The Middle Eastern and African Arbitration Review 2020

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The Middle Eastern and African Arbitration Review 2020

A Global Arbitration Review Special Report

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The Middle Eastern and African Arbitration Review 2020

Account manager J'nea-Louise Wright

Head of content production Simon Busby
Editorial coordinator Hannah Higgins
Production editor Harry Turner
Subeditor Hilary Scott

Publisher David Samuels

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To subscribe please contact:
Global Arbitration Review
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL
United Kingdom
Tel: +44 20 3780 4134
Fax: +44 20 7229 6910
subscriptions@globalarbitrationreview.com

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Welcome to *The Middle Eastern and African Arbitration Review 2020*, 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, telling 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 banner) 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 we can in our daily news. *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.

Across 15 chapters, and 97 pages, and written by 34 authors, it all adds up to an invaluable retrospective. All contributors are vetted for their standing and knowledge before being invited to take part. Their articles capture and interpret the most substantial recent international arbitration events of the year just gone, 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, mining arbitration, the likely outcome of the investment talks within the AfCFTA project, and developments within OHADA.

Among the nuggets to be found:

- an analysis of the likely landing point on FET within AfCFTA;
- a breakdown of the various ways in which 'localisation' is coming to energy arbitration in the region;
- anecdotal evidence that Chinese mining investors are turning to BITs;
- news of the first successful enforcement of a foreign arbitral award through the ADGM courts; and
- Nigeria's courts recently dealt with an attempted challenge to a well-known Swiss arbitrator.

And 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.

Finally, I should point out that writing for this edition was completed before the current global pandemic broke out. Thus there are no direct references to these strange times we are all living through. Even so, there are moments when the content is directly on point. For example, on page 14, where our contributor on CRCICA tells the story of an arbitration between a sports organisation and broadcaster following the (enforced) cancellation of a league, to name but one. I suspect future editions will mention covid-19 a great deal. In the meantime, we wish you all a safe, and appropriately isolated, read.

David Samuels
Publisher
October 2019

AfCFTA and the Upcoming Protocol on Investment: What Can Investors Expect?

Théobald Naud, Maxime Desplats and Ophélie Divoy
DLA Piper

In 2012, African states set out with the ambition to establish an unprecedented 'Continental Free Trade Area'.[1] Negotiations were launched under the aegis of the African Union with the primary objective of 'boosting intra-Africa trade'.[2] 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 GDP of more than US$2.2 trillion.[3]

On 30 May 2019, the African Continental Free Trade Agreement (AfCFTA) became a reality.[4] To date, it has been signed by 54 states (Member States)[5] and ratified by 28.[6]

Under the AfCFTA, Member States will work to progressively eliminate tariffs and non-tariff barriers to both 'trade and investment'.[7] Member States have the further ambition to create a continent-wide customs union providing for the free movement of capital and persons.[8]

This chapter explores the future possible traits of the AfCTA's Protocol on Investment (Investment Protocol), currently under negotiation, which is highly anticipated to follow the model of new generation investment protection instruments.

Implementing the AfCTFTA

The AfCFTA's implementation is comprised of two phases.

Phase I, which pertains to the liberalisation of trade in goods and services, is well underway. So far, Member States have adopted a Protocol on Trade in Goods,[9] a Protocol on Trade and Services,[10] a Protocol on the Settlement of Disputes between Member States and an annex on Rules of Origin. Member States are still negotiating a schedule of tariff concessions and schedules of specific commitments. In theory, these negotiations should come to a close in the coming months, in time for the commencement of preferential trading across the territories of the AfCFTA Member States, which has been slated for 1 July 2020.[11]

Natural persons and corporate entities have no right of recourse under the AfCFTA. Similar 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 wishing to seek recourse against a Member State under the AfCFTA may only do so by seeking diplomatic protection.[12]

For these reasons, intra-African investors are now casting their eyes on the Phase II negotiations, which include the negotiation of an Investment Protocol. However, negotiations are behind schedule. The deadline for the completion of the Phase II negotiations has been postponed to June 2020[13] and is likely to be further postponed to December 2020.[14]

Investors eagerly await the contents of the Investment Protocol, both in terms of the substantive protections it will offer and the rights of recