudan BIT	Rwanda-Qatar BIT		
Mauritius-Zambia BIT	Mauritius-Sao Tome-et-Principe BIT	Mozambique-Turkey BIT	Zambia-Turkey BIT		
Mozambique-Brazil BIT	Morocco-Nigeria BIT	Rwanda-UAE BIT	Zimbabwe-UAE BIT		
Senegal-UAE BIT	Morocco-Rwanda BIT	Sudan-Belarus BIT			
	Morocco-Russia BIT	Tunisia-Turkey BIT			
	Mozambique-Singapore BIT	Uganda-UAE BIT			
	Nigeria-Singapore BIT				
	Nigeria-UAE BIT				
	Rwanda-Turkey BIT				
	Somalia-Turkey BIT				

The diversification and Africanisation of investment instruments have also been coupled with an evolution in the design of African investment treaties, from bilateral to multilateral. Multilateral investment treaties (MITs) are not a new feature in Africa. Indeed, many African states have long been parties to MITs such as the 1980 Arab Investment Agreement or 1981 Investment Charter of the Organisation of the Islamic Conference – to name a few.[32] What marks a departure, however, is that the new generation of MITs are adopted by regional economic communities (RECs) modelled after the then European Economic Community, as part of a continent-wide step towards greater economic integration.

Indeed, in October 2017, the African Union Commission adopted the first harmonised Draft Pan-African Code on Investment (PAIC). Although the PAIC is not binding, it provides clear insights into the pan-African approach to international investment protection. The PAIC is to serve as a model for the investment chapter of the African Continental Free Trade Agreement (AfCFTA), which entered into force on 30 May 2019. The PAIC has been drafted from the perspective of developing countries with a view to promoting sustainable development and 'presents the African consensus on the shaping of international investment law'.[33] This consensus presently includes ISDS, as the PAIC states that 'Member States may, in line with their domestic policies, agree to use' ISDS mechanisms.[34]

Consistent with the PAIC, African RECs across the continent have adopted legal frameworks to encourage the development of intra-African investments. Indeed, as the building blocks of economic integration, African RECs have adopted several MITs. In 2008, the Economic Community of West African States (the ECOWAS) enacted the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation (ECOWAS SIA) and, in 2018, it adopted an investment code that has not entered into force: the ECOWAS Common Investment Code (ECOWIC).

Likewise, in 2016, the Southern African Development Community (SADC) amended its 2006 annex relating to the Cooperation on Investment of the Protocol on Finance and Investment (the SADC Investment Protocol). Similarly, in 2017, the Common Market for Eastern and Southern Africa (COMESA) revised its 2007 Common Investment Area Agreement. While the COMESA investment agreements are not in force, the MITs adopted by these African RECs confirm the Africanisation of investment law.

The multiplication of African dispute resolution forums

One of the more noteworthy developments with the Africanisation of investment law is the multiplication of African forums to settle investment disputes. The prospect of having investment disputes resolved by local African judicial jurisdictions has been an alternative seldom pursued by investors, if ever. Recently, however, African investment and investment-related instruments increasingly provide for the possibility of investment disputes involving African states to be administered by African dispute resolution centres, and based on instruments and even settled by African judicial institutions.

In this regard, the 2016 PAIC is very much part of this trend. As the purported consensus standard for the regulation of investments throughout the continent,[35] the PAIC provides that:

> *Where recourse is made to arbitration . . . the arbitration may be conducted at any established African public or African private alternative dispute resolution center.*[36]

Indeed, all the new generation of regional investment instruments make reference to African dispute resolution forums. For instance, the 2006 SADC Investment Protocol provides that disputing parties may refer their dispute to the SADC Tribunal,[37] although the SADC Tribunal has since been suspended.[38] Likewise, the 2017 Revised COMESA Investment Area Agreement provides that parties may submit their dispute to the COMESA Court of Justice or an 'African international arbitration institution'. [39]

The 2018 ECOWIC, in the same vein, provides that '[w]here recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice'.[40] While the PAIC, the 2018 ECOWIC and the 2017 Revised COMESA Investment Area Agreement may presage the future of investor-state dispute resolution on the continent, these instruments have not yet entered into force.

This particular trend appears to be in force in western Africa, however. In fact, the 2008 ECOWAS SIA provides that any dispute between an ECOWAS member state and an investor that is not amicably settled 'may be submitted to arbitration as follows: (a) a national court; (b) any national machinery for the settlement of investment disputes; (c) the relevant national court of the Member States'.[41]

The inclusion of African dispute resolution forums is a trend that has been introduced either as an added option to be considered alongside ICSID or, more exceptionally, to the exclusion of ICSID altogether.

For instance, besides allowing disputing parties the possibility of submitting their dispute to ICSID, four BITS involving OHADA states provide for arbitration under the auspices of the Court of Common Justice and Arbitration (CCJA) in their dispute resolution clauses: the 2001 Burkina Faso-Benin BIT; the 2003 Burkina Faso-Guinea BIT; the 2003 Equatorial-Guinea-Spain BIT; and the 2007 Senegal-France BIT.[42] This is consistent with the 2017 revision to the Uniform Act on Arbitration (UAA) and the CCJA Arbitration Rules, which both confirm that an arbitration under these rules may be based on 'an instrument regarding an investment, in particular an investment code or a bilateral or multilateral investment treaty'.[43]

The trend of including African forums alongside ICSID is also reflected in African investment codes. For instance, the 2020 Benin Investment Code provides that parties may submit their dispute inter alia to Benin's Center for Arbitration, Mediation, and Conciliation (CAMeC) or the procedures provided in the UAA, but also ICSID.[44] Likewise, the 2012 Mali Investment Code provides that disputing parties may submit their dispute inter alia to the local competent court, ICSID arbitration, or the procedural rules available under the UAA.[45]

Elsewhere in western Africa, the promotion of African dispute resolution has been to the exclusion of ICSID arbitration. Rather than phasing out their BITs as South Africa had begun doing,[46] when revising its investment policy at the national level, Ivory Coast opted for a more 'nationalist approach'.[47] Indeed, the 2018 Investment Code, amending the 2012 Investment Code, notably removes Ivory Coast's offer to arbitrate pursuant to the ICSID Convention.[48] Instead, the amended code provides a more narrow set of dispute resolution alternatives, which suggest that parties may choose the competent Ivorian domestic jurisdiction or an arbitration procedure administered by the Court of Arbitration of Ivory Coast, which has no public track record in administering investment disputes.[49]

Towards more balanced investment instruments

There is an evident shift towards more balanced investment instruments across Africa. Investments instruments on the continent increasingly contain sustainable development considerations in their preamble and, more concretely, in their substantive provisions. The new generation of investment instruments increasingly affirm African states' right to regulate for the public interest. This quest towards more balanced instruments is also evidenced by the emergence of investors' obligations.

Unlike older investment treaties, which emphasised investment protection and 'merely' economic development, the new generation of BITs and MITs put an accent on host-states' right to regulate and on 'sustainable' economic development, which embraces goals beyond economic growth and integrates a social and environmental dimension with the notion of development.

While African states seek to have more balanced investment instruments, few of them have decided to phase out the 'unbalanced' BITs they have previously ratified. This creates a peculiar situation for both African states and investors seeking to have a better assessment of their rights and obligations. Nevertheless, the trajectory or trend of investment law on the continent is one of doing away with unbalanced BITs.

Indeed, the new generation of African BITs and MITs all include provisions to encourage sustainable development and a more balanced distribution of rights and obligations between states and investors. For instance, as is the case with all the new generation of BITs and MITs, the PAIC's preamble recognises the state's right 'to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives'.

These sustainable development considerations are also incorporated in more substantive investment provisions. The 2016 Nigeria-Morocco BIT, for instance, defines an investment in terms of sustainable development. It defines an investment as:

> *an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the assets of the enterprise which contribute to the sustainable development of that Party.*[50]

Furthermore, the new generation of investments instruments affirm the right to regulate either expressly or implicitly, by narrowing the scope of the standards of protections available to investors. For instance, article 14 of the SADC Investment Protocol expressly affirms the right to regulate. It states that:

> *Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.*

Consistent with this trend, the new generation of investment instruments narrow the scope of the traditionally expansive standard of protections in BITs. For instance, the PAIC includes provisions entitled as 'exceptions' to the most-favoured nation treatment standard (MFNT) and national treatment standard (NT). The PAIC's MFNT is a near identical copy of the PAIC's NT standard and states that:

> *Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle.*[51]

Lastly, the new generation of investment instruments increasingly require investors to comply with corporate social responsibility obligations and to conduct social and environmental impact assessments. To be sure, the incorporation of investor's treaty obligation

is not strictly speaking new. Indeed, the 1980 Arab Investment Agreement imposed obligations on foreign investors. [52]

What was once an isolated or exceptional case appears to be a growing trend in the new generation of instruments. Several of the more recently ratified Canadian BITs on the continent, for instance, provide that the contracting states should encourage investors to incorporate recognised standards of corporate social responsibilities in their policies.[53] The ECOWAS SIA is more emphatic. Indeed, its Chapter III, entitled 'Obligations and Duties of Investors and Investments' requires investors to comply with several obligations, which include upholding human rights, refraining from corruption, complying with the host state's laws, and conducting a social and environmental impact assessment.[54] As the next section makes clear, the emergence of investor's obligations in Africa is a trend with significant implications.

Caveat investors? The emergence of investors' obligations

A number of critics of the ISDS system point to what they see as an imbalance between states and investors with, traditionally, bilateral investment treaties granting investors a swathe of rights but without subjecting those investors to any concomitant obligations to the state. As highlighted above, new investment treaties seek to strike a better balance in this regard. Recently, tribunals have shown a willingness to take a close look at the conduct of investors. Tribunals are paying keen attention to the need for investors to comply with domestic laws designed to protect the environment.

In October 2018, the tribunal in *Cortec Mining et al v Kenya* found that the investors did not have a protected investment under the UK–Kenya BIT as they had failed to comply with Kenyan law in obtaining a mining licence.[55] The tribunal – in line with an earlier decision of the Kenyan Court of Appeal – found that the investors had failed to comply with provisions of Kenyan law requiring an environmental impact licence to be issued before the valid grant of any mining licence. Of crucial importance in this case is the fact that the BIT in question did not include express wording that is found in a number of treaties requiring that investments be made 'in accordance with [host state] law'.

Unanimously, the tribunal held that a requirement to comply with host state law could be implied into the interpretation of both the BIT and the ICSID Convention. Following this decision, any attempt by an investor to argue that it is not required to comply with local law seems to be fraught with difficulty. An annulment application brought by the investor was unsuccessful.

In light of the greater emphasis being placed on the obligations of investors, it is likely that in the near future we will see claims brought by states against investors. The drafting of recent BITs opens the door to such claims as well as counterclaims by the host state. Of course, older BITs offer little room for states to sue the investor and, to date, the limited examples of states taking a proactive approach have arisen under investment agreements. For example, in 2019, a Rwandan state-owned company initiated a contractual ICSID arbitration against a local subsidiary of the US energy company ContourGlobal (*Energy Utility Corporation Limited v KivuWatt Limited*, ICSID Case No. ARB/19/3). However, the ICSID case was discontinued before the tribunal was constituted, with the state entity later initiating an UNCITRAL proceeding against KivuWatt instead.

Arbitrator appointments in African ISDS cases – statistics

In recent years, a growing number of arbitration practitioners have voiced concerns over the lack of diversity within arbitral panels beyond gender inequalities, in particular an imbalance in representation from the African continent on arbitral panels. As noted by Dr Onyema, 'between 1998 and 2007, a total of 472 parties from Sub-Saharan Africa arbitrated their disputes before the International Chamber of Commerce (ICC). But over the same period, only 64 arbitrators from the same region were appointed by the ICC'.[56] Although these figures mainly deal with commercial arbitration, investment arbitration is not immune to this problem either. According to ICSID statistics, as at December 2018, ICSID cases involving sub-Saharan African states accounted for 15 per cent of all ICSID cases whereas, over the same period, sub-Saharan African arbitrators, conciliators and ad hoc committee members appointed in ICSID cases accounted for only 2 per cent of total appointments.[57]

The former president of the International Court of Justice, Judge Abdulqawi Yusuf, considers that the lack of geographical diversity affects the system's legitimacy.[58] There have been a number of recent initiatives, however, to bring about change. In September 2019, Dr Onyema, Stuart Dutson and Kamal Shah co-authored 'An African Promise', which 'establishes concrete and actionable steps that the international arbitration community can and must take towards [improving the profile and representation of African arbitrators; and appointing Africans as arbitrators especially in arbitrations connected with Africa]'.[59] Notably, the African Promise calls on the arbitral community to: consider African candidates when appointing arbitrators; collect statistics in relation to appointment of African arbitrators and make them publicly available; and encourage Africans to pursue arbitrator appointments.[60] Eighteen months later, 330 persons have signed the African Promise.

Recent statistics show that a significant change is yet to come, at least in relation to investment arbitration. Of the 58 new cases registered by ICSID in 2020, nine were against African states (ie, 15.5 per cent of the total new cases). At the same time, African arbitrators represented only 4 per cent of the total number of appointments (only eight African arbitrators out of the 181 arbitrators, conciliators and ad hoc committee members appointed in 2020 on cases registered under the ICSID Convention and the Additional Facility Rules).[61]

Although they are not directly related to appointments of African arbitrators in the field of investment arbitration, other very recent initiatives may also have a positive impact on the issue of under-representation of African arbitrators. In this regard, the recent compilation of a list of arbitrators of African descent with ties to the United States[62] should increase the visibility of some of those African arbitration practitioners.[63] In the same spirit, the International Council for Commercial Arbitration (ICCA) issued a 'Diversity and Inclusion Policy' and 'Diversity and Inclusion Implementation Plan' in May 2020.[64] The ICCA notably aims to ensure that publications and panelists at ICCA conferences come from diverse backgrounds, increase accountability by publishing its data regarding diversity, and develop an inclusion fund to support participation and travel in its activities.[65] The launch earlier this year of the group, Racial Equality for Arbitration Lawyers, whose goal is notably to 'focus on racial equality and representation of other unrepresented groups in international arbitration at an international level more generally',[66] is likewise a positive development.[67]

One can hope that all these initiatives will combine to foster the appointment of African arbitrators in investment arbitrations. The very recent appointments of Gérard Niyungeko of Burundi, Sanji Mmasenono Monageng and Edward William Fashole Luke of Botswana in ICSID cases *WalAm Energy LLC v Republic of*

Kenya (ICSID Case No. ARB/15/7), *Nachingwea UK Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v United Republic of Tanzania* (ICSID Case No. ARB/20/38) and *Winshear Gold Corp v United Republic of Tanzania* (ICSID Case No. ARB/20/25) respectively may be a harbinger of a real shift to come. [68]

Legal updates

AfCFTA

In 2012, African states set out with the ambition to establish an unprecedented 'Continental Free Trade Area'.[69] Negotiations were launched under the aegis of the African Union with the primary objective of 'boosting intra-Africa trade'.[70] The agreement would give rise to the creation of an impressive single market for goods and services of 1.2 billion people with a combined gross domestic product of more than US$2.2 trillion.[71]

On 30 May 2019, the AfCFTA became a reality.[72] To date, it has been signed by 54 states (the Member States)[73] and ratified by 36, including Nigeria, Egypt and South Africa, the three largest economies of the continent.[74]

Under the AfCFTA, the Member States will work to progressively eliminate tariffs and non-tariff barriers to both 'trade and investment'.[75] The Member States also have the ambition to create a continent-wide customs union providing for the free movement of capital and persons.[76]

The AfCFTA's implementation is comprised of two phases.

Phase I, which pertains to the liberalisation of trade in goods and services, is almost completed, with Member States successfully negotiating a wide range of annexes and protocols. Although Schedules of tariff concessions and Rules of Origin have not all been finalised,[77] preferential trading across the territories of the AfCFTA Member States, which was initially slated for 1 July 2020, officially started on 1 January 2021 nonetheless. [78]

Natural persons and corporate entities have no right of recourse under the AfCFTA. Similarly to what the World Trade Organization has instituted, the protocols only provide for a state-to-state dispute resolution mechanism. In other words, traders and investors seeking to establish the liability of a Member State under the AfCFTA may only do so by seeking diplomatic protection.[79]

For these reasons, intra-African investors are now casting their eyes on the Phase II negotiations, which include the negotiation of a protocol on investment.

However, negotiations are behind schedule, especially in light of the covid-19 pandemic. Investors eagerly await, therefore, to discover the contents of the protocol on investment, both in terms of the substantive protections it will offer and the rights of recourse that will be made available to them.

Covid-19 and moratoriums on claims

The pandemic has caused significant headaches to states around the world, and undoubtably has put some strain on precarious economies and health systems in Africa. The World Health Organization reports that there have been nearly 3 million confirmed cases of covid-19 in Africa,[80] with likely many cases going unreported. In response to the pandemic, at the 14th meeting of the African Union Ministers of Trade on 24 November 2020, the ministers adopted a 'Declaration on the Risk of Investor–State Dispute Settlement with respect to COVID-19 related measures'.[81]

The Declaration consists of a preamble and six recommendations set out below:

i) Invite Member States to explore all available options under international law to mitigate against the risk of COVID-19 Pandemic related ISDS claims, considering the interaction between pandemics and international investment law.

ii) Commit to work towards the adoption of a set of guidelines for African governments to minimize the challenges of ISDS and to address and reform existing investment treaties.

iii) Request Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels.

iv) Invite Member States to explore all possibilities for mitigating the risks of ISDS, including a mutual temporary suspension of ISDS provisions in investment treaties in relation to COVID-19 Pandemic government measures.

v) Call upon African Union to consider incorporating relevant issues raised in this declaration within the Investment Protocol to the AfCFTA and other relevant negotiations.

vi) Requests the African Union Commission to provide support to Member States in the on-going negotiations within different organisations that are working towards the development of legal instruments to address the risks of ISDS for COVID-19 Pandemic related measures and other global health threats in accordance with international law.[82]

Moreover while there have been calls for a moratorium on ISDS claims during the pandemic,[83] it appears that African states have not issued any such moratoriums.

Conclusion

Africa has quietly, but very effectively, been one of the most innovative forums for investment arbitration over the years. The most recent developments in treaty drafting contribute to a coming of age of Africa in the field of investment protection.

African states have responded to the criticism that bilateral investment treaties are weighted too heavily in favour of investors by ensuring that new treaties impose obligations on investors, in particular with regard to the protection of environmental and corporate social responsibility obligations. Other significant developments include express provisions on a state's right to regulate and a desire that disputes involving African states should be heard on African soil.

The Africanisation of investment arbitration should be applauded and encouraged to continue, while attention will also turn to observing how the new treaties, the new laws and the new practitioners all join together as elements that contribute to creating a safe economic environment for foreign investment in Africa. The next decade will be one of action, where states will bear the responsibility of properly implementing the new mechanisms they have created. More changes are no doubt on the horizon.

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DLA Piper is acknowledged as a leader in the international arbitration field, ranked in Global Arbitration Review's GAR30 as one of the leading global practices. The firm has one of the largest international dispute resolution practices in the world, with more than 1,400 lawyers across the globe. The team has extensive experience acting for both commercial parties and states in international arbitration proceedings, including significant experience of investment treaty disputes.

DLA Piper has particular expertise in African disputes. DLA Piper is acting in numerous commercial disputes for private entities, and has recently represented the Republic of Guinea and the Republic of Kenya in ICSID proceedings, as well as representing the Democratic Republic of the Congo in respect of enforcement issues arising from two arbitral awards and the Republic of Zambia in a commercial arbitration.

DLA Piper has a presence in 20 countries in Africa, with DLA Piper offices in South Africa and Morocco; and DLA Piper Africa firms in Algeria, Angola, Botswana, Burundi, Ethiopia, Ghana, Kenya, Mauritius, Mozambique, Namibia, Rwanda, Senegal, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.

Mining Arbitrations in Africa

Audley Sheppard QC, Amanda Murphy and Karolina Rozycka
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In summary

Increased demand for certain commodities (such as gold, iron ore, copper and some rare earth metals) following the global disruption caused by covid-19 will naturally result in increased foreign investment flow to those countries that are endowed with such resources. Depending upon the response to this demand, states may be exposed to the risk of claims and arbitration. Although resource nationalism continues to be one of the greatest challenges currently facing investors, several African countries (such as Egypt and South Africa) have recently shown willingness to liberalise their approach to foreign investment in the mining sector. One of the major ways in which political risk can be mitigated by an investor is by entering into a host state agreement, which may provide, among other things, stabilisation of the applicable legal framework and recourse to international arbitration in the event the stabilisation provision is breached. Social and environmental concerns are invariably associated with mining projects, and so these issues are also an increasingly common feature of mining disputes and arbitration in Africa.

Discussion points

- Environmental, soial and governance (ESG)-related issues are likely be an increasingly prominent feature in mining arbitrations in Africa, driven by the increasing references to protection of environmental, social and public health objectives in both contractual arrangements and investment treaties.
- China's investment in the African region will likely continue; however, the commencement of the first arbitrations by Chinese investors against African states in 2020 may signal an increasing willingness by Chinese investors to resort to international arbitration.

At the time of publishing the previous edition of this chapter,[1] the coronavirus pandemic was only just beginning, and no one could have predicted just how disruptive and challenging the crisis would become – with the battle still being fought a year on. While most African states (aside from South Africa) have so far appeared to fare better than key trading partners in the United States, Europe and Asia, they were certainly not immune from the mass-scale disruption the crisis caused to global supply chains and capital flows. However, surprisingly, the impact of coronavirus on the mining sector, particularly in terms of price volatility, has largely been positive, with the initial falls in commodity prices seen at the outset of the covid-19 outbreak soon plateauing and then turning upwards. Most metals prices have returned to at least pre-pandemic levels, and the demand for some commodities has skyrocketed reaching historic highs, particularly iron ore and gold.[2] China's speedy recovery from its pandemic experience resulted in high demand for iron ore as China ramped up steel production. The pandemic also triggered a boost to gold prices as a safe-haven asset.

But 2020 was not all about the covid-19 pandemic. Despite the crisis, there has been an increase in climate change action from many states and global energy majors. A large number of states set net-zero carbon targets in 2020, including three of Asia's largest emitters (Japan, South Korea and China). Many countries have already passed laws establishing net-zero targets, including Sweden, the United Kingdom, France, Germany and Spain, and a number of other states have pledged to achieve net-zero at the policy level, including Canada, Chile, Costa Rica, Norway, Portugal, South Africa and Switzerland. More than 27 of the world's leading mining and metals companies have made commitments to address climate change as members of the International Council on Mining and Metals (ICMM), including Anglo American, AngloGold Ashanti, Barrick, Glencore, Gold Fields, Sibanye-Stillwater, BHP, Rio Tinto, Newmont, Vale, Newcrest and South32.[3] The transition to a greener economy is already starting to bump up demand for commodities needed for the transition, such as copper, nickel and rare earth elements. More recently, 2020 also saw the end of the Trump presidency, and the swift rejoining in early 2021 of the United States to the Paris Agreement.

This chapter focuses on the impact that these and other recent developments have had, and may have in the future, on mining projects in Africa, and consequently mining arbitration in Africa. From a mining perspective, the African continent offers some of the richest mineral resources in the world, with large swathes of territory that remain unexplored using modern exploration methods. From the perspective of many African countries, mineral exploration and production is of critical economic importance, representing a substantial component of their economy at present and critical sources of future state revenue. However, because of this rich abundance of resources in sub-Saharan countries, it is also a fertile ground for commercial and investment disputes arising from mining projects. The increasing demand for certain commodities (such as those needed for the green transition, such as copper and some rare earths) will naturally result in increased foreign investment flow to those countries that are endowed with such resources, and depending upon the response to this demand, countries may be exposed to the risk of claims and arbitration.

The likelihood of resource-related disputes is heightened owing to certain factors that – without being Africa-specific – are often prevalent in resource-rich African countries:

- Mining investments and projects in Africa are often sensitive to political risk, which commonly manifests itself in the form of executive interference due to a climate of political instability, lack of stable and consistent governance and limited infrastructure and public services.

- A corollary of Africa's structural and political challenges is increased exposure to security threats, ranging from trespass by artisanal miners to attacks by military or paramilitary groups.
- Finally, an important feature of the mining sector in sub-Saharan Africa is the extensive role played by new investors today. These are often state-controlled companies (such as from China) but also increasingly private investors, teaming up with local entities that lack sufficient funds to invest in their country's resources on their own.

For states, the harmful actions of some foreign investors in Africa in the past rightly justify a focus on compliance by investors with local laws and, increasingly, international environmental and human rights standards. A failure to comply with these laws and standards may result in claims or counterclaims being made by states against investors. Many new treaties entered into by states contain express statements regarding the states' right to regulate in order to protect public welfare objectives such as public health, safety and the environment. Social and environmental concerns are invariably associated with mining projects, and so these issues are an increasingly common feature of mining disputes and arbitration in Africa.

This chapter aims to provide a concise overview of the risks and characteristics of mining disputes in Africa, rather than a definitive theoretical framework for approaching them, in the context of the current investment climate and as we move further into the 2020s.

The mining industry and covid-19 in Africa

Although the African mining sector was somewhat more resistant to the disruption caused globally by the coronavirus pandemic in comparison with other fields, mining companies still had to face a number of new challenges as the crisis began spreading in the first half of 2020. Today, the most visible consequence of the pandemic on the mining industry in Africa probably relates to the measures taken to contain the spread of the virus by national governments, including the mandatory (albeit temporary) shutdown of mines as lockdowns were enforced.

In South Africa, mines were initially closed for at least 21 days, and took several weeks to reopen.[4] Several provinces in the Democratic Republic of Congo also resorted to lockdowns.[5] In Mozambique, Zambia and Tanzania, similar measures lead to a temporary shutdown of mines, while Angola, Ivory Coast, Burkina Faso and Mali tried to maintain activity. [6]

After this initial interruption in production, even if temporary, a number of mining companies struggled to ramp up production to previous levels, while having to screen all workers for covid-19 and adapt work processes to newly imposed safety measures.[7]

As noted above, the pandemic has also impacted mineral prices, leading to extreme volatility in the first half of 2020, and stabilising afterwards at often higher than pre-pandemic levels.[8] The initial lockdown in China first led to a massive drop in demand for base minerals, resulting in significant price volatility in the first half of 2020.[9] In the third quarter of 2020, prices jumped back to pre-pandemic levels, if not above, and stabilised at that level.[10] Gold regained its status as a safe haven, with prices rising by 27 per cent on annual average,[11] beating previous record highs.

2020 turned out to be the start of a predicted super-cycle in commodities, a trend underlined by the fluctuation of the biggest mining companies' market valuation. In 2020, the market valuation of the world's 50 largest miners fell to a low of US$700 billion on 31 March, only to rocket back to US$1.28 trillion by the end of 2020. Compared to the-pandemic level of US$989 billion, mining companies' valuation grew by approximately 29.4 per cent.[12] As a continent with large undeveloped resources, interest from foreign investors will no doubt increase in a super-cycle environment, as the global economy seeks to pull itself into recovery following the pandemic. A high level of competition for resources and a desire to accelerate projects could lead to disputes between investors and governments, with a consequent increase in referrals to arbitration.

In respect of mining arbitrations that were already under way prior to the outbreak of the pandemic, the emergence of virtual arbitrations was a major procedural change. From filings to hearings, 2020 saw entirely remote arbitrations become the norm, with the associated technological challenges. Some institutions even issued guidelines on the best practices for virtual hearings in Africa, taking into account the specific challenges on the continent.[13] A number of (often complex) mining arbitrations, were delayed, as parties and tribunals awaited the possibility of arguing their disputes inperson.

Resource nationalism

Political risk continues to be one of the greatest challenges currently facing investors in the mining industry. This is particularly the case in some African countries where political instability, the lack of strong governance and political structures, and more limited administration and public services, may adversely impact the development and operation of mining projects.

Political risk most often manifests itself in executive and legislative measures aimed at increasing governmental control over the development of natural resources in a manner that disregards the rights of existing concession holders – a policy phenomenon often described as 'resource nationalism'.[14] This is not to be confused with the legitimate aim of states to seek to achieve the highest return from their natural resources, so that the people for which governments are responsible will enjoy the greatest benefit from their nation's natural endowment. Rather, disputes arise when measures are taken against investors that are unlawful, in that they are discriminatory, not in the public interest, not carried out under due process of law and not accompanied by fair compensation.

Resource nationalism in sub-Saharan Africa is arguably closely connected to its history of colonisation and decolonisation. While Western powers wished to retain control of natural resources post-decolonisation, buoyed by their access to specialised workforces and their ownership of hydrocarbons and mining projects, the newly independent former colonies wished to regain control of their own resources.[15] In 1962, the United Nations General Assembly adopted resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources (Resolution 1803).[16] Resolution 1803 consecrates many of the host government's rights (including regarding nationalisation and expropriation of natural resources on its territory) while also providing guarantees and compensation for foreign investors owning natural resource projects who are affected by state measures. In this sense, some commentators consider Resolution 1803 to be a key predecessor to the system of investment protection based on international investment agreements in force today. [17]

The resurgence of resource nationalism in recent years has resulted in part from a significant drop in metals and minerals prices from their peak in 2012. The price downturn put substantial pressure on both states and investors, especially since it followed

a period of exceptionally high prices, which had resulted in a surge in investment.[18] It is perhaps unsurprising in this context that a number of African states implemented measures designed to maintain the economic contribution of mining projects to their overall budgets in a context of declining prices. One significant method of achieving this has been through the enactment of legislation increasing the amounts payable to the state (in the form of taxes and royalties). Mining laws enacted over the past few years by Mozambique, Zambia and Ghana all contain a series of measures in furtherance to that objective.[19]

More recently, in December 2020, the Republic of Congo issued a series of decrees in which it stripped a number of mining companies of their existing rights with respect to various iron ore deposits, granting them to a third company.[20] The Republic of Congo is now facing at least two new arbitrations as a result – one pursuant to the ICC Rules and one at ICSID. [21]

In this climate of increasing resource nationalism, the financial pressure felt by host states is naturally also being felt by (or transferred to) investors, as an increasing number of new state measures affect the profitability and operability of mining projects. From an investor perspective, unforeseen restrictive measures imposed by governments may result in a desire to suspend projects, restrict production or find some other way to protect their investments. Further, given mining companies' general reliance on debt financing, investors may increasingly be forced to take whatever measures they can to meet their repayment obligations.[22] In this context, impacted investors are likely to challenge state measures that they view as confiscatory, punitive or unfairly imposed. Challenges may be based on contracts providing for arbitration as the dispute mechanism, or on investor-state dispute settlement provisions in international investment agreements, such as bilateral investment treaties (BITs), linking African host states with partner states around the globe.[23] There are now many examples of African states taking such measures, including:

- The Democratic Republic of the Congo (DRC): the DRC enacted a mining code in March 2018, providing for increases in taxes and royalties and imposing more stringent requirements regarding the repatriation of export income. The 2018 Mining Code also purports to disregard the stabilisation mechanism previously provided in the DRC's 2002 mining code, which would have guaranteed investors the stability of certain provisions of the previous legal regime for a further 10 years from the promulgation of a new law, such as the 2018 Mining Code.[24]
- Sierra Leone: in September 2018, Sierra Leone's Minister of Mines and Mineral Resources announced plans for 'key reforms' in the mining investment sector, including revising Sierra Leone's minerals policies and laws.[25] Among other priorities, these reforms purport to generate jobs and additional income to Sierra Leoneans. The Minister's statement also acknowledged that 'investors require sufficient guarantees of a business-friendly environment characterised by predictable laws, fiscal stability, transparency, security of tenure, etc'.[26] To this day, the reform project has not been abandoned, thus investors in Sierra Leone may be watching the reforms closely to ensure that their rights are indeed preserved.
- Mali: as Africa's third-largest gold producer, Mali has recently been negotiating with mining companies to draft a new mining code. Under the new proposed code, investors who are currently protected from changes to the fiscal regime for 30 years would see a reduced period of protection, only applicable during the lifespan of the mine. The government threatened to implement a new law unilaterally 'like in DRC' if no compromise was reached – a move that may force international mining companies to turn to arbitration.[27]
- Madagascar: in late 2019, Madagascar announced that it would also reform its mining legislation, with the aim to increase taxation on mining benefits.[28] The reform project was near completion in early 2020, the Council of Ministers having voted a preliminary version of the text in November 2019 and started public consultations in January 2020.[29] It has then been at a standstill since the beginning of the pandemic. The mining reform project is now back on the agenda of the government, with a goal to refurbish the state's finances after the health crisis. [30]
- Ivory Coast: also amended its new 2018 Investment Code, implementing provisions favouring national and OHADA arbitration instead of other institutions.[31] These changes were said to be illustrative of a growing mistrust of several African countries towards Western dispute resolution mechanisms and generally towards foreign investors.

However, although resource nationalism remains in parts of Africa, several countries have recently shown willingness to liberalise their approach to foreign investment in the mining sector. Egypt has adopted new mining regulations, which aim to alleviate many of the burdens the previous mining regulations imposed on investors, such as the requirement to form a joint venture with the Egyptian government.[32] This reform also sets a 20 per cent cap on royalties,[33] again underlining the willingness to provide for a more open investing environment in Egypt.

The South African government has also stressed its intention to review mining regulation in order to help the mining industry back onto its feet after the pandemic, and to rely on it to fuel the country's recovery.[34] It remains to be seen whether these two very recent examples are illustrative of what might be a return to investor-friendly legislation, as prices are expected to rise again after the covid-19 crisis.

Managing political risk through host state agreements

Another key area in which political instability can manifest itself, often linked to resource nationalism measures, relates to changes to the applicable law. One of the major ways in which this form of political risk can be mitigated by an investor is by entering into a host state agreement, which may provide, among other things, stabilisation of the applicable legal framework and recourse to international arbitration in the event the stabilisation provision is breached.[35]

Stabilisation of the applicable legal and regulatory framework is increasingly seen as essential for large-scale mining projects, given the often lengthy time frames involved from resource definition to exploitation. In this respect, mining companies are drawing on the experience of the international oil and gas industry, where businesses have long sought to manage the risks of adverse legislative change by including stabilisation clauses and choices of international law in their long-term agreements with their host governments.

Some African states have recently taken steps to retrospectively amend the protections afforded by host state agreements in the mining sector, underscoring the need for stabilisation in long-term mining projects. Tanzania's mining reform of 2017 is a prime example, whereby the state sought to introduce a unilateral review and renegotiation of any existing contract containing an 'unconscionable' term and purporting to void any existing contract terms

that submit the state to foreign court jurisdiction.[36] Later, in 2018, Tanzania passed the Mining (Mineral Rights) Regulations, reportedly abolishing various companies' retention licences for projects and transferring their rights to the government. Tanzania's commitment to numerous BITs left it exposed to claims under investment treaties (such as unlawful expropriation or fair and equitable treatment (FET) standard claims) challenging the provisions of the new laws it introduced.[37] This resulted in a number of arbitration cases including three new claims in 2020:

- On 17 January 2020, Canadian company Montero Mining issued a notice of intent to submit a claim to arbitration to Tanzania pursuant to the Canada–Tanzania BIT. [38]
- On 27 July 2020, an ICSID proceeding was registered by Canadian company Winshear Gold Ltd pursuant to the Canada–Tanzania BIT. [39]
- A third ICISD arbitration was commenced on 5 October 2020 by Australian company Indiana Resources Ltd pursuant to the UK–Tanzania BIT. [40]

All three of these claims relate to the abolishment of the claimant companies' retention licenses pursuant to the 2018 laws. Tanzania's arbitration docket has been increasing for several years:

- In July 2017, a subsidiary of Canadian mining major Barrick Gold commenced two arbitrations against Tanzania using the mechanism provided by mineral development agreements with the Tanzanian government. These claims were settled in 2019, with Barrick Gold agreeing to pay US$300 million and accept new concession terms.
- South Africa's AngloGold Ashanti had also filed an UNCITRAL claim in 2017 over a set of earlier Tanzanian mining reforms, although its claim is currently stayed while the parties look to settle the dispute.

Similar unilateral action was announced by Mali following a coup d'état by Malian armed forces on 28 August 2020, which overthrew the government of Ibrahim Boubacar Keïta. Former Defence Minister Bah N'daw was sworn in as president to lead a transitional government until elections in 2022. President N'daw announced that, on advice from the Auditor General, his transitional government will undertake a review of mining conventions signed by the former Keïta government with foreign mining companies. According to press reports, the Auditor General advised that '[t]he conventions establishing mining companies include clauses which do not always guarantee the protection of the interests of the state'.[41] Even though the existing Malian Mining Conventions are governed by the law of Mali, they are also arguably automatically subject to the general principles of international law (because they are contracts between a sovereign state and foreign investors). International law includes the *pacta sunt servanda* principle. The Malian Mining Conventions also contain clauses allowing the Convention holder to refer disputes with the government to arbitration at ICISD. If Mali proceeds with its announced review, there may be a wave of cases against Mali by holders of existing mining conventions, as seen in Tanzania.

Security issues, IHL and the impact on mining disputes

The physical security of mining assets has also long been a matter of concern for investors in Africa. Increasingly, mining companies are being called upon to understand and comply with their obligations under international humanitarian law (IHL) if they are operating in active conflict zones. In 2020, the Australian Red Cross released a ground-breaking publication entitled 'Doing Responsible Business in Armed Conflict', being one of the few guidelines to assist companies understand both their rights and obligations under IHL. The publication explains that, unlike human rights initiatives that businesses may adopt or enter into voluntarily, IHL is already binding on anyone whose activities are closely linked to an armed conflict.

From an arbitration perspective, in countries where there is armed conflict, host states generally have a duty to protect the physical integrity and private property of their residents and investors, although this may be difficult to achieve in remote or dangerous areas. Mining companies may rely on relevant provisions of their mining concessions or conventions to secure the unimpeded enjoyment of their mining rights. Foreign investors may also rely on the application of the FET and full protection and security standards, which are present in most international investment agreements currently in force.[42] Full protection and security has been interpreted to mean that the state is obliged to take 'active measures to protect the investment from adverse effects' that 'may stem from private parties', including demonstrators and armed forces.[43] States have been held liable for failing to protect investors or their investments against private violence, for example, through the failure of police to protect an investor's property from occupation and to respond adequately to violent incidents.[44] A series of arbitral awards confirm the application of 'full protection and security' to investments in Africa. [45]

Another recurring security issue for large-scale mining companies is the increasing encounters with unauthorised artisanal and small-scale miners in areas where they hold exclusive mining or access rights. While artisanal mining can help create employment in underdeveloped areas and finance development infrastructure in local communities, it is often associated with poor health and safety conditions and may entail very negative environmental and social consequences.[46] Artisanal mining may therefore create direct safety risks for local populations and for large-scale mining companies, who run the risk of being blamed for the damage done by these unlicensed operators.

The presence of unauthorised (and often, inadequately equipped) artisanal miners on a large-scale mining site creates a substantial risk of injury for the trespassers, as well as for the legitimate site users. Moreover, the activity of artisanal miners may interfere with ongoing exploration and production works, in part by creating hazardous excavations or using inefficient processes that prevent the future recovery of valuable minerals left behind. In addition, artisanal miners often use toxic substances or processes to extract or treat minerals without taking adequate protection measures. The resulting environmental contamination may endanger local populations, impair large-scale mining operations and result in substantial liability for the large-scale mining company holding mineral rights over the area.

Finally, artisanal mining activity results in the production of non-renewable mineral resources by a third party who is not the rightful permit holder, thus depriving the latter of its economic rights over these resources. This competition over the same resources – and the large-scale miners' efforts to keep artisanal miners from trespassing – may result in conflicts between the large-scale operators and artisanal miners (who may be armed or supported by armed groups). This risk is particularly high in areas where government presence and economic opportunities are limited.

In an attempt to solve the problem, Nigeria made artisanal mining legal in 2020. The government hopes that this change will help decrease the violence and improve the working conditions in artisanal mines, and bring in US$500 million a year in royalties and taxes.[47]

A recent case-in-point is the experience of Canadian gold mining company Banro Corporation, which had been operating the Nayoma mine in the DRC. The company was forced to halt production several times as a consequence, and in September 2019, the CEO of Banro stated that: 'The government has done nothing to create a sustainable and positive environment for Banro's employees to work safely and securely.'[48] Banro claims to have suffered financial distress forcing it to attempt to sell its interest in the mine following incursions of artisanal miners and repeated attacks by militia and alleged lack of protection from the government.[49]

Impact of Chinese investments in Africa on African mining disputes

Another driver of mining arbitrations in Africa is the surge of Chinese investment in African mining projects over the past decade, with Chinese foreign direct investment (FDI) to Africa increasing markedly from around US$75 million in 2003 to US$2.7 billion in 2019.[50] China is now the largest trading partner in the African region,[51] having surpassed the US since 2014, with the DRC, Angola, Ethiopia, South Africa, and Mauritius being the top five recipients of FDI from China in 2019.[52] China's 2018 pledge to invest US$60 billion in Africa was said to include 'US$15 billion of aid, interest-free loans and concessional loans, a credit line of US$20 billion, a US$10 billion special fund for China-Africa development and a US$5 billion special fund for imports from Africa'.[53] However, for low- and middle-income African countries, repayment of the loans provided by China may become a significant problem. In such circumstances, governments may be forced to turn to alternative ways to repay their debts, such as through granting rights and concessions over valuable resource assets.[54] The inability to repay debt will likely reinforce China's economic influence and control over vast reserves of metal and mineral resources on the African continent. It may also see China take steps to stem its losses, such as scaling back or restructuring investments, and these actions may have flow-on effects for other projects in the region and may increase the potential for disputes between investors and host states. [55]

One particular characteristic of Sino-African mining contracts over the past decade is the inclusion of commitments to develop or contribute to infrastructure development, as some agreements between African states and China or Chinese state-owned companies contemplate the provision of infrastructure as a means of payment for the resource.[56] These arrangements increase the potential for disputes between foreign investors and host states which can arise not only from the development and operation of mining projects but also from the construction and operation of large-scale infrastructure projects. The interconnection between access to mineral resources and infrastructure investments could also result in situations where host governments decide to terminate mining rights as a result of an investor's failure to deliver on its infrastructure commitments.

Unsurprisingly, a sizeable network of Sino–African BITs has emerged in parallel with this considerable surge in Chinese investments in Africa. By March 2021, UNCTAD's database had registered 36 BITs signed between China and African states, of which 20 had already entered into force.[57] However, these BITs are not necessarily published or easily accessible,[58] and so the actual figure for Sino-African BITs may be higher.

Until recently, no Chinese investor had launched a claim against an African state. However, the very first claim by a mainland Chinese investor against an African state was reportedly launched on 10 February 2021 by Beijing Everyway Traffic and Lighting Tech Co Ltd (a Beijing construction company). The investor reportedly served a notice for arbitration on Ghana pursuant to the China-Ghana BIT, to be conducted at the LCIA.[59] The China-Ghana BIT provides for disputes to be settled by an ad hoc tribunal, and contains a provision for submission of disputes regarding the quantum of compensation payable for an expropriation. The case relates to the cancellation of a contract for the Accra Areawide Traffic Intelligent System, which was intended to help reduce traffic congestion in the capital city, involving the installation of CCTV and automatic number plate recognition systems.[60] The claimant alleges that Ghana subsequently approved a new contract to complete the project with two other Chinese contractors.

There have been reports that another claim has been launched against Nigeria also by a mainland Chinese investor, although little is known about this claim so far.[61] It is possible that these two recent cases signal the start of a pattern of claims by Chinese investors in Africa, in light of the substantial Chinese investment in Africa and tensions associated with escalating debt.

In this context, the African continent is also seeing an increase in the development of arbitration centres. For example, in 2016 the China Africa Joint Arbitration Centre (CAJAC) was created in a joint effort by Chinese and African stakeholders to resolve commercial disputes between Chinese and African parties, given the rapid development of trade and investment between China and Africa. The CAJAC is based in South Africa and China and is a joint initiative between the Arbitration Foundation of South Africa, the Association of Arbitrators and the Shanghai International Trade Arbitration Centre, supported by the China Law Society. The CEO of CAJAC stated that although CAJAC is not an arbitration authority standing by itself, it is 'an integral part of the support structure specially crafted to foster trade and investment between China and Africa'.[62] It may be that the industry will see an increasing number of China–Africa disputes being resolved in these forums.

The rise of ESG and its relevance to mining disputes in Africa

All companies, not just those operating in Africa, are being required to show that they comply with high standards of environmental and social governance (ESG). This broad and encompassing term has risen fast to the top of boardroom agendas, and requires policies and frameworks to address all aspects of ESG in their operations, including climate change, sustainability and human rights-related risks. This is particularly the case in the context of mining investments in Africa, in part because of the specific risks and characteristics outlined in this chapter. Stakeholders increasingly demand effective actions and heightened levels of transparency in relation to ESG issues, and mining investors seeking finance are increasingly required to demonstrate their ESG credentials. Mining investors need to be ready to demonstrate their efforts to comply with local laws and regulations, socio-environmental standards and business human rights principles.[63] This is particularly true in the context of investor-state disputes concerning natural resources projects located in emerging jurisdictions, where respondent states and sometimes third parties, through amicus submissions will increasingly question claimants' compliance with their legal obligations.

It is likely that ESG-related issues will be an increasingly prominent feature in mining arbitrations in Africa, driven by the increasing references to protection of environmental, social and

public health objectives in both contractual arrangements and investment treaties. Foreign investors are usually obliged to comply with local laws as a condition of their concession, or as a term in a host state agreement (where there is one). Breaches of these obligations may result in claims against the investor, or counterclaims by the state. In the context of investment treaty arbitration, the plea of illegality, namely that the investor has failed to comply with local laws, is often pleaded by states 'as a question of admissibility or a question on the merits of the case'. [64]

There is an increasing emphasis today on placing sustainability at the centre of economic development in Africa. For example, the Pan-African Investment Code of the African Union Commission (PAIC) contains obligations on investors to 'adhere to socio-political obligations' and 'contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host state'.[65] The PAIC, which was adopted as a non-binding instrument, is now informing negotiations on the Investment Protocol of the Africa Continental Free Trade Area Agreement (AfCFTA), and so it is possible the Investment Protocol will contain similar ESG provisions. [66]

There are also numerous voluntary compliance mechanisms that many foreign investors operating in Africa seek to observe, such as the Organisation for Economic Co-operation and Development (OECD) Guidelines, the United Nations Global Compact, the International Code of Conduct Association (for private security companies) and the Voluntary Principles on Security and Human Rights. Ensuring responsible global supply chain management of tin, tantalum, tungsten (their ores and mineral derivatives) and gold is of particular relevance for companies operating in Africa.[67] Participation in the Extractive Industries Transparency Initiative and the Kimberley Process necessitates that companies undertake due diligence of their supply chains, including in-country due diligence, to ensure they meet the requirements of these voluntary regimes. However, there is already a groundswell for shifting from voluntary-based mechanisms to hard legal obligations, and once this 'soft law' hardens, there will be fertile ground for disputes as investors are challenged on these grounds.

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Notes

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Remote Hearings and the Use of Technology in Arbitration

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In summary

This chapter analyses the inclination of the arbitration users and community towards the usage of video conferencing and the rise of use of technology in remote hearings relating to arbitrations. Further, it provides practical tips and recommendations relating to organising remote hearings, and concludes with some of the advantages of holding remote hearings, how the arbitration community and users are accepting it, and how techology paves the way for arbitration in the future.

Discussion points

- The incorporation of videoconferencing into arbitration laws and arbitral institution rules
- The guidance and protocols on virtual hearings issued by the arbitration community
- CRCICA's experiences with remote hearings and videoconferencing
- The issue of consent of the parties for holding remote hearings and associated problems

Introduction[2]

Arbitral institutions, users, academics, practitioners and commentators all agree that the covid-19 pandemic has triggered changes that will accelerate the integration of digitalisation to promote flexibility in efficiently handling international arbitration cases.[3]

Technological capacity to make reliable video calls was more limited in the past, as it required specialised and expensive equipment. However, today there are video call platforms such as Microsoft Teams, Zoom and many others providing high-quality video calls at relatively low costs. Stable internet connections and appropriate equipment are becoming more available in many countries worldwide.[4]

Arbitral institutions have gained experience, as have users, counsels and arbitrators, in using technology effectively, while ensuring the balance between due process rights and efficient dispute resolution.[5]

Hearings (remote or virtual)

Professor Maxi Scherer has distinguished between 'virtual hearings' and 'remote hearings' and clarified the common misconception between them. She mentions that the term 'virtual' has many possible meanings, but in computer science, it may be defined as:

> *not physically present as such but made by software to appear to be so from the point of view of a program or user*[6] *. . . In the case of international arbitration hearings conducted in several locations, the participants of the hearing are not virtual, but really exist; they merely interact with each other using communication technologies.*[7]

However, 'remote hearings' are understood as hearings that are conducted using communication technology to concurrently connect participants from two or more locations. This could include communication through telephone or videoconference, or possibly other more futuristic technology such as telepresence. Remote hearings using a videoconference link, namely 'technology which allows two or more locations to interact simultaneously by two-way video and audio transmission, facilitating communication and personal interaction between these locations'.[8]

In international arbitration, there are several types of remote hearings. There are 'semi-remote' hearings, where, for example, the arbitral tribunal might be assembled physically with the parties in one location, and one or several experts or witnesses may testify before them remotely. This is regarded as the commonly used format in international arbitration.[9] While in 'fully remote hearings', all participants are in different locations with no existing main hearing venue. Fully remote hearings are barely used in international arbitration, but are currently being considered in many arbitral proceedings to deal with the hassles dictated by the pandemic and the restrictions that countries are imposing. A fully remote hearing is one that could be referred to as a 'virtual hearing' as no hearing venue exists but for the use of computer technology.[10]

As such, the importance of arbitral institutions, counsels and arbitrators being familiar with remote and virtual hearings, videoconferencing and technology, as well as guidelines to ensure their unified adoption and deployment, has been considered quite crucial and in demand.[11]

In 2018, White & Case LLP conducted a survey titled 'International Arbitration Survey: The Evolution of International Arbitration'; the results showed that 43 per cent used videoconferencing frequently during arbitrations, 17 per cent always used it and 30 per cent used it sometimes. Additionally, 89 per cent mentioned that videoconferencing should be used more often in arbitration.[12] This study will require an updated review following the pandemic and the growing necessity of the use of videoconferencing and remote hearings.

Videoconferencing incorporated into arbitration laws and the tolerance of courts in its usage, videoconferencing incorporated into arbitral institutional rules and the issuance of guidance and protocols

For all possible forms of remote hearings, tribunals and parties must assess the relevant regulatory framework, including especially the law of the seat of the arbitration and the applicable arbitration rules. Some national laws and arbitration rules contain specific provisions on remote hearings in permissive terms, expressly allowing the tribunal to hold hearings remotely or by way of analogy of other provisions.[13] There is also the test of how courts in different jurisdictions tolerate the usage of videoconferencing and remote hearings. Not to mention that, as a result of the pandemic, several guidance and protocols have been issued as of late to facilitate the usage of remote and virtual hearings and videoconferencing, though some were issued prior to the pandemic.

Videoconferencing Incorporated into arbitration laws and the tolerance of courts towards the usage of videoconferencing and remote hearings

The amendments to arbitration legislation in recent years by countries such as the Netherlands (article 1072[b] in the Dutch Code of Civil Procedure Book 4 Arbitration[14] of 2015), Austria (section 595(2) of the Austrian Arbitration Act 2013[15]) and Hong Kong (article 20[2] of the Hong Kong Arbitration Ordinance 2011)[16] allow witness and expert examinations to be conducted without the physical presence of the witness and expert at the hearing.[17] Other legislation does not contain specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing and the tribunal's broad power to determine procedural matters.[18]

With regard to the tolerance of courts towards videoconferencing, remote and virtual hearings, a landmark judgment was issued on 27 October 2020, where the Egyptian Court of Cassation upheld a decision of the Cairo Court of Appeal refusing to set aside an award issued by the Cairo Regional Centre for International Commercial Arbitration (CRCICA).[19] Among the different matters that the Court of Cassation had dealt with, it hinted at the compatibility of virtual hearings with Egyptian law and the increased reliance on virtual hearings.[20] In this unprecedented judgment, the Court of Cassation made an express reference to the term 'virtual hearings' (in the English language) and this was regarded as an implicit message that virtual hearings are consistent with Egyptian law, which in itself does not include any direct prohibition of virtual hearings. This is an innovative statement, whereby the Court of Cassation hints that if parties wish to try and set aside arbitral awards on the ground that a hearing is held virtually, this may simply not qualify as a ground.[21]

A number of national courts have themselves conducted remote hearings:

> *In a recent decision, an Australian court balanced the health risks posed by covid-19 against the principle of just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible. The court concluded that the 'technology hiccoughs' associated with remote hearings, although unavoidable, are tolerable and would not mean that 'the trial will be unfair or unjust'.*[22]

The same conclusion was reached in the English courts.[23,24]

Gary Born mentions that all courts have virtually refused to annul arbitral awards based on objections to the use of videoconferencing and similar technology for witness and expert testimony; the same result has been reached in recognition proceedings involving remote witness testimony:[25]

> *Those results are particularly likely to continue to be reached in the future with respect to entirely remote hearings, with a number of national courts conducting their own remote hearings, and with health regulations making the conduct of physical or in-person hearings impossible or unlikely for prolonged periods of time.*[26]

Videoconferencing incorporated in arbitral institutions' rules and their updates

Several arbitral institutions have included in their arbitration rules the option of using videoconferencing in arbitration cases, such as article 28(4) of the CRCICA Arbitration Rules (relating to the examination of witnesses and expert witnesses only).

The arbitral institutions that have updated their arbitration rules to include expressly the features of a hearing being conducted remotely, virtually or by videoconference are the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC).

Pursuant to article 19.2 of the LCIA Arbitration Rules of 2020:

> *the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, specifying that as to form, a hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form).*[27]

The same is noticed in the updated Arbitration Rules of the ICC of 2021, which added the following sentence in its article 26(1), as it stipulates:

> *The arbitral tribunal may decide, after consulting the parties, and on the basis of relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.*

Arbitral institutions have amended their rules so that videoconferencing can be accommodated. For example, article 24(2) of the Korean Commercial Arbitration Board, International Arbitration Rules of 2016 expressly permits hearings and meetings to be heard at any physical location that the tribunal deems appropriate.[28] Other institutions also expressly allow the tribunal to hold hearings remotely.[29] Other institutions have not issued specific provisions, and remote hearings will be assessed by analogy with other provisions, such as the parties' right to a hearing[30] and the tribunal's broad power to determine procedural matters.[31,32]

Many arbitral institutions worldwide will update or are most definitely working on updating their arbitration rules to accommodate the possibility of holding remote hearings and videoconferencing and not only for the examination of witnesses or expert witnesses in oral hearings.

Guidance and protocols on virtual hearings and videoconferencing

Arbitral institutions, organisations and law firms have published guidelines, protocols, checklists, model procedural orders, and commentary to provide guidance for navigating in the digital and virtual arbitration environment.[33]

Delos Dispute Resolution has compiled relevant resources on remote and virtual arbitration and mediation

hearings under the headings Guidance & Checklists; Protocols; Model Procedural Orders; Webinar Recordings; and Other Resources.[34] The following are some of the guidance and protocols relating to video conferencing and virtual hearings from different institutions:

- the Africa Arbitration Academy Protocol on Virtual Hearings in Africa;[35]
- the AAA-ICDR, Virtual Hearing Guide for Arbitrators and Parties;[36]
- the CIArb Guidance Note on Remote Dispute Resolution Proceedings;[37]
- the Delos Checklist on Holding Arbitration and Mediation Hearings in Times of COVID-19;[38]
- the ICC Guidance Note on mitigating the impacts of COVID-19;[39]
- the HKIAC Guidelines for Virtual Hearings;[40]
- the International Council for Online Dispute Resolution (ICODR) Guidelines for Video Arbitration;[41] and
- the Seoul Protocol on Video Conferencing in International Arbitration.[42]

CRCICA's experiences with remote hearings and video conferencing

Introduction

In its response to the pandemic, CRCICA has encouraged its users (arbitrators, parties and counsels alike) to privilege electronic means for both hearings and submissions. Accordingly, CRCICA has invested in both Zoom and Microsoft Teams to ensure high-quality videoconferencing capabilities.[43]

CRCICA has also allowed physical hearings to take place at its premises, with a requirement that parties send no more than two representatives to maintain a safe distance between attendees and the possibility of holding remote hearings. Since the end of April 2020, several hearings have been conducted by videoconference, thereby minimising disruption to the arbitral proceedings. In general, parties, their counsels and arbitral tribunals have been cooperative with a growing trend towards using technology to accommodate the restrictions associated with the covid-19 crisis. This can be shown in CRCICA's caseload report for the second and third quarters of 2020.[44]

To keep users appraised of new developments, the Centre issued regular updates to its users urging them to privilege electronic means of communication and remote hearings.

CRCICA's data[45] on its hearings for the year 2020 and January 2021

From 1 January to 31 December 2020, 78 hearings took place using CRCICA's hearing facilities:

- 11 hearings were held entirely via videoconference;
- two hearings were held entirely via teleconference;
- 10 hearings were held with partial in-person and remote attendance; and
- 55 hearings were held with in-person attendance of a limited number of people, in compliance with the centre's social distancing guidelines.

Furthermore, during January 2021, eight hearings took place using CRCICA's hearing facilities:

- two hearings were held entirely via videoconference;
- four hearings were held with partial in-person and remote attendance;
- two hearings were held with in-person attendance of a limited number of people, in compliance with the Centre's social distancing guidelines.

CRCICA's hearing facility and steps for holding a hearing via videoconference

CRCICA has a high-tech hearing facility equipped with a premier video conferencing system (Polycom HDX) and interactive meeting room systems are installed to ensure high impact visual experiences and realistic meeting environments. The video conferencing system can accommodate a remote or virtual hearing connected to the cloud and conducted using online platforms, which can be connected up to the maximum number of persons allowed to connect remotely via such platform.

CRCICA offers through its case manager to the tribunal the opportunity of holding hearings remotely through one of its preferred platforms (Microsoft Teams or Zoom). Following that, CRCICA receives a request from the arbitral tribunal to do so. Through its case manager, the centre then sends the link relating to the selected platform to the parties, their counsels, the tribunal and witnesses and experts, if any (hereinafter the 'attendees of the hearing') and request a pre-conference test to troubleshoot any technical issues (at least two to three days prior to the oral hearing). In all manners, the Centre organises virtual breakout rooms for all the attendees of the hearing. The Centre asks the tribunal whether the hearing should be recorded (audio or video) to the tribunal, and it in turn asks the parties accordingly. The centre's IT administrator assists all the attendees of the hearing before, during and after the hearing if they require any further technical assistance.

The number of attendees of the hearing is controlled via their emails. If any of the attendees of the hearing sends the invitation link to anyone else to attend, the protocol at the centre is that, after seeking the arbitral tribunal's clarification regarding such non-listed attendee, the IT administrator can reject such request from a non-attendee to attend the hearing.

The case manager sends an email in advance to the attendees of the hearing to conduct a pre-hearing test call (under the supervision of the IT administrator) right before the beginning of every remote hearing to address once again any potential technical issues. Moreover, the centre's IT administrator is logged on to every hearing to troubleshoot any technical issues during the hearing. During hearings that are conducted with partial physical presence at the centre's premises and some attendees attending remotely, the IT administrator is available to ensure that all attendees to the hearing have access to the same visuals and are able to hear and respond efficiently. There is a backup internet connection for use with the agreed platform, in case a problem arises with the original internet connection. If the problem still persists, the IT administrator will use another online platform. This is the protocol in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. Following the hearing, a link to the recording of the hearing is sent by the case manager to the attendees of the hearing by email with a complex password, which is valid for a period of one week.

Practical tips and recommendations relating to organizing remote and virtual hearings

If both parties are content to move forward with remote hearings, there are no legal issues. As such, if the arbitral tribunal is willing to proceed then practical issues, and not legal ones, will arise.

Below are some practical tips and recommendations to take into consideration when conducting a remote or virtual hearing:

- Conducting testing sessions well in advance of the hearing: videoconferencing can work well provided the systems are compatible and have been subjected to a testing session in advance of the hearing. For example, checking for technical compatibility with the various software and hardware systems used, IT support and coaching all participants on how to connect during the hearings, to activate and deactivate video and sound, checking functionality of technology and whether adjustments are needed for volume, light, position towards the camera, background noise and the like, among other technical issues.[46] In addition, it is preferable to hold another testing session shortly before the remote hearing is due to begin (eg, one day before).[47]
- Check whether any guidelines or protocols are to be adopted and the procedure for the selection of an online platform.[48]
- Data security and privacy issues:
  - Data security (or cybersecurity): arbitral institutions and service providers both place a strong emphasis on preserving the integrity and security of proceedings.
  - Data privacy (or confidentiality), namely the question whether the remote hearing provider or any other involved third party that stores, transmits or otherwise has access to data during the remote hearing might misuse it outside the arbitral proceedings.[49] By way of example, the Seoul Protocol on Video Conferencing in International Arbitration aims to protect the confidentiality of the hearing and its parties through its articles 2.1(c) and 2.2, 3.1 and 8.[50]
- Sitting hours: in a cross-border dispute with various time zones, participants in an arbitration case could be from different jurisdictions and hence it could be quite troublesome to attend the videoconference due to the different time zones. This may adversely impact a party's ability to present its case (although arguably the issues are really not so different from those imposed by jet lag and the fatigue associated with long-distance travel, of which international arbitration practitioners are well aware).[51] Emphasis should be attached to the relevance of giving equality of treatment to counsel from both parties, with any personal inconvenience distributed equally among the parties.[52] Hence, it is preferable to have shorter hearings given the time constraints in different time zones between different jurisdictions and there should be more breaks for the participants in the remote hearing. [53]
- Have a moderator in charge of the remote hearing and someone else to control the camera.[54] Given that not all videoconferencing systems allow hearing participants to see one another at all times, some arbitrators moderate hearings in a manner more similar to telephone conference calls than in-person hearings. To prevent participants at a hearing from talking over one another, it may prove useful for the presiding arbitrator to address counsel before they can speak and for all other participants to mute their microphones.[55]
- A number of courts and bar associations have published guidelines on advocacy in remote hearings, suggesting that participants slow down speaking pace in anticipation of potential delays in transmission, including more pauses to allow questions from the tribunal and maintaining professional appearance and decorum.[56,57] Having a real-time transcription service is also recommended in case anything is missed or unclear during the remote or virtual hearing.
- Have a secretary to the tribunal or the arbitral institution's case manager assist the tribunal with any matters technology-related. Further, if any participant gets logged out of the hearing, it would be the secretary to the tribunal's or the arbitral institution case manager's function to notice this and request the tribunal to pause the hearing pending the reconnection of the logged-out participant.
- The arbitral tribunal should have access to private deliberations during the hearing.
- There must be a back up connection in case any fault occurs during the videoconference so the hearing can continue with minimal disruption. This can be done through a different platform. The Seoul Protocol on Video Conferencing in International Arbitration nonetheless provides for this concern through its article 6, which sets out guidelines on 'Test Conferencing and Audio Conferencing Backup'. These guidelines can help smooth the disruption from an unpredicted communication failure and so allow for a quick recovery during a hearing.[58]
- With regard to examining witnesses: the absence of a physical hearing means the tribunal has limited control over who is in the room with the witness. The Seoul Protocol on Video Conferencing in International Arbitration deals with this risk in its article 1.2 by requiring the videoconferencing system to show a reasonable part of the interior of the room in which the witness is located. It also requires, in its article 3.1, the tribunal to verify the identity of each individual present. Alternatively, parties could be requested to use a camera (or cameras) that display the entire room (360 degrees) or the witness could simply be asked to rotate the laptop camera to show the whole room. Tribunals will need to be prepared to be cautious in addressing concerns that witnesses may be utilising a 'phone a friend' approach to dealing with questions on cross-examination. [59]
- Finally, as translating in real time is difficult in virtual hearings, it is recommended to allow for a separate interface to connect to the interpreter's audio feed only.[60]

Consent of the parties for holding remote hearings and associated problems

As each party in an arbitration case is entitled to request an oral hearing, all the parties, arbitrators and witnesses (including experts) should be physically present. In some cases, all parties will agree to the conduct of a remote hearing and cooperate to ensure that it proceeds smoothly. In these circumstances, there is no question as to the tribunal's authority to conduct such a hearing.[61]

For ongoing arbitral cases, it would be wise to obtain a joint agreement from the parties that no party would seek to vacate the resultant arbitral award following its approval on holding the remote hearing. However, for newly registered cases, the ideal scenario is to have this matter agreed upon as early as possible between the parties and the tribunal in the arbitration (ie, procedural order No. 1). In that case, there are model procedural orders intended to be used by arbitrators, parties and counsels as a checklist of issues and guidelines to address matters that are unique to remote video arbitration proceedings.[62]

The dilemma of a party rejecting holding a remote hearing and insisting on an in-person physical hearing

In relation to the tribunal's power to order remote hearings, parties generally object either on the basis that they are entitled to an oral hearing that necessitates a physical hearing, or on the basis that a remote hearing would violate the principle of fair and equal treatment. Some parties may also refer to provisions of applicable institutional rules, noting that either those rules do not specifically

mention the power of the tribunal to order a remote hearing, or interpreting provisions requiring an in-person hearing as requiring an in-person 'physical' hearing.[63]

If the arbitration agreement is silent regarding holding remote hearings and if the applicable national law or institutional arbitration rules do not contain any particular provision on remote hearings, the solution then is to refer to the tribunal's broad power to organise procedural matters. National arbitral laws, as well as institutional rules typically provide that, absent any agreement by the parties, the arbitral tribunal may 'conduct the arbitration in such manner as it considers appropriate'[64] and 'decide all procedural and evidential matters'[65] or 'determine the procedure to the extent necessary, either directly or by reference to a statute or to rules of arbitration'.[66,67] Renowned Egyptian arbitrator Mohamed Salah Abdel Wahab shared a succinct six-point pathway to deal with this matter with *Global Arbitration Review*:[68]

> *Institutional arbitration rules contain similar provisions regarding the tribunal's power to organize the proceedings generally, and evidence taking more specifically.[69] Accordingly, the question whether a hearing should be held physically or remotely is for the arbitral tribunal to decide, absent any provision to the contrary.[70]*
>
> *In general, where a party opposes a remote hearing arguing its right to be heard is compromised, the tribunal is faced with the task of providing content to the right allegedly breached. What constitutes the right to be heard in a traditional setting is likely to differ in a virtual environment. Therefore, when ruling on the objection, a tribunal might find it useful to consider whether the parties, their witnesses and experts have steady access to the virtual platform where the hearing is to take place, if there are security measures in place and if the settings enable the parties to fully present their case in an adversarial way. Here, the particular circumstances of each party will shape the content of the right at stake, and help the tribunal decide.[71]*

When a remote hearing is ordered over the objections of one party, it may result in claims in an annulment proceeding that the objecting party was denied an opportunity to be heard. If there are no objections to the use of a remote hearing in the first place, then objections to such a hearing, on grounds of a denial of an opportunity to be heard and otherwise, would generally be waived.[72]

Gary Born mentions that 'where national courts conduct full remote hearings in domestic litigations, it is very difficult to regard similar hearings as denying parties to an international arbitration an opportunity to be heard'.[73]

Finally, some might consider that it is wrong to insist that an 'oral hearing' requires an in-person physical hearing. Parties can still make oral submissions, be heard and be seen by videoconference as well as in person. More importantly, the essential attributes of a physical hearing (real-time interaction with the tribunal, witnesses and parties, with both visual and audio connections) can be provided by a remote hearing. A remote hearing is, in every meaningful sense, a 'hearing'.[74]

Conclusion

Among the many advantages that remote or virtual hearings provide is that they can lead to saving time and eliminate the necessity of travelling to other countries; not to mention easing related logistics and avoiding a great deal of administrative hassle, which often weighs down on the process, such as visas, temporary work permits, arrangements for venue and accommodation, and the provision of food and beverages, to name but a few.[75] In support of this view, Lucy Greenwood has initiated the 'Green Pledge', 'a campaign for greener arbitration' with guiding principles aimed at minimising the environmental footprint of arbitration.[76] In addition, there is a great need for greater diversity and more inclusiveness in arbitration. Arbitrator appointments should reflect the entire international community of users, which is not the case today. Parties and institutions need to ensure that there is diversity in all respects: gender, age, racial, geographical, religious, and professional backgrounds. Remote arbitration procedures and remote hearings will enable arbitrators located anywhere on the globe to arbitrate in a case without regard to travel times and costs. [77]

Arbitral institutions noted that international arbitration practice will not likely return to the pre-pandemic state, but will reflect further acceptance of, and leaning towards, the use of remote hearings. It is not likely that remote hearings become the norm, but it should become the norm for parties and arbitrator to consider remote hearings. Many observers believe that post-pandemic arbitration procedures will include hybrid procedures, where there will be a mix of in-person and remote hearings in a case.[78]

It would be incorrect to say that remote or virtual hearing services represent a revolution in the arbitral process; rather, ithey could be regarded as an evolutionary change.[79] Such evolutionary innovation is what follows after the original offering is refined to a point where it becomes an effective and in-demand solution.[80] The dynamic nature of international arbitration and its community have provided a perfect environment to foster this accelerated evolution. When one considers the non-technical innovations that have led to increased efficiencies in arbitration (such as, for example, the use of Redfern schedules or the use of witness conferencing), it becomes evident that evolution, normalisation and refinement of these innovations have been undisputed. Remote or virtual hearings should be considered as yet another of these procedural innovations.[81]

Notes

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Also see AAA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference at: https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf. Also see Annex III to the Africa Arbitration Academy Protocol on Virtual Hearings in Africa provides a Model Arbitration Clause (including Virtual Hearing Option) at: https://www.africaarbitrationacademy.org/protocol-virtual-hearings/

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The Cairo Regional Centre for International Commercial Arbitration (CRCICA) is an independent non-profit international organisation established in 1979 under the auspices of the Asian African Legal Consultative Organization (AALCO), in pursuance of AALCO's decision taken at the Doha Session in 1978 to establish regional centres for international commercial arbitration in Asia and Africa.

In 1979, an agreement was concluded between AALCO and the Egyptian government for the establishment of CRCICA for an experimental period of three years. Pursuant to subsequent agreements concluded between AALCO and the Egyptian government in 1983, 1986 and 1989, CRCICA continued to function for two additional similar periods, after which it was granted permanent status.

Pursuant to the Headquarters Agreement concluded in 1987 between AALCO and the Egyptian government, CRCICA's status as an international organisation was recognised and the centre and its branches were endowed with all necessary privileges and immunities ensuring their independent functioning.

The Covid-19 Factor: the Impact of Covid-19 on Damages Assessments

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In summary

The covid-19 pandemic has introduced new considerations into the assessment of damages, which may have material impacts. The impact of covid-19 extends to the preparation of cash flow forecasts, commonly accepted valuation methodologies and the appropriate date of assessment. Ultimately, covid-19 is likely to have a lasting impact on damages assessments. As covid-19 continues to disrupt businesses and economies globally, it is important to ensure that valuation conclusions are reasonable, and based on documentary evidence, or sensible assumptions.

Discussion points

- Preparation of projections and forecasts is more challenging
- Valuation approaches are subject to uncertainty
- Date of assessment may have a material impact

Introduction

On 9 January 2020, the World Health Organization announced a cluster of 'pneumonia-like' illnesses in Wuhan, China, which appeared to have been caused by a novel coronavirus.[1] By 3 February 2020 the US declared a public health emergency due to covid-19, and on 11 March 2020 the World Health Organization declared the spread of covid-19 to be a global pandemic.[2]

The effects of covid-19 have been rapid and uncompromising. Economic progress has been halted and restrictions on movement, activity and commerce have been introduced throughout societies across the world. From small business owners to the largest corporations in the world, the impact of covid-19 has affected every segment of the economy.

Covid-19 precipitated a dramatic decline in stock markets and economic activity. While many stock markets have subsequently rebounded (amid high volatility), unemployment rates have increased in all developed economies.[3] The global economy entered recession in 2020 and is estimated to have contracted by 4.3 per cent.[4]

Governments have responded to covid-19 in divergent ways: some introduced lockdowns (to varying extents) to limit the spread of covid-19, while others did not. Regardless, most governments effected accommodative monetary policies to seek to constrain the economic damage inflicted by the pandemic.[5]

The implications of covid-19 on the assessment of damages in international arbitration disputes will be widespread and can already be observed. There will be disputes that arise directly as a result of covid-19, and those where breaches are not caused directly by covid-19 but are nonetheless still impacted by the rapid economic changes caused by the pandemic. This is especially relevant to an assessment of damages. In this article, we focus on these changes, and consider:

- how covid-19 has impacted the ability of damages experts to effectively forecast the future performance of assets in disputes;
- the ramifications of covid-19 on commonly accepted valuation approaches; and
- how small changes in the date of assessment may cause material changes to an assessment of damages.

Challenges in preparing projections and forecasts

Where the actions or inactions of a party, allegedly in breach of contractual commitments, has caused another party to suffer economic damage, the quantification of losses is often based on a financial comparison between:

- the present value of the cash flows of the injured party in a hypothetical scenario in which the alleged contractual breach did not occur, referred to as the 'but for scenario'; and
- the present value of the cash flows of the injured party based on its situation in fact, referred to as the 'actual scenario'.

Often, projections of cash flows in the but for scenario are informed by business plans or forecasts prepared prior to the date of alleged wrongful conduct, or the historical financial performance of the entity or project in question.

In many cases, the ramifications of covid-19 could reduce the relevance of such information. It is possible, for example, that as a result of covid-19 (and regardless of the alleged contractual breach):

- customer demand for the products or services provided by the entity in question has changed;
- supply chains or production processes have been disrupted so as to render the provision of goods and services unfeasible across a particular period, at least at volumes considered to be 'normal' prior to covid-19; and
- the cost structure of businesses has changed, meaning that it is inappropriate to assume that historical unit costs or profit margins would remain the same post-covid-19.

Each of these factors could necessitate adjustments to pre-covid-19 data, and it will be necessary for experts to consider carefully the basis for such adjustments. In combination, it is possible that these and other factors may have fundamentally changed the economic viability of established business models and enterprises.

However, it is not only downside risks that business plans or forecasts prepared prior to covid-19, or an entity's pre-covid-19 financial performance, may inadequately capture. Companies in

several industries, including technology and communications, have benefitted from sharp increases in demand.

Current business plans and projections are also likely to be more uncertain as a result of the pandemic. This is because entities' economic and operating environments are changing in unexpected ways, as governments and citizens adopt measures to address the health implications of covid-19. Uncertainty in the macro-economic environment is widely acknowledged. For example:[6]

- the International Monetary Fund cautions that there is a 'higher-than-usual degree of uncertainty' around its baseline forecasts;
- the Organisation for Economic Co-operation and Development reports that 'the economic outlook remains exceptionally uncertain, with the COVID-19 pandemic continuing to exert a substantial toll on economies and societies'; and
- the Bank of England states that 'the outlook for the economy remains unusually uncertain. It will depend on the evolution of the pandemic and measures taken to protect public health around the world'.

In many cases, the formation of reasonable assumptions will depend upon an assessment of the implications of the pandemic on the particular business in question, due to its diverse and wide-ranging effects. For example:

- in the case of a manufacturing company, it may be necessary to closely scrutinise its supply chain – the sequence of processes involved in production and distribution – to identify the impact of an alleged breach on the business in question;
- for a hotel, it will likely be necessary to understand the restrictions imposed by governments and other authorities on citizens' and visitors' rights to travel over the relevant period; and
- for a logistics company, acute shifts in demand due to the increased purchase of goods and services online rather than in-person could materially impact losses.

In other words, a 'one-size-fits-all' approach is unlikely to suffice, and valuers must be prepared to consider new factors that in the past would not have applied. It may also be appropriate to model scenarios based on different assumptions as one considers how the pandemic will continue to affect businesses as governments, economies and societies continue to grapple with its effects.

Valuation approaches subject to uncertainty

There are three commonly accepted valuation approaches used to by valuers in an assessment of damages:

- income-based approach under which the value of a business or asset is calculated by reference to explicit projections of its future cash flows, and the associated risks of earning them;
- market-based approach, under which the value of a business or asset is calculated by reference to the value of other comparable businesses or assets (in terms of growth, risk profile, geography or industry) or transactions in them; and
- asset-based approach, under which the value of a business is calculated by reference to the value of its assets. The asset-based approach often represents the minimum value of the company.

In the following paragraphs, we explore how each of these approaches may be impacted by covid-19.

Income-based approach

First, the income-based approach requires the valuer to prepare explicit forecasts of the future performance of the business, and the risk associated with these forecasts. We have explained above how the preparation of forecasts may be impacted by covid-19.

In addition, the level of risk associated with cash flow forecasts is also likely to have been impacted by covid-19. Under the income-based approach, valuers convert future cash flows into a present lump sum value. This is the 'value' of an asset.

The discount rate takes into consideration both the time value of money (that a dollar today is worth more than a dollar in one year), and the risks inherent in cash flow forecasts. It reflects the return required by providers of capital to a particular business or asset. This includes the return to shareholders (the cost of equity), the return to debt holders (the cost of debt), or both (the weighted average cost of capital).

Valuers often use the capital asset pricing model (CAPM) to model cost of equity. The CAPM formula is reproduced below:

> *Required return = risk-free rate of return + the beta factor, or the exposure of the asset being valued to non-diversifiable risks x equity risk premium*[7]

Often, the risk-free rate of return is estimated with reference to the prevailing yield on US government bonds, or similar 'risk-free' assets. Yields on these assets have fallen significantly during the pandemic, both as a result of fiscal stimuli adopted by governments, and as investors seek to invest in 'risk-free' assets to avoid losses during periods of market volatility. Valuers may consider whether reliance upon very low risk-free rates is appropriate for forward-looking valuations, especially those which involve long-term cash flow forecasts.

Covid-19 has also caused increased volatility in stock markets. This impacts the estimation of both the beta factor and the equity risk premium, which are often based on market data. These inputs are typically estimated with reference to current data, as at the date of the assessment. However, the volatility introduced by covid-19 may limit the reliability of such data. At the same time, there is also a risk that pre-covid market data estimated may be stale, and inappropriate for damages assessments with valuation dates after the emergence of covid-19.

When considering the cost of debt, valuers often apply either the cost of debt for the business or asset in question, or for comparable companies. Valuers may need to consider when the debt was acquired, and whether the cost remains reflective of that which would apply at the date of valuation.

Market-based approach

The market-based approach requires a valuer to identify businesses or assets comparable to the one in question, and then infer financial ratios or 'multiples' for these comparable assets, either based on market data or transactions in these companies or assets. These multiples are applied to a relevant metric for the business or asset in question – often a measure of profitability – to estimate its value. As with the income-based approach, covid-19 may introduce novel challenges in applying the market-based approach to value assets.

For example, notwithstanding the covid-19 pandemic, the identification of appropriate comparable assets for use in a valuation can be challenging, particularly if the subject company operates in a niche industry or possesses unusual characteristics. This task may now be more difficult, as valuers may need to

consider whether previously comparable companies are likely to have responded to the pandemic similarly, or operate in countries where the effect of the pandemic was equivalent.

Further, in an analysis of multiples implied by transactions in comparable businesses or assets, it may be inappropriate to assume that pre-covid transactions can be used in valuations of assets after the pandemic arose. Alternatively, transactions that took place during the covid-19 pandemic could have occurred in situations where there was economic distress. Valuers must therefore take care to understand the transaction under review, and to consider whether it is appropriate to use as a reference point in the current circumstances. In many ways, these considerations reflect those that would typically concern valuers, prior to the pandemic. However, covid-19 has introduced a new dimension to factors under consideration.

Asset-based approach

In preparing an asset-based valuation, valuers often rely upon information contained in audited financial statements, or quarterly reporting. These documents state the value of a company's assets at a specific point in time.

However, companies may take different approaches to valuing assets. Some companies may revalue assets on a quarterly basis, some may revalue assets yearly. Valuers therefore need to consider how temporally relevant the information set out in these documents are to their damages assessments. Valuers should also consider the likelihood of functional or economic obsolescence of assets, due to reduced demand or economic constraints introduced by the pandemic.

Date of assessment

Valuers are typically asked to conduct a damages assessment at a particular point in time, the date of assessment. The appropriate date of assessment is a question of law. However, it can affect the quantum of damages suffered considerably, as often valuers should only consider information known or knowable at the date of assessment.

As the covid-19 pandemic has caused rapid changes in companies' abilities to operate, large changes in value have occurred over short-timescales. In some cases, valuers may therefore need to pay particular consideration to the facts and circumstances applicable to the business in question at the date of assessment.

Valuations prepared on a current basis may also change in unexpected ways, as the implications of the pandemic unfold. Valuers must be prepared to explain such changes, and why they are reasonable and appropriate in the circumstances.

Conclusion

In this article, we have identified that covid-19 may affect an assessment of damages in a number of different ways including:

- how forecasts are prepared. Covid-19 has introduced additional challenges in preparing cash flow forecasts and new factors that would not have applied in the past;
- the adoption of commonly accepted valuation methodologies. Covid-19 has an impact on each methodology. Forecasting the risks associated with future cash flows may become increasingly difficult, and covid-19 data may cease to be relevant post-covid-19; and
- the appropriate date of assessment is likely to become an issue of focus. Owing to covid-19, changes in the date of assessment may lead to material changes in the quantum of damages.

The common theme across these factors is that covid-19 has introduced new considerations into the assessment of damages, which may have material impacts. Owing to the uncertain nature of covid-19, there are often multiple approaches valuers can adopt to include the impact of the pandemic in their assessments. To counteract this, scenario analysis will become increasingly important, which may aid tribunals in their role as ultimate arbiters of fact in international arbitration disputes.

Ultimately, covid-19 is likely to have a lasting impact on damages assessments. As covid-19 continues to disrupt businesses and economies globally, it is important to ensure that valuation conclusions are reasonable, and based on documentary evidence, where available, and sensible assumptions where this evidence is not available.

The views expressed in this article 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 A Timeline of COVID-19 Developments in 2020, *The American Journal of Managed Care*, 2 January 2021.
2 A Timeline of COVID-19 Developments in 2020, *The American Journal of Managed Care*, 2 January 2021.
3 Global economic prospects, World Bank, January 2021.
4 Global economic prospects, World Bank, January 2021.
5 Policy responses to COVID-19, International Monetary Fund.
6 World Economic Outlook Update, IMF; Economic Outlook – Interim Report, OECD, September 2020; Monetary Policy Report, September 2020, Bank of England.
7 The equity risk premium represents the premium required by the investor to invest in the equity market over the risk-free rate.

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Angola

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In summary

As one of the fastest growing economies in the first two decades of the 21st century, Angola has become, in spite of some recent setbacks, one of the most attractive destinations for foreign investment. However, its exponential growth since the early 2000s has not been fully accompanied by the development of a fast, effective judicial system. Further, because of that, a more arbitration-friendly culture has been, and still is, under development in the Angolan legal culture.
With this article, the authors intend to demonstrate some of the means through which the development of this culture is being achieved, as well as to provide the reader with an overview of the achievements and difficulties that arbitration in Angola has faced since the inception of the Voluntary Arbitration Law in 2003.

Discussion points

- In recent years, the development of Angola has not been entirely matched by an expeditious and resourceful judicial system.
- Angola's legal community has been demonstrating an increasing interest in the use of arbitration as an alternative means of dispute resolution.
- The Angolan Arbitration Law was greatly inspired by the former Portuguese Voluntary Arbitration Law of 1986 and follows many of the principles and rules of the Model Law on International Commercial Arbitration of UNCITRAL.
- In the context of promoting and facilitating the use of arbitration, Angola has authorised the creation of arbitration centres.
- The Angolan Executive also reaffirmed the purpose of promoting the use of alternative means of dispute resolution, such as mediation and arbitration, and that the resolution of disputes between the state and any private party through such alternative means should be actively proposed and accepted by the state. This openness to arbitration is patent in several sectoral regimes that mention arbitration as a legitimate means of resolution of the disputes that arise under their purview.
- Angola is, as of 2017, a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, Angola is not a member of the ICSID nor a party to the ICSID Convention, in spite of being a party to six bilateral investment treaties (BITs) that are currently in force.

According to the World Bank statistics, Angola has a population of 31.8 million, while having recorded a gross domestic product of US$88.8 billion in 2019.

Notwithstanding the recent slowdown, caused mostly by the decrease in oil prices – on which the Angolan economy is still dependent – Angola has experienced exponential economic growth since the end of the civil war in 2002, having created conditions to become more attractive to investments, both domestic and international, in several economic areas. In spite of that, according to the Statistical Bulletin published by the National Bank of Angola (BNA) on 19 January 2021,[1] after a period of recovery in terms of net foreign direct investment (FDI) in Angola that started in 2017, when FDI reached US$8.7 billion, 2019 recorded an FDI of just US$2.7 billion. This negative trend appears to have continued in 2020, considering that (also likely due to the global pandemic that started during the first quarter of the year) a net FDI of minus US$2.7 billion is expected.[2]

The country's development in recent years, in line with Africa's general economic performance, has not, however, been entirely matched by an expeditious and resourceful judicial system capable of duly responding to the growing number of disputes that any developing economy generates. Nevertheless, the Angolan Executive is focused on enhancing the efficiency of the judicial system and on the modernisation of its legal framework, with measures such as the adoption of new legislation (eg, a new Criminal Code, a new Criminal Procedure Code, and the approval of a new Insolvency and Company Reorganisation Law).

Angola's legal community has been demonstrating an increasing interest in the use of arbitration as an alternative means of dispute resolution not only between companies and individuals, but also involving the state and other public entities. This is reflected in the many general and sectoral legal instruments providing for and promoting the use of arbitration. In addition, an arbitration community is growing in Angola, which is demonstrated by the increase in discussion forums on arbitration and by the growing relevance given to arbitration by universities and other scientific institutions. Similar initiatives are also being launched by the Angolan Bar Association and local law firms.

In addition, in August 2019, an ambitious privatisation programme known as PROPRIV was approved by Presidential Decree No. 250/19, which enshrines the full or partial privatisation of over 190 companies that are either public companies or companies where the state holds equity. This privatisation programme started in late 2019 and the corresponding privatisation procedures of the companies listed therein are scheduled for execution up until 2022. An update to that privatisation programme was approved in February 2021, through Presidential Decree No. 44/21. Considering the hefty negotiation procedures that the PROPRIV might entail and the contracts that might be entered into between the state and investors, there is an additional need for investors to have their rights assured by a quick, neutral and

specialised access to justice if a dispute arises, and therefore the introduction of arbitration agreements into such contracts will most certainly be a reality.

Arbitration in Angola

The Voluntary Arbitration Law

Angola's first substantial step in its efforts to promote the use of arbitration began just a little over a year after the end of the civil war, when Angola's National Assembly approved the Voluntary Arbitration Law (the Angolan Arbitration Law), which was enacted through Law No. 16/03 of 25 July 2003.

The Angolan Arbitration Law was greatly inspired by the former Portuguese Voluntary Arbitration Law of 1986 and, although it does not perfectly mirror the Model Law on International Commercial Arbitration of UNCITRAL, it follows many of its principles and rules.

The Angolan Arbitration Law generally admits the arbitrability of disputes pertaining to disposable rights, provided that these disputes are not subject, by special law, to the exclusive jurisdiction of judicial courts or to mandatory arbitration. Regarding any disputes involving the state or other public entities, the Angolan Arbitration Law establishes that these bodies may enter into arbitration agreements:

- when the relevant dispute concerns a private law relationship;
- in administrative contracts; or
- in other cases specifically provided by law (article 1 of the Angolan Arbitration Law).

According to articles 16 and 17 of the Angolan Arbitration Law, the parties may agree on relevant matters pertaining to the arbitration (such as the rules of the arbitration proceedings and the seat of arbitration) in the arbitration agreement or in any subsequent written document. The parties may agree on the rules of the procedure and are entitled to submit the procedure to the rules provided by a given arbitral institution. Should this agreement not be reached by the parties before the acceptance of the first-appointed arbitrator, the arbitrators will be responsible for establishing the rules of procedure.

The parties may also agree, in the arbitration agreement or in a subsequent document, that the ruling of the case be made according to equity or usage and custom, both national and international (article 24 of the Angolan Arbitration Law). Otherwise, the arbitral tribunal shall rule according to the applicable law. When a decision is based on usage and custom, the arbitral tribunal is, in any case, subject to the principles of Angolan public order.

Moreover, the parties may agree, again in the arbitration agreement or in a subsequent document, on a deadline for the issuance of the arbitral award (article 25 of the Angolan Arbitration Law). In case nothing is specifically agreed by the parties in that respect, the law establishes that the award must be rendered within six months of the acceptance of the last-appointed arbitrator. Experience shows that this is a very tight deadline and, therefore, it is wise for the parties and the arbitrators to agree on a more realistic time limit for the issuance of the arbitral award.

Furthermore, according to the Angolan Arbitration Law, and in line with most arbitration laws, the arbitration proceedings are subject to fundamental principles of due process, including the principle of equality of the parties and the adversarial principle (article 18 of the Angolan Arbitration Law).

Additionally, article 19 of the Angolan Arbitration Law provides that the parties may be represented or assisted by a lawyer, which has in the past led to the understanding that it should be a lawyer registered with the Angolan Bar Association.

Arbitral awards produce the same effects as judicial decisions rendered by state courts and are enforceable when condemnatory (article 33 of the Angolan Arbitration Law). Additionally, and as discussed further below, Angola acceded in 2017 to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Contrary to many laws and regulations on voluntary arbitration and also to the UNCITRAL Model Law on International Commercial Arbitration, the default rule under the Angolan Arbitration Law for domestic arbitrations is that arbitral awards are appealable on the merits to local courts under the same terms as judicial decisions, unless the parties have previously waived the right to appeal (article 36 of the Angolan Arbitration Law). Such a waiver may result from the referral to institutional arbitration rules that exclude the possibility of appeal. This is obviously an issue that must be carefully considered at the stage of drafting the arbitration agreement. In cases where the parties allow the arbitral tribunal to rule according to equity, the award is unappealable.

In any event, according to article 34 of the Angolan Arbitration Law, the arbitral award may be set aside for one of the reasons specified in the Angolan Arbitration Law for that purpose, notably when:

- the dispute is not arbitrable;
- the award is rendered by an arbitral tribunal with no jurisdiction;
- the arbitration agreement has expired; or
- the award lacks the statement of grounds.

Unlike the right to appeal, the right to request the setting aside of the award cannot be waived by the parties.

The Angolan Arbitration Law distinguishes domestic arbitration and international arbitration and also applies to the latter. Article 40 of the Angolan Arbitration Law defines international arbitration as the arbitration that brings into play the interests of international trade, namely where:

- the parties to an arbitration agreement have their domiciles in different states when the arbitration agreement is entered into;
- the place of arbitration, the place where a substantial part of the obligations resulting from the legal relationship from which the dispute arises or the place with which the conflict has a closer connection is not located in the state where the parties are domiciled; or
- the parties have expressly agreed that the object of the arbitration agreement is connected to more than one state.

In the context of international arbitration, the parties may agree on the language of the arbitration, and, if no agreement is reached between the parties, the arbitral tribunal will determine the language to be used in the proceedings (article 42 of the Angolan Arbitration Law).

Moreover, the substantive law applicable to the case will be the one agreed to by the parties. If such an agreement does not exist, the arbitral tribunal applies the substantive law resulting from the relevant conflict of law rules. The tribunal may only decide according to equity or resort to amiable composition when the parties have expressly authorised it to do so, and must, in any case, respect the usages and customs of international trade applicable to the object of the arbitration agreement (article 43 of the Angolan Arbitration Law).

In contrast to domestic arbitration, the Angolan Arbitration Law establishes as a default rule that arbitral awards rendered in the context of international arbitration are unappealable, unless the parties have agreed on the possibility of appeal and set the

terms of that appeal (article 44 of the Angolan Arbitration Law). This rule is in line with best practice in international arbitration.

Other than the above-mentioned specific rules, and in the absence of further regulation agreed to by the parties, international arbitration proceedings are regulated by the same provisions applicable to domestic arbitration (article 41 of the Angolan Arbitration Law).

Institutional arbitration

In the context of promoting and facilitating the use of arbitration, it is also worth mentioning Decree No. 4/06 of 27 February 2006, which concerns the creation of arbitration centres. This decree grants the Minister of Justice and Human Rights powers to authorise the creation of such centres and establishes their respective licensing procedures.

The possibility of institutional arbitration was already established in article 45 of the Angolan Arbitration Law. Institutional arbitration is seen in Angola as an important alternative means for resolving disputes because it provides certainty, predictability and legal security to legal relationships through a system that is both flexible and controlled, in that it operates under the auspices of an institution.

To date, seven arbitration centres have already been authorised in Angola, including:

- the Centre for Extrajudicial Dispute Resolution;
- the Angolan Centre for Arbitration of Disputes;
- the CEFA Arbitration Centre;
- the Harmonia Dispute Resolution Centre;
- the Arbitral Juris;
- The Centre for Mediation and Arbitration of Angola; and
- the Mediation and Arbitration Centre of the Angolan Industrial Association.

Unfortunately, to date, many of these centres seem to have been engaging in little arbitral activity.

Special regimes

In further effort to support the use of arbitration and recognising the lack of resources and celerity of the judicial system, as well as the benefits of alternative means of dispute resolution, the Angolan Executive approved, in 2006, Resolution No. 34/06 of 15 May 2006, which reaffirmed the purpose of promoting the use of alternative means of dispute resolution, such as mediation and arbitration, and that the resolution of disputes between the state and any private party through such alternative means should be actively proposed and accepted by the state.

This openness to arbitration is patent in several sectorial regimes that mention arbitration as a legitimate means of resolution of the disputes that may arise under their purview.

In this context, the Petroleum Activities Law, approved through Law No. 10/04 of 12 November 2004, establishes the rules of access to and performance of petroleum operations in Angola. Article 89 of this law indicates that strictly contractual disputes that may arise between the competent ministry and the licensees, or between the National Concessionary and its associates, are subject to arbitration, as provided in the relevant licences or contracts. However, that same provision requires that the arbitral tribunal be seated in Angola, apply Angolan law and conduct the arbitration in Portuguese, Angola's official language.

Another important regime is provided by the Private Investment Law, approved by Law No. 10/18 of 26 June 2018, which defines the principles underlying private investment in Angola and regulates the benefits and aids provided by the Angolan state to private investors, as well as their rights, duties and guarantees. Article 15 of this law states that disputes regarding disposable rights may be resolved through alternative means of dispute resolution, notably negotiation, mediation, conciliation and arbitration, provided that no special law submits those disputes to the exclusive jurisdiction of judicial courts or to mandatory arbitration.

Other relevant sectoral legal regimes that also mention the possibility of resorting to arbitration include the following:

- the Securities Code, approved by Law No. 22/15 of 31 August 2015, in its articles 131 and 223;
- the Legal Regime of Compensatory Measures, approved by Law No. 20/16 of 29 December 2016, in its article 26; and
- the Law on Public-Private Partnerships, approved by Law No. 2/11 of 14 January 2011, in its article 20.

The entry into force of the New York Convention

In 2017, Angola took a significant step towards becoming a more arbitration-friendly country by acceding to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The process of ratification began with Resolution No. 38/2016, published in the Official Gazette on 12 August 2016.

Angola made a reservation to the application of this Convention, stating that, on the basis of reciprocity, it will only apply the Convention in cases where the arbitral awards are rendered in the territory of another state that is both a party to the Convention and a state recognised by Angola.

Therefore, since the entry into force of the New York Convention in Angola, the recognition and enforcement in Angola of arbitral awards rendered in states that are also party to the New York Convention will be subject to the rules and procedures established in the New York Convention, supplemented, where necessary and compatible with the Convention, by the rules of the Angolan Civil Procedure Code.

Furthermore, under article II of the New York Convention, Angolan courts must recognise and enforce arbitration agreements that satisfy the conditions established in the Convention. If legal proceedings concerning a matter subject to an arbitration agreement are brought before Angolan courts, the court, at the request of one of the parties, shall decline jurisdiction, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Investment arbitration in Angola

Angola is not new to foreign investments and has introduced several reforms to encourage those investments (such as the PROPRIV approved in 2019 and updated in February 2021). Moreover, Angola has taken some steps towards arbitration in the context of investment disputes, although the more recent reforms seem to call for a paradigm shift.

First, as stated above, the Private Investment Law is an important legal instrument to foster and protect investments in Angola, including by foreign investors. This law grants to foreign investors, with some variations, many of the most common standards of protection, such as protection of private property and against expropriation, full protection and security and free transfer of investment-related funds.

Article 15 of this law grants to investors the right to resort to Angolan courts for purposes of protecting their rights and interests and contemplates the possibility of arbitration as a means to resolve disputes related to the breach of the rights established

therein. The former Private Investment Law required an arbitration to take place in Angola and to be governed by Angolan law both as to the substance of the case and to the conduct of the proceedings, but these restrictions were not transposed to the new law.

Second, Angola is a party to six bilateral investment treaties (BITs) that are currently in force, entered into with the following countries: Italy, Cape Verde, Germany, Russia, Portugal and Brazil. These BITs establish the typical set of rights and guarantees granted to foreign investors, including fair and equitable treatment, compensation for expropriation, national and most-favoured-nation treatment and non-discrimination. The limited size of Angola's network of BITs requires the investor to carefully structure its investments in order to benefit from the protection of a treaty.

Regarding investor-state dispute settlement provisions, there are some differences between the BITs listed above. These are outlined below:

- BIT with Italy: where amicable discussions fail, the next step is:
  - dispute resolution by the judicial courts of the host state;
  - ad hoc arbitration under the UNCITRAL Arbitration Rules; or
  - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Italy are parties to this Convention (this option is not applicable given that Angola is not a party to the ICSID Convention);
- BIT with Cape Verde: failing resolution through amicable discussions:
  - ad hoc arbitration; or
  - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Cape Verde are parties to this Convention (also not applicable given that Angola is not a party to the ICSID Convention);
- BIT with Germany: failing resolution through amicable discussions:
  - dispute resolution by the judicial courts of the host state;
  - ad hoc arbitration under the UNCITRAL Arbitration Rules;
  - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Germany are parties to this Convention (again not applicable given that Angola is not a party to the ICSID Convention); or
  - institutional arbitration before ICSID and under the ICSID Additional Facility Rules, provided at least one of the states (Angola or Germany) is a party to the ICSID Convention (this option applies because Germany is a party to the ICSID Convention);
- BIT with Russia: failing resolution through amicable discussions:
  - dispute resolution by the judicial courts of the host state,
  - ad hoc arbitration under the UNCITRAL Arbitration Rules, unless the parties choose other rules;
  - institutional arbitration before ICSID and under the ICSID Convention, provided both Angola and Russia are parties to this Convention (not applicable as Angola is not a party to the ICSID Convention); or
  - institutional arbitration before ICSID and under the ICSID Additional Facility Rules, if both Angola and Russia or at least one of these states are not a party to the ICSID Convention;
- BIT with Portugal: failing resolution through amicable discussions:
  - dispute resolution by the judicial courts of the host state;
  - ad hoc arbitration under the UNCITRAL Arbitration Rules;
  - institutional arbitration before ICSID and under the ICSID Convention;
  - if one of the states (Angola or Portugal) is not a party to the ICSID Convention (which is the case of Angola), institutional arbitration before ICSID and under the ICSID Additional Facility Rules; or
  - any other institutional arbitration or ad hoc arbitration under any other arbitration rules.

As stated, Angola is not a member of the ICSID and is not a party to the ICSID Convention. Indeed, despite it being broadly discussed and several news reports indicating that the Angolan Executive has decided to accede to the ICSID Convention, Angola is not yet a party thereto. However, as mentioned above, as in the case of the BIT with Germany, there can be an ICSID arbitration involving Angola and German investors under the ICSID Additional Facility Rules, which allow for an ICSID arbitration even when the host state is not a party to the ICSID Convention.

Angola has also entered into other BITs with other states, but those have not yet entered into force.

Through Presidential Decree No. 122/14 of 4 June 2014, Angola approved model provisions for BITs to be executed by Angola in the future (some authors call it Angola's 'model BIT'). These provisions continue to include some of the main rights typically granted to foreign investors under investment treaties. However, according to Angola's model BIT, and in contrast to the BITs currently in force between Angola and foreign states, those rights are no longer enforceable through investor-state arbitration, but rather through consultations between the contracting states. In the event of failure of those consultations, the dispute shall be solved through state-to-state dispute resolution via the International Court of Justice.

In this context, the Cooperation and Facilitation Investment Agreement signed between Angola and Brazil on 1 April 2015, which is also already in force (as mentioned above), is the first example of a new generation of BITs following approval of the model BIT under Decree No. 122/14. Unlike the other BITs in force between Angola and foreign states, this new agreement with Brazil no longer provides for investor-state arbitration, but rather for state-to-state arbitration.

Also in the context of investment protection, Angola is not a member of the Organization for the Harmonization of Business Law in Africa, which aims at promoting investment and arbitration as an instrument for the settlement of contractual disputes. However, Angola is a member of the Multilateral Investment Guarantee Agency.

Angola is also a member of several multilateral treaties that establish either arbitration clauses or other alternative dispute resolution mechanisms. One example of these treaties is the Cotonou Agreement, signed between the European Union and the African, Caribbean and Pacific Group States, in which Angola participates via the Southern African Development Community. This agreement advises the contracting parties entering into investment agreements to thoroughly study the main clauses aimed at protecting the investment, including, among other things, the provision for international arbitration in the event of any disputes between the investor and the host state. Moreover, the Cotonou Agreement also establishes that the signatory states shall cooperate and support each other in the necessary economic and

institutional reforms and policies that contribute to the creation of a safe environment for the investment. One of the areas where this cooperation is specifically foreseen is the modernisation and development of mediation and arbitration systems. The Cotonou Agreement also submits any dispute between the signatory parties arising from its interpretation or application to a Council of Ministers. If the Council of Ministers is not successful in solving the dispute, either party may request that the matter be referred to arbitration, and the procedure to be applied, unless the arbitrators decide otherwise, shall be the one that is established in the regulation of the Permanent Court of Arbitration for International Organisations and States.

Finally, the ratification and entry into force of the New York Convention, as described above, is also another major step towards the protection of foreign investors in Angola, as it will allow foreign investors to resolve their investment disputes through arbitration outside Angola and to then have any foreign arbitral awards recognised and enforced in Angola. This is especially relevant considering that Angola is not a party to the ICSID Convention, that arbitration proceedings under the ICSID Additional Facility Rules can only be held in states that are parties to the New York Convention and that the awards made under the ICSID Additional Facility Rules are subject to the recognition and enforcement regime of the New York Convention.

Conclusion

Notwithstanding the efforts resulting from all the general and special laws, regulations and other legal instruments favourable to arbitration, and despite the existence of an emerging arbitral community, the reality is that the arbitral culture in Angola is still at an early stage.

Some of the reforms introduced by the Angolan Executive are very recent and still need to be tested in real-life circumstances. The same applies to the entry into force of the New York Convention, which is certainly a landmark in Angola's steps towards the promotion of foreign investment and openness to arbitration but still requires testing in practice. In any event, there seems to be a clear trend for commercial arbitration to continue to grow in Angola.

Regarding investment arbitration, a paradigm shift can already be observed, with investor–state arbitration already being excluded from the most recent investment treaty signed by Angola, which may pose certain risks.

At a time when many are calling for the end of investment arbitration to resolve investment disputes (with several proposals for the implementation of a more judicial-based rather than arbitration-based system), it remains to be seen how Angola will tackle the development, promotion and protection of private investment while also following international tends regarding investment dispute resolution.

Notes

1 Available at https://www.bna.ao/uploads/%7Bed9793a1-395f-4804-917a-dea0ed00651b%7D.pdf.

2 Based on BNA estimates in September 2020.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) is a leading full-service law firm in Portugal, with a solid background of decades of experience. Broadly recognised, Morais Leitão works in several branches and sectors of the law on national and international level. The firm's reputation among both peers and clients stems from the excellence of the legal services provided.

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The Morais Leitão international arbitration team focuses on arbitration connected to Portuguese-speaking countries. Team members have strong and diversified academic and cultural backgrounds, in-depth knowledge of the relevant industry sectors and fluency in several languages, including English, Spanish, French, German and Portuguese.

Morais Leitão has a strong tradition in international arbitration that goes back more than 25 years and its members have been consistently recognised for the quality of their services.

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ALC Advogados is a market-leading law firm in Angola. Recognised for the excellence of its work, innovation capacity and ethical and deontological values, ALC Advogados combines profound local knowledge with its remarkable international experience.

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ALC Advogados is very active in private investment, corporate, oil and gas and also banking and finance. The firm is also involved in M&A projects and tax impact analysis.

ALC Advogados is the exclusive member firm of the network Morais Leitão Legal Circle for Angola.

Egypt

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In summary

This chapter outlines the main features of Egypt's arbitration legal framework along with shedding light on key developments in the arbitration field during 2020. This includes the development of arbitration principles by the Egyptian courts concerning the definition of 'international' arbitration, removal of arbitrators, the application of the estoppel doctrine, virtual hearings, unfair compensation as a ground for annulment and the delocalisation and use of non-lawyers and foreign lawyers in arbitration proceedings. This chapter also summarises the introduction of arbitration as a means of dispute settlement in various disputes related to the banking sector, customs, intellectual property and sports arbitration.

Discussion points

- Legal framework for arbitration in Egypt
- Expansion of the scope of matters that may be solved by arbitration
- Recognition and enforcement of foreign awards in Egypt
- Sports arbitration developments
- Delocalisation of arbitration and allowing virtual hearings amid the covid-19 pandemic
- CRCICA's role in international arbitration

Referenced in this article

- Egyptian Arbitration Act
- Civil and Commercial Procedural Law
- The Sports Law No. 71 of 2017
- Investment Law No. 72 of 2017
- Court of Cassation, Challenge No. 18309 JY 89, dated 27 October 2020
- Court of Cassation, Challenge No. 6466 of JY 89, dated 14 January 2020
- Cairo Court of Appeal, Circuit (3), Challenge No. 98 of JY 135, dated 26 November 2020
- Court of Cassation, Challenge No. 3449 of JY 78, dated 11 February 2020
- Court of Cassation, Challenge No. 282 JY 89, dated 9 October 2020
- Cairo Court of Appeal, Circuit (1), Challenge No. 15 of JY 137, dated 8 July 2020

International arbitration in Egypt has continued to grow over the past year. Since the Arab Spring in Egypt, investment treaty claims against the Arab Republic of Egypt have increased. Egypt has been actively pursuing settlements to these disputes and has been successful in settling some of them.

Egypt is a party to 115 bilateral investment treaties (BITs), 28 of which are not yet in force, and 15 of which have been terminated.[1] Egypt is also a contracting state to the International Centre for the Settlement of Investment Disputes (ICSID). In 2020, one new investment treaty case was registered with ICSID against Egypt. To date, a total of 35 cases against Egypt have been registered with ICSID. Of these 35 cases, seven are currently pending[2] (including one annulment proceeding brought by Egypt).[3]

The Egyptian Arbitration Act

The Egyptian Arbitration Act No. 27/1994 (the Arbitration Act) was enacted based on the UNCITRAL Model Law on International Commercial Arbitration (1985). The Arbitration Act applies to arbitrations conducted in Egypt or in cases where the parties to an international commercial arbitration conducted abroad agree to subject the arbitration to the Arbitration Act.[4] While the Arbitration Act is regarded as being the general law governing arbitration in Egypt, there are other laws that govern certain aspects of arbitration in respect of certain legal relationships. For example, technology transfer contracts, sport arbitrations, investments under the investment law and contracts of public entities.

The Egyptian legislator has also been expanding the scope of matters that may be resolved by compromise, including matters that are classically regarded as matters of public law – for example, tax disputes,[5] custom disputes[6] and certain crimes under the investment law of 2017,[7] as well as the criminal procedural law.[8] This is apart from crimes that can be prosecuted only upon a complaint by specific public or private persons.[9] This may be of importance since all matters that can be resolved by compromise, as in waived, can be settled by arbitration under the Arbitration Act. This means that there is a possibility that arbitration in Egypt may extend to a completely new level that would include certain public law matters. It remains to be seen whether and to what extent such a possibility exists. A recent judgment by the Court of Appeal[10] suggests that a tribunal might be competent even with matters related to cheques as long as they are closely connected to the dispute. Thus, the court suggests that returning a cheque or its value falls within the arbitration agreement. It is worth noting that cheques in Egypt are the subject of criminal proceedings due to the punishment for issuing bounced cheques.

Under the Arbitration Act, an arbitration is considered international if the subject matter thereof relates to international trade and, inter alia, if the parties to the arbitration agree to resort to a permanent arbitral organisation or centre headquartered in Egypt or abroad.[11] The Court of Cassation drew a distinctive line in respect of the institutions whose arbitrations are deemed international.[12] The Court held that, for institutions located in Egypt, their arbitrations are international if the institution is based or

established by virtue of an international or regional treaty (eg, CRCICA) or a law for the purpose of administering international commercial arbitration. For institutions located outside Egypt, the court limited them to those having international or regional reputation with strong trust of users in the field of business and investment. In illustrating what institutions would satisfy such criteria, the Court, following the preparatory works of the Arbitration Act, gave an example of the International Chamber of Commerce (ICC) in Paris. Arbitrations held under the auspices of institutions that do not fulfil either of these criteria are deemed national.

That being said, the criteria of international arbitration have been subject to different judicial views in the recent years. The High Administrative Court,[13] following a reading of a judgment by the constitutional court,[14] took the view that resorting to a permanent arbitral organisation such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA) is sufficient to consider the arbitration international. Yet, in 2018, the Court of Cassation, in the context of enforcing an arbitral award, took the opposite view, considering that an arbitration conducted under the auspices of CRCICA is a 'national' arbitration rather than an international one,[15] which the Court of Cassation reconfirmed in a 2020 judgment.[16] The rationale stated by the Court of Cassation for its judgment is that Egyptian law adopts an objective approach based upon the nature of the arbitration irrespective of the institution that administers that arbitration. However, the matter is still unsettled by Egyptian courts as both the Court of Appeal[17] and the Court of Cassation[18] held in 2019 that awards rendered by CRCICA are international in nature.

The Arbitration Act is applicable without prejudice to the international conventions that Egypt is party to[19] and applies to all arbitrations between public or private law persons, irrespective of the nature of the legal relationship that the dispute revolves around,[20] unless other contradictory and specific provisions of law exist.

The arbitration agreement

The Arbitration Act defines an arbitration agreement as an agreement that the parties agree to resolve by arbitration all or part of a dispute, which arose or may arise between them in connection with a specific legal relationship, contractual or otherwise.[21] Since 2005, the Cairo Court of Appeal has held that the arbitration agreement is considered to be the constitution of an arbitration that determines the scope, extent and subject of arbitration, and grants the arbitrators their powers resulting in excluding the dispute from the jurisdiction of the courts.[22]

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 a 'submission agreement', which is an arbitration agreement that the parties agree to after a dispute has risen – if so, the parties must define in the arbitration agreement the matters or disputes subject to arbitration, otherwise the agreement shall be null and void; or[23]
- the arbitration agreement may be incorporated by reference.

However, the validation of this incorporation requires an explicit reference to an existing document with a valid arbitration agreement therein.[24] Pursuant to article 10(3) of the Arbitration Act 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 that the reference is made to should be known to all the parties against whom that 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 it is an integral part of the contract (a general reference to the existing document or its terms is not sufficient).[25]

In terms of the scope of the arbitration agreement, the Court of Appeal has held that the arbitration agreement scope excludes disputes related to the execution of the applicable contract, if the arbitration agreement is drafted in a manner that would only empower the arbitral tribunal to hear disputes arising out of the difference in interpreting the provisions of the agreement. The Court of Appeal decided that the tribunal would only be competent to hear those disputes relating to interpretation and not performance of the contract.[26] However, the Court of Appeal found that even if the tribunal exceeded its mandate and the scope of the arbitration agreement without any objection by the parties, this would not be a ground for annulment of the award as long as the party making the claim for annulment did not make any objection in this respect during the arbitration proceedings.[27] In another judgment, the Court of Appeal[28] found that rendering an award for tort liability falls outside the jurisdiction of the tribunal. In that case, the tribunal awarded compensation for the abuse of using a trademark that was categorised by the tribunal itself as tortious liability, which was considered by the court to fall outside the scope of the arbitration agreement.

Conditions of validity of the arbitration agreement

In addition to the general requirements for the validity of contracts, such as consent, capacity and the existence of a legal relationship, the following requirements, as well as any further requirements mandated by a specific provision of law, must be satisfied for there to be a valid arbitration agreement.

- The arbitration agreement must relate to matters that are amenable to compromise.[29] In this regard, the Cairo Court of Appeal maintained that matters relating to deciding ownership of real estate in Egypt relates to public policy and, therefore, are non-arbitrable and that any arbitration agreement in this respect is null and void, being against public policy.[30]
- The arbitration agreement must be in writing, otherwise it shall be null and void.[31] It will be deemed written if it is included in written communication exchanged between the parties. This requirement is widely interpreted to include an arbitration agreement concluded by exchanging offers and acceptance through electronic means.[32] Silence may be considered as acceptance of the arbitration agreement if there are previous continued transactions between the parties where the arbitration agreement is included,[33] or where proceedings are initiated without objection from the opposing party.[34]
- In accordance with article 702 of the Egyptian Civil Code and article 76 of the Civil and Commercial Procedures Law (CCPL), the arbitration agreement may not be concluded by an agent except by virtue of private and specific written delegation,[35] otherwise the arbitration clause will not be effective in relation to the principal.

Defective arbitration clauses have been repeatedly held by the Cairo Court of Appeal as valid arbitration agreements and were interpreted to favour arbitration over courts.[36]

Administrative contracts

Arbitration relating in administrative contracts was a highly contested matter before it was settled by an amendment to the Arbitration Act in 1997.[37]

Arbitration in relation to administrative contracts is permissible, provided that the arbitration agreement is approved by the competent minister or by whomever assumes his or her authority with respect to independent public authorities.[38] The power to approve the arbitration agreement may not be delegated.[39] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[40] Egyptian courts had held that the absence of ministerial approval invalidates the arbitration agreement.[41]

In 2010, the Cairo Court of Appeal held that ministerial approval is a legislative requirement for the validity of the arbitration clause and is a requirement addressed to both parties,[42] which was similarly upheld by the Supreme Administrative Court in 2011.[43] 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 as this requirement should not be applicable to international commercial arbitrations conducted with foreign investors.[44] The Arbitration Act does not provide for an annulment sanction for violation of article 1, and, therefore, this requirement is addressed, and needs to be fulfilled by the administrative entity and not the other party (that is, it is the sole responsibility of the administrative entity and it should therefore bear the liability for not obtaining ministerial approval).[45] Other tribunals have, as recently as 2011, taken the view that the arbitration agreement is void in the absence of ministerial approval.[46] The consensus of case law settled for a while on the position that 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.[47]

How the approval may be given has been subject to various views. One indicates that approval may be subsequent to the conclusion of the administrative contract and does not need to be written or expressed in a specific form.[48] On 5 March 2016, the Unification of Principles Circuit of the Supreme Administrative Court contributed to this matter in a case related to an arbitration agreement between an administrative authority and a private entity. The Court held that for the arbitration agreement in a dispute in relation to administrative contracts to be valid, the competent minister must approve and sign the arbitration agreement itself. The initial approval to resort to arbitration to resolve the existing dispute does not suffice alone nor does the delegation in signing the arbitration agreement. In any of these two cases, the arbitration agreement shall be null.[49] The Constitutional Court seemed to support that view.[50] Nonetheless, in a Court of Appeal judgment, dated 19 September 2018, the court decided that the law did not require a specific form of the competent minister's approval.[51]

In addition to the above, the subject matter of the administrative contracts disputes was subject to another recent judgment of the Court of Appeal.[52] It found that administrative contract disputes subject to arbitration are those arising from a contractual relationship with the administration. As such, an arbitral tribunal can render an award against the administration concerning financial rights and obligations without extending its oversight to the conditions of public authority or legitimacy of its decisions or the immunity of sovereign acts. In this case, the Court found that the arbitral tribunal had not exceeded these powers, and the award was valid.

Competent court with regard to administrative contracts

Under article 54(2) of the Arbitration Act, the competent court for 'matters the Arbitration Act refers to courts' is the court of first instance, which has jurisdiction over the dispute if there is no arbitration agreement. The competent court to decide on the annulment of an arbitral award is the second-degree court, which hears the appeals against the judgments from the court of first instance. An arbitral dispute arising out of administrative matters, for example, would be subject, if there were no arbitration agreement, to the jurisdiction of the Administrative Court.[53] Therefore, a challenge of the relevant arbitral award would be within the jurisdiction of the Supreme Administrative Court. However, if the arbitration is an international commercial one, the challenge of the award would be subject to the jurisdiction of the Cairo Court of Appeal under article 54(2), unless the parties agree to the jurisdiction of another Egyptian court of appeal.[54] It was held by the Supreme Constitutional Court that even in the event that the dispute arises out of an administrative contract, the Cairo Court of Appeal will be the competent court if the subject matter of the contract contains elements that are commercial and international in nature. [55]

In line with this, the Cairo Court of Appeal decided that if an arbitral award is rendered based upon an administrative contract, according to article 1 of the Arbitration Act, the second degree of the originally competent court, in this case the Supreme Administrative Court, shall be the competent court for an annulment lawsuit. However, according to article 1 of the Arbitration Act, if the dispute arises in connection to an administrative contract and is an international commercial dispute, then the Cairo Court of Appeal shall be the competent court, not the Supreme Administrative Court.[56] As explained, the question of whether an arbitration is international, particularly when held under the auspices of a permanent arbitral institution, is subject to uncertainty.

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 comprised of three arbitrators if the parties fail to reach an agreement.[57] The same principle applies in the CRCICA Rules. [58]

Substituting an arbitrator

Generally, 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 for choosing the arbitrator whose jurisdiction has been terminated.[59] Where the arbitration is institutional and the agreed appointing authority – for example, CRCICA – has made an appointment, the Court of Appeal has held that the court may not interfere by appointing an arbitrator in substitution of CRCICA's appointed arbitrator even if one of the parties alleges that it did not agree to the arbitrator appointed by CRCICA. [60]

If an arbitrator is substituted for any reason, the Cairo Court of Appeal has held that this shall not necessitate a repeat of the arbitral proceedings before the newly constituted tribunal. Rather, the new tribunal shall continue the proceedings that took place before its appointment. This is on the condition that the parties shall have the opportunity to participate in the proceedings (respecting the principle of confrontation) and that all members of the arbitral tribunal have had the opportunity to deliberate with each other before rendering the award. [61]

The possibility of challenging a court decision appointing an arbitrator

Pursuant to article 17(3) of the Arbitration Act, a decision by the competent court to appoint an arbitrator in cases of failure to appoint one is unchallengeable independently. A party may still challenge such a decision when seeking to set aside the final arbitration award on the bases of constituting the tribunal in breach of the law or the arbitration agreement pursuant to article 53(e) of the Arbitration Act. However, a party may do so only if it objected to the appointment in the context of the arbitration proceedings subsequently to the court's decision. Failure to so object is considered by the Court of Appeal to be a waiver of the right to seek annulment on that ground. The Court has considered this to be the case especially where the party elects to pay that arbitrator's fees among the fees of other arbitrators.[62] However, the Court of Cassation seems to accept challenging the court's decision to appoint an arbitrator independently. In one case, the Court of Cassation found such a challenge to be admissible and cancelled a decision of the first instance court upheld by the Court of Appeal. The Court reasoned that such a decision becomes challengeable if rendered in contradiction of law, the parties' agreement or jurisdiction rules of public policy.[63]

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 during the very late stages of the arbitral proceedings. [64]

According to the general rules of substitution of arbitrators, a substitute arbitrator shall be appointed by the same mechanism used to appoint the predecessor.[65] 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, at the request of a party, CRCICA can determine, 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. 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.[66]

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 or her mission after the conclusion of all hearings and pleadings, an award rendered by a truncated tribunal shall not be annulled.[67] More recently, in 2013, the Cairo Court of Appeal held that there is nothing in 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 or her consequential refusal to sign the award, are not sufficient reasons to annul the award as provided for by article 43 of the Arbitration Act.[68]

In 2015, the Court of Cassation held that awards rendered by a truncated tribunal could be annulled. The Court stressed the importance, pursuant to the Arbitration Act, 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, the award becomes subject to annulment.[69]

Impartiality and independence of arbitrators

The Arbitration Act 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.[70] The arbitral tribunal is obliged to then refer the challenge to the competent court to decide the challenge.[71] If the tribunal rendered its opinion on the challenge, even if that opinion was implicit, this might lead to annulment of its award.[72] The parties' ability to agree to different challenge proceedings, including by agreeing to certain institutional arbitral rules, such as CRCICA rules, remains differential. For instance, under the CRCICA Rules the challenge shall be adjudicated by a decision of a tripartite special impartial and independent committee, to be formed by CRCICA from members of the advisory committee.[73] Nevertheless, the Cairo Court of Appeal accepted that it has jurisdiction to decide on such challenges, even though it relied on CRCICA's decision on the challenge to arrive at the very same outcome.[74] Conversely, the Court of Appeal in 2020 adopted a different view. It found that the procedures for challenging arbitrators stipulated in the Arbitration Act is not applicable if the parties had a different agreement or agreed on the rules of a centre with different procedures. [75]

Removal of arbitrators

The Arbitration Act provides in article 20 for the possibility of seeking the removal of an arbitrator by a court decision if he or she is unable or fails to perform his or her mission, or acts in a manner that unduly delays the arbitral proceedings. In application, the Court of Appeal considered that increasing ad hoc arbitration fees, which are decided by the ad hoc tribunal, repeatedly and exaggeratedly from US$50,000 to US$6 million, then suspending the proceedings for the parties' failure to pay such fees is conduct that obstructs and unnecessarily delays the proceedings. Accordingly, the court found that such conduct justifies the removal of the presiding arbitrator but not a party's appointed arbitrator in the same tribunal on the basis that this would interfere with the party's freedom to choose its arbitrator. [76]

The possibility for an Egyptian minister to serve as an arbitrator

According to article 10 of Presidential Decree No. 106 of 2013, government officials, as soon as appointed, are obliged to stop or liquidate any ongoing professional practice they may have and may not present any consultancy services whether paid or unpaid. The Cairo Court of Appeal considered that acting as arbitrator falls outside the prohibition established by the aforementioned presidential decree. This is because serving as an arbitrator does not entail providing consultancy services and the arbitrator is not considered an agent or a provider of service. This exclusion from the prohibition applies as long as the minister's mission as arbitrator does not cause harm to the public interest or the ministers' government position.[77]

Procedural law

The Arbitration Act grants parties the freedom to choose the procedural law that will be applied by the arbitral tribunal, including their right to subject the arbitration to the applicable rules of any

institution or arbitration centre in Egypt or outside. However, if the parties fail to agree on this matter, the arbitral tribunal will be granted the freedom to select the applicable procedural law.[78]

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,[79] except where these norms are considered 'basic guarantees of adjudication'.[80]

Suspension

Pursuant to article 46 of the Arbitration Act, 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, such as forgery challenges, including corresponding criminal proceedings, or criminal acts in general. In such cases, the tribunal may suspend the arbitral proceedings on the condition that the matter is essential or necessary for the tribunal to be able to decide the subject matter of the dispute.[81] In such a case, the arbitral tribunal shall suspend the proceedings until a final judgment is rendered in this respect by the competent authority.[82] This results in the suspension of the time limit for rendering the final arbitral award where such a limit applies.[83]

The Court of Appeal judgments seem to narrow the scope for the arbitral tribunal to suspend proceedings. In its interpretation of article 46, the Court of Appeal found that it is within the tribunal's jurisdiction to assess whether the forgery allegation is of any seriousness, and, if not, it may proceed with the arbitration. In addition, as ruled by the same court, if the forgery allegation concerns the arbitration agreement itself, the arbitral tribunal may decide it without the need to suspend the proceedings as it would be a matter within its jurisdiction in such case.[84] Even in cases where the tribunal is obliged to suspend the proceedings, deciding so remains the exclusive jurisdiction of the tribunal. The Court of Appeal found that it has no competency to decide suspension in general.[85] Furthermore, the Court of Appeal recently held that the reliance by the arbitral tribunal on a document that turned out to be forged would not result in annulling the award because this is not among the exhaustively defined grounds for annulment of an arbitral award provided under article 53 of the Arbitration Act. [86]

The role of Egyptian courts in arbitral proceedings

The Arbitration Act 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 competent local court may order provisional or conservatory measures, whether before the commencement of arbitral proceedings or during the procedure based on an application from one of the parties[87] and the president of the court referred to in article 9 of the Arbitration Act 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.[88]

The arbitral award: time limit

The Arbitration Act grants the parties the right to agree upon the time limit of arbitration proceedings. In the absence of the parties' agreement, arbitration proceedings are limited to 12 months from the date of commencement of the proceedings. This period may be extended by an additional six months by the tribunal, unless the parties agree to extend the period.[89] In this regard, if the parties agree to certain arbitration rules that provide for a different time limit, or are even silent on the point, those 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, the proceedings shall not be subject to the time limit set out in the Arbitration Act and shall not be limited to a certain time limit unless otherwise agreed by the parties.[90] 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.[91] 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.[92] In a recent case,[93] it was found that if the competent court's order terminating the proceedings was unchallenged within the prescribed period, it would have the authority of *res judicata.* Thus, if the arbitral tribunal rendered its award afterwards, it would be annulled due to its contradiction of a court judgment that has the authority of *res judicata*, an issue that pertains to public policy.

However, the parties' continuance in the proceedings beyond the determined time limit is considered an implied extension to that limit.[94] Recently, the Court of Cassation[95] and the Court of Appeal[96] confirmed that the extension of the time limit beyond the designated limit in article 45 of the Arbitration Law is not a ground for the annulment of an arbitral award, as long as the parties did not object to the extension before the arbitral tribunal since it is a matter of fact. The Court further held that a party waives its right to dispute the extension of the time limit if it did not raise any objection to the extension before the arbitral tribunal.[97] The Cairo Court of Appeal has also ruled that the lapse of the 18-month period provided under the Arbitration Act for the issuance of the award does not entail the annulment of the arbitral award, as this time limit is deemed to be merely of an 'organisational' nature.[98]

Mandatory information to be featured in an award

The Cairo Court of Appeal refused the challenge of an arbitral award on the basis that the arbitral award did not mention the place of issuance of the award, or the nationality of the members of the arbitral tribunal and did not attach or include a copy of the arbitration agreement in the award in violation of article 43(3) of the Arbitration Act. The court held that although the Arbitration Act does require that this information be provided in arbitral awards, this information may be supplemented by another document as long as this document is prior or contemporary to the arbitral award and the latter explicitly refers thereto. The Court further applied the procedural rule that as long as the objective of the procedure has been fulfilled, there is no harm suffered and consequently no annulment.

On this basis, the omission of information may only lead to the annulment of an arbitral award when the objective of mentioning that information is not fulfilled. The Court of Appeal considered in the above case that the place where the award has been rendered is known according to the place of arbitration in the arbitration agreement. The nationality of members of an arbitral tribunal is known by their disclosures and CVs submitted upon accepting appointment. Also, the arbitration agreement may be derived from the parties' claims and defence in the proceedings. In a nutshell, the court considered that no party had suffered any harm by the omission of this information and therefore that the challenge must fail.[99] Nevertheless, the Court of Cassation

considered that it is not sufficient to refer to the arbitration agreement as cited in a party's submission, as it does not indicate that the tribunal examined the arbitration agreement itself.[100]

Setting aside arbitral awards

Pursuant to article 53 of the Arbitration Act, arbitral awards can only be challenged by annulment proceedings, and it may be annulled for several reasons including, inter alia, absence of a valid arbitration agreement or the violation to the right of defence of one of the parties. Annulment proceedings could only be brought within 90 days of the valid notification of the award debtor, and the 90 days will not commence even if the counterparty became aware of the award through other means.[101] In this regard, the Court of Appeal distinguished between two notification scenarios. In the first, where the bailiff proceeds to the address of the notified party and does not find him or her, administrative notification through the public prosecution or the police will not be valid.[102] In the second, the bailiff proceeds to the address of the notified party and the notified party refuses to receive the notification; in this case, the administrative notification through the public prosecution or the police will be valid.[103] The Supreme Constitutional Court held that the right to bring annulment proceedings against arbitral awards is a constitutional one. Additionally, the Cairo Court of Appeal held that, if the parties agreed in the arbitration clause that the arbitral award is final and no party may challenge it, this cannot prevent either party from filing a nullity suit. However, waiver of an annulment lawsuit after the arbitral award is permitted under Egyptian law. [104]

In 2020, the Court of Cassation[105] set out three conditions to consider a party to have waived its right to object to a breach that occurred during the arbitration proceeding:

- the party that claims the violation continues in the arbitration proceedings while knowing of the violation;
- the violation should be for a condition that was in the arbitration agreement; and
- the party that claims the violation did not object to the violation to the arbitral tribunal within the agreed time. If there is no agreed time, it should be made within reasonable time.

Further, the Court of Cassation confirmed its stance regarding whether the reasoning of the arbitral award might lead to its annulment under article 53. The Court of Cassation refused a previous Court of Appeal judgment annulling an arbitral award rendered against a famous Egyptian television personality for being based on ambiguous, illogical, unfounded facts and assumptions, and full of flagrant discrepancies and unsubstantiated statements to the extent that rendered the award without reasoning.[106] The Court of Cassation refused the reasoning of the Court of Appeal and held that lack of reasoning is not one of the grounds of annulment stipulated in article 53 of the Arbitration Act.[107]

Article 53 further provides that the court adjudicating the annulment action should decide *ipso jure* the nullity if it is in conflict with Egyptian public policy. The Egyptian courts defined public policy in the context of arbitration to mean only those rules forming the social, economic and political foundations of the society, and not all mandatory rules of law.[108]

In another case,[109] after the arbitral award was issued and annulment was refused by the Court of Appeal, the losing party petitioned for reconsideration of the court judgment rendered in the annulment case based on article 241(1) of the CCPL. Article 241(1) provides that the parties may, even after a final judgment is rendered, petition for reconsideration of the final judgment, if, inter alia, 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 influenced the outcome of the dispute. The Court of Appeal, in a first precedent, found in favour of the plaintiff and annulled the court judgment and the arbitral award in question based on that petition. However, the Court of Cassation refused the judgment.[110]

In another case, the Court of Appeal decided that the prescription of the right to arbitrate by the lapse of 15 years, the general prescription period of civil obligations stipulated in the Egyptian Civil Code, is not one of the grounds for annulment. [111]

Egyptian courts opined on whether an international commercial arbitration award rendered in Egypt in the context of an international treaty could be subject to annulment proceedings before Egyptian courts, where the treaty seems to prohibit challenging the award. The Cairo Court of Appeal took the view that annulment proceedings are not allowed under the treaty.[112] However, the Court of Cassation rejected this view. In its reasoning, the Court decided that annulment proceedings do not qualify as a challenge and therefore are not prohibited under the treaty. The Court concluded that the treaty does not contradict the Arbitration Act regarding the right to request annulment and referred the case back to the Cairo Court of Appeal.[113] The latter Court rendered a second judgment maintaining its initial position.[114] However, the Court of Cassation[115] overturned this judgement and referred the case to another circuit within the Court of Appeal on the basis that judgments rendered by the Court of Cassation must be followed by other courts, including the Court of Appeal.

The Cairo Court of Appeal found that its jurisdiction to decide on setting aside cases does not extend to amending arbitral award, and, in particular, its dispositive part.[116] The case pertained to an application made under article 192(1) of the Procedural Law to interpret a previous Court of Appeal judgment that partially set aside an arbitral award. The applicants requested that the Court of Appeal interpret the setting-aside judgment by adding a certain wording to the dispositive part of the arbitral award, which the Court refused on the basis that it was not empowered to amend the dispositive part.

The Cairo Court of Appeal still maintains that only the binding final arbitral award may be subject to annulment.[117] Accordingly, any other decisions, orders or evidence proceedings may not be subject to independent annulment proceedings. On these grounds, the Court found that it lacks jurisdiction to decide on the annulment of a notice of an arbitration hearing.

The Court of Cassation further maintained its position that the court of appeal's jurisdiction in an annulment claim may not extend to reviewing the substance of the arbitral award to determine its convenience or to review the determination of the arbitrators in understanding the facts or applying the law since the annulment claim is not an appeal. This applies even if the determination was incorrect because the arbitrators' mistakes in this regard are not a ground for the annulment of the award they issue.[118]

Competent court for annulment

According to article 9(1) of the Arbitration Act, if the arbitration is international and commercial in nature, the Cairo Court of Appeal is the competent court to rule on the annulment of the award. Article 2 defines the criterion of 'commercial arbitration'. It provides that arbitration is commercial if it is raised based upon a legal relationship of economic nature. The article further

provides examples of this legal relationship. In this regard, the Court of Cassation held that it is within the judge's authority to determine whether the relationship is 'of an economic nature', pursuant to article 2 of the Arbitration Act, as long as his or her determination is based on reasonable grounds. The Court further provided that the judge may rely on the parties' intent in the contract to reach a determination. [119]

The Court of Cassation's power to decide annulment upon its own initiative or upon the public prosecutor's request

The Egyptian Court of Cassation recently held that parties and public prosecution alike may raise grounds of annulment that are matters of public policy before the Court of Cassation, even if the grounds were not raised before the Court of Appeal, as long as the elements of those grounds were already available before the Court of Appeal. In this regard, the Court of Cassation reaffirmed the principles of article 109 of the CCPL that the jurisdiction of the courts is a matter of public policy. The Court further decided that the public prosecution might bring a suit for nullity of an arbitral award, when the award violates public policy provisions, without the need to comply with time limits for nullity suits provided for in article 54(1) of the Arbitration Act.[120]

Enforcement of arbitral awards

Pursuant to article 55 of the Arbitration Act, all arbitral awards rendered in accordance with the provisions of this law have the authority of *res judicata* and shall be enforceable in conformity with its provisions.[121] The enforcement of domestic arbitral awards is governed by article 56 of the Arbitration Act, which requires a request for enforcement to be submitted to the president of the competent court, along with the required documents.[122] 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.[123] The enforcement of foreign arbitral awards in Egypt is governed by the New York Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention),[124] and, as such, are subject to the same enforcement rules applicable to national arbitral awards under the Arbitration Act.[125] 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 contradict the provisions of domestic Egyptian law, the provisions of the New York Convention will prevail.[126] The Court of Appeal also held that the enforcement of foreign arbitral awards cannot be subject to rules stricter than those applicable to national arbitral awards under the Arbitration Act. Therefore, subjecting foreign arbitral awards to the rules of enforcement of the CCPL would contradict the object of the New York Convention,[127] a stance adopted recently by the Court of Cassation.[128] Nonetheless, recently, one circuit of the Court of Appeal held that foreign arbitral awards should be subject to the application of the provisions of the CCPL, that is, similar to the method of enforcement of foreign judgments and not the Arbitration Act, if the parties did not agree to apply the Arbitration Act,[129] while another circuit of the Court of Appeal took the opposite view and subjected it to the Arbitration Act.[130]

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 CCPL. According to article 55 of the ICSID Convention, 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 87 of the Egyptian Civil Code provides that public assets of the Egyptian state are immune from enforcement and attachment procedures.

In a recent ruling, the Court of Appeal held that the Constitutional Court had already ruled that article 58(3) of the Arbitration Act is unconstitutional because it allows the challenging of a judge's order to refuse enforcement of an arbitral award while prohibiting the challenging of the judge's refusal to grant that order. A Constitutional Court judgment is binding for the courts.[131] Accordingly, the Cairo Court of Appeal ruled that the period for challenging an enforcement order, pursuant to the Constitutional Court's judgment, should be 30 days, equal to the period allowed for challenging a refusal to grant such an order, not 10 days as in the general rules on challenging orders on application under the CCPL.[132]

In terms of objections to enforcement, the Cairo Court of Appeal refused the enforcement of an arbitral award for contradicting a final judgment by the Court of Administrative Jurisprudence rendered after the arbitral award but before the request for the enforcement order.[133]

The Court of Appeal previously rendered a judgment enforcing a foreign arbitral interim measure that was issued by an ICC tribunal. The judgment found that arbitral interim measures are to be applied according to the same legal procedures as those for enforcing a final arbitral award – that is, by an order on application without notification of, or hearing, the parties. The court went further and required the interim measure:[134]

- to be final, and to be considered so if rendered by a competent arbitral tribunal;
- to be based on a valid arbitration agreement;
- to have offered both parties the opportunity to present their case; and
- not to be against public policy.

It is worth mentioning that article 24 of the Arbitration Act allows the court to order the enforcement of interim measures decided by arbitral tribunals in arbitrations that are subject to the Arbitration Act.[135]

2019–2020 highlight developments: in sports arbitration

Overview

The Sports Law No. 71 of 2017 (the Sports Law) was enacted to regulate sports matters. This is considered the first comprehensive sports law in Egypt, replacing the history of regulating sports matters under different laws. The Sports Law established the Egyptian Sports Arbitration Centre (the Sports Centre) for settlement of any sports disputes subject to the parties' respective agreement or sports regulations.

Article 66 of the Sports Law provides the mechanisms to settle any dispute arising in relation to sports. It includes mediation, conciliation and arbitration in case an arbitration clause is included in any contract or regulation binding on the parties of the dispute.[136]

The president of the Egyptian Olympics Committee issued a decision regarding a draft amendment of the statute of the Egyptian Olympic Committee. The amendment changed the name of the Egyptian Sports Arbitration Centre to the 'Egyptian Sports Settlement and Arbitration Centre'; it also vested the Olympic Committee with particular responsibility for the promotion of the principles of the Olympic Charter in dispute resolution and affirmed that the Egyptian Sports Settlement and Arbitration Centre has the exclusive jurisdiction to settle sports disputes according to the Sports Law and the principles of the Olympic Charter.

The board of directors of the Sports Centre is headed by the president of the Egyptian Olympics Committee. The members of the centre are:

- a representative of individual sports;
- a representative of team sports;
- a representative of the Ministry of Sports; and
- three legal and technical experts.

The duration of the term of the board of directors is four years, renewable for one additional term.

According to the Sports Law, the Sports Centre shall consider the Olympic Charter and the international criteria of the relevant sports' associations. Furthermore, the Centre shall consider the fundamental procedural guarantees and principles of the CCPL. The Sports Law empowered the Olympic Committee to issue its own mediation and arbitration rules, which set out in Decision No. 88 of 2017. As per the Sports Law, absent a provision in it or in the Sports Centre's rules, the Arbitration Act shall apply.[137]

The Sports Centre's rules organise not only its mediation and arbitration proceedings but also summary decisions, which are to be decided by a sole arbitrator,[138] challenging the arbitral awards and the enforcement thereof.

All the statutes of the sports federations approved by the president of the Egyptian Olympics Committee in 2020 included arbitration as a means to settle the disputes of the respective sports, for instance, the statute of the Basketball Federation,[139] the statute of the Judo, Aikido and Sumo Federation,[140] the statute of the Kickboxing Federation[141] and the statute of the Tennis Federation.[142]

Additionally, the president of the Egyptian Olympics Committee approved the statute of Genius Sports Club, which granted the Sports Centre the jurisdiction to settle disputes arising from the application of the statute including disputes arising in relation to membership, elections, contracts and other acts concluded on behalf of the Club.[143]

Moreover, the Headquarters Agreement concluded between Egypt and the Confederation of African Football selected arbitration as a final stage to settle disputes arising out of the interpretation, application, breach or termination of the agreement. The arbitration will be conducted at CRCICA in accordance with its Arbitration Rules.[144]

Annulment of Sports Centre awards

Several annulment proceedings were brought in respect of arbitral awards rendered under the Sports Law. The Egyptian courts' jurisprudence is not consistent on whether such annulment proceedings can be brought forward under the Arbitration Act. In one case, the Court of Appeal decided that such proceedings are subject to the annulment procedures defined under the Sports Centre's rules, which are given precedence over the Arbitration Act by the Sports Law.[145] In the same vein, the Court of Appeal has also adopted the view that an appeal cannot be lodged against an arbitral award issued by the Sports Centre, as the Sports Law does not provide for such an appeal mechanism.[146]

In contrast, there were other judgments by the Court of Appeal holding that sports arbitration awards are subject to the annulment procedures stipulated in the Arbitration Act.[147] Confirming the same view, the Court of Appeal set aside a sports arbitration award because it was made by three arbitrators, while the default clause of the rules of the Sports Centre requires, in the absence of an agreement, that the tribunal is composed of a sole arbitrator; and because the award was not signed by the three arbitrators.[148]

The stance of the courts on mandatory arbitration under the Sports Centre arbitration rules

The Court of Appeal has previously described arbitration under the Sports Law as being mandatory,[149] although mandatory arbitration is systematically declared by the Constitutional Court as unconstitutional.[150] In a recent judgment, the Court of Cassation found that arbitration under the Sports Law, although mandatory, conforms with international practice in this respect, which aims to limit states' interference in sports as well as the directions of the International Olympic Committee.[151] Nevertheless, the court found that the rules of arbitration of the Sports Law as well as the Sports Centre's rules of arbitration might be unconstitutional for other reasons and referred the matter to the Constitutional Court.

Possible unconstitutionality of several articles of the Sports Law

The Court of Cassation referred articles 66 and 69 of the Sports Law to the Supreme Constitutional Court to decide on their constitutionality. The Court of Cassation found in its landmark judgment that articles 66 and 69 may conflict with the guarantee of impartiality and independence of the judiciary stipulated in article 94 of the Constitution. The Court's view is that article 66 links the Sports Centre to the Egyptian Olympic Committee, although it was mentioned in the same article that the Sports Centre is independent. Similarly, article 69 of the Sports Law has established several links between the Sports Centre and the Egyptian Olympic Committee including granting the president of the board of directors of the Olympic Committee the legislative mandate to issue the Sports Centre's rules.

Moreover, the Court of Cassation ruled that the Sports Centre's Rules were issued upon a legislative mandate granted to the Olympic Committee by the Sports Law. This deemed the rules to be a law, the constitutionality of which is subject to the jurisdiction of the Constitutional Court. The Court of Cassation found that articles 2, 81, 92-bis (b) and 92-bis (c) of the Sports Centre's rules may be in breach of articles 53, 84(2), 97 and 170 of the constitution, which require equality between citizens before the law, prohibit immunity from judicial review, and define the limits of legislative mandates and the hierarchy of different legislative instruments.

In particular, the Court of Cassation found that articles 2 and 81 of the Sports Centre's rules potentially exceed the legislative mandate granted by article 69 of the Sports Law to the Olympic Committee. Specifically, the Court's view is that this mandate requires the rules to be consistent with international standards and requires the Sports Centre to abide by the Olympic Charter, international standards, provisions of the Sports Law, main guarantees and principles of adjudication of the CCPL and the Arbitration Act. However, the rules did not abide by these requirements.

Importantly, the Court of Cassation found that articles 81, 92-bis (b) and 92-bis (c) of the Sports Centre's rules giving the arbitration awards immunity from judicial review were inconsistent with international standards, which the Court drew from the rules governing the Court of Arbitration for Sports (CAS), and which allow for the review of sports arbitration awards by the Swiss federal courts.

Abolishing mandatory arbitration in disputes arising between public sector companies or between a public sector company and state organs

Law No. 4 of 2020 amended some of the provisions of the Law regarding Public Sector Authorities and their Companies and abolished mandatory arbitration in disputes arising between public sector companies or between a public sector company and state organs. Before this amendment, public authorities, public bodies, and public sector companies were obliged to bring disputes between each other to mandatory arbitration under the auspices of the Ministry of Justice.

Arbitrations where state organs and companies are parties

The Prime Minister issued Decree No. 1062 of 2019 regulating the rules governing the Supreme Committee for Advising on International Arbitration Cases (the Supreme Committee) by introducing significant changes to its composition while simultaneously expanding its powers.

The Supreme Committee is competent to review and submit its opinion in all types of arbitral disputes, both commercial and investment, where the state or one of its authorities, entities or subordinated companies is a party to the dispute. The Supreme Committee is also competent to carry out the following:

- providing advice and opinions regarding the defence submitted in arbitration cases;
- determining the strength and suitability of the defence and the documents presented, and proposing any additions or changes that the Supreme Committee deems necessary to improve the Egyptian position;
- providing all types of legal assistance that may be required by the State Lawsuits Authority or the law firms carrying out the state's defence before arbitral tribunals; and
- suggesting an amicable settlement with the other parties.

The decree focuses on the establishment of the Technical Secretariat, which is expected to be the driving force behind the substantive work of the Supreme Committee. The Deputy Minister of Justice for Arbitration heads the Technical Secretariat, and a decree setting out the composition of the secretariat is expected to be issued shortly.

In addition, the decree explicitly prohibited any governmental or administrative authority from taking any action with respect to an arbitral dispute without first referring the matter to the Supreme Committee.[152]

In 2020, Decree No. 1062 of 2019 was amended and new authorities were granted to the Supreme Committee. Now contracts concluded by state organs, public sector companies or companies in which the state is a shareholder that include an arbitration clause to resort to international arbitration must be referred to the Supreme Committee before their conclusion. Furthermore, none of the state organs, bodies, ministries, state-owned companies or companies in which the state is a shareholder may take part in any procedure in an arbitration dispute without the Supreme Committee's approval.

The banking financial sector

Establishment of the Banking Financial Disputes Arbitration Centre

The New Banking Law No. 194 of 2020 introduced a new alternative method to settle banking and financial disputes through an independent arbitration centre dedicated to resolving disputes arising from the application of the New Banking Law and other related laws that govern banking activities. However, recourse to the new arbitration centre is subject to the parties' prior or subsequent agreement to settle the dispute through arbitration.

Arbitration of customs disputes

The new Customs Law No. 207 of 2020,[153] like its predecessor,[154] granted the party concerned, or its representative, the right to request arbitration in customs-related disputes, in the event of a sustained dispute between the Customs Authority and that concerned party, and subject to the approval of the Minister or his or her delegate. According to the New Customs Law, the dispute should be settled by a three-arbitrator tribunal chaired by a member of one of the judicial authorities, or one of the law professors registered in the Arbitrators Register of the Ministry of Justice.[155] As for the other two arbitrators, one arbitrator shall be nominated by the Minister while the other shall be nominated by the concerned party. [156]

Arbitration in IP disputes

The Minister of Trade and Industry Decree No. 354 of 2020, authorised the Contact Point Body for Protecting Intellectual Property Rights Affairs, in order to achieve its goals, to settle IP rights disputes through arbitration, subject to the agreement of the parties and in accordance with the rules and procedures set by the law in this regard. [157]

The non-banking financial sector

Establishment of the Non-Banking Financial Disputes Arbitration Centre

In continuation of the state's policy of expanding the reliance on arbitration as the primary dispute resolution instrument, the law organising control over the Non-Banking Financial Markets and Instruments provided for the establishment of an arbitration centre by a presidential decree to resolve disputes arising out of the application of the laws governing non-banking financial transactions, subject to the parties agreement on arbitration. Presidential Decree No. 335 of 2019 was issued in this regard, establishing the Non-Banking Financial Disputes Arbitration Centre (the NBF Centre). The NBF Centre is competent in all disputes that arise from application of the laws concerning non-financial transactions, in particular disputes between shareholders, partners or members of companies and entities that work in the non-banking financial markets. It is also competent in disputes between those companies and beneficiaries of the non-banking financial activities. However, the NBF Centre is only competent if the parties agree to its jurisdiction, whether before or after the dispute arises. The NBF Centre offers mediation and conciliation services before starting arbitration proceedings, unless the parties agree otherwise. According to article 8 of the aforementioned Presidential Decree, the Prime Minister issued Decree No. 2597 of 2020, which includes the statute of the NBF Centre and the rules and procedures regulating the Centre's operation.

Principles from the Egyptian courts issued in 2020

The Estoppel Doctrine

The Court of Cassation[158] recently applied the estoppel doctrine and confirmed that a party may not benefit from its own fault towards other parties nor shall the others bear its consequences, whether such fault is fraudulent or not, and even if the other parties were also at fault. This applies in the context of an arbitration agreement, the Arbitration Law, any other law and all transactions in fields other than arbitration. The Court further held that estoppel is not explicitly regulated under the law. However, it applies by virtue of article 1(2) of the Egyptian Civil Code.[159] The Court determined two conditions for invoking estoppel: a party must act in a manner that contradicts with its previous conduct; and this contradiction shall harm another party who dealt with the first party while relying on the validity of its previous conduct. In this case, the court denied one party's claim to nullify an arbitration agreement that was concluded by its vice-chair of the board instead of its chair, because this party may not benefit from its fault nor shall the others bear its consequences as per the estoppel doctrine. The same principle was adopted by the Court of Appeal[160] finding that the basic principles of arbitration do not allow a party to challenge an award when that party stated or accepted the same during the arbitration proceedings.

Representation of the parties in the arbitral proceedings by non-lawyers or foreign lawyers

The Court of Cassation[161] held that non-lawyers can represent the parties in the context of arbitration. The Court confirmed that the Arbitration Act did not include any provision that restricts the freedom of the parties to represent themselves before arbitral tribunals. It also did not include any rule that prohibits the parties from appointing others to represent them in arbitral proceedings including non-lawyers. The Court further reasoned that since the arbitration law permits the appointment of arbitrators irrespective of their profession, then, a fortiori, this applies to the parties' representatives. Therefore, the Court denied one party's claim to nullify an arbitral award in which a consulting engineer represented one of the parties to the arbitration.

Virtual hearings and delocalisation of arbitration

The Court of Cassation[162] recently confirmed that arbitration is no longer localised and that the legal definition of the seat is no longer associated with the actual place of holding the arbitration sessions (the venue). It had thus become the case that arbitrations were frequently seated in Egypt without taking place in Egypt. The Court confirmed that such delocalisation is also evident in the recent trend for virtual hearings.

The procedure of referring the award to the ICC International Court of Arbitration found to be valid

One of the parties in an ICC arbitration argued that the award should be annulled because non-arbitrators had participated in issuing the award, while only the tribunal issue the award. However, the Court of Cassation[163] refused this argument as the parties had agreed to the ICC Rules including the review by the Court of Arbitration of the award before rendering it. Additionally, the Court refused to consider the International Court of Arbitration a 'court' in the strict sense. The Court considered it to be an independent arbitration body that ensures the correct application of the rules of the ICC and does not interfere with the tribunal in issuing the award, but only supervises the arbitration procedures without having anything to do with the subject matter of the dispute or the claims of the parties. The Court added that the Court of Arbitration's review is only limited to ensuring the correctness of the award in its form to avoid refusing its enforcement in the country where it will be enforced; and even when the Court of Arbitration reviews the subject matter of the award, its opinion is not binding.

Extremely excessive and unfair compensation as grounds for the annulment of arbitral awards

The Court of Cassation has previously adopted a position that the wrong assessment of damages is not a ground for annulment because, in the eyes of the Court, the assessment of compensation is considered a question of fact and thus falls outside the scope of the action for annulment.[164] However, in 2020, the Court of Appeal[165] reviewed an annulment action for an arbitral award between an investor and the Libyan government rendered by a tribunal seated in Egypt. The tribunal in that case awarded about US$960 million to the investor as damages. In its judgment, the Court of Appeal found that it is necessary to find harm to order compensation. As such, compensation must be proportionate to the damage. If compensation is excessively not proportional with the damage, it would be considered extremely unjust and in violation of public policy (represented by the rules of equity and fairness). The Court held that an arbitral award may be annulled if it included – clearly and explicitly – unjust compensation, extremely unfair, extremely excessive in relation to the damage, or disproportionate and unreasoned. Similarly, in another judgment, the Court implied that it has jurisdiction to review the tribunal's assessment of compensation if it was extremely unfair, abusive or invented.[166]

Application of arbitration clauses between group of contracts

The Court of Appeal[167] recently confirmed the extension of the arbitration agreement to other contracts if the contracts are closely connected. The dispute concerned two contracts signed between an employer and another contractor. The Court found that one of the contracts was not independent; rather it was complementary, supplementary and closely connected with the first one. In addition, the Court found that both related to the same works. Thus, the Court found that the tribunal's refusal of a plea of non-jurisdiction made by one of the parties over the dispute related to one of the contracts (which did not include an arbitration agreement while the other one did) was correct.

The Court refuses jurisdiction on an award issued in a customary arbitration

Disputants in some Egyptian towns and villages frequently take recourse to elders or persons with high social status to settle their disputes. Sometimes this takes the form of an agreement to take recourse to a certain person to settle a particular dispute. Normally, the issues subject to dispute are matters related to rights in water, land and succession. In an interesting case, the parties brought their dispute concerning the right to use common property to a customary tribunal and the tribunal issued its decision. One of the parties challenged this decision before the Cairo Court of Appeal. However, the Court of Appeal refused the annulment action on the basis that the decision was not binding and final, and thus was not an arbitral award. The Court set out certain conditions for considering a decision an arbitral award: it must be final and obligatory; and any award whose enforcement depends on the consent of the parties will not be considered an arbitral award.[168]

The award does not have to include the arbitration agreement

The Court of Appeal[169] has held that the award issued does not have to include the arbitration agreement if the rationale behind this inclusion is achieved. In this case, one of the parties challenged an award for not including the arbitration agreement, which is a requirement for the validity of the arbitral award. The court found that the rationale behind requiring the award to include the arbitration agreement is to define the scope of the jurisdiction of the arbitral tribunal. The Court found that this could be achieved through looking at the documents of the case including the statement of claim, the hearings, and the requests of the parties, which would equally define the scope of the jurisdiction of the tribunal. It is worth noting that this judgement appears to contradict previous court judgements requiring the award to include the arbitration agreement.

Appointment of the presiding arbitrator in a different manner from that stated in the parties' agreement

The Court of Appeal[170] recently refused a claim made by one of the parties to annul an arbitration award because the presiding arbitrator was appointed by the arbitration institution in a manner different from that stated in the parties' agreement. The Court refused because none of the parties objected to the appointment during the proceedings.

Controversy on whether the applicable interest rate is a matter of public policy

The applicable interest rate remains an alive topic. The Egyptian Civil Code allows parties to agree on an interest rate, but only to a maximum of 7 per cent.[171] Absent agreement, the applicable rate shall be 4 per cent in civil matters and 5 per cent in commercial matters.[172] It has been a subject of debate whether the maximum rate pertains to public policy for the purposes of deciding on annulment of arbitration awards. In 2020, the Court of Appeal[173] did not consider it as such and considered application of higher interest rate a mere wrong application of the law and not related to public policy. It is worth noting that the Court of Appeal previously,[174] in denying that the maximum rate pertains to public policy, relied on the fact that the legislator already provides for higher rates in the Egyptian Central Bank Law in banking transactions and commercial law for commercial matters. In addition, it found that public policy is a matter that changes over time and upon change in circumstances. Thus, the maximum rate stipulated by the Civil Code, which was promulgated in 1948, is no longer necessitated by an essential public interest that justifies maintaining it as a public policy rule. [175]

However, the Court of Cassation recently confirmed that matters pertaining to the maximum interest rate are public policy matters. It thus held that the maximum rate is 5 per cent in commercial matters as per the Egyptian Civil Code, and denied the enforcement of any interest rates exceeding such cap while maintaining the enforceability of such interest rates up to the maximum rate. [176]

CRCICA in 2020

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 Court of Appeal considered CRCICA's status as a non-profit international organisation to be that of an international body enjoying judicial immunity in practising its role as an arbitration institution and thus it may not act as defendant in challenging its arbitration-related function.[177]

The total number of cases filed with CRCICA as at 30 September 2020 was 1,433 cases. In the third quarter of 2020, 16 new cases were filed, demonstrating a slight increase in new cases compared with the 15 new cases filed in the second quarter of 2019.[178]

CRCICA's caseload in the third quarter of 2020 involved disputes related to construction, tourism and hospitality, corporate restructuring, international sale of goods, renewable energy and mining. CRCICA has also highlighted that it has signed a total of 89 cooperation agreements with one new agreement in 2020, with China Guangzhou Arbitration Commission.[179]

Since it was established, CRCICA has adopted, with minor modifications, the arbitration rules of UNCITRAL. 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.

Recently, CRCICA has been responsive to the covid-19 outbreak and it saw an increase in the utilisation of virtual hearings, with four hearings held entirely via videoconference, one procedural hearing was held via teleconference and only two hearings were held with partial in-person attendance and partial remote attendance during the third quarter of 2020.[180]

The authors would like to thank Mr Moamen Elwan, Mr Hesham Elwakeel and Mr Mohammed A. El Sherif, associates at Matouk Bassiouny, for their support and research in the preparation of this chapter.

Notes

1 https://investmentpolicy.unctad.org/international-investment-agreements/countries/62/egypt?type=bits.
2 https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx.
3 *The Annulment Proceedings of Unión Fenosa Gas, SA v Arab Republic of Egypt* (ICSID Case No. ARB/14/4) was registered on 8 January 2019.
4 Article 1 of Arbitration Act No. 27/1994.
5 Article (138) of Tax Law No. 91 of 2005.
6 Article 64 of the New Customs Law No. 207 of 2020.
7 Articles (90) & (93) of Investment Law No. 72 of 2017.
8 Article (18) bis (a) of the Criminal Procedural Law.
9 See for example, article (137) of Tax Law No. 91 of 2005, article (119) of Customs Law No. 66 of 1963, article (131) of Central Bank Law No. 88 of 2003, article (94) of Investment Law No. 72 of 2017, and article (21) of Competition Law No. 3 of 2005.
10 Cairo Court of Appeal. Circuit (1), Challenge No. 64 of Jy 137, dated 9 December 2020.
11 Article (3) of Arbitration Act No. 27/1994.
12 Court of Cassation, Challenge No. 14126 of JY 88, dated 22 October 2019.
13 High Administrative Court, Appeal No. 3623 JY 56.
14 Supreme Constitutional Court, Appeal No. 47 JY 31, Hearing Session dated 15 January 2012.
15 Court of Cassation Judgement, Challenge No. 8777 of 87 JY, dated 7 March 2018.
16 Court of Cassation, Challenge No. 7470 JY 89, dated 23 February 2020.
17 Cairo Court of Appeal, Circuit (7), Challenge No. 28 of JY 135, dated 6 February 2019.
18 Court of Cassation, Challenge No. 14126 of JY 88, dated 22 October

2019.

19 Article 1 of Arbitration Act 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.

20 Article 1 of Arbitration Act No. 27/1994.

21 Article 10(1) of Arbitration Act No. 27/1994.

22 Cairo Court of Appeal Judgment, Circuit 91 – Commercial, Case No. 95/ 120 JY, session dated 27/4/2005.

23 Article 10(2) of Arbitration Act No. 27/1994.

24 Article 10(3) of Arbitration Act No. 27/1994.

25 Court of Cassation Judgment, Challenge No. 495/72 J, session dated 13 January 2004.

26 Cairo Court of Appeal, Challenge No. 3 of 136 JY, session dated 27 May 2019.

27 Cairo Court of Appeal, Circuit (1), Challenge No. 15 of JY 137, dated 8 July 2020.

28 Cairo Court of Appeal, Circuit (1), Challenge No. 39 of JY 136, dated 10 September 2020.

29 Article 11 of Arbitration Act 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).

30 Cairo Court of Appeal, Circuit (7), Judgement, Challenge No. 4 of 130 JY, session dated 3 September 2018. Also see, Cairo Court of Appeal, Circuit (91), Challenge No. 8 of 136, dated 9 April 2019, Cairo Court of Appeal, Circuit (91), Challenge No. 15 of JY 136, dated 14 May 2019 and Cairo Court of Appeal, Circuit (91), Challenge No. 17 of JY 134, dated 14 May 2019, Cairo Court of Appeal, Circuit (1), Challenges No. 40 & 50 of JY 136, dated 3 March 2020.

31 Article 12 of Arbitration Act No. 27/1994.

32 Fathy Waly, Arbitration Act in Theory and Practice, 2014, p. 162.

33 Professor Mahmoud El Briery, International Commercial Arbitration, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 59.

34 Cairo Court of Appeal, Circuit (50), Challenge No. 59 of 135 JY, session dated 28 November 2018.

35 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.

36 Cairo Court of Appeal, Circuit (8), Challenge No. 55 of 134 JY, session dated 16 September 2018 and Cairo Court of Appeal, Circuit (50), Challenge No. 59 of 135 JY, session dated 28 November 2018.

37 Article 1 of Law No. 9/1997, which amended some provisions of the Arbitration Act No. 27/1994 including the permissibility to arbitration in relation to administrative contracts after the approval of the competent minister.

38 Article 1 of the Arbitration Act as amended by Law No. 9/1997.

39 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.

40 Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, Lawsuit No. 11492/65 JY, session dated 7 May 2011.

41 CRCICA Arbitration Case No. 676/2010, award dated 21/08/2011, Journal of Arab Arbitration, Issue No. 17, pp. 263–264.

42 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.

43 id and also see Administrative Court Judgment No. 11492/65 JY, session dated 7 May 2011.

44 id and also see CRCICA Arbitration Case No. 382/2004, session dated 7 March 2006 referred to in Walid Mohamed Abbas, Arbitration in Administrative Disputes of Contractual Nature, 2010, Dar El Gama'a El Gadida, p, pp. 221–222.

45 id. 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.

46 id. 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, Arbitration in Administrative Disputes of Contractual Nature, 2010, Dar El Gama'a El Gadida, pp. 222–223; CRCICA Case No. 676/2010, award dated 21 August 2011, Journal of Arab Arbitration, Issue No. 17, p. 262.

47 id. 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, Arbitration Act in Theory and Practice, 2014, p. 138.

48 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.

49 Supreme Administrative Court-Unification of Principles Circuit, Challenge no. 8256 JY 56 dated March 5, 2016.

50 Supreme Constitutional Court, Appeal No. 1 JY 38, Hearing Session dated 6 May 2017.

51 Cairo Court of Appeal, Challenge no. 48 of 134 JY, dated 19 September 2018.

52 Court of Appeal, Circuit (1), Appeal No. 48 of JY 137, dated 9 December 2020.

53 Fathy Waly, Arbitration Act in Theory and Practice, 2014, p.775.

54 Fathy Waly, Arbitration Act in Theory and Practice, 2014, p.775.

55 Supreme Constitutional Court, Judgment dated 15 January 2012, the Malicorp decision, referred to in Fathy Waly, Arbitration Act in Theory and Practice, p. 775.

56 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.

57 Article 15 of the Arbitration Act No. 27/1994.

58 Article 7(1) of CRCICA Rules.

59 Article 21 of the Arbitration Act No. 27/1994; Article 14(1) of CRCICA Rules.

60 Cairo Court of Appeal, Circuit (7), Challenge No. 38 of 135 JY, session dated 3 September 2018.

61 Cairo Court of Appeal, Challenge no. 71 of 131 JY, dated 4 March 2015.

62 Court of Appeal, Circuit (50), Challenge No 3 of JY 136, dated 30 January 2019.

63 Court of Cassation, Challenge no. 12459 of 85 JY, dated 1 June 2016.

64 Gary B Born, International Arbitration: Law and Practice, 2012, p. 142.

65 Article 21 of Arbitration Act No. 27/1994.
66 Article 14(2) of CRCICA Rules.
67 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.
68 Cairo Court of Appeal, Circuit 7 Commercial, Case No. 32/129 JY, session dated 5/3/2013, referred to in Professor Fathy Waly, Arbitration Act in Theory and Practice, 2014, p. 359.
69 Cairo Court of Cassation, Case No. 2047 of 83 JY Session dated 26/05/2015.
70 Articles 18 and 19 of the Arbitration Act No. 27 of 1994.
71 Article 19(1) of the Arbitration Act No. 27/1994; Court of Cassation, Challenge No. 9568/79 JY, session dated 14 March 2011.
72 Cairo Court of Appeal, Circuit (3), Challenge No. 98 of JY 135, dated 26 November 2020.
73 Article 13(6) of CRCICA Rules.
74 Court of Appeal, Circuit (62), challenge No. 73 of 134, session dated 4 April 2018.
75 Cairo Court of Appeal, Circuit (1), Challenge No. 64 of JY 137, dated 9 December 2020.
76 Court of Appeal, Circuit (50), Challenge No 3 of JY 133, dated 30 January 2019. In 2020, this judgement was challenged before the Court of Cassation, and it reversed the judgement based on lack of standing of one of the parties, while confirming that the Court of Appeal had jurisdiction over the request to remove an arbitrator. The Court also stated that an arbitrator may also be removed in case that arbitrator does not comply with the rules of conduct that ought to be followed by arbitrators. Court of Cassation, Challenge No. 6466/89 JY, session dated 14 January 2020.
77 Cairo Court of Appeal, Challenge no.37 of 131 JY, dated 4 March 2015.
78 Article 25 of the Arbitration Act No. 27 of 1994.
79 Court of Cassation, Challenge No. 547 of 51 JY, session dated 23 December 1991; Court of Cassation, Challenge No. 1259/49 JY, session dated 13 June 1983.
80 Court of Cassation Appeal No. 145 of 74 JY, session dated 22 March 2011.
81 Prof Fathi Wali, Arbitration in the Domestic and International Commercial Disputes, 2014, p. 488.
82 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.
83 Article 46 of Arbitration Act No. 27/1994.
84 Cairo Court of Appeal, Circuit (91), Challenge No. 33 of 135 JY, session dated 12 August 2018.
85 Cairo Court of Appeal, Circuit (7), Challenge No. 20 of 135 JY, session dated 6 August 2018.
86 Cairo Court of Appeal, Circuit (18), Challenge No. 91 of 133 JY, session dated 13 May 2019.
87 Article 14 of Arbitration Act No. 27/1994.
88 Article 37 of Arbitration Act No. 27/1994. More examples are set out in articles (9), (17), (19), (45), (20) and (24) of the Arbitration Act.
89 Article 45(1) of the Arbitration Act No. 27/1994; Cairo Court of Appeal, Circuit 91 Commercial, Case No. 55/2005 JY, session dated 27 February 2005.
90 Professor Mahmoud El Briery, International Commercial Arbitration, Fourth Edition 2010, Dar El Nahda El Arabi'a, pp. 516–517.
91 Article 45(2) of the Arbitration Act No. 27/1994.
92 Professor Mahmoud El Briery, International Commercial Arbitration, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 525.
93 Cairo Court of Appeal, Circuit (63), Challenge No. 1 of JY 135, dated 6 February 2019.
94 Article 8 of the Arbitration Act No. 27/1994; Court of Cassation, Challenge No. 3869/78 JY, session dated 23 April 2009.
95 Court of Cassation, Challenge No. 19574 of JY 88, dated 6 July 2020
96 Cairo Court of Appeal, Circuit (1), Appeal No. 1 of JY 137.
97 Court of Cassation, Challenge No. 19574 of JY 88, Session dated 6 July 2020
98 Cairo Court of Appeal, Circuit (18), Challenge No. 27 of 135 JY, dated 13 May 2019.
99 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.
100 Court of Cassation, Challenge No. 10473 of JY 78, Session dated 16 November 2016. See Also, Cairo Court of Appeal, Circuit (1), Challenge 37 of JY 136, dated 3 February 2020.
101 Cairo Court of Appeal, Circuit (3), Challenge No. 56 of JY 135, dated 24 June 2020.
102 Cairo Court of Appeal, Circuit (1), Challenge No. 77 of JY 136, dated 4 June 2020.
103 Supreme Constitutional Court, Challenge No. 95 of 20 JY, session dated 11 May 2003.
104 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.
105 Court of Cassation, Challenge No. 11713 of JY 89, dated 27 February 2020.
106 Cairo Court of Appeal Judgment, Case No. 11, 12, 14/132 JY, Session dated 6 January 2016, the *Bassem Youssef* case.
107 Court of Cassation, Challenge no. 2698 of 86 JY, dated 13 March 2018.
108 Court of Cassation, Challenge No. 10132 of 78 JY, session dated 11 May 2010.
109 Court of Appeal Judgment, Case No. 2 of 132 JY, Session dated 3 February 2016.
110 Court of Cassation, Challenge No. 4715 and 4868 of JY 86, hearing session dated 18 January 2017.
111 Cairo Court of Appeal, Circuit (8), Challenge No. 48 of 134 JY, session dated 19 September 2018.
112 Cairo Court of Appeal, Challenge No. 39 of 130 JY, session dated 5 February 2014.
113 Court of Cassation, Challenge No. 6065 of 84 JY, session dated 4 November 2015.
114 Cairo Court of Appeal, Circuit (62), Challenge No. 39 of 130 JY, session dated 6 August 2018.
115 Court of Cassation, Challenge No. 18615 of JY 88, dated 10 December 2019.
116 Cairo Court of Appeal, Circuit (50), Application for Interpretation No. 310 of JY 135, dated 25 March 2019.
117 Cairo Court of Appeal, Circuit (91), Challenge No. 61 of JY 135, dated 14 May 2019.
118 Court of Cassation, Challenge No. 11713 JY 89, dated 27 February 2020. See also: Court of Cassation, Challenge No. 18309 JY 89, dated 27 October 2020. See also, Cairo Court of Appeal, Circuit (1), Challenge No. 7 of JY 137, dated 8 September 2020.
119 Court of Cassation, Challenge no. 5162 of 79 JY, dated 21 January 2016.
120 Court of Cassation, Challenge no. 12459 of 85 JY, dated 1 June 2016.
121 Article 55 of Arbitration Act No. 27/1994.
122 Article 56 of Arbitration Act No. 27/1994.
123 Article 58 of Arbitration Act No. 27/1994.
124 Some jurists take the view that the Arbitration Act and the Egyptian Civil and Commercial Procedures Law No. 131/1948 (articles 296–301) also apply.

125 Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
126 Court of Cassation, Challenge No. 282 JY 89, dated 9 October 2020. See also: Court of Cassation Judgment, Case No. 5000/78 JY, Session dated 6 April 2015.
127 Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
128 Court of Cassation, Challenge No. 282 of JY 89, dated 9 January 2020.
129 Cairo Court of Appeal, Circuit (3), Challenge No. 15 of JY 136, dated 31 December 2020.
130 Cairo Court of Appeal. Circuit (1), Challenge No. 15 of JY 137, dated 4 November 2020.
131 Court of Cassation, Challenge No. 7088 of 78 JY, dated 11 January 2016.
132 Court of Appeal, Circuit (50), Challenge No. 3 of 133 JY, session dated 28 August 2016.
133 Cairo Court of Appeal, Circuit (50), Challenge No. 17 of 135 JY, session dated 31 December 2018.
134 Cairo Court of Appeal, Circuit (7), Challenge No. 44 of 134 JY, session dated 9 May 2018.
135 Article (24) of the Arbitration Act states that: '1. Both parties to the arbitration may agree to confer upon the arbitral tribunal the power to order, upon request of either party, interim or conservatory measures considered necessary in respect of the subject matter of the dispute and to require any party to provide appropriate security to cover the costs of the ordered measure.
2. If the party against whom the order was issued fails to execute it, the arbitral tribunal, upon the request of the other party, may authorize the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the court specified in Article 9 of this Law for rendering an execution order.'
136 Article 66 and article 67of the Sports Law No.71 of 2017.
137 Article 70 of the Sports Law No. 71 of 2017.
138 Article (38) of the Egyptian Sports Arbitration Centre Internal Regulations issued by the Egyptian Olympic Committee Decree No. 88 of 2017
139 The President of the Egyptian Olympics Committee decision No. 1 of 2020.
140 The President of the Egyptian Olympics Committee decision No. 5 of 2020.
141 The President of the Egyptian Olympics Committee decision No. 26 of 2019 (Issued in 13/07/2020).
142 The President of the Egyptian Olympics Committee decision No. 30 of 2019 (Issued in 03/09/2020).
143 The President of the Egyptian Olympics Committee decision No. 12 of 2019 (Issued In 22/05/2020).
144 The Presidential Decree No. 149 of 2020 regarding the approval of the Headquarters Agreement Concluded between Egypt and the Confederation of African Football (CAF).
145 Cairo Court of Appeal, Circuit (7), Challenge No. 40 of 135 JY, session dated 5 December 2018, and Cairo Court of Appeal, Circuit (62), Challenge No. 22 of 135 JY, session dated 2 July 2018.
146 Cairo Court of Appeal, Circuit (8), Challenge No. 45 JY 135, session dated 20 January 2019. See also, Cairo Court of Appeal, Circuit (7), Challenge No. 73 of JY 135, dated 4 May 2019.
147 Cairo Court of Appeal, Circuit (50), Challenge No. 47 of 135 JY, session dated 25 November 2018.
148 Cairo Court of Appeal, Circuit (91), Challenge No. 9 of JY 136, session dated 9 April 2019. Also, Cairo Court of Appeal, Circuit (50), Challenge No. 46 of JY 135, dated 27 January 2019.
Article (38) of the Egyptian Sports Arbitration Centre Internal Regulations issued by the Egyptian Olympic Committee Decree No. 88 of 2017.
149 Cairo Court of Appeal, Circuit (7), Challenge No. 40 of 135 JY, session dated 5 December 2018, and Cairo Court of Appeal, Circuit (62), Challenge No. 22 of 135 JY, session dated 2 July 2018.
150 The Supreme Constitutional Court Judgement, Challenge No. 130 of 34 JY, session dated 13 January 2018.
151 Court of Cassation, Challenge No. 1458 of JY 89, dated, 24 December 2019.
152 Article (6) of Prime Minister decree No. 1062 of 2019 reorganising the rules governing the Supreme Committee for Advising on International Arbitration Cases
153 Article 64 of the New Customs Law No. 207 of 2020.
154 Article 57 of the Old Customs Law No. 66 of 1963.
155 Article 64 of the New Customs Law No. 207 of 2020.
156 Article 57 of the Old Customs Law No. 66 of 1963.
157 The Minister of Trade and Industry Decree No. 354 of 2020 regarding to restructuring of the Contact Point Body for Protecting Intellectual Property Rights Affairs.
158 Court of Cassation, Challenge No. 18309 JY 89, dated 27 October 2020.
159 It states 'In the absence of an applicable provision of law, the Judge shall rule according to custom; and in the absence of custom, in accordance with the principles of Islamic Law. In the absence of such principles, the Judge shall apply the principles of natural law and the rules of equity.'
160 Cairo Court of Appeal, Circuit (1), Challenge No. 48 of JY 137, dated 9 December 2020.
161 Court of Cassation, Challenge No. 18309 JY 89, dated 27 October 2020.
162
163 Court of Cassation, Challenge No. 18309 JY 89, dated 27 October 2020.
Court of Cassation, Challenge No. 3449 of JY 78, dated 11 February 2020.
164 Court of Cassation, Challenge No. 3299 of JY 86, dated 13 March 2018. See also, Court of Cassation, Challenge No. 414 of JY 71, dated 8 January 2009.
165 Cairo Court of Appeal, Circuit (1), Appeal No. 39 of JY 130, dated 3 June 2020
166 Cairo Court of Appeal, Circuit (1), Challenge No. 61 of JY 134, dated 12 August 2020.
167 Cairo Court of Appeal, Circuit (1), Challenge No. 61 of JY 134, dated 12 August 2020.
168 Cairo Court of Appeal, Circuit (1), Challenge No. 5 of JY 137, dated 8 September 2020
169 Cairo Court of Appeal, Circuit (1), Challenge No. 61 of JY 134, dated 12 August 2020.
170 Cairo Court of Appeal, Circuit (1), Challenge No. 10 of JY 137, dated 10 August 2020.
171 Article (227) of the Egyptian Civil Code.
172 Article (226) of the Egyptian Civil Code.
173 Cairo Court of Appeal, Circuit (1), Challenge No. 48 of JY 137, dated 9 December 2020.
174 Cairo Court of Appeal, Circuit (1), Challenge No. 48 of JY 137, dated 9 December 2020.
175 See also Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
176 See Court of Cassation, Challenge No. 282 JY 89, dated 9 October 2020
177 Cairo Court of Appeal, Circuit (7), Challenge No. 38 of 135 JY, session dated 3 September 2018.

178 https://crcica.org/news/2020/09/30/crcica-recent-caseload-3rd-quarter-2020-virtual-hearings-at-the-crcica/
179 https://crcica.org/news/category/crcica-newsletter-2-2020/cooperation-agreements-crcica-newsletter-2-2020/
180 https://crcica.org/news/2020/09/30/crcica-recent-caseload-3rd-quarter-2020-virtual-hearings-at-the-crcica/

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John Matouk is the co-founder of Matouk Bassiouny and heads the firm's dispute resolution and commercial groups. A New York-qualified lawyer and dual national, John has been practising in Cairo for over 15 years and is consistently recognised in industry publications as a leading lawyer in Egypt. John is also an associate professor of practice in the Department of Law at the School of Public Affairs and Global Policy in the American University in Cairo. John's disputes work encompasses a large and varied practice across the Middle East and North Africa. His recent experience includes representing parties in high-value complex commercial arbitrations, oil and gas disputes, and investment disputes.

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Matouk Bassiouny & Hennawy is a full-service independent law firm based in Cairo, Egypt. We specialise in advising multinationals, corporations, financial institutions and governmental entities on all legal aspects of investing and business in Egypt and the region. Our team of 16 partners and over 170 fee-earners are trained both locally and internationally and are fully conversant in English, Arabic and French.

The firm prides itself on its in-depth understanding of cross-border cultural and business practices and on providing a commercial problem-solving approach to its legal services.

Headed by F John Matouk – co-founder of the firm – the dispute resolution group consists of three partners, one of counsel, seven counsels and 12 senior associates and 42 fee-earners. Grounded in both common and civil law jurisdictions, our team provides our clients with comprehensive dispute resolution services in both English and Arabic. Our primary goal is to effectively manage risk and resolve disputes pursuant to clients' strategic interests – whether through amicable negotiation, litigation or arbitration.

Matouk Bassiouny & Hennawy's arbitration team headed by Dr Amr A Abbas is active in Cairo Regional Centre for International Commercial Arbitration (CRCICA), the International Chamber of Commerce (ICC), LCIA and the International Centre for the Settlement of Investment Disputes (ICSID) arbitral proceedings. The litigation team is active in Egyptian civil, commercial, criminal, administrative and labour courts. We represent clients in high-value, high-profile disputes in a diverse range of sectors including automotive, construction, heavy industry, manufacturing, oil and gas, pharmaceutical, real estate, telecommunications and tourism.

Lebanon

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In summary

Lebanon is an arbitration-friendly jurisdiction whose arbitration legislation is modern and embraces well-established principles of international arbitration. The main advantages of arbitration in Lebanon are similar to those prevalent in other arbitration-friendly jurisdictions. Investors and business actors in Lebanon increasingly include arbitration clauses in their agreements to benefit from the ability to choose their arbitrators, the speed and flexibility that is offered by arbitration, and the confidential nature of arbitral proceedings.
In addition, the recent legislative developments in Lebanon, regulating public–private partnerships (PPPs) as well as oil and gas investments in Lebanon, further promote the use of arbitration as a primary mechanism for the resolution of disputes with the Lebanese state. The latter is also part of the One Belt One Road Initiative, which raises interest in the Lebanon-China BIT.

Discussion points

- Overview of the arbitration legal framework.
- Recognition and enforcement of domestic, international and foreign arbitral awards in Lebanon.
- In focus: the international and national legal framework for investments in Lebanon.
- Recent developments in international arbitration.

Referenced in this article

- Lebanese Code of Civil Procedure enacted by Decree Law 90/83, with amendments resulting from Law No. 440, dated 29 July 2002.
- Lebanese Code of Obligations and Contracts.
- Lebanese Code of Commerce.
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, 10 June 1958.
- Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Washington Convention, 18 March 1965.
- Law No. 48 'Regulating Public Private Partnerships'.
- Lebanese Court of Cassation, No. 14/2014 dated 25 January 2014.
- Court of Cassation, First Chamber, Decision 56, 24/10/1958.
- Lebanese Arbitration Centre of the Chamber of Commerce and Industry and Agriculture of Beirut and Mount Lebanon.
- The Chartered Institute of Arbitrators Lebanon Branch.

Arbitration law

The provisions of the Lebanese Arbitration Law are based on the old French arbitration law (Decrees No. 80-354 of 14 May 1980 and No. 81-500 of 12 May 1981).

The Lebanese Code of Civil Procedure (LCCP) enacted by Decree Law 90/83, with amendments resulting from Law No. 440 dated 29 July 2002, devotes its second chapter to arbitration. The LCCP makes a distinction between domestic arbitration[1] and international arbitration,[2] the latter being governed by more liberal rules. The main differences between domestic and international arbitration concern the criteria for the validity of arbitration clauses, which are subject to stricter formal requirements in domestic arbitration. Other differences include availability of recourses to challenging or setting aside an award, which is broader in domestic arbitration than in international arbitration.

Pursuant to article 809 of the LCCP, an arbitration is deemed international 'when it involves the interests of international trade'. These interests are defined as involving movements of goods or funds beyond borders. In other words, if the operation that is the subject matter of the dispute is linked to more than one country, the arbitration is international.[3] Factors that are not determinative when assessing whether an arbitration is international include the nationality of the parties or arbitrators, the place of the arbitration, the residence of the parties or the place where the contract was concluded. Furthermore, the application of a foreign law or procedure will have no effect on the definition of an arbitration as international. [4]

Regarding international arbitrations seated in Lebanon, article 812 of the LCCP provides that where an international arbitration is governed by Lebanese law, unless agreed otherwise, provisions relating to domestic arbitration apply. [5]

Lebanon is a signatory to the New York Convention with a reservation that the government of Lebanon will apply the convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state. Lebanon also ratified, among others, the Washington Convention on 26 March 2003.

Arbitration institutions based in Lebanon

The relevant arbitral institution based in Lebanon is the Lebanese Arbitration Centre of the Chamber of Commerce and Industry and Agriculture of Beirut and Mount Lebanon,[6] founded in 1995, which has its own Rules of Conciliation and Arbitration. The centre is an independent arbitration institution that administers domestic and international arbitration and also offers the possibility of resolving disputes through optional conciliation.

The Lebanese National Committee of the International Chamber of Commerce of Paris (ICC), although not involved in the administration of arbitration cases, is often invited by the ICC Secretariat to propose candidates for appointment as arbitrators.

The Chartered Institute of Arbitrators Lebanon Branch[7] principally serves as a forum for education and training in alternative

dispute resolution (ADR) and may sometimes act as an appointing authority.

Overview of the arbitration legal framework in Lebanon

Arbitration agreements

Formal requirements for an enforceable agreement

Unlike in domestic arbitrations, where the written form of the arbitration agreement is required as a condition of validity (article 763 LCCP), there is no particular requirement for an international arbitration agreement to be valid other than the parties having consented to it. Article 814(2) of the LCCP, however, provides that an agreement in writing is required to obtain enforcement of the award rendered in international disputes.

Insofar as administrative contracts are concerned, one important formal requirement concerns contracts made with the Lebanese state or with other state entities. In domestic administrative contracts, a state or state entity can enter into an arbitration agreement subject to prior authorisation by the Council of Ministers upon a recommendation of either the relevant minister or the relevant regulatory authority. In international administrative contracts, while the law is silent on the necessity of obtaining a prior authorisation from the Council of Ministers, it is recommended to systematically obtain such authorisation in respect to arbitration clauses inserted in such agreements.

Separability of the arbitration agreement

The principle of separability of the arbitration agreement from the main contract is a well established principle in Lebanon and is recognised by Lebanese courts. [8]

Arbitrability of disputes

Under Lebanese law, the following types of disputes are not arbitrable and are subject to the exclusive jurisdiction of the Lebanese national courts:

- Questions of personal status (nationality, age, adoption) and questions of social status (divorce and marriage). However, article 1037 of the Code of Obligations and Contracts allows for an exception regarding financial compensation resulting from personal status disputes. In this case, arbitration is confined to the compensation sought.
- Non-negotiable personal rights such as the right to physical integrity, human dignity, privacy, the right to food, among others. Similar to the questions of personal status, however, any dispute relating to monetary compensation associated with those personal rights is arbitrable.
- Rights of succession. Arbitration over acquired hereditary rights is possible where the value of such rights is determined.
- Questions of public policy, including all matters considered by law as guaranteeing social, economic or political interest.
- Questions of insolvency. As provided by article 490 of the Code of Commerce, state courts have exclusive jurisdiction in insolvency matters.
- Questions of employment contracts and social security. These issues fall under the exclusive competence of the local Labour Arbitration Court.
- Contracts for commercial representation. Article 5 of Decree Law No. 34, dated 5 August 1967, provides for the exclusive jurisdiction of Lebanese courts in respect of disputes arising out of commercial representation agreements. However, it should be noted that in recent years the Lebanese courts have adopted a more permissible stance towards the arbitrability of such disputes in specific circumstances.[9]

Arbitrators: Appointment and challenges

Appointment of arbitrators

Lebanese law does not place any limitation on the choice of the arbitrator, but an arbitrator must be a natural person, have full capacity to exercise his or her civil rights and must not be insolvent.[10] There is similarly no limitation on the nationality of the persons who can act as arbitrators where the seat of arbitration is in Lebanon or where hearings are held in Lebanon. In domestic arbitration, the arbitration clause should include the name or characteristics of the appointed arbitrators or the appointment mechanism.[11]

Parties are free to agree on the number of arbitrators. The parties may designate arbitrators in their arbitration agreement or provide for a mechanism for their designation directly or by reference to arbitration rules. The law requires the arbitration tribunal to be made up of an odd number. In the absence of agreement between the parties, the most diligent party may petition the president of the competent Court of First Instance to make such an appointment.[12]

Challenge of arbitrators

Arbitrators are required to act independently and impartially, failing which they may be subject to challenge pursuant to article 770 of the LCCP.

Under article 770 of the LCCP, arbitrators may be challenged on the same grounds as judges for reasons that arise or become known after their appointment and which are exclusively listed in article 120 of the LCCP. Such grounds include:

- if an arbitrator was a legal representative or an agent of one of the parties or one of the parties appointed him or her as an arbitrator in a previous case;[13]
- if he or she previously provided a legal opinion with respect to the same case even if this occurred before being appointed as an arbitrator;[14] and
- if there is sympathy or animosity between an arbitrator and one of the parties which could prevent the arbitrator from ruling impartially. [15]

Moreover, an arbitrator may be liable for his or her gross fault as is the case for local judges pursuant to article 741 of the LCCP.

In domestic arbitration, unless provided otherwise by the arbitration rules in institutional arbitration, challenges against arbitrators should be brought before the Court of First Instance where the agreed place of arbitration is located. Failing this, the challenge can be brought before the Beirut Court of First Instance within 15 days from the date the challenging party becoming aware of the arbitrator's appointment or within 15 days from the date that the reason for the challenge becomes apparent following the appointment of the arbitrator (article 770 LCCP). The court's decision on the challenge is final. In international arbitration there are no express provisions regarding the challenge of arbitrators, which in most instances will be subject to the arbitration rules of the arbitral institution agreed upon by the parties.

The parties' representatives

In domestic arbitration, where the Lebanese rules of procedure apply, parties must be represented by counsel for claims exceeding 1 million Lebanese pounds or for which the amount is not determined, as well as in cases where the law requires representation by counsel (article 378 LCCP).

In international arbitration, there are no express provisions for mandatory legal representation. Consequently, unless provided otherwise, the parties are free to decide whether they wish to be represented by legal counsel with no condition of nationality.

Intervention of domestic courts

Domestic courts' support to the arbitral procedure

The President of the Court of First Instance may act as the judge in support of arbitration if required. Such support includes the appointment of arbitrators where the parties have failed to designate an arbitrator or where designation of an arbitrator is not carried out by the relevant arbitral institution. The Lebanese legislation further provides for the assistance of courts in the absence of an agreed set of institutional rules containing a default mechanism for the constitution of an arbitral tribunal or a mechanism provided for in the arbitration clause itself.[16]

Intervention of domestic courts in cases of forgery allegations

Domestic courts are competent to rule on allegations of forgery. Where a party alleges forgery of one or more documents in the course of a domestic arbitration, the arbitrator shall suspend the proceedings pending the competent court's decision on the issue of forgery.[17] According to the law, such principle also applies in international arbitration, unless there is an agreement to the contrary. [18]

Domestic courts and provisional relief

Under articles 589–593 of the LCCP, the Lebanese courts can grant provisional relief in support of arbitration when the arbitral tribunal is not yet constituted. In this case, an application for interim measures should be filed before the competent judge of summary proceedings, which can be done on an ex parte basis.

After the constitution of the arbitral tribunal, subsequent requests for interim measures must generally be submitted directly to the arbitral tribunal, which has the power to order any interim and conservatory relief deemed appropriate in accordance with articles 789 and 859 of the LCCP. The arbitrators may also request the local judge to sanction witnesses who fail to appear at a hearing or those who refuse to testify.[19]

Finally, a party may seek an interim attachment order from the competent court to freeze the assets of the losing party pending the enforcement of an arbitral award.

Recognition and enforcement of domestic, international and foreign arbitral awards in Lebanon

Recognition and enforcement procedure

The recognition and enforcement of an award in Lebanon is made through ex parte proceedings and a legitimate interest is required for a court to accept jurisdiction over the recognition and enforcement of foreign awards (article 795 LCCP).

The court that is competent to grant exequatur depends on the nature of dispute. In civil and commercial matters, exequatur requests are filed before the President of the Court of First Instance, either at the place where the award was made, if a domestic award was rendered in Lebanon, or in Beirut if the award was rendered outside Lebanon. In administrative matters, exequatur requests should be filed before the President of the Council of State (articles 770, 775,793, 795 and 810 LCCP).

The exequatur application must contain the arbitral award and the arbitration agreement or a certified copy of these documents, irrespective if the award is domestic or foreign. For international or foreign awards, the judge will principally verify the existence of the award and that recognition of the award does not manifestly violate Lebanese international public policy (articles 814 and 815 LCCP).

Recourse against a decision on exequatur

A court decision granting recognition or enforcement of a domestic or international award rendered in Lebanon is not subject to any recourse (articles 805 and 819 LCCP).

However, a court decision denying recognition or enforcement of a domestic, foreign or international award rendered in Lebanon is subject to appeal (articles 806 and 816 LCCP).

Challenge of arbitral awards

In domestic arbitration, unless agreed otherwise by the parties, an arbitral award can be subject to appeal.[20] The arbitral award can also be subject to the setting-aside action.[21] When an arbitration is conducted *ex aequo et bono*, an arbitral award cannot be appealed before the Court of Cassation unless the Court of Appeal annulled the arbitral award. In this case, the grounds for appeal before the Court of Cassation are limited to the annulment grounds as set out here below.

However, in international arbitration, the appeal is not an available recourse and the arbitral award can only be subject to the setting-aside action.[22] In both domestic and international arbitration, the setting aside action is of public order and cannot be excluded by the parties' agreement.

The grounds for annulling awards in domestic arbitration are set out under article 800 LCCP as follows:

- where the award has been rendered without an arbitration agreement or on the basis of an agreement that is null or void due to the expiry of the relevant time limit for rendering the award;
- where the award has been rendered by arbitrators not appointed in accordance with the law;
- where the arbitrators ruled without complying with the mission conferred upon them;
- where the award has been delivered without due respect of rights of defence;
- where the award does not contain the mandatory requirements related to the relief sought by the parties, along with the grounds and means substantiating such relief; the name of the arbitrators, the *ratio decidendi* of the award, the date of the award, and the signature of the arbitrators; and
- where the award has violated a rule of public policy.

The grounds for annulling awards in international arbitration are set out under article 819 LCCP as follows:

- where the award has been rendered without an arbitration agreement or on the basis of an agreement that is null or void due to the expiry of the relevant time limit for rendering the award;
- where the award has been rendered by arbitrators not appointed in accordance with the law;
- where the arbitrators ruled without complying with the mission conferred upon them;
- where the award has been delivered without due respect of rights of defence; and
- where the award has violated a rule of international public policy.

In focus: the international and national legal framework for investments in Lebanon

International investment agreements and other treaties with investment provisions

Private actors investing in Lebanon benefit from the protection of a number of international investment agreements and from other treaties with investment provisions, which provide for recourse to arbitration in case of dispute. These include 52 bilateral investment

treaties (BITs) signed by Lebanon, 43 of which are in force.

In addition to being a signatory to the 1965 ICSID Convention[23] and the 1958 New York Convention, Lebanon has also signed other significant treaties, including:

- the Unified Agreement for the Investment of Arab Capital in the Arab States (Arab Investment Agreement 1980);[24]
- the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Investment Agreement, 1981);[25]
- the Euro-Mediterranean Interim Association Agreement (EC-Lebanon Association Agreement, 2002);[26]
- the Free Trade Agreement between the European Free Trade Association and Lebanon (EFTA-Lebanon FTA, 2004);[27] and
- the Trade and Investment Framework Agreement between the United States and Lebanon (Lebanon-US TIFA, 2006).[28]

Lebanon has also ratified various regional and multilateral agreements (eg, intergovernmental agreements, guidelines and principles), namely:

- the Islamic Corporation for the Insurance of Investment and Export Credit (ICIEC, 1992);[29]
- the Inter-Arab Investment Guarantee Corporation of 1971;
- the UN Code of Conduct on Transnational Corporations of 1983;
- the World Bank Investment Guidelines of 1992;
- the ILO Tripartite Declaration on Multinational Enterprises;[30] and
- the UN Guiding Principles on Business and Human Rights of 2011.

Further, Lebanon is a party to the convention establishing the Multilateral Investment Guarantee Agency (MIGA). Under the treaty, Lebanese investors may acquire political risk insurance from MIGA in respect of investments made in certain developing states. However, this does not apply to all investments, as certain thresholds must be met (eg, investments must be medium to long term in nature).

The Lebanese Investment Law[31]

Lebanon has also enacted a national investment law aiming at promoting and encouraging investments in the country. The Lebanese Investment Law, enacted in 2001, covers investments in the agriculture, agro-food, tourism, information technology, telecommunication, technology and media sectors.[32] It applies to investors willing to benefit from its provisions.[33] Lebanon's pro-investment arbitration position could also be inferred from several factors. In addition of the Lebanese courts being generally supportive and respectful of arbitration proceedings, all the Lebanese BITs contain arbitration clauses, and the Lebanese government is open to arbitration in general as governmental entities tend to include arbitration clauses in the contracts they sign with investors.

The Lebanese Investment Law further establishes a public authority named the Investment Development Authority of Lebanon (IDAL), a legal entity enjoying administrative and financial autonomy, administered by a board of directors and reporting to the Lebanese Prime Minister.

In case of a dispute between IDAL and a foreign or national investor,[34] the parties shall first attempt to resolve their dispute amicably and, in the absence of amicable resolution of the dispute, the parties to such dispute shall recourse to arbitration.[35] Under the Investment Law, a number of features pertaining to arbitration must be agreed upon in advance.

Lebanon has been the subject of a few investor-state investment disputes.[36] However, as the country is currently facing an unprecedented economic and financial crisis, this will likely lead to a significant increase in investment-related disputes.

Recent developments in international arbitration in Lebanon

Arbitration under the new Public Private Partnerships law

On 7 September 2017, Lebanon enacted Law No. 48 'Regulating Public Private Partnerships' (the PPP Law). One of the most significant innovations of this law is that it expressly allows recourse to arbitration in disputes involving state entities.

This law was enacted ahead of the CEDRE Conference[37] (also known as Paris IV) held in Paris on 6 April 2018, in which several countries have pledged over US$11 billion to support Lebanon in developing its economy through a comprehensive roadmap providing for several reforms and for investments in infrastructure projects. [38]

The PPP Law provides for an improved model for infrastructure projects involving public and private entities as compared to the general framework that has been governing public procurement long before the enactment of the PPP law.

The provisions of the PPP law comprise, among others, those related to its scope of application, the relevant authorities involved and the PPP project agreement to be entered into between the private and the public entity.

As defined under the PPP law, the PPP project agreement is the main legal instrument regulating the PPP project, together with its annexes undertakings and related guarantees. The PPP law further provides for a number of mandatory provisions that need to be included in a PPP project agreement. Among these mandatory provisions, we note the provision related to dispute settlement mechanism, which can include mediation and domestic or international arbitration. [39]

Although the PPP Law provides that arbitration is an acceptable method of dispute resolution, to the extent that PPP project agreement may be characterised as an administrative contract, it is recommended that private parties ensure that the specific arbitration clause contained in their agreement is pre-approved by the relevant administrative authorities pursuant to article 762 LCCP.

This pre-approval acts as a confirmation of certainty until this issue is definitively resolved and to avoid any procedural hurdles in the future.

Arbitration in the Lebanese oil and gas legislation

Following prospects of abundant gas reserves in the Eastern Mediterranean basin, Lebanon has been actively engaged in setting out the legal framework for petroleum development in offshore Lebanon. Despite some delays caused by political deadlocks, Lebanon was able to launch its first licensing round for offshore petroleum development, which culminated in early 2018 in the award of two exploration and production agreements (EPA) based on the model EPA issued by virtue of Decree No. 43 of 19 January 2017. Both EPAs were awarded to the same consortium comprised of three international companies for the offshore blocks 1 and 9 (out of a total of 10 offshore blocks).

The model EPA provides for an entire article on arbitration, article 38. Such article was reflected as is in the two awarded EPAs.

Article 38 of the model EPA provides that the parties shall submit any dispute, controversy or claim arising out of or relating to the EPA to binding arbitration, subject to the other provisions of the EPA, and if the dispute, controversy, or claim cannot be

resolved during a negotiation period specified in previous articles.

The salient features of the arbitration provisions under article 38 of the model EPA are as follows:

> *a) The dispute shall be settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce, hereinafter referred to as the 'ICC Rules of Arbitration';*
> *b) The place of any arbitration pursuant to these provisions shall be Paris, France;*
> *c) The law applicable to the merits of the dispute shall be Lebanese law;*
> *d) The language of the arbitration shall be English, and the English version of this EPA and the decree no 10389/2013 (PAR) may be used in such arbitration to the extent there is no conflict with the Arabic version;*
> *e) The arbitral proceedings shall be confidential; and*
> *f) The arbitral panel shall be composed of three (3) arbitrators to be appointed in accordance with the ICC Rules of Arbitration, provided that, upon mutual agreement of both Parties, the arbitration may be conducted by a sole arbitrator appointed pursuant to the ICC Rules of Arbitration.*

Article 38 further provides that the arbitral awards rendered in such arbitration are binding on the parties and it includes a waiver of sovereign immunity from jurisdiction and enforcement, as follows:

> *a) In respect of proceedings to enforce any such award or decision including, without limitation, immunity from service of process and form the jurisdiction of any court; and*
> *b) In respect of immunity from the execution of any such award or decision against any property held for a commercial purpose.*

The model EPA also contains a specific procedure for the resolution of disputes by a sole expert as outlined in article 39. This mechanism is particularly relevant in the context of technical disputes, where advanced expertise and understanding is required. The sole expert is defined as 'an independent and impartial physical or legal person of international standing with relevant qualifications and experience' pursuant to article 39 of the model EPA. Further, the expert may not have the same nationality of any of the parties and must be appointed by their mutual agreement. Such expert shall also not act as an arbitrator or mediator, but as one who endeavours 'to express an opinion on the resolution of the disagreement or to resolve the dispute'.

We further note that, at the beginning of April 2019, the Lebanese Minister of Energy and Water announced the launch of the second licensing round (SOLR) for offshore petroleum development in blocks 1, 2, 5, 8 and 10. For this second licensing round, the model EPA was further amended by virtue of Decree No. 4918 dated 31 May 2019. The amendments to the model EPA affected articles 5, 6, 7, 8, 9, 20, 21, 25, 27, 30, 36 and 44, as well as Annex D (Accounting and Financial Procedures). However, the model EPA articles related to the arbitration and to the sole expert remain unchanged.

Arbitration under the China-Lebanon Bilateral Trade Treaty: One Belt One Road Initiative

Chinese investments are becoming more present in Lebanon. In fact, the Lebanese government has been very supportive of the One Belt One Road Initiative. The Lebanese Minister of Economy signed a memorandum of understanding (MoU) with the government of China on 'joint promotion of cooperation in the framework of the Silk Road economic belt and the 21st Century Maritime Silk Road initiative'. The MoU was concluded during an official visit to China to participate in the China-Arab States Expo 2017 held between 5 and 7 September 2017 in the city of Yinchuan. The Investment Development Authority of Lebanon (IDAL) aims to encourage foreign investments in Lebanon including Chinese investments.

Lebanon and China signed a BIT on 13 June 1996 that entered into force on 10 July 1997 (Law No. 614 published in the Official Gazette No. 11 of 6 March 1997). The BIT of 1996 offers Chinese investors an array of investment protection mechanisms such as the most favoured nation treatment clause (article 3), compensation in case of expropriation (article 4), compensation for losses (article 5) and protection of investments (article 2).

Moreover, the China-Lebanon BIT makes the following distinction:

> *a) The settlement of disputes between a contracting party and an investor of the other contracting party (Art. 8 of the BIT):*
>
> *There is an initial cooling off period of six months, during which the parties may engage in negotiations to settle their dispute. Should the negotiations fail, the competent court of the contracting party accepting the investment has jurisdiction to hear the case. However, if the dispute relates to the amount of compensation and cannot be settled through negotiations, either party may submit the dispute to an ad hoc arbitral tribunal under the UNCITRAL Arbitration Rules.*
>
> *b) The settlement of disputes between contracting parties (Art. 9 of the BIT): Such disputes shall be settled through diplomatic channels within a period of six months, failing which, the dispute shall be submitted upon the request of either contracting party to an arbitral tribunal consisting of three members. If both arbitrators fail within two months after their appointment to reach an agreement regarding the chairperson, the latter shall be appointed by the President of the International Court of Justice upon request of either contracting party. Further, the arbitral tribunal shall issue its decision in accordance with the general principles of law, the provisions of the BIT, as well as the generally accepted principles of international law. Subject to other provisions agreed upon by the contracting parties, the arbitral tribunal shall determine the procedure of the arbitration.*

Force majeure under Lebanese governing law in domestic arbitration and international arbitration

The covid-19 pandemic has underscored the importance of using force majeure to repudiate the performance of burdensome contractual obligations that were undertaken prior to its outbreak.

Force majeure framework under Lebanese Law

The general Lebanese legal framework does not provide a definition of 'force majeure'; rather, this was developed through jurisprudence and doctrine. Force majeure clauses are subject to contractual liberty under Lebanese law and parties can agree the types of event that qualify as force majeure events in their agreement.[40] Lebanese doctrine and jurisprudence confirm that force majeure extinguishes contractual liability when the applicable conditions are met and when it is relied on as a basis for the non-performance of obligations.[41] Article 342 of the Code of Obligations and Contracts 1932 refers to force majeure as an event that renders the performance of contractual obligations impossible and that 'the debtor must prove the existence [of]'.[42] In such cases, the obligations that were not performed due to said event are extinguished and no longer enforceable.[43]

For an event to qualify as force majeure, three conditions must be met:

- the event must have been unforeseeable;[44]
- the event must have been irresistible (ie, unavoidable);[45]
- and the debtor must have had no hand in the event's occurrence (ie, the event must be unrelated to the debtor).

If these conditions are met, the debtor will be exempt from its contractual liability where performance is impossible as a result of the force majeure event.

However, parties may still contractually agree to abide by the terms of their contract even in cases of force majeure. This right is specifically enshrined in Law 160/20, which provides that parties to a contract can waive their right to benefit from the suspension of time limits, provided that such waiver is express and in writing.[46]

Conclusion

The legislative landscape in Lebanon is evolving positively towards encouraging recourse to arbitration and other ADR mechanisms in cases where disputes arise. In addition to the laws described above, a new law just introduced judicial mediation to Lebanon for the first time.[47] There is also an ongoing project to amend the current Lebanese arbitration law and adopt a more modern one.

By ensuring better protection of investors and business actors in Lebanon and encouraging recourse to ADR, the Lebanese authorities are creating an increasingly friendly environment for large projects and investments in the country.

Notes

1 1 LCCP Articles 762 to 808.
2 LCCP Articles 809 to 821.
3 Beirut Court of Appeal, Third Chamber, 10 December 2001; Beirut Court of Cassation, Decision No 14/2014, 25 January 2014.
4 'Arbitration in Lebanon', in Abdul Hamid El Ahdab and Jalal El-Ahdab, Arbitration with Arab Countries, Kluwer Law International 2011, pp 337–449.
5 Article 812 of the LCCP: 'the provisions of articles 762 to 792 (relating to domestic arbitration) shall only apply in default of specific agreements and subject to the provisions of Articles 810 and 811 (relating to international arbitration)' (OLF translation).
6 Official Website: https://www.ccib.org.lb/en/.
7 Official Website: http://ciarb-lebanon.org/.
8 Eg. Beirut Court of Appeal, decision no. 767/2008 dated 20 May 2008, Lebanese Court of Cassation no.14/2014 dated 25 January 2014.
9 Zeina Obeid and Ziad Obeid, 'Arbitration in commercial representation disputes: walking the line between tradition and modernism,' International Law Office, 19 July 2018.
10 Article 768 LCCP.
11 Article 763 LCCP.
12 Article 810 LCCP.
13 Article 120(4) LCCP
14 Article 120(6) LCCP.
15 Article 770 LCCP.
16 Article 810 LCCP.
17 Article 783 LCCP.
18 Article 812 LCCP.
19 Article 779 LCCP
20 Article 799 LCCP.
21 Article 800 LCCP.
22 Article 819 LCCP.
23 The ICSID Convention was signed by Lebanon on 26 March 2003 and entered into force in Lebanon on 25 April 2003.
24 The Arab Investment Agreement was signed by Lebanon on 26 November 1980 and entered into force on 7 September 1981. In 2019, Lebanon ratified (by Law No. 120 dated 29 March 2019) the 2013 amendments to the 1980 Arab League Investment Agreement (Unified Agreement for the Investment of Arab Capital in the Arab States).
25 OIC Investment Agreement entered into force in February 1988.
26 EC–Lebanon Association Agreement was signed on 17 June 2002 and entered into force on 1 April 2006.
27 EFTA–Lebanon FTA was signed on 24 June 2004 and entered into force on 1 January 2007.
28 Lebanon–US TIFA was signed on 30 November 2006 but has not entered into force.
29 ICIEC Agreement was signed by Lebanon on 26 December 1993.
30 ICIEC Agreement was signed by Lebanon on 26 December 1993.
31 Law no. 360 of 16 August 2001.
32 Article 2 of the Lebanese Investment Law. The Law can also apply to other sectors, as specified by a decree issued by the Council of Ministers based on a proposal of the President of The Council of Ministers.
33 ibid.
34 'Investor' is defined as follows under the Law: 'The natural person or legal entity, whether Lebanese, Arab or foreign investing in Lebanon in accordance with the provisions of this law.'
35 Article 18 of the Investment Law.
36 There have been 5 recorded cases in which Lebanon has acted as Respondent, with the first being brought before the Cairo Regional Center for International Commercial Arbitration (CRCICA) in 2000 (Eastern Company v. Lebanon), based on publicly available information from the UNCTAD website, available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/116/lebanon/investor>
37 CEDRE is an acronym for 'Conférence Economique pour le Développement par les réformes et avec les entreprises' (Economic Conference for Development through Reforms et with Businesses).
38 Rania Ghanem, '11.8 billion promised at the Paris CEDRE Conference' (Businessnews.com.lb,6April2018) available at: http://www.businessnews.com.
39 Article 10 (15) of Law 48 dated 7/9/2017 Regulating Public Private Partnerships 'The dispute resolution mechanism, which can include mediation and domestic and international arbitration'.
40 Mustapha Al-Awji, Civil Law, Vol 2 (tort liability), El-Halabi, 2009, p118.
41 ibid, p. 110.
42 Article 342 of the Code of Obligations and Contracts
43 ibid, Article 341.
44 Court of Cassation, First Chamber, Decision 56, 24/10/1958, Baz, 1958, p94, cited in Sader, Volume on Torts, 2008, p. 165, para 4.
45 ibid.
46 Law 160/20, Article 4.
47 Law No. 82 published in the Official Gazette on 18 October 2018. Zeina Obeid and Valeria Spagnolo, 'An alternative solution: judicial mediation', International Law Office, 10 January 2019.

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Professor Dr Nayla Comair-Obeid, founding partner of Obeid Law Firm, heads the firm's dispute resolution practice. She is also an associate member of the 3 Verulam Buildings Chambers (3VB) and professor of international commercial arbitration at the Lebanese University and formerly taught alternative dispute resolution at the Lebanese Judicial Institute. Author of The Law of Business Contracts in the Middle East, Professor Comair-Obeid publishes prolifically and is regularly invited to lecture at world-renowned academic institutions where her articles and scholarly publications are often cited as reference works.

Throughout her career, Professor Comair-Obeid has held and continues to hold prominent positions in several major international arbitration institutions. Professor Comair-Obeid is member of the International Chamber of Commerce Executive Board since 2019, Chartered Institute of Arbitrators (CIArb) Companion since 2018, and is former President of the CIArb for 2017. She also previously chaired the board of trustees of the Chartered Institute of Arbitrators in 2014, and the Lebanon branch of the CIArb between 2004 and 2009. Professor Comair-Obeid is also a member of the London Court of International Arbitration Court; Trustee of the Cairo Regional Centre for International Arbitration; Council member of the Institute of World Business Law of the International Chamber of Commerce; and a member of the ICSID panel of arbitrators and conciliators. In August 2018, she was appointed as a member of China's International Commercial Expert Committee of the Supreme People's Court.

A specialist in international business law and Islamic and Middle Eastern legislation, Professor Comair-Obeid regularly serves as party-appointed arbitrator, chairperson, sole arbitrator and counsel in complex international arbitrations conducted in Arabic, French or English, both ad hoc and under a variety of international arbitration rules. Professor Comair-Obeid is also often called upon as a legal expert on various aspects of Lebanese law and Middle Eastern legislations in foreign courts and arbitral proceedings. Professor Comair-Obeid is referred to as 'pre-eminent in her field' and a 'leading authority in international arbitration' by international legal publications.

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Established in 1987, Obeid Law Firm is a full-service law firm operating in the Middle East and North Africa region from its headquarters in Beirut, Lebanon. The firm is widely recognised as one of the leading law firms in Lebanon and the Middle East and holds widespread recognition among local and international legal practitioners.

Known for its commitment to excellence and its expertise in Middle Eastern legislations, the firm has established a first-class international arbitration practice acting as parties' counsel, arbitrator, or expert. Obeid Law Firm has been involved in some of the largest arbitration cases in the Middle East and has actively participated in various legal reforms in Lebanon and the Gulf region. The firm's dispute resolution team also advises clients at the pre- and post-arbitration stages through to the enforcement of arbitral awards, foreign courts decisions and related execution measures before the local courts.

Led by Professor Dr Nayla Comair-Obeid, the firm's arbitration team combines international best practice with unrivalled local expertise. With acknowledged arbitration specialists engaged in some of the most significant English, French, and Arabic-language arbitrations in the Middle East and North Africa region, the firm's arbitration practice offers unparalleled regional expertise and wide-ranging capabilities.

The firm is the author of the 'IBA Arbitration Guide' for Lebanon and has participated in the review and translation of the Arabic versions of the KCAB rules, the IBA Guidelines for Drafting International Arbitration Clauses and the revised 2012 ICC Rules. The firm is also home to the past president of the Chartered Institute of Arbitrators (CIArb) and the current chairman of the Lebanon Branch of the CIArb, both of whom are partners.

Mozambique

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In summary

This article describes the main legal framework of international and domestic arbitration, as well as the specific sectoral rules on arbitration regarding relevant business sectors in Mozambique, such as rules applicable to public–private partnerships, large-scale projects and business concessions, investment law, mining law and the special framework of the Rovuma Basin Project. From this analysis, it arises that Mozambique has followed the international trends on the development of arbitration and is party in the main international conventions, which facilitates foreign and national investment in the country.

Discussion points

- The situation and main sectors of foreign direct investment in Mozambique
- Identification of some difficulties or crisis suffered in Mozambique with economic impact
- The plurality of legal sources of arbitration
- Specific investments in certain sectorial projects

Referenced in this article

- *Oded Besserglik v Mozambique* award
- 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)
- 1981 Agreement on Promotion, Protection and Guarantee of Investments Amongst the Member States of the Organization of the Islamic Conference (the OIC Investment Agreement)
- Mozambican Arbitration, Conciliation and Mediation Law
- 2004 Constitution of the Republic of Mozambique;
- Mozambican Code of Civil Procedure
- Law No. 15/2011 of 10 August 2011
- The Investment Law (Law No. 3/93 of June 24 1993, regulated by Decree-Law No. 43/2009 of August 21 2009 and as amended by Decree-Law No. 48/2013 of September 13 2013)
- Law 7/2014 of 28 February 2014
- Mining Law (Law No. 20/2014 of 18 August 2014)
- Petroleum Law (Law No. 21/2014 of 18 August 2014);
- Law No. 25/2014 of 23 September 2014
- Decree-Law No. 2/2014, of 2 December 2014.

Year	Foreign direct investment, net inflows
(Current balance of payments, US dollar)	Table text
2010	1.258 billion
2011	3.664 billion
2012	5.635 billion
2013	6.697 billion
2014	4.999 billion
2015	3.868 billion
2016	3.128 billion
2017	2.319 billion
2018	2.892 billion
2019	5.7 billion

Since 2010 and especially 2013, foreign direct investment has increased in Mozambique. According to the statistics released by World Bank, the net foreign direct investment in Mozambique corresponded to the following amounts.

Mozambique has attracted investment in several industries besides the main sectors of coal, oil, and natural gas, such as real estate, transportation, wood products, food and tobacco, metals, communications, building and construction materials, alternative and renewable energy, financial services and industrial machinery, equipment and tools.

However, the economic and fiscal pressure of the past several years, together with known setbacks in the relationship with the International Monetary Fund, donors and international creditors, has created certain difficulties with regard to increasing foreign investment and economic growth.

In any case, according to African Economic Outlook 2020, Africa's general economic performance continues to improve, with gross domestic product growth reaching an estimated 3.4 per cent in 2019. Looking forward, African economic growth is projected to accelerate to 3.9 per cent in 2020 and to 4.1 per cent in 2021. Mozambique will hopefully follow this trend.

In 2019, the economic performance of Mozambique was significantly and negatively affected by the two climate cyclones, Idai and Kenneth, in March and April, and resulted in a reduction in agricultural and electricity production by collection and infrastructure activities, including the port of Beira, one of the major ports for exports of raw materials.

The government of Mozambique and investors have been working to improve the country's financial and economic landscape and to take advantage from the country's very significant natural resources, particularly coal and natural gas, with some

high-profile investments. The Nacala Corridor Railway and Port Project, to export coal from the Moatize coal mines, and the liquefied natural gas projects in the Rovuma Basin in the north of the country, deserve a special mention. Even at different stages of execution, they are expected to be game changers for the country.

The contribution of mega-projects in the extractive industry sector in Mozambique reached 14,440 million meticais in 2019, corresponding to 6.8 per cent of the total revenue collected by the state in 2018 (211.9 billion meticais) and a decrease of 62.4 per cent, compared to the 2017 record.

The low performance was owing to the negative performance of projects in the field of energy production, oil exploration and mineral resources, which registered decreases of contribution in the order of 40.2 per cent, 78.4 per cent and 23.1 per cent, respectively

The major energy projects injected 3.4 billion meticais into the public coffers, against 5.6 billion meticais from mining and 4.1 billion meticais from mineral resources.

The opposite behaviour was observed in the remaining groups in this sector of economic activity, which had a positive variation in their contribution to state revenues, between 2017 and 2018 (grew by 27.1 per cent).

The extractive industry mega-projects in Mozambique reached about 73.3 billion meticais in 2019, an increase in collection more than five times than in the year 2018. The Mozambican state invested more than 276 billion meticais in revenue in the mega-projects.

The collection of capital gains revenue in the amount of 54.1 billion meticais – resulting from the sale of the assets of the oil company Anadarko, in the Rovuma Basin Area, in favour of the French company Total – contributed most to the increase in the contribution of mega-projects in the period under review.

Another major investment project for 2020 is the petrochemical company Sasol, which is expected to produce 20,000 tonnes of cooking gas in the province of Inhambane to supply the Mozambican market. The project, valued at US$600 million, includes the exploration of light oil and natural gas in discovered hydrocarbon wells.

Although the development indexes will increase in 2020, the World Bank guarantees an increasing reduction in investment in rural areas.

The consultancy EXX Africa classified Mozambique as the best investment destination in sub-Saharan Africa in 2020 – with large foreign investments in the natural gas industry and possible support from the International Monetary Fund, improved performance in the banking sector and as a result of international legal processes in the face of scandals over hidden debts.

The Mozambican state will be able to allocate US$300 million per year to the Coral Sul liquefied natural gas project, which will start in 2022. During the 25 years of the concession, the state will be able to invest US$19 billion. After being extracted at Rovuma, the gas will undergo the transformation process and will be stored on this platform with a capacity of 238 thousand cubic meters, for later sale, entirely to BP.

In 2020–2021, the international situation of pandemic also has been negatively affected the Mozambican economic situation. On 22 October 2020, the World Bank approved a US$100 million grant from the International Development Association (IDA) in support of the government of Mozambique's covid-19 (coronavirus) response programme.

The social and economic development of Mozambique, as well as the intent of maintaining and increasing these levels of foreign direct investment has required the promotion and development of arbitration as a preferred dispute resolution mechanism.

Investors in these relevant projects seek to mitigate the risks, namely the legal risk. In addition to the proper structuring of the investment to benefit from the protection of investment treaties, one possible route is the inclusion of arbitration clauses in key contracts, allowing the resolution of disputes likely arising from the contracts to be more efficient, quick and effective. For that purpose, several factors have been crucial such as the openness of the Mozambican state to include arbitration clauses in important contracts, even with the place of arbitration outside of Mozambique, alongside a relatively modern dispute resolution framework and a progressive familiarity and supportive attitude of judicial courts to arbitration.

The legal framework of arbitration in Mozambique: the plurality of legal sources

Mozambique has a civil law legal system that, for historical reasons, is largely based upon Portuguese Law, particularly in the field of private and commercial law.

Arbitral tribunals are expressly foreseen in the 2004 Constitution of the Republic of Mozambique as being side-by-side with administrative courts, labour courts, tax courts, customs courts, admiralty courts and community courts (article 222(2)).

In 2018, the Assembly of the Republic passed the constitutional review law. The constitutional review law is modern and reflects greater administrative decentralisation in Mozambique.

As in other countries favourable to arbitration, on the one hand, Mozambique is party to key international treaties and, on the other hand, there are several internal sources of legislation regulating the possibility of choosing arbitration, either domestic or international and adopting many of the solutions generally accepted as best practices.

International legal sources of arbitration

Mozambique is a party to the most important international treaties relevant to arbitration.

First, on 11 June 1998, Mozambique ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force on 9 September 1998.

Mozambique's position as a party to the New York Convention entails two different important consequences.

On the one hand, Mozambican courts must recognise and enforce arbitration agreements that meet the necessary requirements under article II of the New York Convention. If legal proceedings concerning a matter subject to such an arbitration agreement are brought before Mozambican courts, the court, at the request of one of the parties, shall decline jurisdiction, unless it finds, on a prima facie judgment, that the arbitration agreement is null and void, inoperative or incapable of being performed. This 'negative effect' of the arbitration agreement is also reflected, in similar terms, in article 12 of the Mozambican Arbitration, Conciliation and Mediation Law (Law No. 11/99 of 8 July 1999, the Mozambican Arbitration Law).

On the other hand, subject to the conditions laid down in the New York Convention, Mozambican courts must recognise and enforce arbitral awards rendered in other New York Convention contracting states and, conversely, arbitral awards rendered in Mozambique may also be enforced in other New York Convention contracting states. In this respect, it should be noted that Mozambique, under the terms permitted by the New

York Convention, made a reciprocity reservation, in the sense that it reserves the right to apply the Convention only when arbitral awards have been rendered in the territory of another contracting state.

The enforcement of foreign arbitral awards rendered in New York Convention contracting states requires prior recognition proceedings subject to the New York Convention rules and limits and also to article 1094 of the Mozambican Code of Civil Procedure (approved by Decree-Law No. 44.129 of 28 December 1961, as amended by Decree-Law No. 1/2009 of 24 April 2009). These proceedings take place before the Supreme Court and, at least in accordance with the law, are very expedited.

Second, and in respect of international investment protection law, Mozambique is a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and has signed 27 bilateral investment treaties (BITs), 20 of which are currently in force.

As a consequence of Mozambique being a party to the ICSID Convention, it may be possible for qualified foreign investors to submit to ICSID arbitration certain disputes, provided that there is consent by the Mozambican state, among other requisites.

In general terms, such consent may arise either from:

- one of the 20 BITs in force;
- an arbitration agreement contained in contracts with the Mozambican state (or with other state entities, subject to additional requirements under the ICSID Convention); or
- Mozambican internal law, especially Investment Law (Law No. 3/93 of June 24 1993, regulated by Decree-Law No. 43/2009 of August 21 2009 and as amended by Decree-Law No. 48/2013 of September 13 2013), discussed below.

Mozambique's network of BITs in force covers most of the states from where major investment flows come, directly or indirectly, including, in particular, the United States, China, India, United Kingdom, France, Germany, Italy, Mauritius, Netherlands and Portugal. Investors may consider the structuring of their investments in Mozambique so as to attract and maximise the protection afforded by these treaties.

Most of these BITs contain, with slight variations, the usual standards of protection, including fair and equitable treatment, compensation for expropriation, national and most favoured nation treatment and non-discrimination. The treaties also generally include Mozambique's consent to arbitrate investment disputes with protected investors arising out of the treaties typically offering the alternative between ICSID arbitration or ad hoc arbitration (frequently under the UNCITRAL Rules of Arbitration).

In the recently rendered *Oded Besserglik v Mozambique* award, a case brought by a South African national, Mr Besserglik, against Mozambique regarding an investment in a couple of entities in Mozambique and from which he had been allegedly unlawfully deprived, a tribunal accepted a motion to dismiss and declined jurisdiction over the dispute for the relevant treaty executed between Mozambique and South Africa that was never entered into force. The decision was criticised specially for lack of transparency and legitimacy, given that the tribunal took five years, and significant costs, to conclude that the treaty invoked by the investor was not in force.

It is noteworthy that Mozambique is also a party to the 1981 Agreement on Promotion, Protection and Guarantee of Investments Amongst the Member States of the Organization of the Islamic Conference (the OIC Investment Agreement). The OIC Investment Agreement is a multilateral treaty concluded under the auspices of the Organization of the Islamic Conference and, although it has not attracted much attention until recently, it provides a number of investment protections, including, with some differences to usual standards found in traditional BITs, protection against expropriation and national and most favoured nation treatment. Most importantly, article 17 of the OIC Investment Agreement arguably contains a consent from the contracting states to investor-state arbitration. Among many others, contracting states to the OIC Investment Agreement include Algeria, Bahrein, Egypt, Indonesia, Morocco, Nigeria, Qatar, Saudi Arabia, Turkey, United Arab Emirates and Tanzania.

Internal legal sources of arbitration: multiple, general and sectoral legislation on arbitration

Internal sources of legislation regarding arbitration are multiple and sometimes conflicting: there are general and sectoral laws, as well as private and administrative laws.

The Mozambican Arbitration Law

The central piece of the Mozambican arbitration legal framework is the Mozambican Arbitration Law, which allows for the possibility of choosing arbitration as a dispute resolution mechanism and sets forth the main general rules applicable to arbitrations located in Mozambique (article 68).

The Mozambican Arbitration Law is mostly in line with the Model Law on International Commercial Arbitration (Model Law) of UNCITRAL and adopts many of the solutions generally accepted as best practices. The law is peculiar in the sense that it not only regulates arbitration but also conciliation and mediation.

According to the Mozambican Arbitration Law, there are some general principles applicable to all alternative dispute resolution mechanisms, such as the principles of liberty, flexibility, privacy, reputation, celerity, equality and due process. These principles should be respected and conform by the rules regarding arbitration.

In line with other modern arbitration laws, the Mozambican Arbitration Law contains general rules covering

- the object and scope of arbitration, the matter of arbitrability, the competence of competence of the arbitral tribunal and the exceptional intervention of judicial courts in arbitrations (Chapter I);
- rules applicable to the arbitration agreement (Chapter II);
- rules regarding arbitrators and the arbitral tribunal (Chapter III);
- rules related to arbitral proceedings and the conduct of arbitration (Chapter IV);
- rules applicable to the arbitral award (Chapter V);
- rules regarding the challenge of the arbitral award (Chapter VI);
- rules related to enforcement of the arbitral award (Chapter VII); and
- rules applicable to international commercial arbitration (Chapter VIII).

The Mozambican Arbitration Law distinguishes two main types of arbitration: domestic arbitration and international commercial arbitration, the latter being governed by special rules (articles 52 to 59 of the Mozambican Arbitration Law) and, in the absence of special rules, by the provisions governing domestic arbitration (article 53 of the Mozambican Arbitration Law).

Pursuant to the terms of article 52, international commercial arbitration is applicable if 'interests of international trade are at stake' and, notably, when:

- parties to an arbitration agreement are domiciled in two different countries at the entering into the arbitration agreement;
- one of the following places is outside the country where parties are domiciled:
- the place of arbitration, if such a place is set out or is capable of being determined in the arbitration agreement; or
- any place where a substantial part of the obligations resulting from commercial relations or the place in which the object of litigation is found to be closely connected; and
- the parties have expressly agreed that the scope of the arbitration convention has connections with more than one jurisdiction.

Therefore, the parties may expressly characterise an arbitration as international, either by agreement between them or by choosing a place of arbitration located outside of Mozambique.

On the matter of arbitrability, article 5 of the Mozambican Arbitration Law provides for two general restrictions on the validity of arbitration agreements regarding the object of the arbitration:

- disputes involving non-disposable or non-negotiable rights; and
- disputes that are exclusively subject by special law to the jurisdiction of a judicial court or a special arbitration law. The Mozambican Arbitration Law is applicable in a subsidiary way to arbitrations subject to special legal frameworks (article 5(3)).

According to article 6(1) of the Mozambican Arbitration Law, the state and other legal persons governed by public law may enter into arbitration agreements only in cases regarding disputes related to 'private law or contractual relations' or if there is an 'authorisation by a legislative act'. Therefore, from the perspective of Mozambican law, if the dispute refers to public law matters, the state and other legal persons governed by public law may only validly submit disputes to arbitration if there is a special legislative authorisation.

The arbitral tribunal may be composed by a sole or several arbitrators, provided that they are in an odd number. Should the parties fail to agree on the number of arbitrators, the arbitral tribunal is composed by three arbitrators (article 16). The parties may choose the arbitrators or the method for their appointment. As a general rule, the appointment of the arbitrators is made by the parties and the arbitrators appointed by the parties designate the remaining arbitrator to complete the constitution of the arbitral tribunal. Whenever the designation of an arbitrator or arbitrators fails, the appointment should be made by the president of the arbitral institution chosen by the parties or by someone in whom the president delegates this power and, in the absence of an agreement in relation to the choice of an arbitral institution, by the judicial court. There is no appeal of this decision (article 18).

The parties may freely choose the procedural rules applicable to the proceedings, as well as the place of arbitration, within the general main principles applicable to arbitration mentioned above. In the absence of the choice of the parties, the arbitral tribunal has the power to decide these matters (article 27).

Unless the parties agree otherwise, the deadline for an arbitral award to be issued is six months from the constitution of the arbitral tribunal (article 35(1) to (3)). In certain circumstances, the deadline may be extended for equal period of time (article 35(4)).

After being deposited in the secretary of the judicial court of the place of arbitration under the terms of article 42 of the Mozambican Arbitration Law, arbitral awards have the same effects of judicial decisions and are final and enforceable under the terms of the Mozambican Code of Civil Procedure.

Arbitral awards may be challenged before judicial courts only on the basis specific grounds laid down in the law, particularly in the case of manifest disregard of procedures with impact on the exercise of the rights of defence and due process and on the basis of the breach of the Mozambican state's public policy (in accordance with articles 44 to 47). It is possible, however, to directly challenge the merits of the award.

Judicial court intervention is required, or may be necessary, in several circumstances set forth in the Mozambican Arbitration Law. First, after the issuance of an arbitral award, in the stage of enforcement or of setting aside of the decision. Second, according to article 12(4), the parties may request state courts to order interim measures in relation to a dispute covered by an arbitration agreement. Finally, state court intervention may be required during the arbitral proceedings either to appoint one or more arbitrators (if needed), or to assist in taking of evidence. These aspects are crucial and should be considered by the parties when they are choosing the place of arbitration and, consequently, the law applicable to the arbitration.

Regarding the enforcement of foreign arbitral awards, the applicable regime depends on whether the award was rendered in a state party to the New York Convention. If so, the New York Convention applies, supplemented by article 1094 and the Mozambican Code of Civil Procedure, which, as noted above, provides for a recognition procedure before the Supreme Court. If the award was rendered in a state that is not a party to the New York Convention, recognition is subject to the same procedure provided under article 1094, but the grounds that allow the refusal of recognition are wider. For example, if the award to be recognised was rendered against a Mozambican national, recognition is denied if the award breaches Mozambican private law, to the extent that, under Mozambican private international law, the dispute should be governed by Mozambican law.

The Administrative Arbitration Rules

Regarding administrative arbitration, that is, arbitration involving certain state entities acting in that capacity, there is a special legal framework set out in Chapter X of Law 7/2014 of 28 February 2014 (Law No. 7/2014), which, subject to certain conditions, allows the state and other public legal entities to enter into arbitration agreements.

In accordance with article 202 of Law No. 7/2014, an arbitral tribunal may be created to decide on the following matters:

- administrative contracts; and
- contractual liability and torts of the public administration.

The rules established in Law No. 7/2014 are similar to the ones found in the Mozambican Arbitration Law regarding domestic arbitrations, with some differences that arise from the administrative nature of the claims, such as:

- the inexistence of provisions on choice of law for the merits of the claim;
- the possibility of extending the deadline for the arbitral award is limited to half of its initial duration; and
- in case of annulment of the decision of the arbitral tribunal, the power of the administrative court of reviewing the merits of the claim.

The Investment Law

Independent of the protection conferred by the ICSID Convention and by BITs, the Investment Law (Law No. 3/93 of 24 June 1993, regulated by Decree-Law No. 43/2009 of 21 August 2009 and as

amended by Decree-Law No. 48/2013 of 13 September 2013) expressly provides a certain number of protections and safeguards and foresees a special mechanism for resolution of disputes in relation to certain disputes between the Mozambican state and foreign investors regarding investments authorised and executed in the country. This special mechanism for resolution of disputes applies to disputes connected in the interpretation and application of the mentioned law and that could not be solved by the competent judicial authorities in accordance with the Mozambican legislation.

In particular, the Investment Law, subject to the conditions laid down thereto, provides for the possibility of investor-state arbitration under the ICSID Convention or under the International Chamber of Commerce Rules of Arbitration.

Importantly, the Investment Law expressly does not apply to oil, gas and mining sectors, which are governed by specific rules.

The level of protection granted by the Investment Law is, generally, lower than the protection granted by a typical BIT. The major advantage of the first one is that it applies to all the investors that meet the conditions of the Investment Law, even when they are not covered by the protection of a BIT (for example, because they are not nationals of a contracting state).

The law applicable to public-private partnerships, large-scale projects and business concessions

Law No. 15/2011 of 10 August 2011 (Law No. 15/2011, regulated by Decree No. 16/2012 of 4 June 2012) establishes the guiding rules for the process of contracting, implementing and monitoring undertakings of public–private partnerships (PPP), large-scale projects (LSP) and business concessions (BC). Article 39 of the Law No. 15/2011 expressly recognises the possibility of arbitration in PPP, LSP and BC. In fact, article 39(2) of this law foresees that:

> *[I]n order to accelerate the resolution of disputes and preserve the dynamics of business economic life, especially for the satisfaction of collective needs, PPP, LSP and BC contracts may privilege the resolution of disputes arising therefrom by resorting to mediation and arbitration under the terms of the law.*

The Mining Law

Regarding the mining sector, the Mining Law (Law No. 20/2014 of 18 August 2014) establishes the general principles applicable to the exercise of rights and duties regarding the use and exploitation of mineral resources, including mineral water. The Mining Law does not foresee a special rule applicable to dispute resolution. Consequently, it seems that the rules set forth by the other laws such as Law No. 15/2011 are applicable.

Furthermore, Decree No. 88/2017 approved the Regulation of Radioactive Minerals, Resolution No. 5/2016 approved the Organic Statute of the National Institute of Minas Gerais and Decree No. 22/2015 defined the attributions, competences and organics of the National Institute of Mines.

The Petroleum Law

The Petroleum Law (Law No. 21/2014 of 18 August 2014) confirms the possibility of entering into in arbitration agreements, admitting several options.

The Petroleum Law provides that disputes arising from the agreements foreseen in the mentioned law be preferably solved by negotiation. If the dispute is not solved by agreement, it may be submitted to arbitration, to the competent judicial authorities under the terms and conditions set forth in the concession agreement or, if there is no arbitration clause in the concession agreement, to the competent judicial authorities.

Arbitration between the Mozambican state and foreign investors subject to the Petroleum Law may be governed by the following laws:

- the Mozambican Arbitration Law;
- the ICSID Convention and Rules;
- the rules fixed in the Regulation on Additional Facility approved on 27 September 1978 by the ICSID, if the foreign entity does not fulfil the conditions of nationality foreseen in article 26 of the ICSID Convention; and
- the rules of other international instances of recognised reputation in accordance with the agreement of the parties in the concession agreements foreseen in the Petroleum Law. In this case, it is necessary for an express specification of the conditions for its implementation, including the way of appointing the arbitrators and the deadline to issue an award.

As these rules set forth in the Petroleum Law are special in relation to the rules foreseen in the Law No. 15/2011 of 10 August 2011, the former should prevail over the latter.

The Rovuma Basin Project framework

In the specific case of the Rovuma Basin Project, Law No. 25/2014 of 23 September 2014, authorised the government to approve a specific legal and contractual framework for the Rovuma Basin Projects, including express permission to ensure that public sector entities may be subject to international arbitration.

In execution of this legislative authorisation, the government approved Decree-Law No. 2/2014, of 2 December 2014, which contains the specific regime applicable to the Rovuma Basin Project.

According to article 25 of Decree-Law No. 2/2014, disputes not amicably settled within 90 days shall be submitted to arbitration in accordance with the dispute settlement mechanisms provided for in the relevant concession agreements.

These legal texts support the autonomy of the parties to choose a foreign law to be applicable to the merits of the contracts and the possibility of choosing international arbitration (article 3(1)(j) of the Law No. 25/2014 and article 25 of Decree-Law No. 2/2014).

Finally, by Resolution No. 25/2016 of 3 October 2016, the Mozambican government approved and published a Model Concession Agreement to Exploration and Production of Petroleum and a Model Joint Operation Agreement, both containing arbitration agreements.

In accordance with article 26, disputes between the parties should be solved by negotiation of the parties. Should the parties not solve the dispute amicably, the Model Concession Agreement provides for ad hoc arbitration in accordance with the UNCITRAL Arbitration Rules and with the Permanent Court of Arbitration acting as appointing authority. The seat of arbitration is Geneva, the applicable substantive law is Mozambican law and the language of the arbitration is English. It is also established that the arbitrators cannot have the nationality of any of the parties. The arbitration agreement further provides for a wide waiver of sovereign immunity and, in terms that are not entirely clear, of the right to seek the annulment of arbitral awards.

In its turn, the Model Joint Operation Agreement provides for a different solution (article 19.2): ICSID arbitration, with the designation of the Mozambican National Oil company as a constituent

subdivision or agency of Mozambique for the purposes of consent for ICSID Convention. Like the Model Concession Agreement, the seat of arbitration is Geneva, the applicable substantive law is Mozambican law and the language of the arbitration is English.

Conclusion

Mozambique has developed arbitration as the preferred dispute resolution mechanism, following other modern arbitral legislation and opening the possibility of choosing this alternative dispute resolution mechanism.

A notable sign of this openness by Mozambique towards arbitration was the ratification of the most significant international conventions regarding arbitration, the 1958 New York Convention and the 1965 ICSID Convention, and the adoption of specific domestic regimes favourable to arbitration.

As demonstrated above, Mozambique's legal environment and framework is largely favourable to arbitration. The Mozambican state has opened the option to investors of mitigating legal risks by choosing arbitration as preferred dispute resolution mechanism and as a means to promote investment and growth.

At the same time, the legal framework specifically applicable to major investments and to arbitration is particularly complex, notably due to the plurality of existing sources, sometimes with overlapping scopes of application and conflicting rules. On the one hand, in certain cases, the plurality of sources of legislation may be considered a challenge to be overcome by interpretation. On the other hand, in relation to the mining sector, there are no specific provisions regarding arbitration such as the provisions set forth in the Petroleum Law.

Considering that foreign investment will continue to play a very significant role in the development and expansion of Mozambique, there are several goals that would be determinant for it and for the future of arbitration in Mozambique, such as the management of political conflicts, the sectorial growth and economic stabilisation, as well as the improvement of the legal framework and its practical promotion and the increasing of active participation and role of the Mozambican arbitral community in the wider arbitration community. The main arbitral institution in Mozambique is the Arbitration, Conciliation and Mediation Centre (CACM). At this stage, CACM has administered mainly domestic arbitrations. In April 2018, CACM organised its first congress with the presence of Mozambican and Portuguese speakers. More recently, there have been some calls for a modernisation of the Mozambican Arbitration Law and there are reports that this reform may occur in the near future, strengthening Mozambique's pro-arbitration attitude.

With special thanks to Vanessa de Almeida Pires and Alice Otero Morgado, for their collaboration researching and updating this chapter.

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He regularly participates as a lecturer in postgraduate courses on arbitration and as a speaker at seminars and conferences.

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With a team comprising over 250 lawyers at a client's disposal, Mo-rais Leitão is headquartered in Lisbon, with additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados), Hong Kong and Macau (MdME Lawyers) and Mozambique (HRA Advogados).

The Morais Leitão international arbitration team focuses on arbitration connected to Portuguese-speaking countries. Team members have strong and diversified academic and cultural backgrounds, in-depth knowledge of the relevant industry sectors and fluency in several languages, including English, Spanish, French, German and Portuguese.

Morais Leitão has a strong tradition in international arbitration that goes back more than 25 years and its members have been consistently recognised for the quality of their services.

Paula Duarte Rocha
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Paula Duarte Rocha is a partner at HRA Advogados, the Mozambican member of the Morais Leitão Legal Circle.

Paula is highly experienced in the Mozambican market, having intervened in all areas of practice, advising both national and foreign investors, as well as national and foreign private companies.

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HRA Advogados is formed by lawyers with relevant experience in several practice areas. The firm is particularly experienced in business law practice, having assisted national and international clients in im-portant and innovative projects in Mozambique. The office is a refer-ence both to multinationals and law firms without a local office.

The firm's head office is in Maputo. However, as members of an international network of associations, the firm has a team of lawyers available in different jurisdictions across Portuguese-speaking coun-tries. While working in close connection with the member firms of the Morais Leitão Legal Circle, the firm combines local knowledge with the international experience and support of the whole network, which enables it to maximise the resources available to clients, thus providing them with the best outcomes to their needs in various jurisdictions.

HRA Advogados is the exclusive member firm of the network Mo-rais Leitão Legal Circle for Mozambique.

Nigeria

Uzoma Azikiwe and Festus Onyia
Udo Udoma & Belo-Osagie

In summary

Despite the disruption of commercial and judicial activities that resulted from the covid-19 pandemic, 2020 was still marked by some notable decisions of Nigerian courts in respect of arbitration. While some of the decisions handed down by the Nigerian courts, notably the Court of Appeal in 2020, demonstrate yet again that Nigerian courts will not set aside an award on frivolous grounds, some of them are not entirely satisfactory and have raised issues of concern.

Discussion points

- Applicability of the limitation period for the enforcement of foreign judgments prescribed in the Foreign Judgments (Reciprocal Enforcement) Ordinance 1958 to arbitral awards.
- Applicability of the English Arbitration Act to the enforcement of arbitral awards in Nigeria.
- What constitutes taking steps in proceedings commenced in breach of arbitration agreement.
- Importance of serving a notice of an arbitration on the responding party.
- The risks of an arbitral tribunal continuing proceedings and issuing an award while its jurisdiction is being challenged in court.
- Need to serve notice of hearings and proceedings to an abstaining party.
- Settlement, negotiation and payment of settlement sum while abstaining from proceedings.

Referenced in this article

- Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria 2004
- Article 3 of the Arbitration Rules, First Schedule to the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria 2004
- *Emerald Energy Resources Limited v Signet Advisors Limited* (No. 1) and *Emerald Energy Resources Limited v Signet Advisors Limited* (No. 2)
- *Indorama Eleme Pet Ltd v Cutra Intl Limited* (2020)
- Section 2 of the Reciprocal Enforcement of Judgments Ordinance Cap. 175, Laws of the Federation of Nigeria 1958
- Section 66 of the Arbitration Act of England
- Section 5 (4) (a) of the Admiralty Jurisdiction Act
- *The Vessel MT Sea Tiger v ASM (HK) Ltd* (2020) 14 NWLR (Part 1745) 418

Limitation period for seeking the enforcement of an arbitral award

Emerald Energy Resources Limited v Signet Advisors Limited (No. 1)[1]

In this case, the respondent, Signet Advisors Ltd (the respondent or Signet) brought an application at the Federal High Court of Nigeria (FHC) under the Arbitration and Conciliation Act (ACA)[2] for the recognition and enforcement of a London Court of International Arbitration (LCIA) arbitral award that was rendered by an eminent panel of arbitrators. The appellant, Emerald Energy Resources Ltd (Emerald or the appellant) filed a preliminary objection seeking the dismissal of the application on the grounds, among others, that Signet's right to seek enforcement of the arbitral award had become statute barred, given that the application was not brought within a period of 12 months from the making of the award pursuant to the provisions of the Foreign Judgment (Reciprocal Enforcement) Ordinance Cap. 175 Laws of the Federation of Nigeria 1958 (the 1958 Ordinance). According to Emerald, Signet's recognition and enforcement application was statute barred because it was filed more than 12 months after the award was made. The preliminary objection was dismissed.

Emerald's appeal to the Court of Appeal turned on the question of whether the arbitral award ought to have been registered for enforcement in Nigeria within a period of 12 months under the 1958 Ordinance as contended by Emerald.

Signet contended that its application for the enforcement of the award was not statute-barred because the 12 month limitation period prescribed under the 1958 Ordinance for the enforcement of English judgments in Nigeria does not apply to arbitral awards; and that its recognition and enforcement application was brought under the ACA, which does not prescribe a limitation period for the enforcement of arbitral awards.

In dismissing the appeal, the Court of Appeal held that: Signet's recognition and enforcement application was not statute-barred because section 2 of the 1958 Ordinance that Emerald relied on in its contention applies to the enforcement of judgments of the English courts and not arbitral awards; for the limitation period prescribed under section 2 of the 1958 Ordinance to apply to an award, such an award must have become enforceable in the same manner as a judgment of a High Court in England; and the ACA is the relevant law to consider in order to determine whether an application to enforce an arbitral award is statute-barred and the ACA does not prescribe a limitation period for the enforcement of arbitral awards.

Comments

We hold the view that the decision of the Court of Appeal to the effect that the 12-month limitation period prescribed under the 1958 Ordinance does not apply to an arbitral award is correct. Emerald's contention that Signet's recognition and enforcement application was statute-barred was misconceived and baseless. As rightly observed by the Court of Appeal, though an arbitral award

has the binding force of a judgment, is final and conclusive and operates as a judgment, it is not a judgment in the strict sense as to subject it to the enforcement regime of the 1958 Ordinance, particularly section 2 thereof. Section 2 of the 1958 Ordinance would have applied if after obtaining the award in England, Signet obtained an order in England to enforce the arbitral award in the same manner as a judgment of the English High Court. In that case, the award would have been elevated to the status of an English High Court judgment, which was not the case here.

It is to be noted, however, that while it is correct that the ACA does not provide for a limitation period for the enforcement of an arbitral award in Nigeria, that is not the end of the matter. This is because the Limitation Laws of the various states in Nigeria provide that the Limitation Law shall apply to arbitration as they apply to court actions. For instance, the Limitation Law of Lagos State[3] provides in section 62 thereof that 'this Law and any other Limitation enactment shall apply to arbitration as they apply to actions in the court'.[4] While there is no question that an arbitration claim must be commenced within the time limit provided in each applicable Limitation Law, namely 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*.[5] 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[6] for the enforcement of the award began to run in 1964 when the underlying agreement between the parties was breached and not from the making 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*.[7]

Although the issue was not raised in the *Emerald* case under review, it is important to note that while the ACA does not prescribe a limitation period for the enforcement of an arbitral award, the limitation period will be determined by reference to the relevant limitation statute in Nigeria.

Supportive attitude of Nigerian courts to arbitration

Emerald Energy Resources Limited v Signet Advisors Limited (No. 2)[8]

This is a related case to *Emerald Energy Resources Limited v Signet Advisors Limited (No. 1)* and arose from same arbitral award. Signet had filed an application in the FHC for the recognition and enforcement of the arbitral award under section 51 of the ACA, while Emerald resisted the application pursuant to section 52 of the ACA. The grounds upon which Emerald resisted the application were: incapacity on the basis that it (Emerald) was an agent of a known and disclosed principal and that it was the principal that ought to have been sued in the arbitration; that the tribunal exceeded its jurisdiction and decided matters outside the scope of the parties' submissions; and that the award creditor failed to comply with the condition precedent to the enforcement of the award as prescribed under the English Arbitration Act 1996. The FHC after considering the position of each party, granted Signet's application for leave to enforce the award in the same manner as a judgment or order of the Court. Emerald was dissatisfied with the decision and lodged an appeal at the Court of Appeal.

The Court of Appeal dismissed the appeal on all the grounds. On Emerald's argument that it was under a known and disclosed incapacity so as to come under section 52(2)(a)(i) of the ACA, which provides that recognition and enforcement of an award will be refused if one of the parties to the arbitration agreement was under some incapacity, the court rejected Emerald's argument that it was an agent of a known and disclosed principal. The Court of Appeal found as a fact that from the records, the parties to all the underlying agreements that gave rise to the dispute that was submitted to arbitration were Emerald and Signet and no other party, that Emerald neither established the existence of any agency relationship with any principal nor even disclosed the name of the so-called principal. The Court wondered how Signet could be expected to have joined unknown parties to the arbitration.

The court also considered Emerald's contention that the award should be set aside because the arbitral tribunal dealt with a matter outside what was submitted to it and found no merit in that argument and rejected same.

On Emerald's contention that the award should not be enforced in Nigeria because the award did not comply with section 66 of the English Arbitration Act 1966, which makes provision for how an arbitral award can be enforced in England, the Court of Appeal also rejected this argument and held that it is the ACA that regulates arbitration proceedings, including the enforcement of awards in Nigeria, and not the English Arbitration Act, which does not apply in Nigeria.

In its final comments, the Court restated the attitude of Nigerian courts towards arbitral awards, which is to uphold and give effect to them unless in deserving situations. According to the Court, arbitral awards whether domestic or international should not be treated with levity. The Court further held that parties who have submitted their dispute to arbitration should be made to accept the arbitral award resulting therefrom and that except in truly deserving circumstances, arbitral awards should not be set aside or denied recognition in Nigeria.

Comments

The attempts made by Emerald in this case to discredit the award in this matter on baseless grounds show the lengths to which some disgruntled award debtors can go to frustrate an arbitral award that resulted from arbitration proceedings that they willingly submitted to and participated in. However, it is reassuring that the Court of Appeal held that the award cannot be set aside unless the conditions prescribed under the ACA are met.

The importance of effecting service of notice of arbitration on the responding party, as well as ensuring that an abstaining party continues to be notified about hearing dates

Indorama Eleme Petrochemicals Ltd v Cutra Intl Limited[9]

In this case, Cutra Intl Limited (the respondent or CIL), submitted a dispute arising from a consultancy agreement with the appellant, Indorama Eleme Petrochemicals Ltd (the appellant or Indorama) to arbitration under the ACA as provided for in the arbitration agreement contained in the consultancy agreement. The respondent did not, however, serve the notice of arbitration on the appellant as mandated under the ACA. Indorama, therefore, challenged the jurisdiction of the sole arbitrator to determine the matter.

The arbitrator delivered a ruling on the challenge to its jurisdiction arising from the non-service of the notice of the arbitration on Indorama and took the position that it had jurisdiction. The basis of the tribunal's decision was that the intendment of

section 17 of the ACA was to make the provisions of the ACA operational only if the parties did not have a contrary understanding and the parties might have decided to dispense with giving a formal notice, hence, it was not included as a necessary step in clause 6 of the Consultancy Agreement.

Indorama filed an application in court against both the sole arbitrator and the respondent seeking a declaration that the condition precedent to the commencement of the arbitral proceedings (service of a notice of arbitration) had not been complied with; an order setting aside the ruling of the arbitrator; and an order removing the arbitrator. Indorama also filed a motion for stay of the arbitral proceedings pending the determination of the suit filed against both the arbitrator and the respondent. The court processes were duly served on the arbitrator and CIL. Subsequently, Indorama notified the arbitrator by email that it would no longer participate in the arbitral proceedings given the relief it was seeking in the court proceedings.

It would appear from the judgment that either before or after the tribunal's decision on jurisdiction, Indorama took further steps in the proceedings by filing a crossclaim, paying its own share of the deposit towards the costs of the arbitration and also vigorously cross examining CIL's witness.

Despite the proceedings commenced by Indorama, the tribunal continued proceedings in the arbitration, and during the proceedings of 15 November 2016, the arbitral tribunal foreclosed Indorama's right to call witness(es) or tender additional documents, closed the trial phase of the arbitration and gave directions as to the timelines for the filing of post-hearing submissions and publication of the final award by the tribunal. Upon the publication of the final award on 20 December 2016, Indorama filed an application in the High Court to set aside the award, which was denied, and which decision was subsequently challenged at the Court of Appeal.

At the Court of Appeal, Indorama argued that the arbitral tribunal misconducted itself in assuming jurisdiction despite the fact that it (Indorama) was not served with the notice of arbitration; that the arbitral tribunal misconducted itself by conducting further proceedings and rendering a final award despite being served with Indorama's proceedings seeking, among other reliefs, a declaration that the condition precedent to the commencement of the arbitral proceedings, that is, service of a notice of arbitration, had not been complied with, an order setting aside the decision of the arbitrator on jurisdiction and removal of the arbitrator. Indorama further contended that the arbitral tribunal misconducted itself by failing to give notice to Indorama of the proceedings conducted from 9th November 2016 until 20th December 2016 when the award was published.

On the issue of jurisdiction, CIL argued that Indorama had waived its rights and submitted to the jurisdiction of the arbitral tribunal by filing a crossclaim, paying its own share of the deposit of the costs of the arbitration, and vigorously cross examining its witness.

In its decision, the Court of Appeal held that:

- The arbitral tribunal misconducted itself when it conducted the arbitral proceedings between the appellant and the respondent without the fulfillment of the condition precedent to the commencement of the arbitration, which was the service of the notice of arbitration on Indorama.
- The arbitrator's failure to defer to the court on the issue of jurisdiction and competence and failure to ensure that the appellant was served with hearing notices regarding the proceedings from 9 November 2016 through to 20 December 2016 was an act of misconduct that vitiated the arbitral award.
- Even if the appellant had notified the arbitrator that it would no longer participate in the arbitral proceedings, the law still required that it be notified of the hearing schedules, particularly as the tribunal had, in setting the timetable for the filing of post-hearing submissions, indicated a timeframe for Indorama to file its own post-hearing submissions.
- The arbitrator and CIL being aware of the suit against them before the High Court were obliged to respect the court and that when there is an ongoing litigation, none of the parties to the litigation must do anything to foist a fait accompli on the court.
- Due process and caution demanded that when one of the parties to an arbitral proceeding challenges the jurisdiction of the arbitrator, as well as the competence of the arbitral proceeding before a competent court, the parties must defer to the court.
- It was unconscionable for the arbitrator to ignore the proceedings of the High Court and continue the arbitral proceeding.

Comments

In our view, service of a notice of arbitration on the responding party is a very important step in the commencement of arbitration proceedings. In fact, it is a condition precedent. Where a notice of arbitration was not served on the responding party, the tribunal would lack jurisdiction. It would appear that the arbitral tribunal misconceived the import of section 17 of the ACA and assumed that the effect of the parties not stating in the arbitration agreement that notice of arbitration was to be served meant that they did not intend that service of the notice of arbitration be effected. On the contrary, however, Section 12 of the ACA, provides that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall be deemed to commence on the date the request to refer the dispute to arbitration is received by the responding party. Similarly, article 3 of the Arbitration Rules under the ACA states that the party initiating recourse to arbitration shall give to the other party a notice of arbitration and that the arbitral proceedings shall be deemed to commence on the date on which the notice is received by the responding party. It follows therefore that it takes service on the responding party with a notice of arbitration to commence an arbitration. There was nothing to show that the parties agreed to dispense with the service of arbitration agreement on each other. So, in principle, the Court of Appeal was right that the failure to serve the notice of arbitration on the responding party would affect the tribunal's jurisdiction. However, we find the Court's decision on the issue of waiver to be surprising. The Court's decision on this point was based on its finding that Indorama promptly challenged the arbitral tribunal's decision on jurisdiction in court. We note, however, that CIL contended that Indorama had waived its jurisdictional complaints by filing a cross claim, attending, and participating in the proceedings, paying its own share of deposit of the costs of the arbitration and vigorously cross-examining CIL's witness(es). There was no finding by the Court that Indorama did not take those steps. It is unclear why the Court failed to consider whether those specific steps meant that Indorama had waived its jurisdictional complaints, which would be the case if they actually took the alleged steps.

Even more concerning is the Court's decision that the continuation and conclusion of the arbitral proceedings by the tribunal after being served with Indorama's proceedings amounted to misconduct. Firstly, this decision would be used and abused by parties who are bent on frustrating arbitration proceedings to emasculate arbitral tribunals. If an arbitral tribunal is required to stay proceedings once

its jurisdiction is being challenged in court, then all it takes for a disgruntled party to derail the proceedings is to raise jurisdictional objections whether on genuine or fanciful grounds, and if the objection is dismissed apply to the court to set aside the tribunal's decision, as well as stay further proceedings by the tribunal.

Second, while a party may apply to the court to set aside an arbitral tribunal's jurisdictional decision, there is nothing in the ACA that suggests that the arbitral tribunal should stay proceedings to await the court's decision on a challenge to its jurisdiction. What is more. The Court of Appeal had decided on the basis of section 34 of the ACA that Nigerian courts have no jurisdiction to restrain an arbitral tribunal from conducting proceedings while its jurisdiction is being challenged in court.[10] It follows that if the court lacks the jurisdiction to ultimately injunct an arbitral tribunal from conducting proceedings, the continuation of the arbitral proceedings, as well as publication of the award while Idorama's challenge to the tribunal's jurisdiction in the court was pending could not amount to misconduct. Unfortunately, neither section 34 of the ACA nor the Court of Appeal's earlier decisions on same were discussed in the Indorama case. It is hoped that the Supreme Court will have the opportunity to review this decision.

Finally, arbitral tribunals faced with a situation where one of the parties decides not to participate any further in the proceedings would do well to note the Court's decision that failure to serve hearing notice on that party even after it has expressly communicated its decision to withdraw from the proceedings would amount to a breach of fair hearing, which would in turn invalidate the award. It is therefore a matter of due process to ensure that the abstaining party is duly notified of the dates of hearings as well as served with every correspondence and documents exchanged between the arbitral tribunal and the participating party.

Taking steps in proceedings commenced in breach of an arbitration agreement

The Vessel MT Sea Tiger v ASM (HK) Ltd[11]

In this case, the seconnd appellant, Sea Tigers Tankers SA (STTS) and Accord Ship Management (HK) Ltd (ASM), entered into a ship management agreement (SMA) for the management of MT Sea Tiger, the first appellant. By Clauses 23 and 25 of the SMA, it was provided that any dispute arising from or in respect of the agreement would be referred to international arbitration in London.

However, when a dispute arose as to the payment of the management fees between the parties, ASM filed an action in the FHC for the arrest of MT. Sea Tiger (the Ship Arrest Action). The parties of record in the Ship Arrest Action were the vessel MT Sea Tigers and the owners of the Vessel MT Sea Tigers. Although STTS were the owners of the vessel, they were not sued by their name. ASM also gave an indemnity as to damages. STTS did not enter a formal appearance in the proceedings and did not file a defence to the claim. Subsequently, the parties entered into a settlement agreement as a result of which the action was discontinued on 27 February 2014 by ASM and the vessel was ordered to be released. During the court proceedings of 27 February 2014, ASM's counsel informed the court that the parties had settled the matter, which was confirmed by the counsel who represented the vessel and its owners.

Subsequently, Sea Tiger and STTS filed an action at the FHC against ASM claiming damages caused by the wrongful arrest of MT. Sea Tiger from 31 December 2013 to 27 February 2014 in violation of the arbitration clause contained in the SMA.

The claim was dismissed by the trial court on the grounds that both MT Sea Tiger and STTS submitted to the jurisdiction of the FHC in the Ship Arrest Action by the payment and settlement of the claim to secure the release of the vessel MT Sea Tiger from the arrest and detention it was placed under. The court further held that STTS, as owners of MT Sea Tiger, was a party in the Ship Arrest Action even though it was described as the owners of the vessel MT Sea Tiger rather than by its corporate name, Sea Tiger Tankers SA. STTS was dissatisfied with the judgment of the trial court and appealed same to the Court of Appeal.

The Court of Appeal dismissed the appeal and affirmed the decision of the trial court. The Court of Appeal held that STTS was a party to the Ship Arrest Action and that it took steps in the proceedings by settling ASM's claim and thereby waived its right to rely on the arbitration agreement contained in the SMA. The Court held that STTS as the beneficial owner of the vessel was a party to the Ship Arrest Action by virtue of the provisions of section 5(4)(a) of the Admiralty Jurisdiction Act (AJA), even though not specifically described by its name in the initiating court documents.

On the question of whether STTS took steps in the Ship Arrest Action, the Court of Appeal held that even though STTS did not enter a formal appearance in the Ship Arrest Action, STTS had participated in the proceedings by paying the negotiated sum of US$112,000 to ASM to secure the release of vessel MT Sea Tiger. The Court also held that STTS's failure or refusal to appear in the action to enable it to challenge the jurisdiction of the lower court on the grounds of the arbitration clauses in the SMA as well as the payment of the settlement sum meant that STTS had submitted to the jurisdiction of the court and took steps in the proceedings and thereby waived its right to insist on the arbitration clause under the SMA.

Comments

Section 5 of the ACA provides that if any party to an arbitration agreement commences any action in court with respect to any matter that is the subject of an arbitration agreement, any party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings. Although what constitutes taking steps in proceedings commenced in breach of an arbitration agreement depends on the ambient facts and circumstances of each case, a review of judicial authorities in this regard by Nigerian courts shows that taking steps in proceedings would involve some positive act or conduct on the part of the defendant to the action. For instance, it has been held that a party who makes any application whatsoever to the court, even though it be merely an application for extension of time would be deemed to have taken steps in the proceedings.[12] Filing of an affidavit in opposition to summons for summary judgment, service of a defence, filing an application to the court for leave to serve defence or for an order for discovery or for an order for further and better particulars have been held to amount to taking steps in proceedings that were commenced in breach of arbitration agreements.

We therefore find it strange that the Court of Appeal held in this case that the payment of settlement sum coupled with the failure or refusal on the part of STTS to enter appearance in the matter for purposes of applying for stay of proceedings amounted to taking steps in the proceedings or submission to jurisdiction.

Even though STTS did not enter a formal appearance in the Ship Arrest Action and was not represented by counsel in the proceedings conducted in the matter, a counsel however attended court on its behalf on 27 February 2014, being the date the action was withdrawn. In the course of the proceedings, the counsel for

ASM informed the court that the parties had settled the matter, ASM had filed a notice of discontinuance of the action, as well as consent to release the vessel. He therefore applied to discontinue the action and release the vessel. Thereafter, the counsel who represented the defendants in the matter (the vessel and STTS) confirmed the position as stated by ASM's counsel.

While the appearance of a counsel on behalf of the defendants on that date and his participation in the proceedings as aforesaid arguably amounted to taking steps in the proceedings, we are unable to agree with the Court of Appeal that settlement negotiations and payment of the settlement sum to procure the release of the vessel amounted to submission to jurisdiction and taking steps in the proceedings.

Where an admiralty claim is commenced in breach of an arbitration agreement leading to the arrest and detention of a vessel, it is always commercially sensible for the vessel owners to enter into negotiations with the claimants with a view to securing the release of the detained vessel to mitigate their damages. To the extent that the vessel owners have not entered appearance or taken any positive steps in the proceedings, such settlement negotiations, including payment of the agreed settlement sum, should not, in our view, amount to taking steps in the proceedings or submission to jurisdiction.

That being said, the case illustrates the need for vessel owners who wish to negotiate the release of a detained vessel in the context of proceedings commenced in breach of an arbitration agreement to ensure that their actions are carefully calibrated in order to avoid taking any steps that could be considered as submission to jurisdiction or steps in the proceedings. The settlement negotiations should expressly be stated to be without prejudice to their rights under the relevant agreements. If the vessel owners intend to sue the claimants for breach of the arbitration agreement, they should also consider whether it would be tactically necessary to be represented in court by a lawyer on the date the action is to be withdrawn after they have paid the agreed settlement sum or whether to send a lawyer to observe but not participate in the proceedings to ensure that the action is discontinued as agreed.

Notes

1 Unreported decision of the Court of Appeal, Lagos Judicial Division, in Appeal No. CA/L/932/2018 delivered on 13 November 2020

2 Chapter A18, Laws of the Federation of Nigeria (LFN) 2004

3 Chapter L84 Laws of Lagos State 2015

4 See also for instance section 61 of the Limitation Act Chapter 522 Laws of the Federal Capital Territory Abuja, which provides that 'This Act and any other limitation enactment shall apply to arbitration as they apply to actions in the court.' See for similar provisions, section 34 of the Limitation Law Chapter L14 Laws of Cross River State and section 34 of the Limitation Law of Akwa Ibom State (Cap. 78) Laws of Akwa Ibom State 2000. For an in-depth discussion of the question of limitation periods applicable to award enforcement, see the Nigerian chapter of the *Middle Eastern and African Arbitration Review 2016* contributed by Uzoma Azikiwe and Festus Onyia and accessible at this link https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2016/article/nigeria.

5 1974-75 NSCC 590.

6 In this case it was the English Statute of Limitation 1623. which requires that a civil action must be commenced within a period of six years of the cause of action.

7 (1997) 9 NWLR (Pt.520) at 224. See also *Tulip (Nig.) Ltd v N.T.M.S.AS.* (2011) 4 N.W.L.R (Pt.1237) 254.

8 Unreported decision of the Court of Appeal, Lagos Judicial Division in Appeal No. CA/L/1330/2018 delivered on 13 November 2020.

9 (2020) 11 NWLR (Pt. 1735) 302

10 *Statoil (Nigeria) Ltd & Anor v Nigerian National Petroleum Corporation & 2 Others* (2014) N.W.L.R. ((Pt. 1373)1 and *Nigerian Agip Exploration Ltd v Nigerian National Petroleum Corporation & Anor*, Unreported decision of the Court of Appeal, Abuja Judicial Division in Appeal No. CA/A/628/2011 delivered on 25th February 2014.

11 (2020) 14 NWLR (Part 1745) 418

12 *Obembe v Wemabod Estates Ltd* (1977) 5 SC, 115.

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Uzoma Azikiwe is a partner and the head of Udo Udoma & Belo-Osagie's litigation, arbitration and alternative dispute resolution team. He was elevated to the rank of senior advocate of Nigeria in 2020. He provides advice in maritime, aviation, employment and energy matters, and his specialisations include advising multinationals on oil and gas law, environmental matters, the provision, manning and maintenance of vessels, cabotage issues, telecommunications, construction and infrastructure, and administrative and constitutional law.

He trained as an international commercial arbitrator with several Nigerian and international arbitration organisations, including the International Chamber of Commerce Institute of World Business Law, the Chartered Institute of Arbitrators in the UK, the Chartered Institute of Arbitration (Nigeria), and the Chartered Institute of Mediation and Conciliation. He obtained a diploma in international commercial arbitration at St Anne's College, Oxford, United Kingdom, and has benefited from PIDA training in international commercial arbitration, PIDA training in international commercial contracts and training by the Chartered Institute of Taxation of Nigeria.

Uzoma makes presentations, presents depositions and gives evidence as a legal expert on Nigerian law before various foreign courts. Most recently, he appeared in this capacity before the High Court of Justice in England (in the 2009 case of *Dornoch Limited & Others v Westminster International BV & Others*).

He has published articles on commercial law including 'The Doctrine of Undisclosed Agency Revisited', as well as articles on environmental law and arbitration. His articles have been published in reputable international journals, such as *The European, Middle Eastern and African Arbitration Review*, *The Middle Eastern and African Arbitration Review*, *International Financial Law Review Dispute Resolution Guide* and *Chambers International Arbitration Country Practice Guide*. He presents papers at and conducts seminars for various major service companies in the oil industry in Nigeria on employment and labour matters.

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Festus Onyia is a partner at Udo Udoma & Belo-Osagie in Nigeria and specialises in civil, corporate and commercial litigation, arbitration and alternative dispute resolution (ADR). His other practice areas include labour law, employment and industrial relations law and tax litigation.

He has attended several seminars, conferences and trainings across his core practice areas and has trained as an international commercial arbitrator with several Nigerian and international arbitration institutions, including the International Chamber of Commerce (ICC) in Paris where he attended the advanced PIDA training in international commercial arbitration.

Festus has acted as counsel in both ad hoc and institutional arbitrations, including under the ICC Rules of Arbitration. He has also advised on issues of Nigerian law for determination in matters before foreign courts and arbitration tribunals.

He was a member of the international task force appointed by the ICC Commission on Arbitration and ADR on the revision of the ICC Rules as Appointing Authority in UNCITRAL and other Ad Hoc Proceedings. His recent work includes successfully defending a foremost accounting, auditing, consulting and financial services firm in an ad hoc arbitration seated in Lagos.

In addition, Festus led the legal team that represented a multinational oil and gas drilling company and its Nigerian subsidiary in an arbitration under the ICC Rules (Case No. 22243/TO) in respect of a claim against a Nigerian oil and gas company for the recovery of unpaid invoices of over US$20 million arising under a drilling contract. More recently he successfully acted for an international drilling company in ad hoc arbitration that resulted in a US$9 million dollar award in favour of the drilling company.

Festus has made presentations and written articles across his practice areas. His articles have been published in multiple reputable international journals such as *The European, Middle Eastern and African Arbitration Review*, *The Middle Eastern and African Arbitration Review*, *International Financial Law Review Dispute Resolution Guide*, *Chambers International Arbitration Country Practice Guide*, *Dealmakers Africa* and *The Nigerian Tax Law Review*. Festus is affiliated with several professional bodies such as the Chartered Institute of Arbitrators (UK) and is a Fellow of the Nigerian Institute of Chartered Arbitrators.

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Founded in 1983, Udo Udoma & Belo-Osagie is a full-service corporate and commercial law firm with offices in Nigeria's key commercial centres and an affiliate in Ghana. Our 15 partners and 66 associates specialise in assisting local and international clients to create and implement innovative and practical solutions that are designed to facilitate business in Nigeria and in Africa. As a firm, we have developed a reputation for enabling a wide range of transactions, including those that are new to Nigeria, generating innovative legal solutions, facilitating complex transactions and resolving disputes within a short space of time.

The firm's litigation, arbitration and alternative dispute resolution team provides a full bouquet of services to clients across all our practice areas. Such services include representation before courts, arbitration, mediation and other tribunals, due diligence reviews, portfolio audits, acting as counsel in court-regulated transactions and the drafting and review of local and cross border transaction agreements. Members of this dynamic team also routinely support and advise our international law firm peers on Nigerian law matters and have been called upon to act as expert witnesses in the courts of the United Kingdom and the United States. The team also represents, as counsel, various national and multinational corporate organisations in disputes relating to coastal trade (cabotage), oil and gas, mining, dredging, construction, aviation and maritime arbitrations. The litigation team evaluates the litigation portfolios of target companies involved in financings, investments, mergers and acquisitions handled by the firm's corporate team, and routinely carries out comprehensive legal audits and risk assessments of these portfolios.

The wealth of experience of this vibrant team is vested in its members, many of whom are not only qualified barristers and solicitors, but also arbitrators, mediators and conciliators with practical experience in a diverse range of corporate and commercial matters. Members of the litigation, arbitration and dispute resolution team have written extensively on commercial litigation and arbitration issues in reputable journals within Nigeria and internationally.

Challenging Arbitral Awards in Qatar

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In summary

This chapter provides an overview of the challenge to arbitral awards in Qatar.

Discussion points

- The arbitration legislation in Qatar
- The competent court in Qatar
- The grounds for challenge
- The procedure

It is not uncommon for a losing party to an arbitration to challenge the final award. Such a challenge is brought before the competent court of the arbitral seat.

This article provides an overview of the legal framework for challenging arbitral awards in Qatar.

The applicable law

In 2017, Qatar enacted a new arbitration law by way of Law No. 2 of 2017 (the Arbitration Law). The Arbitration Law is based on the UNCITRAL Model Law and superseded Chapter 13 of Law No. 13 of 1990, which formerly contained the law relating to arbitration in this jurisdiction.

The competent court

Article 33(1) of the Arbitration Law provides that challenges to arbitral awards must be made before the competent court. Article 1 of the Arbitration Law designates the competent court for Doha-seated arbitrations to be the Civil and Commercial Arbitral Disputes Circuit of the Court of Appeal (the Competent Court).[1]

The grounds for challenge

Most arbitration laws limit the right to set aside (or annul) arbitral awards to grounds relating to procedural and public policy matters. The Arbitration Law follows this approach.

Under the Arbitration Law, the grounds are divided between those that should be put forward by the parties, and those that can be raised by the Competent Court on its own motion.

Grounds to be invoked by the parties

Under article 33 of the Arbitration Law, these grounds are the incapacity of the parties, the invalidity of the arbitration agreement, the violation of due process, the tribunal's excess of authority and the tribunal's improper constitution, as well as other procedural irregularities.

Each is considered below.

The incapacity of the parties to an arbitration agreement

Further to article 33(2)(a) of the Arbitration Law, incapacity is determined with reference to the relevant law governing such matters. Articles 49 to 54 of the Qatar Civil Law No. 22 of 2004 (the Civil Code) determine a person's capacity. Minors, mentally incapacitated persons, persons without legal capacity, bankrupt people or those deprived of their civil rights as a result of criminal conviction, are considered to be lacking capacity and are thus prevented from entering into agreements (including arbitration agreements).

Invalidity of the arbitration agreement

Article 33(2)(a) of the Arbitration Law provides that the invalidity of the arbitration agreement constitutes a ground for challenge. In this respect, validity is determined by reference to the law chosen by the parties or, failing which, under the Arbitration Law. The Arbitration Law requires that an arbitration agreement be in writing for it to be valid: see article 7(3).

Improper constitution of the arbitral tribunal and procedural irregularities

Article 33(2)(d) of the Arbitration Law provides that an award may be challenged if the composition of the arbitral tribunal, the appointment of the arbitrators or the arbitral proceedings, were not in accordance with the agreement of the parties, unless such agreement was in conflict with a mandatory provision of the Arbitration Law. Absent such agreement, a challenge can be made if the tribunal's appointment, or the arbitration procedure, were not in accordance with the Arbitration Law.

Violation of due process

Under article 33(2)(b) of the Arbitration Law, a party that was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its defence for any other reasons beyond its control, can challenge an award rendered against it.

The arbitral tribunal exceeds its authority under the arbitration agreement

Article 33(2)(c) of the Arbitration Law provides that, if an arbitral award decides matters outside the scope of the arbitration agreement, it can be challenged by the parties. This provision allows partial set aside if it is possible to separate those parts of the award rendered in excess of the tribunal's jurisdiction from matters that fell within the agreement to arbitrate.

Grounds that can be invoked by the competent court on its own motion

The Arbitration Law provides that the Competent Court may, on its own motion, set aside arbitral awards based on inarbitrability and public policy considerations.

Inarbitrability

Article 33(3) of the Arbitration Law gives the Competent Court power to set aside arbitral awards rendered in respect of inarbitrable matters.

Article 7(2) of the Arbitration Law provides that matters that cannot be subject to compromise are incapable of being arbitrated. Article 575 of the Civil Code prescribes those matters that cannot be compromised. These include 'personal status' (for example, marriage) and criminal disputes, but issues relating to the financial rights associated with these matters can be arbitrated. More generally, compromise cannot be made in respect of any disputes where the subject matter violates Qatari public policy.

Article 2(2) of the Arbitration Law requires the prior approval of the prime minister for the arbitrability of administrative dispute. It also prohibits arbitration for disputes between state entities.

Public policy considerations

Under article 33(3) of the Arbitration Law, an arbitral award can be set aside on public policy grounds.

The concept of public policy in Qatar has been defined by the Qatari Supreme Court as a set of fundamental principles relating to the social, financial and ethical norms on which the Qatari society is based.[2]

The Challenge procedure

Article 33(4) of the Arbitration Law provides that, unless the parties agree in writing to extend the time limit, an application challenging the award must be filed within one month from the date of receipt of the award by the parties; notification of the award to the applicant; or the issuance of a corrective or supplemental award.

Under article 33(5) of the Arbitration Law, the Competent Court may suspend the setting aside proceedings for a period determined by it upon the request of one of the parties. During that period, the Competent Court may give the arbitral tribunal the opportunity to resume the arbitration proceedings to take any action that the arbitral tribunal deems necessary to remedy the grounds of the challenge.

The decision of the Competent Court on any challenge is final and not capable of being appealed: see article 33(6) of the Arbitration Law.

Endnotes

1 As opposed to arbitrations seated in the Qatar Financial Centre (QFC), a separate jurisdiction for which the competent court is the First Instance Circuit of the Civil and Commercial Court of the QFC. It is beyond the scope of this chapter to consider the arbitration regime of the QFC.

2 See, for example, Decision No. 348 of 2015, Civil and Commercial Circuit, Court of Cassation.

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Sultan Al-Abdulla & Partners (SAP) is a full-service Qatar law firm which provides a wide range of services in both contentious and non-contentious matters. Founded in 1999, SAP is one of the oldest and largest law firms in Qatar.

SAP is highly ranked by international legal directories in all of its practice areas. SAP is ranked Band 1 by Chambers and Partners and Tier 1 by The Legal 500. The firm was named Qatar Law Firm of the Year 2017 by the Qatar Business Law Forum sponsored by Lexis Nexis.

We are one of the leading arbitration practices in Qatar. Our lawyers have significant experience in handling complex matters, with an emphasis on commercial, construction and public law cases. Our team is admitted to practise in various common and civil law jurisdictions, such as England, Qatar, Egypt, the US, Pakistan and India. The diverse backgrounds of our lawyers enable us to act for a wide range of clients in Qatar, the wider Middle East and internationally. Given our bilingual capabilities, our team can handle arbitrations in Arabic and English. We therefore offer the benefits of an international law firm, coupled with deep knowledge of our local market, its culture and systems.

Saudi Arabia

Hamed Hassan Merah and James MacPherson
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In summary

This article discusses how local and international alternative dispute resolution (ADR) has transformed access to justice. It also discusses the convergence of innovative local legal infrastructure with best international statutes; modernisation; and the key contributors to the transformation of the Saudi ADR ecosystem.

Discussion points

- Government support
- Diversification of ADR
- Judicial support
- Institutional leadership

Referenced in this article

- The Arbitration Law enacted by Royal Decree No. M/34 dated 16/04/2012G and its Implementing Regulations issued by Cabinet Decree No. 541 dated 22/05/2017G
- Royal Decree No. 28004, dated 19 January 2019
- The Franchise Law enacted by Royal Decree No. M/22, dated 08/10/2019G
- The Bankruptcy Law enacted by Royal Decree No. M/50, dated 14/02/2018G
- The Government Tenders and Procurement Law enacted by Royal Decree No. M/128 dated 16/072019G and its Implementing Regulations amended by Cabinet Decree No. 3479 dated 04/04/2020G
- The Commercial Courts Law enacted by Cabinet Decree No. 511 dated 08/04/2020G
- Cabinet Decree No. 103 (the Conciliation Center Statute)
- The United Nations Convention on International Settlement Agreements Resulting from Mediation 2019 (the Singapore Convention)

Introduction

Improving ADR and access to justice in Saudi Arabia

The complete transformation of Saudi Arabia's commercial ADR ecosystem over the last decade has dramatically altered the way those doing business in Saudi Arabia operate and access justice. The legal reforms and initiatives have been so comprehensive, fundamental and substantive in their rapid implementation, uptake and impact that a survey of the more consequential ones is beneficial.

All companies and their counsels - whether learning or briefing, part of their due diligence, legal or risk management, contract negotiation and drafting, project management, litigation management, dispute management and resolution - will find this a useful primer. This chapter will provide vital information needed to be briefed on the development and current state of Saudi ADR and includes viewpoints from leading ADR practitioners working in the region.

The main conditions in which ADR has increased access to justice in Saudi Arabia are reviewed, outlined and discussed. The requisite need for understanding how ADR works and its reliance on a range of different types of dispute resolution mechanisms, the comprehensive use of dispute resolution system design and the adoption of the appropriate legislation and regulation for both mediation and arbitration processes (and in a complementary, mutually reinforcing and effective way) has been undertaken and put in place in Saudi Arabia.

Highlighted here as the most important preconditions for realising the potential of ADR to provide access to justice in Saudi Arabia.

Four sections:

The four key contributors to the transformation of the Saudi ADR ecosystem are the following:

Government support	Legislative and procedural reforms, and opting-in to ADR investing in transformation
Diversification of ADR	SCCA partnering with government and the private sector to diversify, deliver and promote ADR across sectors
Judicial support	SCCA collaborating with all judicial entities and courts on ADR enforcement
Institutional leadership	Sophisticated international standard service provider, responsive innovation and professionalisation

Unlocking the potential of ADR

The Saudi government recognises the value and game-changing power of ADR. The level of coordinated activity - whether legislatively or initiatives invested in and undertaken across the board in the Kingdom - reflects their comprehensive commitment to fully realising the many benefits of commercial ADR. The solutions and their impact on businesspeople have also been effectively linked into a winning narrative.

The Saudis invested strategically in basic long-term support which, although relatively modest, have been highly impactful on the development, growth and sustainability of their ADR Sector.

Importantly, they have brought together the various stakeholders to get behind a unified vision and narrative: 'Ours is an ADR friendly and innovative jurisdiction'.

National ADR awareness campaign

All three Ministers of Justice, Finance and Commerce, in partnership with other government, semi-government and private sector partners, announced in mid-February 2021 that they would be leading a major coordinated, national ADR push - the latest example of the depth of commitment and sustained strategic value placed on dramatically improving the quality and access to justice in Saudi Arabia.

Institutions participating in the national campaign to raise awareness about ADR include government and semi-government entities such as the Ministry of Justice, Ministry of Commerce, Ministry of Finance, Ministry of Media, National Competitiveness Centre (NCC), the Small and Medium Enterprises General Authority; the Council of Saudi Chambers as a private sector representative; the Saudi Bar Association and the SCCA.

Coordinated legislative reforms

ADR is playing an increasingly important role in managing and resolving disputes since the 'new' Arbitration Law in 2012 kicked off reforms of the commercial legal system of Saudi Arabia. Some of the key legislation and implementing regulations that have changed the ADR landscape in Saudi Arabia that will be discussed include:

- the Arbitration Law 2012;
- the Arbitration Implementing Regulations 2017;
- Royal Decree No. 28004, dated 19 January 2019 (Circular to all ministries, government authorities, state-owned companies, and affiliated bodies encouraging all government entities and state-owned companies to settle their disputes with foreign investors through arbitration, making specific mention of SCCA in particular as a first option);
- the Bankruptcy Law 2018;
- the Franchise Law 2019;
- the Government Tenders and Procurement Law 2019;
- the Government Tenders and Procurement Implementing Regulations 2020;
- the Commercial Courts Law 2020, introducing several new measures to improve the efficiency of the judicial system, with certain claims now be mediated or conciliated before seeing a judge (court-mandated conciliation or mediation);
- Cabinet Decree No. 103 – Conciliation Center Statute; and
- the Singapore Convention – the United Nations Convention on International Settlement Agreements Resulting from Mediation 2019.

Although in the past arbitration in Saudi Arabia has not been as popular as elsewhere, 'the recently enacted legislation, in particular the Arbitration Law and the Enforcement Law, and the opening of the SCCA, a modern arbitration centre, provides a reason for cautious optimism that the judiciary's familiarity with arbitration and the trend for increasingly favouring arbitration as an effective method of dispute resolution in the KSA' will continue.[1] The key is to sustain and maintain this positive momentum.

Targeted legislative reform: to meet local and international standards

Minister of Justice Walid Al Samani was very precise in regarding which aspect of judicial performance he felt his reforms were meant to zero in on when he stated that the 'new laws will be limiting the role of the courts in applying the statutory text'.

The Herbert Smith Freehills Middle East ADR team in Dubai concluded that:

> *[the] aim to bring the KSA legal system in line with both international standards and Shari'ah, by creating a more transparent legal framework. We understand that new mechanisms will also be introduced, so there are fewer discrepancies in Court decisions. . .This is a significant step towards more certainty for those accessing the KSA legal system and the announcement is a welcome step both for legal practitioners and those doing business in the Kingdom.*[2]

Government support opting-into ADR and making it happen

Circular of the Royal Decree No. 280004 to all ministries, government authorities, state-owned companies, and affiliated bodies was to encourage them to resolve their disputes with foreign investors through arbitration, making specific mention of SCCA in particular.

Saudi Finance Minister Mohammed Al-Jadaan announced the impact of the government's streamlined process and its categorical embrace of ADR:

> *Recourse to arbitration has now become a right of ministries with the agreement of the Ministry of Finance. Whereas recourse to arbitration was previously an exception, now, this is a clear confirmation by the government of the importance of arbitration and the government's commitment to participate in more rapid, cost-effective dispute resolution.*[3]

Testament to Saudi's commitment include the ministries that actively embraced the opportunity of the availing themselves of the SSCA Model Clause, among them:

- Minister of Finance approved 14 unified governmental contracts, providing for the SCCA's Model Clause as its default ADR mechanism.
- SCCA Module Clause has been included in a number of the model contracts issued by the Ministry of Commerce.

The Government Tenders and Procurement Law

In December 2019, the new Government Tenders and Procurement Law (the GTP Law), along with the Implementing Regulations, came into force. The GTP Law specifically encouraged government ministries and agencies involved in tenders and procurement to strategically avail themselves of appropriate ADR mechanisms.

The Franchise Law

Similarly, the Franchise Law promotes ADR by expressly stating that 'it is permissible to agree to settle disputes that arise from the franchise agreement or the application of the law by alternative means, such as Arbitration, Mediation and Conciliation'.

Third-party funding: lawsuits

Significantly, the ADR market has been largely rendered into a modern, permissive, party-centric and supportive context. The legislation and regulations deliberately allowing great flexibility in terms of process, as well as also including such modern features as third-party funding. In fact, when litigating or arbitrating in Saudi Arabia, 'there are no restrictions on the types of lawsuits in which a third party may fund a party's costs.'[4]

The Singapore Convention: mediation agreement enforcement in Saudi Arabia

In order to enhance the effectiveness of commercial mediation, Saudi Arabia was among the 46 founding signatory countries to the Singapore Convention and the fourth country to ratify it globally.

Entering into force in Saudi Arabia on 5 November 2020, the Singapore Convention is a major development with implications for those doing business internationally. Applying to international mediated settlement agreements, the Convention establishes a harmonised enforcement mechanism to invoke cross-border mediated settlement agreements and to enforce them among its signatories, 'thereby bringing more certainty and stability to mediation procedures between international parties', notes John Barlow, HFW in Riyadh and Dubai: '

> *If a party can show that the settlement agreement falls within the scope set out . . . a relevant court or other competent authority in a signatory country has limited grounds for refusing enforcement . . . [the competent authority] will likely rely on the SCCA Mediation Rules, which provide a code of ethics for mediators, potentially the Execution Law, any other applicable laws.*[5]

Party autonomy and choice: appointments, representation and more

Under the Saudi Arbitration Law, parties can appoint any arbitrator, mediator, lawyer, expert or other representative regardless of gender, nationality or religion.

Parties are availing themselves of their freedom of choice and are retaining women ADR and legal professionals among others, local and foreign. For example, in addition to parties having female legal representation in SCCA mediation, the SCCA appointed its first female mediator in February 2020. Also this year, the SCCA received a request for mediation where women legal representatives have signed as party representatives on the submission to mediate at the SCCA. All are very promising indicators for women professionals and all clients.

A review of the notice taken of ADR appointments also points to a string of successes with regard to arbitration and mediation. There have been official press releases regarding the confirmed appointment of two female arbitrators from the courts of appeal in Saudi Arabia. The Court of Appeal in Dammam approved the appointment of Saudi female arbitrator, Shaima Aljubran in the field of commercial disputes. Further, the Court of Appeal in Makkah Province confirmed the appointment of Rabab Ahmed Al-Ma'bi as an arbitrator to settle commercial disputes between two companies in Jeddah.[6] Also in Riyadh, the Commercial Court of Appeal approved the appointment of Saudi female arbitrator, Sara Alkhunaizan in the field of commercial disputes.

Given the confidential nature of commercial ADR, whether mediation or arbitration, as well as the fact that ad hoc ADR remains quite widespread in Saudi Arabia and therefore less conducive to observation, when it comes to tracking and analysis we only have the above-noted appointments in the public domain. Others may not have been publicised. Thankfully, there is ever more publicly available information related to court judgments and increasing local and foreign media scrutiny and coverage – all contributing to a more accessible and transparent justice system, including, it is anticipated, more news of female appointments.

While SCCA officially signed the ERA Pledge to ensure the engagement of men and women of all ages across the professional spectrum and regions of Saudi Arabia, SCCA's multi-year efforts have yielded promising results. Fortunately, given the centrality of comprehensive diversity to realising the full potential of ADR for all stakeholders, the response has been overwhelmingly positive in terms of enrolment, overall participation and an ever-growing pool of talent. In order to sustain the requisite awareness and buy-in needed to see diversity among arbitrators and mediators, counsels and parties themselves, SCCA is providing a platform and a service for all.

Diversification of ADR

SCCA partnering with government and private sector to diversify, deliver and promote ADR across sectors

Court-mandated mediation has been instituted and launched to provide better resolution and enhanced access to justice. Saudi Arabia is increasingly providing in general a more ADR friendly jurisdiction while instituting court-mandated mediation in particular being tasked with transforming the way ADR is accessed, its profile, use and overall embrace across the spectrum of disputes among litigants.

The Commercial Courts Law (CCL)

Among the legislative reforms most welcomed by practitioners was the 2020 CCL. As Clyde & Co's Dubai and Riyadh ADR team noted:

> *The CCL represents a bold step in the modernization of the court system in KSA. It introduces a wide range of new measures to expand and refine the jurisdiction of the Commercial Courts, streamline the service and administration of claims, provide flexibility in relation to the production of evidence and expand the enforcement powers of the Commercial Courts . . . [and] expressly permits Commercial Courts to utilize the services of the private sector in relation to: Alternative dispute resolution such as reconciliation and mediation . . .*[7]

Mandatory conciliation/mediation

> *The CCL encourages parties to resort to alternative dispute resolution ('ADR') and will make ADR mandatory in some cases (which will be identified in accordance with the Implementing Regulations) . . . Any initiative by the Commercial Courts to encourage ADR is to be welcomed in our view. For too long, litigation has been the first port of call for the parties to a dispute across the Gulf. Making mediation mandatory in some cases may serve to raise awareness of ADR in the Kingdom and reduce the amount of unnecessary litigation.*[8]

Aware of the important role that ADR plays in resolving speedily and cost-effectively commercial disputes, the salutary way it enhances the culture of resolving disputes amicably and its resulting alleviation of the burden on commercial courts, the Saudi government enacted the recent Commercial Courts Law (CCL) and related Implementing Regulations (the Regulations). Combined, these measures mandated that litigants, in cases determined by the Regulations, are to attempt to resolve their disputes through reconciliation or mediation before they would be able to resort to the Commercial Court. In order to resort to the court, litigants must provide evidence that no resolution has been reached through reconciliation or mediation during the 30 days from their attempt to mediate.

Such cases include (within the amounts specified in the Law):

- claims between merchants because of their original or dependency business against merchant in commercial contracts disputes;

- claims relating to appointed public trustee, liquidator, bankruptcy secretary and expert provided that disputes is within the competence of the court;
- claims for damages arising from disputes previously litigated in the court;
- compensation for damages arising from disputes previously litigated in the court;
- claims between shareholders or partners in a *Mudarabah* company;
- claims where the parties are married or are related up to the fourth degree; and
- claims in relation to contracts that include written agreements to conciliate, mediate, and amicable settlements before resorting to litigation.[9]

MOJ mediation: how it works

The MOJ's major ADR initiatives were recently outlined in a comprehensive report released in February 2021. Among the highlights are the following.

Launching Taradhi platform

The MOJ launched the Taradhi platform 'for the remote provision of mediation services from filing the case up to reaching the mediation result, without having to visit the court.' Already, in less than one year, 'over 300,000 claims have entered the Taradhi system with over 53,000 mediated deeds.'[10] The MOJ has introduced several divisions and departments, including its own Conciliation Centre, and empowered notaries to notarise mediated settlement agreements.

Empowering presiding judges to refer cases to mediation offices

Saudi Justice Minister Walid al-Samaani issued an order empowering presiding judges to refer cases to mediation offices before referral to judicial panels.[11]

If no agreement is reached within a month, the case is referred to the competent judicial panel.

Implementing mediation system

The MOJ has implemented the mediation system through a series of services and decisions, aiming to increase the percentage of successfully mediated cases. The goal is to reduce the influx of lawsuits, fast-track decisions, and provide means for ADR through non-profit organisations and the private sector - including the SCCA.[12]

Men and women can register as mediators or conciliators.[13]

Approving mediation and conciliation rules

Within the initiative for implementing the mediation system, the MoJ has approved new procedural rules for mediation and conciliation offices, aiming to make mediation a viable option for resolving disputes.

Mediation records recognised as enforcement instruments

The MOJ has recognised mediation records as 'enforcement instruments' after approval by the Conciliation Center. The step enhances mediation and conciliation procedures in Saudi Arabia, and promotes the resolution of disputes through mutual consent.[14]

Expanding the Najiz portal and app

The MOJ's Najiz.sa portal now offers over 120 e-services related to the judiciary, enforcement, notarisation, mediation, training and law practice, with over 70,000 daily visits to access over services.[15]

Its overall objectives include:

- making MOJ services easily available;
- fast-tracking performance and achieving justice;
- enhancing transparency;
- enabling quick access to information; and
- saving time and effort for clients.

MOJ Commercial Court Mediation Programme

After an initial limited pilot project in Riyadh's courts, the SCCA-MOJ Mediation Programme has been widened to include courts in areas across Saudi Arabia.

With parties' agreement, commercial cases are transferred from Commercial Court by its judges to the SCCA for administration.

After an initial pilot in the Riyadh Commercial Court, the pilot programme was rolled out to include other courts across Saudi Arabia.

Cases can include any and all types of commercial disputes, with parties including individuals and commercial entities. To increase access and utility, the mediation can take place in any language the parties wish.

The average court-connected mediated case life was 35 days, with a respectable settlement of cases rate exceeding 61 per cent. Important features include both gender diversity - both men and women can register as mediators - and the innovation of formally making recorded mediation settlement agreements recognised as enforcement instruments.[16]

The first mediation case, in which both parties were represented by Saudi female lawyers, was mediated by Saudi female mediator and resulted in a settlement during the first hearing.

Several of the SCCA-MoJ Mediation Programme cases, which occurred during the covid-19 pandemic, were fully mediated virtually with SCCA.

Conventional and virtual arbitration and mediation

While the underlying legal and professional services infrastructure has been transformed in Saudi Arabia, recent circumstances have also made alternatives even more attractive. The case for ADR in Saudi Arabia was made even more compelling by the global pandemic and the resulting social, economic and commercial challenges.

Virtual ADR, offered in recent years by the world's leading ADR institutions, was fully introduced by SCCA in KSA in 2020. SCCA's remote online mediation and arbitration provides parties with virtual proceedings, tailored timelines, ability to opt for a 'Proceeding based on Documents' under the SCCA's Expedited Procedure Rules, a paperless process option (including electronic filing and document sharing), party-specified remedies – all while maintaining the requisite confidentiality and overall procedural flexibility parties have grown accustomed to.

ADR was already taking off in KSA – and the covid-19 pandemic has given it new impetus and momentum. The results continue to demonstrate and validate the efforts. Local, regional and international parties have shown their confidence in ADR in Saudi and the SCCA in all its manifestations, and the increasing caseloads signal a new era for arbitration in Saudi Arabia and for those doing business there or merely seeking to enforce a foreign judgment or arbitral award.

Saudi-seated arbitrations have become increasingly expedited by the dramatic reduction in the formerly interventionist powers of Saudi Courts. Instead, according to the practical experience of Saudi-seated arbitrations under the newest Arbitration Law (2012) – and the amendments and clarifications – proceedings are being conducted expeditiously. The statute also met the expectations

of users of arbitration, including all the key provisions, for example, local and foreign nationals can both represent parties and be appointed as arbitrators.

Further, arbitrations conducted under SCCA Arbitration Rules benefit from case management and clear, international standard provisions. Many users express their enthusiasm for institutional arbitration's beneficial ability to reign in 'wild-west' ad hoc arbitration.

Parties may now have the expectation that dispute resolution services and service providers will include the requisite rules, and that those charged with resolving disputes as mediators or rendering binding awards as arbitrators will include those with the requisite skills and expertise, including highly specialised knowledge of the relevant substantive issues in contention.

SCCA Mediation is administered under the rules promulgated per its own procedures, from applying for mediation, to its proceedings, fees and the role of the mediator. SCCA Mediation is essentially 'professionally facilitated negotiation' with the Mediator providing neutral, skilled facilitation. Mediation works and these Guidelines will help parties to make the most of this opportunity.

The transformative initiatives have yielded overwhelmingly positive results with regard to strengthening key features of ADR like party autonomy, diversity and transparency. Further, the legal infrastructure has been completely overhauled with all the underlying legislation, implementing regulations and institutional practice guides that have been adopted to best international standards.

SCCA to make mediated settlements enforceable

To help reduce the covid-19 pandemic's impact on the business sector, SCCA launched the 'COVID-19 Emergency Mediation Program' (EMP), an innovative, cost-effective programme providing remote, online mediation with innovative enforceable outcomes. The EMP delivers a high-level of reliability for resolving disputes in accordance with institutional rules that ensure neutrality and optimal efficiency throughout the mediation process. Parties access a practical and effective approach to mediation, enabling a fair and amicable settlement, that notably provides parties the ability to convert their own mediated settlement agreement into an executive title (bond) to add certainty and resume their business activities quickly.

The launch of EMP is part of the SCCA's efforts to reduce the pandemic's impact on the business sector. By means of amicable resolutions backed by a settlement agreement convertible into a final and enforced title (bond), parties with contractual relationships can prevent commercial disputes escalating into lengthy and costly litigation.

The SCCA developed the EMP in consultation with its Rules Advisory Committee, consisting of 14 high-level international experts from 11 countries, including well-known arbitrators, legal advisers, senior attorneys and law professors. The design of EMP is based on the SCCA's existing and time-tested Mediation Rules, modified to meet the demand created by this crisis for a swift, effective and comprehensive alternative resolution mechanism. This involved rethinking the way mediation is conducted and offering a state-of-the-art videoconferencing platform and an affordable fee schedule. It also necessitated re-training meditators to guarantee their readiness to meet the current challenges related to the pandemic's effects.

In this context, the Conciliation Center (Mosalha), under the auspices of the Ministry of Justice, is undertaking important efforts to develop and support the Kingdom's conciliation and mediation system. The SCCA is the first licensed Conciliation Office within that system, enabling the SCCA to convert settlements resulting from SCCA Mediation into enforceable titles (bonds). This is a significant milestone for the alternative dispute resolution industry in Saudi Arabia. On a more global level, the SCCA is the first of ADR centre to offer such a comprehensive solution at an institutional level and fully embraces the spirit and intent of what the Singapore Convection has accomplished at the international level.

Mediation facilitation service

ADR institutions are uniquely qualified to make an overture to an undecided party about the process of mediation and its many merits. Now, one party can avail itself of the new Mediation Facilitation Service in which the SCCA will make up to five written or oral attempts to contact the other party within 30 days of the registration of the request.

If successful, the SCCA initiates the mediation process once any outstanding Administrative Fees for Mediation are paid. The otherwise non-refundable 1,000 Saudi riyals (US$267) in service fees already paid by the requesting party will be credited towards its share of the SCCA Administrative Fees for Mediation if the parties wish to keep their mediation with the SCCA. The mediation will be administered as set forth in the EMP, modifying the SCCA Mediation Rules.[17]

Judicial support all forms of ADR enforcement

Judgments

For almost two decades, there has been an increasingly steady flow of appropriate judicial actions and judgements. As Al-Tamimi's Head of Arbitration Thomas Snider has observed:

> *Consistent with this evolution towards a more arbitration-friendly legal environment, courts in the KSA have been adopting more pro-arbitration judgments (issued both prior to and following the 2012 Arbitration Law).*[18]

In 2017, all commercial disputes were transferred to the then newly formed Saudi Commercial Courts 'at the same time widening the definition of commercial disputes to include construction cases and commercial property disputes'. Both the enforcement of judgments and arbitration have been reformed most recently, when the procedures of the Commercial Courts were overhauled by the Commercial Courts Regulation, Royal Decree No M/93 entered into force on 16 June 2020.[19]

Enforcement: arbitral awards and tribunals

Although there may be some lingering uncertainty internationally about non-Muslim arbitrators and their arbitral awards, those who have first-hand experience and closely follow local and foreign arbitration activity in the kingdom are more sanguine: 'To date, no one has heard of a foreign arbitration award not being enforced in the Kingdom on the grounds that said award was rendered by a tribunal chaired by a non-Muslim arbitrator', notes Freshfields' Riyadh-based Jean Benoit Zeggers.

Importantly, there is also the long-standing practice in the kingdom that any portion of an arbitral award deemed by a Saudi Enforcement Court to run counter to public policy or Shariah law can be set aside or otherwise deemed unenforceable, but without affecting the rest of the award. However, if one wishes to ensure that an arbitral award does not contain provisions contrary to public policy or Shariah law, 'out of an abundance of caution it is important to consider having a tribunal member or chair familiar with Saudi law draft or review the award before it is issued', adds Zeggers.

The Enforcement of foreign arbitral awards has indeed been consistent for several years. In a recent webinar, HSF's Dubai-based Stuart Patterson noted:

> *[the] considerable increase in the enforcement of foreign award, with 600 applications made in 2018 from all over the world, and reports suggesting numerous examples of success enforcement against Saudi companies in the Kingdom, including an ICC award issued in Malaysia against a private Saudi university and an award against a Saudi gold mining company issued by a China-seated tribunal.*[20]

Partial enforcement: foreign judgments and arbitral awards

Among the many international norms recognised in Saudi law and upheld by Saudi courts is partial enforcement. As Riyadh-based practitioner Sultan Al Masoud has noted:

> *Saudi law recognizes the principle of partial enforcement of foreign judgment or award, meaning that if a part of the judgment or award contradicts Saudi law (e.g. contains payment of interest) that part would not be enforced, while the rest of the judgment or award would be enforceable in accordance with the Enforcement Law.*[21]

It may also useful to highlight and dispel certain misapprehensions some have expressed in the past with regard to concerns related to gender or religious background with regard to expert testimony or other evidence provided in hearings in Saudi Arabia. Jean Benoit Zeggers summarised it well in a recent exchange:

> *Generally the admissibility and assessment of evidence, including witness testimony in Saudi commercial disputes (before courts or arbitral tribunals) is not dependent on gender, race or creed, but on the relevance of the evidence submitted, and credibility of the witness, as the case may be.*

Enforcement: building a solid track record

In February 2021, the Saudi MOJ released a report outlining dramatic statistics pointing to the success of its coordinated, multi-level strategy. 'These figures stress the governmental, legislative and judicial support for Alternative Dispute Resolution (ADR), including the issuance of several laws, such as the Arbitration Law, the Enforcement Law, and the Government Tenders Law.' The Ministry also reinforcing its role as a purposeful proponentof ADR with 'several royal orders have promoted ADR solutions due to their key role in boosting the business environment and encouraging local and foreign investment'.

The sheer volume of activity and commensurate results was impressive with the enforcement courts having 'handled a total of 75,000 arbitration awards and conciliation deeds [aka mediation agreements], with a total value of 7.6 billion riyals [over US$2 billion]. They include 25,000 awards worth 4.7 billion riyals [over US$1.25 billion], and 50,000 conciliation deeds worth 2.9 billion [over US$7.7 billion]'.

The local and international import of these figures was underscored by the MOJ, noting 'These figures reflect the Saudi enforcement judiciary's effectiveness in implementing local awards issued by the Saudi Center for Commercial Arbitration, as well as foreign arbitration awards'.

The MOJ also revealed that the enforcement of arbitration awards has increased over the past five years from 930 awards enforced to 8,946 in the past year. 'The ministry is working to streamline and fast-track procedures whether for local or international arbitration awards.'

In February 2021, a major campaign was kicked-off by the MOJ, Ministry of Finance, Ministry of Commerce and the SCCA to bring national attention to the importance and effectiveness of ADR in Saudi Arabia. 'Through its various initiatives and media channels, the ministry has sought to enhance mediation and conciliation, and promote the conciliation/mediation culture,' said Sulaiman Al-Olayan, deputy minister's assistant for court affairs and supervisor of the Conciliation Center. The MOJ has 'upgraded conciliation procedures by launching the Conciliation Center and digitizing the conciliation process through the Taradhi platform'.

Al-Olayan added that mediation and conciliation are among the most effective options for the amicable resolution of disputes as they achieve swift justice and reduce litigation costs and effects. 'Under Article 9(3) of the Enforcement Law, a conciliation [mediation] deed is recognized as an enforcement instrument that cannot be challenged or appealed.'[22]

Continuing research to knowledge of court decisions and practices

Although there is no system of binding precedent in the Saudi Court system, decisions are generally considered by judges to be persuasive, and therefore an important guide to lawyers and litigants. These decisions continue to reinforce the welcome advances and developments across in the entire Saudi court system for arbitration in the country.

2021 Saudi Arbitration Index: building a caselaw database with analysis

Among the most beneficial developments of recent years has been the tremendously important role played by the Saudi judiciary. The modern era of arbitration in Saudi Arabia kicked off by the Arbitration Law 2012 has been marked by the vital cooperation and support for arbitration of the Saudi judiciary.

Now, building on its first comprehensive research into the analysis of Saudi courts and arbitration released in 2018, SCCA's new Saudi Arbitration Index (SAI) 2021 will provide a vital tool for all those considering or undertaking arbitration in the country.

With the direct support and contributions of the various relevant courts across Saudi Arabia, facilitated by the judiciary and MOJ, and selected for their touching upon local and foreign arbitrations (whether challenging arbitrator appointments, clauses, interim measures or enforcement of awards, etc) over 600 judgments from 2018–2020 are under review.

The 2021 SAI will be downloadable from the SCCA site in the third quarter of 2021 and will consist of all 'new' arbitration law cases along with providing current, accurate, detailed analysis of 32 key judgments in both Arabic and English.

The SAI will:

- provide ongoing research to enhance knowledge of court decisions and practices;
- foster open dialogue with the judiciary; and
- build understanding and trust in institutional ADR within the business and legal communities.

The SCCA team has worked to address the lacuna of case law that pertains to arbitration and various meetings have been held to define the scope of the project. The SCCA researched and identified possible sources of judgments and conducted an initial review of materials for quality and project feasibility. The activities and deliverables can be summarised as follows.

Analytical framework

The SCCA's goal is to review all available relevant cases for 2020 and previous years. It aims to review over 600 judgments to then identify trends and principles

The SAI analyses and evaluates whether and how judicial actions and judgments are steering Saudi Arabia's overall commercial ADR climate. Guided by the normative international standards and expertly assessing against those standards and the publicly stated objectives, ADR experts assess the extent to which norms have been met for each of the relevant cases. These expertly reviewed and indexed cases provide assessments that comprise the record.

To date, the Saudi courts performance has been exemplary, even when compared to the best regional and international jurisdictions. The incremental and sustained indexing and analytical process makes relevant comparisons of cases and provides indicators of the effectiveness of the national reform policies and initiatives, as well as the partnerships wth the SCCA and its local, regional and international networks of ADR, legal and corporate and consumer experts .The SAI tracks and highlights the technical aspects of the judicial work on and with arbitral processes and award enforcement.

Institutional leadership

Leading Saudi ADR: the SCCA strategy

Since its inception, the SCCA's board and its diverse stakeholders have understood the need to transform the domestic ADR landscape and how it is perceived internationally. Only through a comprehensive, substantial and strategic overhaul that engages and invests in all aspects of professionalising the nascent ADR industry could the evolutionary changes take hold and be seen to enhance the way commercial disputes are managed and resolved in the Saudi Arabia.

Institutional ADR

SCCA has devised a methodology in line with current and best international practices in alternative dispute resolution, the application of governance standards, the worldwide scope of SCCA and its team as well as the promotion of neutrality, independence, and institutionalisation.

With an international roster of ADR professionals that reflects the diversity required to meet the demands of its global clientele, the SCCA has arbitrators with over 24 different nationalities and 19 languages, and over 20 substantive areas of practice and industry experience.

Increase in overall caseloads: arbitration, mediation and a la carte services

In almost four years since the SCCA's inception to the end of 2020, 116 cases have been registered, which includes arbitration, mediation, and limited services, by an increase in 2020 to 2019 by 178 per cent. The parties of the cases are from 13 countries from North America, Europe, Middle East, and Asia. These 116 cases are distributed into 18 industries: 55 per cent of the construction industry cases and then the banking and capital market, education, aviation, entertainment, etc.

In 2020, the SCCA attracted over 75 cases (arbitration, mediation and limited service cases) which in a fifth year of operations bespeaks an impressive record among ADR providers.

With the introduction of court-mandated cases, the vast numbers of contracts in which the SCCA has been named as the institutional ADR provider by parties across Saudi Arabia, regionally, and internationally, the caseloads should grow commensurately.

Mediation

Referring mediation cases from the various commercial courts to the SCCA

The Commercial Courts Law states there will be a mandatory referral of cases to mediation and conciliation – requiring proof of good faith facilitation attempted by a neutral third party are eased by having the centre SCCA provide a confirmation.

Arbitration 'limited services'

SCCA also nominates arbitrators to the appeal courts for ad-hoc cases – already requests received and nominations have been provided. As an approved training provider, the SCCA develops training materials on ADR to be conducted for hundreds of judges from across Saudi Arabia.

Track record: provision of innovative services

The SCCA instituted the provision of its arbitrators nomination services to the Appeal Committee for Resolution of Securities Disputes on Capital Market Ad-Hoc Cases.

Saudi ADR milestones: 2020

The first institutional arbitration emergency award rendered in Saudi Arabia was completed in 2020 under the SCCA arbitration rules by an SCCA-appointed emergency arbitrator within only 14 days on a substantial claim.

While the SCCA appoints male and female arbitrators and mediators, importantly in August 2020, the first female arbitrator, Sara Alkhunaizan, in the field of commercial disputes, was appointed by a Saudi court, upon nomination by SCCA: the Appeal Court in Riyadh.

International best practices: rules and administrative practice

SCCA Rules Advisory Committee: 14 international experts

In order to ensure that all the institutional ADR services, including the products, practices and case administration of the SCCA are developed and implemented to the highest international standards, the SCCA Rules Advisory Committee consists of a high-level, elite group of prominent international arbitrators.

The creation of this committee bolsters the trust SCCA has earned at the national and international levels. Its 14 members include independent international arbitrators, legal advisers who have worked in prominent international arbitration centres, top attorneys from major international law firms, and law professors from several international universities. The Committee's members, who come from across the spectrum of international commercial arbitration, reflect the international reputation of the SCCA and the services it offers clients in Saudi Arabia and abroad.

The Committee will provide the SCCA with technical counsel and industry insights through outstanding expertise and international best practices from across the spectrum of commercial arbitration practice based on the specialised experience that each member brings to the Committee. This will enable the SCCA to continue enhancing its operations and upgrade its services to make it the ideal international partner in the region and the preferred regional option for ADR services.

The SCCA Committee for Administrative Decisions (CAD)

To diversify and further institutionalise key aspects of SCCA case administration, SCCA created a new committee to render determinations related to disputes that pertain to arbitrator challenges, place of arbitration disputes and the number of arbitrator disputes. The SCCA Committee for Administrative Decisions (the Committee) serves the purpose of giving parties in SCCA-administered, or ad hoc non-SCCA-administered cases where the parties have so agreed, access to a neutral and highly qualified expert decision-making authority that efficiently determines certain issues that arise in an arbitration proceeding.

The Committee comprises five members, including high-level SCCA executives and neutral external members with extensive international commercial ADR and case administration experience to this decision-making process. Committee meetings may be held in person, via video conference, by telephone, or any other appropriate means of communication.

The current members of the Committee are Mohamed Abdel Raouf, Jennifer Kirby, Christian P Alberti and two other SCCA executives.

Consistent with similar reputable, international ADR institutions, the dual-language services include skilled professional staff support. The SCCA-CAD has already held various meetings and decided a total of three challenges with differing outcomes (two removals and one reaffirmation). It provides its services free of charge for SCCA-administered cases, and at a reasonable service fee for non-SCCA-administered ad hoc cases.[23]

Next generation Arab ADR professionals

Arab commercial arbitration moot programme

Importantly, the next generation of arbitration professionals are being engaged and trained in the world's first Arab-language international Commercial Arbitration Moot. This investment in developing young Arabs has been a runaway success with over 500 Saudis and, from this year, non-Saudi Arabs participating in the first two years (2020–2021). By providing the requisite arbitration advocacy skills and experience, as well as the networking to provide vital professional links with peers and experienced practitioners across Saudi Arabia and the wider region, it is on track to train over 2,500 young Arab lawyers by 2025.

Professional arbitrator training and accreditation in the Arab region

Through a strategic joint initiative of the international, UK-based Chartered Institute of Arbitrators and the Saudi Centre for Commercial Arbitration and its four domestic locations, over the last two years, close to 500 professionals have received comprehensive and ongoing international commercial arbitration training primarily in Arabic and English. Commercial parties and their counsel now have access to an increasingly significant pool of local neutrals who have completed the rigourous, international standard of arbitration training required to become a fellow of the Chartered Institute of Arbitrators (FCIArb) and to join the SCCA roster of arbitrators.

The tremendous uptake and impact of this training revolution is a result of an exceptional and comprehensive training strategy comprising all facets of professional development. Key to its success is the unprecedented alliance of the country's ADR leaders, SCCA, and the pre-eminent commercial ADR accreditation body, the Chartered Institute of Arbitrators (CIArb).

Catherine Dixon, CIArb's director general of the Chartered Institute of Arbitrators, conveyed the strategic nature of the relationship:

> *CIArb has an excellent partner in a jurisdiction that is committed to international ADR. We are proud to be working with so many ADR professionals. Our commitment to ADR in Saudi includes continuing to contribute to scholarships for the SCCA Arab Moot 2021 - which helps to ensure a sustainable level of highly skilled ADR professionals for years to come.*

Professional mediator training and accreditation

Along with its arbitration workshops, the SCCA's professional mediation training included over 200 professionals over the past five years, including many female practitioners and students who have gone on to successfully advise clients and mediate themselves.

Importantly, the next generation of arbitration professionals are being engaged and trained in the world's first Arab-language international Commercial Arbitration Moot. This investment in developing young Arabs initiative has been a runaway success with over 500 Saudis and, from this year, Gulf region Arabs participating in the first two years (2020–2021). By providing the requisite arbitration advocacy skills and experience, as well as the networking to provide vital professional links with peers and experienced practitioners across Saudi Arabia and the wider region, it is on track to train over 2,500 young Arab lawyers by 2025.

Judicial engagement and dialogue

The Saudi judiciary has been remarkably and consistently engaged in the transformation of the ADR landscape in the country. Having taken on board all the many recent developments and the related legislation, regulations and relevant standards and even international treaties, judges have been remarkably effective. Fortunately, the MOJ and Judicial Training Institute along with partners like the SCCA have been working closely to impact how a highly skilled judiciary has been able to exercise its many powers, whether appropriately and in a pro-arbitration manner or not. Specialised and current technical expertise, including general and specific principles, is paramount to ensure the court intervenes or assists as necessary or appropriate in international commercial arbitration proceedings

Given the important role of a highly skilled, ADR-savvy and sophisticated bench, the Judicial Training Institute continues to work closely with the SCCA to ensure that the requisite arbitration curriculum is in place as more Saudi judges are engaged in dialogues and ongoing professional development in the field of ADR, including a formal course of 'Commercial Arbitration and the Judiciary System'. Over the past five years, many hundreds of Saudi judges have participated in an array of local and international ADR activities, from mediation skills training, arbitration workshops and roundtables, conferences and colloquia.

Conclusion

Multi-faceted coalition of public and private sectors: commitment to stay the course for a thriving Saudi and regional ADR ecosystem

Those currently working in ADR or looking at the current state of ADR in Saudi Arabia know that the story is a remarkably good one. Yet, they encounter among some peers around the world some lingering doubts and misconceptions that no longer reflect the facts on the ground. Among them are antiquated impressions of restrictive practices related to procedure, advocacy and enforcement.

In recent years, major issues have been identified and addressed by the various, diverse relevant stakeholders in Saudi Arabia – in

particular the legislators, judiciary, practitioners and SCCA, the national ADR institution.

Transformative initiatives have yielded overwhelmingly positive results with regard to strengthening key features of ADR such as party autonomy, diversity and transparency. Further, the legal infrastructure has been completely overhauled with all the underlying legislation, implementing regulations and practice guides that have been adopted to best international standards.

Importantly, the awareness among and abilities of users, the expertise and qualifications of neutrals and the increasingly ADR-savvy Saudi bar (many with affiliations with internationally recognised firms) have made for a truly sophisticated ADR capacity in the country.

The considerable and consequential changes to the administration of justice in Saudi Arabia have been highly welcomed and beneficial the past 10 years.

This chapter outlined the transformative legislation and implementation, strategic initiatives and related actions and the consequential results of this sustained strategic direction. The commitment, uptake and popularity of the resulting changes of the last decade will sustain and ensure these trends increase and broaden – just as they increasingly yield the results of developing on the promise of commercial and court-connected ADR making a reality.

The increasingly inclusive, responsive and diverse legal and ADR services sectors in Saudi Arabia all point to a sustained transition that will continue until it is fully realised. It is also expected that, as a strategic industry for commercial development in Saudi Arabia, ADR will continue to do its part to tap into all segments of society across regions, generations, genders and professions.

Whether considering mediation or arbitration (or both in a stepped-clause fashion) for an ongoing or potential future dispute involving parties in Saudi Arabia or internationally, business leaders and their counsels have the benefit of being able to consider the country as an ADR-friendly jurisdiction with a highly supportive, professional ADR ecosystem.

With regard to how the burgeoning Saudi arbitration market is likely to perform moving forward, AlTamimi's ADR team in Dubai was bullish, predicting:

> *With the introduction of the Arbitration Law, which expressly allows the use of foreign arbitration centres and institutional rules, and the establishment of the SCCA in Riyadh, it is anticipated that this historical trend [of more ad hoc cases] will be reversed and institutional international arbitration will become more common than ad hoc international arbitration.*[24]

Increasingly, ADR is playing an outsized and efficacious role in increasing the quality and access to justice by individuals, families, communities and commercial enterprises. By enhancing the speed, containing the cost and creating mechanisms that are more industry-specific, culturally inclusive and relevant – while also raising the bar in terms of standards, ethics and quality as well as inclusive diversity and reach – our field of conflict management and resolution is transforming the experience and opportunities for all.

The dramatic, broad and meaningful transformation of ADR in the Kingdom to date clearly has momentum. We predict that litigants and disputants wills continue to yield the qualitative and quantitive results that they have come to expect in the world's leading ADR-friendly jurisdictions.

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24 AlTamimi 2020

James MacPherson
Saudi Centre for Commercial Arbitration (SCCA)

James MacPherson is a leading International ADR specialist with over 20 years' experience within public and private sectors as a neutral (mediator, facilitator and arbitrator), ADR trainer, adviser and systems designer.

In 2014, James was retained as special counsel and project leader establishing the first international Saudi ADR centre (SCCA), affiliated with and active on domestic and international rosters of ADR providers around the world, he also serves on the inaugural board of the Oman Arbitration Centre (OAC).

He was co-founder and inaugural CEO of the Bahrain Chamber for Dispute Resolution (BCDR-AAA) and has served as board member of the International Mediation Institute (The Hague).

Specialising in conflict management and resolution for corporate and government organisations, including designing and directing international, multilingual arbitration and mediation programmes.

He advises businesses and government agencies in Africa, Asia, Europe, the Middle East and North America on ADR systems design and training as well as legislative policy.

He has enjoyed designing and delivering ADR training in Bahrain, Canada, Germany, Hong Kong, Jordan, Kuwait, Maldives, Morocco, Oman, Qatar, Saudi Arabia, Sri Lanka, Syria, Turkey, UAE, UK and USA.

A successful bilingual (English and French), dual national (Canada and US) mediator, James works to resolve matters ranging from commercial, insurance, construction, employment, financial and IP/tech, to indigenous disputes and organisational conflict.

Hamed Hassan Merah
Saudi Centre for Commercial Arbitration (SCCA)

Hamed Merah is the CEO of the Saudi Centre for Commercial Arbitration. Hamed is also an internationally recognised leader and expert, with an extensive track record of achievements during his career encompassing banking, investment banking, insurance (*takaful*), and the development of related industry standard-setting.

As CEO and board member, he led one of the most important specialised international organisations in the Islamic finance industry, with activities and members in more than 45 countries

He has comprehensive academic qualifications, professional fellowships, and advanced training courses in law, *shariah*, leadership, compliance, governance, insurance, and capital markets. Further, he is a Harvard Business School alumni and an MCIArb, member of the Chartered Institute of Arbitrators, UK.

He delivers courses and workshops, including as a keynote speaker, in numerous specialised conferences in more than 30 countries, and has authored two published books.

He is a member of several international advisory boards and-councils, including:

- the International Monetary Fund (IMF) Interdepartmental Working Group on IF (2014–2017);
- the International Financial Reporting Standards (IFRS) IF Consultative Group (2015–2017); and
- the Advisory Council on IF of the Astana International Financial Centre, Kazakhstan (2018–2019).

He led the official delegation representing Saudi Arabia in the meetings of the United Nations Commission on International Trade Law (UNCITRAL) and is a former Secretary General and board of trustees member of the Accounting & Auditing Organization for Islamic Financial Institutions (AAOIFI), Bahrain.

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SCCA is not-for-profit organisation established by Cabinet Decree No. 257 dated 14/6/1435 H. – 15/03/2014 G. to administer arbitration procedures in civil and commercial disputes where parties agree to refer their disputes to SCCA arbitration and all in accordance with regulations in force and judicial principles of civil and commercial procedure. Disputes of personal status, administrative, criminal or matters that cannot be arbitrated are not the SCCA's jurisdiction. An independent board of directors was arbitrated by a resolution from the president of the Council of Ministers, and all Board members may not hold a government position.

The SCCA provides alternative dispute resolution services, including arbitration and mediation. SCCA services are provided in accordance with international and professional standards in Arabic and English.

SCCA also provides users with professional services by staff trained to international best practice standards, and the latest ADR technology methods and facilities – all contributing to the rapid and effective settlement of domestic and international commercial disputes.

Turkey

Utku Coşar, İpek Sumbas Çorakçı and Hakan Yakışık
Coşar Avukatlık Bürosu

In summary

This chapter provides an overview of international arbitration in Turkey, in particular, the rules and procedures governing international arbitration as well as the main rules governing the enforcement procedure of foreign arbitral awards in Turkey including the recent developments. The chapter also examines certain decisions on these issues to shed light on the practice adopted by the courts.

Discussion points

- Arbitrability
- Arbitration agreement and jurisdictional concerns
- Annulment of arbitral awards
- Enforcement of foreign arbitral awards
- Public policy
- Istanbul Arbitration Centre

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Introduction

International arbitration in Turkey, regulated by the International Arbitration Law No. 4686 (IAL), continues to evolve, as illustrated by the most recent decisions of the Court of Appeals.

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, such as the arbitration costs (arbitrator fees, payment of costs, deposit of advance) and the terms of reference. The IAL does not include the 2006 amendments of the Model Law.

Arbitrability

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 concerning criminal issues, family law or issues related to employees' payments arising from labour contracts are not eligible. [1] Article 1 further provides that disputes relating to rights in rem over immoveable properties located in Turkey are not arbitrable. Thus, disputes regarding ownership of real estate may not be submitted to arbitration, a position that the Court of Appeals (the Court) 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 the matter pertains to public policy.[2] 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 annulled by the courts.[3]

The IAL also governs a number of procedural issues, including the form and validity of the arbitration agreement, the appointment of arbitrators and challenges to arbitrators. Moreover, the IAL codifies the procedure for challenging awards and determining arbitration expenses.

Form and validity of the agreement

According to article 4 of the IAL, which governs the form and validity of the arbitration agreement, 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. This article provides that the agreement to arbitrate must be in writing, 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 where a party advances the existence of a written arbitration agreement in a statement of claim and the opposing party fails to 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.[4]

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.[5] 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.[6] Moreover, in a 2019 decision, the Court of Appeals decided that a contractual clause stating that 'all disputes arising from or in relation to this agreement shall be submitted to FIFA' would not constitute an arbitration agreement as it did not mean resolving disputes arising from such agreement through arbitration.[7]

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 regulates that an arbitration agreement signed by a representative not granted special powers in his or her power of attorney will be invalid, where the attorney had signed the arbitration agreement on behalf of his or her client.[8] Accordingly, if a representative signs an arbitration agreement, the power of attorney authorising him or her to act on behalf of his or her principal must clearly specify that the attorney has been granted the authority to sign an arbitration agreement or to bind his principal to arbitrate.

In the same vein, amendments to arbitration agreements signed by representatives have also been examined by the Court of Appeals.[9] 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, but did not cover amending arbitration agreements or executing arbitration agreements on behalf of the parties.[10] The Court further decided 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.

In June 2015, the Court of Appeals reversed a court of first instance decision regarding an arbitral award arising from a dispute based on a concession agreement on the grounds that the claimant was not a party to the arbitration agreement. In the annulment case, the first instance court found that the award was binding on the claimant, which was not a party to the concession agreement, based on the fact that the claimant was a beneficiary to the concession agreement and also that it approved the agreement. The Court of Appeals reversed this decision, on the basis that an arbitration cannot be initiated against a person who is not a party to the arbitration agreement, and that the concession agreement was actually not approved by the claimant. The Court held that being a beneficiary to an agreement that has an arbitration clause does not automatically make the beneficiary a party to the arbitration agreement. [12]

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 it believes that the arbitral tribunal has exceeded its powers or 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, if the arbitral tribunal decides that it has jurisdiction, it will continue the arbitral proceedings and render an award.

Article 7(h) provides 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 tribunal decides that the main contract is null and void, this would not invalidate the arbitration agreement. Furthermore, the fact that a party has chosen an arbitrator or participated in the constitution of a tribunal does not invalidate its right to raise a jurisdictional objection.

According to the IAL, jurisdictional objections are to be contested within the confines of arbitral proceedings. In a case where the validity of an arbitration agreement was contested before a court after the initiation of the arbitral proceedings, the Court of Appeals ruled that, under the IAL, challenges of this sort should first be brought before the arbitral tribunal.[13] The Court of Appeals also held that the decision of the arbitral tribunal on jurisdiction would be subject to review in an annulment action brought against the final award. In another decision, the Court confirmed its earlier ruling that after the initiation of the arbitral proceedings, the tribunal shall have jurisdiction to rule on its competence. It also held that this was not the case where an arbitration objection is raised during a pending court case as a preliminary objection under article 5 of the IAL,[14] and ruled that in such a case the validity of the arbitration agreement shall be decided by the courts.[15]

The Court of Appeals has also issued decisions relating to arbitral tribunals' decisions on jurisdiction. In one 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.[16] The Court noted that the dispute between the parties was within the scope of the contract and that the procedure agreed by the arbitration agreement had been properly followed. As a result, the tribunal's award denying jurisdiction was found to be invalid and, consequently, set aside.

In another decision on jurisdiction of an arbitral tribunal, the Court of Appeals found that arbitrators are bound by the requests of the parties and they cannot render a decision exceeding those requests.[17] In this dispute, the defendant requested in its defence for an amount to be deducted from the claimed receivables and it reserved its right to file a counterclaim regarding this deductible; however, the defendant did not file such a counterclaim. The arbitrators ruled in favour of the defendant that the deductible amount be collected 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 should be annulled because the arbitrators had exceeded their authority. In a more recent case, the Court of Appeals held that the principle of being bound by the requests of the parties is a public policy issue that may lead to annulment of arbitral awards.[18]

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. According to article 15 of the IAL, 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;
- 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 have affected the final award;
- 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 or is contrary to public policy.

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, parts that are 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.[19]

In 2018, the IAL's provision concerning the competent court in annulment actions was amended. Accordingly, any annulment actions against a final arbitral award must now be filed at the competent regional judicial court 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.

Prior to the 2018 amendments, the IAL provided that the competent court to hear annulment actions was the civil court of first instance. In different cases, the Court of Appeals provided different interpretations of this provision. 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.[20] 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 (the former) 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.[21] With the 2018 amendments, the competent courts for cases other than annulment actions were also clarified. According to additional article 1 of the IAL, competence granted to the civil court of first instance under the IAL would be undertaken by civil courts or commercial courts of first instance, depending on the subject of dispute. [22]

In a decision regarding the burden of proving the existence of the grounds for annulment, the Court of Appeals reversed a first instance court's decision in which the court dismissed the annulment application due to the claimant's failure to prove that the award was against public policy. The Court of Appeals held that according to article 15 of the IAL, it is the court's duty to ex officio determine whether the award was against public policy or whether the subject of the arbitration is non-arbitrable under Turkish law.[23]

The issue regarding who shall bear the costs of arbitration after the annulment of an arbitral award was also examined by the Court of Appeals. In a 2019 decision, the Court of Appeals held that the losing party of an arbitral award cannot be held responsible for the arbitrator fees as the arbitral award was annulled. In this case, the Court found that as a result of the annulment, article 16 of the IAL (which provides that in the absence of an agreement to the contrary, the costs of arbitration, including the arbitrator fees, shall be borne by the losing party, or where both parties are successful to a certain extent, the costs shall be shared by both parties pursuant to their degree of success) cannot be applied. It held that the arbitrator fees, which was the subject of the lawsuit, should be completely borne by the party that initiated the arbitral proceedings.[24]

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, as well as the International Private and Procedural Law No. 5718 (IPPL) as the applicable rules of procedure of the territory where the award is relied upon pursuant to New York Convention. 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. 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 required condition for granting an interim attachment order.[25]

There are different decisions of the Court of Appeals regarding court fees to be collected when applying for an enforcement

decision. The 19th Civil Chamber of the Court of Appeals decided in 2009 that 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.[26] Likewise, in other cases, the same chamber of 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.[27] 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. Similarly, in 2015, the 15th Civil Chamber of the Court of Appeals[28] decided in the same vein based on article 3/II of the Law on Fees No. 492. Article 3/I of Law No. 492 states that if an enforcement decision regarding an arbitral award is requested, the court fees shall be collected according to the nature of the award. The subsequent article provides that the same shall apply to the enforcement requests of the foreign arbitral awards.

Conversely, in another case in which the claimant was seeking enforcement of a decision made by the Russian State Court of Arbitration, the 11th Chamber of the Court of Appeals reversed the enforcement decision of the first instance court and held that the dispute between the parties regarding whether the award was made by an arbitral tribunal or a court was not sufficiently examined, and that the submission of the arbitration agreement to the enforcement court would be required if the award in question was rendered by an arbitral tribunal. It also held that the court fees in the cases for the request for enforcement shall be subject to fixed fees instead of proportional fees.[29] Moreover, the 11th Chamber decided in the same vein in cases regarding the enforcement requests for foreign court decisions and applied fixed fees on the basis that the cases for the request for enforcement are in the nature of declaratory actions rather than actions of performance.[30]

However, the provision that regulates the proportional fees in the Tariff No. 1, which is attached to the Law on Fees with No. 492 and is updated every year, was amended effective as of 9 August 2016. According to the amendment, proportional 'fees shall not be collected in the arbitration proceedings under this provision'. Subsequent to this, the Plenary Session of the Civil Law Chambers of the Court of Appeals held that as a result of this amendment made in the Tariff No. 1, only fixed fees can be collected in cases of enforcement of foreign arbitral awards.[31]

The question of whether an application of a party for the correction and interpretation of an award from the tribunal would suspend its enforcement in Turkey was examined by the Regional Judicial Court in a 2018 decision. The court first relied on article V of the New York Convention, which provides that enforcement of an award can only be refused if certain conditions exist. According to the court, the arbitral award in question was final and enforceable, and an application for an additional award from the arbitrators by way of correction and interpretation is not one of the conditions for refusal of enforcement under the New York Convention. The court held, considering that even the initiation of an action for annulment of an award in the seat of arbitration does not prevent its enforcement in another state, as per article VI of the New York Convention, an application for an additional award from the arbitrators would not prevent its enforcement.[32]

For those arbitral awards rendered in countries not party to the New York Convention, enforcement in Turkey is regulated by 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 public morals or public policy;
- 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 all or 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 had resulted from the agreement that did not contain an arbitration clause.[33]

Moreover, the Court of Appeals recently reviewed whether a partial award in which a tribunal held that it had jurisdiction could be recognised. In its analyses, the Court of Appeals first stated that according to the IPPL, the recognition of awards shall be subject to the provisions regarding enforcement. Afterwards, it indicated that the ICC Rules, which were agreed on by the parties, stated that every award was binding on the parties and also that the New York Convention emphasised the binding effect of the awards instead of their finalisation in order to be enforced. The Court of Appeals then held that in order for a partial award, such as the said partial award declaring jurisdiction, to be considered as a final award, it was sufficient that the aspect of the dispute decided by such partial award is separable and independent. Consequently, it reversed the lower court's decision by holding that the conditions for recognition was established for the said partial award on jurisdiction.[34]

Decisions on enforcement requests can be appealed and subject to rectification; appeal stays the execution of the enforced award according to IPPL article 57(2).

Public policy

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. [35]

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.[36] 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.

Similarly, in 2017, the Court of Appeals ruled that an award that results in a reduction of the public income of the state would violate public policy and reversed a court of first instance decision rejecting an application for annulment of an arbitral award arising from a concession agreement. The Court of Appeals found that the first instance court erred when it had not determined whether the arbitral award in question would result in the reduction of public income of the state and held that the first instance court should have obtained an expert report determining the impact of the arbitral award on public income, considered the characteristics and purpose of concession agreements and taken into account that a reduction in the public income of the state would clearly violate public policy.[37] In this case, the Court of Appeals again stated that merits of the dispute may be partially reviewed to examine objections relating to public policy.

In a 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 against reviewing the merits of the content cannot be removed by discretionary right.[38]

In another enforcement decision, the Court of Appeals examined the extent to which an arbitration agreement may be contrary to public policy if such an 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 (to the 'claiming party'), the agreement is valid and cannot be considered to be against public policy.[39] 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.[40]

In a decision regarding a domestic arbitration award, the first instance court annulled an award based on the reason that the tribunal should have obtained an expert report regarding the calculation of damages instead of making the decision by itself as none of the members of the tribunal were experts in finance, and as the tribunal had erred in the application of the law, thus finding the award to be against public policy. However, the Court of Appeals reversed the annulment decision of the first instance court, as it stated that the tribunal has discretion in deciding whether to obtain an expert report. Moreover, the Court of Appeals also ruled that the merits of the case and the application of the law cannot be reviewed during an annulment case.[41] Similarly the Court of Appeals also held that the issues of conducting site inspections and obtaining expert reports concern collection of evidence, and the tribunal's failure to perform these are not listed as a ground for annulment under article 15 of the IAL. Accordingly, the Court reversed the lower court's decision to annul the award and decided that an annulment based on the failure to conduct a site inspection and obtain an expert report would be contrary to the prohibition of reviewing the merits of the case.[42]

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.[43] 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 Centre

In 2015, the Istanbul Arbitration Centre (ISTAC) was established by the Law on the Istanbul Arbitration Centre No. 6570 (LIAC),

which was published in the Official Gazette on 29 November 2014 and came into effect on 1 January 2015. Pursuant to article 1 of the LIAC, the ISTAC oversees the settlement of disputes, including those containing a foreign element, through arbitration or alternative dispute resolution methods.

The ISTAC Arbitration and Mediation rules went into effect on 26 October 2015.[44] The ISTAC offers services such as fast track arbitration and emergency arbitrator procedure. Apart from this, on 15 November 2019, the ISTAC established the rules governing 'Mediation Arbitration'.[45] According to article 1 of said rules, the purpose of the rules is to regulate the procedure and practice to be followed where mediation and arbitration are together determined as the dispute resolution mechanism. Furthermore, due to the need arising from the covid-19 pandemic, ISTAC announced online hearing procedures and principles in April 2020.[46]

In 2016, the Prime Ministry's office issued a circular that stated all public authorities shall consider including ISTAC arbitration clauses in their domestic and international agreements.[47] In line with this circular, the template contracts attached to the Tender Application Regulations (within the scope of the Public Procurement Contracts Law No. 4735) were amended, which came into force on 19 January 2018.[48] According to the amendments, the administration may choose to include an arbitration agreement in the contracts made within the scope of the Tender Application Regulations, as opposed to a jurisdiction clause in favour of Turkish courts.

If the administration prefers arbitration for the dispute resolution mechanism and if the dispute does not include a foreign element, the dispute shall be resolved pursuant to ISTAC Arbitration Rules. On the other hand, if the dispute includes a foreign element, the administration may choose the ISTAC Arbitration Rules or the provisions of the IAL.[49]

Conclusion

There have not been any fundamental changes in the Turkish international arbitration system since its enactment in 2001, but as described above, it has been continuously evolving by the Court of Appeals decisions. On the other hand, there have been changes to domestic legislation, namely, the ratification of a new Code of Civil Procedure (CCP), which entered into force on 1 October 2011, in addition to a new Code of Obligations and a 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.

Notes

1 Court of Appeals, 9th Civil Law Chamber, 22 March 2004, File No. 2004/5846, Decision No. 2004/5621.

2 Court of Appeals, 15th Civil Law Chamber, 18 June 2007, File No. 2007/2680, Decision No. 2007/4137; Court of Appeals, 15th Civil Law Chamber, 10 October 2011, File No. 2011/4411, Decision No. 2011/5792.

3 Court of Appeals 11th Civil Law Chamber, 5 December 2012, File No. 2011/13485, Decision No. 2012/19915.

4 Court of Appeals 11th Civil Law Chamber, 18 April 2013, File No. 2012/6961, Decision No. 2013/7612.

5 Court of Appeals 15th Civil Law Chamber, 18 June 2007, File No. 2007/2680, Decision No. 2007/4137.

6 Court of Appeals 15th Civil Law Chamber, 13 April 2009, File No. 2009/1438, Decision No. 2009/2153.

7 Court of Appeals 13th Civil Law Chamber, 23 October 2019, File No. 2018/2348, Decision No. 2019/10372.

8 Court of Appeals 19th Civil Law Chamber, 21 May 2007, File No. 2007/380, Decision No. 2007/5114.

9 Court of Appeals Plenary Session of Civil Law Chambers, 18 October 2006, File No. 2006/15-609, Decision No. 2006/656; Court of Appeals Plenary Session of Civil Law Chambers, 18 July 2007, File No. 2007/15-444, Decision No. 2007/554.

10 Court of Appeals Plenary Session of Civil Law Chambers, 18 October 2006, File No. 2006/15-609, Decision No. 2006/656.

11 Court of Appeals Plenary Session of Civil Law Chambers, 18 July 2007, File No. 2007/15-444, Decision No. 2007/554.

12 Court of Appeals 11th Civil Law Chamber, 25 June 2015, File No. 2014/9538, Decision No. 2015/8707.

13 Court of Appeals, 15th Civil Law Chamber, 27 June 2007, File No. 2007/2145, Decision No. 2007/4389.

14 Pursuant to article 5 of the IAL, if a dispute subject to an arbitration agreement was brought before the courts, the counter party may raise an arbitration objection. If the court accepts such objection, it dismisses the case based on procedural grounds.

15 Court of Appeals, 15th Civil Law Chamber, 5 November 2020, File No. 2019/3156, Decision No. 2020/2913.

16 Court of Appeals, 11th Civil Law Chamber, 16 July 2009, File No. 2007/13799, Decision No. 2009/8820.

17 Court of Appeals, 15th Civil Law Chamber, 11 May 2011, File No. 2010/7197, Decision No. 2011/2857.

18 Court of Appeals, 15th Civil Law Chamber, 11 July 2019, File No. 2019/1234, Decision No. 2019/3335.

19 Court of Appeals, 15th Civil Law Chamber, 15 November 2007, File No. 2007/3708, Decision No. 2007/7216.

20 Court of Appeals, 11th Civil Law Chamber, 15 March 2012, File No. 2012/ 2110, Decision No. 2012/3915.

21 Court of Appeals, 19th Civil Law Chamber, 12 February 2014, File No. 2014/111, Decision No. 2014/2806. See also: Court of Appeals, 19th Civil Law Chamber, 27 May 2013, File No. 2013/6262, Decision No. 2013/10896.

22 Articles 53–54 of the Law Amending the Enforcement and Bankruptcy Code and Certain Laws No. 7101, published in the Official Gazette dated 15 March 2018 with No. 30361.

23 Court of Appeals, 13th Civil Law Chamber, 13 November 2012, File No. 2011/19737, Decision No. 2012/25406.

24 Court of Appeals, 13th Civil Law Chamber, 20 June 2019, File No. 2018/5543, Decision No. 2019/2891.

25 Court of Appeals, 6th Civil Law Chamber, 14 April 2014, File No. 2014/3906, Decision No. 2014/4941.

26 Court of Appeals, 19th Civil Law Chamber, 15 September 2009, File No. 2007/5703, Decision No. 2009/8256.

27 Court of Appeals, 19th Civil Law Chamber, 14 April 2012, File No. 2012/1885, Decision No. 2012/5598; Court of Appeals, 19th Civil Law Chamber, 2 June 2015, File No. 2014/11188, Decision No. 2015/8132; Court of Appeals, 19th Civil Law Chamber, 29 May 2013, File No. 2013/5305, Decision No. 2013/9912.

28 Court of Appeals, 15th Civil Law Chamber, 18 March 2015, File No. 2015/385, Decision No. 2015/1303.

29 Court of Appeals, 11th Civil Law Chamber, 26 October 2015, File No. 2015/3987, Decision No. 2015/10984.

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Coşar represents local and international private companies, states and government agencies in litigation and commercial and investment arbitration. The firm often advises clients on pre-dispute matters and the structuring and restructuring of investments, and conducts merit reviews of possible arbitration and litigation cases. Coşar's areas of expertise include complex civil, commercial and administrative disputes and enforcement of foreign arbitral and court decisions.

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In summary

Arbitration practice in the UAE has fared well during the covid-19 pandemic. Some of the changes necessitated by the pandemic are likely here to stay. The main UAE institutional arbitration rules continue to diverge with some becoming more prescriptive and others maintaining a light-touch approach. The courts seem unwilling to let go of some of the old relics from the previous arbitration regime but are generally more pro-arbitration than they were 10 years ago.

Discussion points

- The UAE's recent arbitration reforms has placed it well to weather the effects of the covid-19 pandemic.
- The UAE's main institutional rules continue to diverge.
- Quirks from the old arbitration regime survive but the courts are generally more arbitration-friendly than they were 10 years ago.
- Some of the changes necessitated by the pandemic are likely to stay and may make arbitration more transparent and accessible to the parties that use it.

Referenced in this article

- ADGM Arbitration Regulations, Regulation 33(2)
- UAE Federal Arbitration Law 2018, articles 28, 28(2), 33(3), 41(3), 41(6) and 46(1)
- DIFC Arbitration Law 2008, articles 27(2) and 38(5)(f)
- DIAC Rules, article 17
- ASCCAC Rules, article 14
- DIFC-LCIA Rules 2020, articles 4.1, 19.2, 26.2, 14.2, 22.1(viii) and 22.7
- IBA Rules on the Taking of Evidence in International Arbitration 2020, articles 2, 8 and 9
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Introduction

Arbitration in the UAE has weathered the covid-19 pandemic remarkably well. This is perhaps owing to two reasons: arbitration's innate flexibility, and the UAE's recent successful reforms of its arbitration landscape, both of which positioned the UAE to quickly adapt to the needs of 2020. The main UAE arbitration institutional rules continue to diverge as some have modernised and others are left behind.

Some relics from the old arbitration regime have passed over to the not-so-new 2018 UAE Federal Arbitration Law, but the local courts are broadly more pro-arbitration than they were 10 years ago and this trend looks set to continue.

Weathering the storm

Since acceding to the New York Convention in 2006, the UAE has continued to make fundamental structural changes to its arbitration infrastructure, including the establishment of two offshore common law jurisdictions (the Dubai International Finance Centre and Abu Dhabi Global Market), each with their own arbitration laws and regulations, and culminating with the much lauded UAE Federal Arbitration Law enacted in 2018. At the beginning of 2020, just before the covid-19 pandemic took hold, the UAE boasted three arbitration seats all with modern arbitration laws based, to varying degrees, on the UNCITRAL Model Law.

Those modern arbitration laws have been crucial in keeping the UAE arbitration world afloat. Each of them distinguish between the legal seat of the arbitration (denoting the rules that apply to the arbitration and the relevant curial courts) and physical (or virtual) meeting place. For example, Regulation 33(2) of the ADGM Arbitration Regulations provides that the arbitral tribunal may direct the appropriate meeting place: for consultation among its members; for hearing witnesses, experts of the parties; or for inspecting property or documents.[1] The distinction is important because it enables the tribunal and parties to meet in a place other than the seat without undermining the legal seat of the arbitration.

The UAE Federal Arbitration Law goes further. Article 28(2) specifically provides that arbitration hearings, and the deliberations of the tribunal, can be made 'by modern means of communication and electronic technology' and article 33(3) provides that there is no requirement that the parties are physically present at any hearing.

Against this backdrop, electronic filings, virtual hearings, remote deliberations of the tribunal and the execution of awards outside the UAE, all necessary to safely proceed during the pandemic, was permissible and became the new reality. Before the enactment of the UAE Federal Arbitration Law in 2018, such flexibility was not guaranteed. For example, under the old arbitration regime, it was widely accepted that arbitrators had to be physically located in the UAE to issue an arbitration award. Fortunately, the new UAE Federal Arbitron Law expressly amended that requirement.[2]

Not only has the modernisation of the UAE's arbitration laws set it up to successfully deal with the pandemic, it has helped cement the UAE's position as a recognised safe and reliable

location to seat an arbitration and a real contender on the international stage.

Prevalence of electronic procedures

Proponents of arbitration often cite its flexibility as one of its key attributes. The pandemic has put that characteristic to the test and UAE arbitral institutions largely rose to the challenge. Apart from the very recent changes to the ICC and DIFC-LCIA Rules (see below), none of the major UAE institutional arbitration rules explicitly dealt with electronic procedures, including the electronic filing of submissions, management of evidence and virtual hearings.

However, most of the major UAE institutional rules empower the arbitration tribunal to determine appropriate procedures that gives them flexibility to implement electronic processes, including virtual hearings, during the conduct of the arbitration.[3]

The institutions have themselves proven to be adaptable and rose to the challenge. Shortly after the pandemic took hold, many of the institutions issued guidelines and protocols to ensure the safe continuation of arbitrations. In March 2020, the Dubai International Arbitration Centre announced that it would only receive requests for arbitrations, and supporting documents, though its online portal. Similarly, ADCCAC announced that it would only receive documents via email.

There is also guidance available to parties dealing with electronic procedures. In last year's article, we outlined the now seemingly prescient ADGM Arbitration Guidelines, which promote the use of electronic bundles at hearings to minimise the use of hard copy bundles.

More recently, and relevant to virtual hearings, the IBA Rules on Taking Evidence in International Arbitration, in force since 2010, were republished on 15 February 2021. The new IBA Rules now cover a framework and outline protocol for remote hearings[4] and encourage tribunals to address, during early consultation with the parties, cybersecurity, data protection and confidentiality.[5] In April 2020, the ICC issued guidance on measures aimed at mitigating the effects of the pandemic which appends a useful checklist on conducting virtual hearings. [6]

Such guidance and suggested protocols have been invaluable. At the beginning of 2021, we successfully held a virtual hearing in an ADCCAC arbitration consisting of a tribunal based in three different locations across different continents, witnesses and experts from around the Middle East and China and counsel in Abu Dhabi and Dubai. We used the AAA-ICDR Virtual Hearing Guide[7] as the basis for agreeing a protocol dealing with cybersecurity, technical requirements, an express warranty not to communicate electronically with witnesses giving evidence, electronic bundles, electronic presentation of evidence and real time transcription. 'International arbitration' has never felt so international.

Further divergence of institutional rules

Whilst the main institutional rules all offer flexibility, there continues to be a shift in approaches, which started before the pandemic. In one camp, the DIFC-LCIA and ICC Arbitration Rules have continued to modernise. In 2016/2017 they both introduced the use of an Emergency Arbitrator for urgent applications and the ICC Rules introduced an expedited process for disputes valued under US$2 million. In the other camp, the DIAC and ADCCAC Arbitration Rules have maintained a 'light-touch' approach, leaving the parties and tribunal to agree appropriate procedures.

The gulf between the two camps has widened with the publication of the 2020 ICC and DIFC-LCIA Arbitration Rules, both effective from 1 January 2021. Reflecting the changes to arbitration practice necessitated by the pandemic, the new DIFC-LCIA Rules provide the following new provisions for electronic procedures and virtual hearings:

- The claimant is to submit its request, and the respondent its response, in electronic form either by email or other electronic means including via any electronic filing system approved by the DIFC-LCIA Arbitration Centre; [8]
- Hearings 'may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)';[9] and
- Awards may be signed electronically. [10]

Similarly, the 2020 ICC Rules now make provision for virtual hearings.[11] Confirmation of the primacy of electronic communications and procedures is comforting for those conducting proceedings where international travel is still exceptional and social-distancing the norm. Perhaps more significantly, now those procedures are codified in the new Rules there is a real sense that the pre-pandemic, paper and travel-heavy conduct of arbitrations may not return, at least not to the same degree.

Other notable and important amendments to the 2020 DIFC-LCIA Rules include:

- The early determination of claims. Article 22.1(viii) empowers the tribunal to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the tribunal or inadmissible or manifestly without merit. Such a provision is welcome and may, if operated effectively, streamline proceedings, dispense with unmeritorious claims and narrow the issues to be decided.
- Consolidation of multiple arbitrations. Article 22.7 permits claimants to commence more than one DIFC-LCIA arbitration in a composite request and, in turn, respondents are permitted to serve a composite response. The tribunal also has the power to consolidate, or run concurrently, multiple arbitrations provided that:
  - all the parties agree to the consolidation; and
  - the arbitrations are commenced under the same, or compatible, arbitration agreements under the DIFC-LCIA rules either between the same parties or concerning the same transactions, or series of related transactions, provided that no tribunal has been constituted or, if constituted, consist of the same arbitrators.

The new additions to the 2020 DIFC-LCIA Rules largely focus on more efficient processes and, coupled with the primacy of electronic communications and processes, bring them in line with modern (and necessary) practice.

In comparison, the DIAC and ADCCAC Rules, which have been around in their current forms since 2007 and 2013 respectively, feel somewhat outdated. The Rules do not address consolidation of related arbitrations, offer expedited procedures, the early determination of specific issues, or, in any detail, electronic communications and procedures. The DIAC announced the 'imminent' release of its new Rules in 2017 but none have been published. Since then, the UAE has enacted the Federal Arbitration Law and has dealt with a pandemic.

Time will tell whether users of arbitrations will favour the detail and prescription of the DIFC-LCIA Rules or the freedom and flexibility offered by the DIAC and ADCCAC Rules. In our

experience, once parties are at the stage of arbitrating their dispute, agreement on anything, including procedures, is more difficult and can be costly which makes more detailed rules, such as the 2020 DIFC-LCIA ones, preferable and ultimately more cost-effective.

Relics of the old arbitration regime

The 'new' UAE Federal Arbitration Law is not so new. Enacted in 2018, it has now governed onshore UAE arbitrations for just over two years and judgments from the local courts continue to refine its parameters. The trend seems to be that the courts are consistently pro-arbitration, but some relics from the old regime subsist.

Before the enactment of the UAE Federal Arbitration Law, it was well established, absent any agreement to the contrary, that arbitral tribunals, operating under the DIAC Rules, did not have power to award legal or other costs. A DIAC arbitration tribunal is empowered to award 'costs', as defined in the DIAC Rules, limited to the administrative fees of the DIAC and the costs and expenses of the arbitration tribunal. This put DIAC arbitrations at a slight disadvantage to arbitrations governed by other institutional rules where arbitrators can award legal and other costs to the successful party. Such a power is a distinguishing feature, and seen as an advantage for arbitrations in the UAE as compared with the local courts, which will only award nominal litigation costs to the successful party.

Some hoped that the UAE Federal Arbitration Law would redress this point and bring it in line with the ADGM and DIFC arbitration laws by explicitly giving tribunals the power to award legal and other costs.[12] However, the new law did not appear to go that far. Article 46(1) of the UAE Federal Arbitration Law, similar to that of the DIAC Rules, states that costs are 'the fees and expenses incurred by any member of the Arbitral tribunal in the exercise of his duties and the costs for experts appointed by the Arbitral Tribunal'. Legal and other costs incurred by the parties in the conduct of the arbitration is not mentioned. It therefore seems that the pre-UAE Federal Arbitration Law position would remain the same.

This was confirmed in a 2020 Dubai Court of Cassation decision: in a DIAC arbitration, the parties must give the tribunal the power to award legal and other costs otherwise any such decision on costs will be nullified.[13] To get around the restrictions under the DIAC Rules, parties grant DIAC arbitration tribunals power to award legal and other costs in the arbitration agreement or when agreeing the terms of reference. It is, therefore, surprising that, in this case, notwithstanding the terms of reference explicitly empowering the DIAC tribunal to award costs, the court found that the tribunal had no such power.

The court's reasoning was that the parties' legal representatives signing the terms of reference on behalf of the parties did not have specific authority under their respective powers of attorney to grant them the power to make such an agreement. Lawyers are therefore advised to carefully check the wording of their powers of attorney to ensure that they are drafted broadly enough to cover all necessary authorities, including the authority to bind their clients to an agreement that a DIAC tribunal has the power to award costs.

In another Dubai Court of Cassation case from last year, the court held that an arbitration award is invalid, and could be nullified, unless the decision, and reasoning for the decision, are signed by the arbitrators.[14] The case is interesting because that was considered to be the position under the old arbitration regime, but was not believed to be the case under the new Federal Arbitration Law, which, at article 41(3), simply provides that the 'award shall be signed by the arbitrators' (ie, without distinguishing between parts of an award). The reasoning adopted by the court was that the wording in article 41(3) is similar to the old regime and therefore it considered that the judgments that interpreted the old regime should apply to the new one. It is likely that the requirement of arbitrators to sign the decision, and reasoning of the decision, applies to electronic signatures, which is now permitted under article 41(6) of the UAE Federal Arbitration Law.

Importantly, in both cases, the Dubai Court of Cassation did not nullify the entire awards. In the first case, the court partially nullified the award, dispensing with the part dealing with costs. In the second case, the Court of Cassation remitted the award to the Dubai Court of Appeal for the arbitral tribunal to rectify the error. To those practising outside the UAE, such decisions may seem pedantic, but the court's decision not to nullify either of the awards reflects the increasingly pro-arbitration approach of the courts; 10 years ago, the courts were more likely to have taken a hard-line approach.

Looking ahead

As the pandemic struck the UAE, arbitration practitioners scrambled to keep arbitrations already underway on track. In our view, this has been a resounding success in part due to the flexibility of arbitration and the strong foundations laid by recent reform. In many ways, the pandemic has hastened the trend to run arbitrations more efficiently, with less emphasis on paper and more on electronic procedures and communications.

Some of the advances made in 2020, and the costs savings they brought, are likely to stay. It is unlikely that the days of printing, say, 50 plus lever arch folders, in multiple sets, will return, especially when very often the key and determinative documents could be reduced to one or two folders. That's not to say that all hearings will now be virtual – we respectfully suggest that there is still a real benefit in presenting a case to a tribunal, and cross-examining witnesses, in person; for example, to pick up on subtle body language that is not readily apparent on videoconferencing. Nevertheless, we do suggest that it may not be necessary to fly every witness or expert across the world in circumstances where their evidence could be examined just as easily over Zoom.

Regardless of whether in-person hearings return, there is arguably a benefit to having them filmed so senior individuals of the parties that might not usually attend in-person hearings can dip in and out to see, in real-time, how the hearing is progressing (rather than rely on written summaries). Such interaction makes the arbitration process more transparent and could encourage increased ownership by the parties rather than leaving it up to the lawyers. Of course, any observation of proceedings must be tightly controlled, and access limited to named individuals, to preserve the confidential nature of arbitrations.

The effect of the pandemic on parties is only just beginning. Parallels are often made with the 2008 financial crisis and the delayed effect it had on disputes, which started in the subsequent years (with some rumbling on today). It is therefore very likely that there will be a steady uptick in disputes in the coming years as the devastating effect of the pandemic comes to bear.

In the UAE, it is likely that, as has been the case over the last 15 years, construction disputes will play a large role in future arbitrations. Such disputes are document-heavy, involve multiple heads of claims (and counter-claims) and can involve multiple contracts involving the same parties. These are all issues that are seemingly addressed by the DIFC-LCIA's 2020 Rules and the provisions for electronic communications, the early determination of unsustainable claims and consolidation of multiple arbitrations.

Let's hope 2021 is not as disruptive as 2020, but that the good progress made to make arbitrations more efficient and cost effective is maintained.

Notes

1 See also article 27(2) of the DIFC Arbitration Law 2008 and article 28 of the UAE Federal Arbitration Law 2018.
2 Article 41(6) of the UAE Federal Arbitration Law.
3 Article 17 of the DIAC Rules; article 14 of the ADCCAC Rules; and article 14.2 of the 2020 DIFC-LCIA Rules.
4 Article 8 of the 2020 IBA Rules on the Taking of Evidence in International Arbitration.
5 Articles 2 and 9 of the 2020 IBA Rules on the Taking of Evidence in International Arbitration.
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10 Article 26.2 of the DIFC-LCIA 2021 Rules.
11 Article 26(1) of the 2020 ICC Rules.
12 Regulation 50(5)(f) of the ADGM Arbitration Regulations; article 38(5(f) of the DIFC Arbitration Law.
13 Dubai Court of Cassation No. 990 of 2019 (5 April 2020).
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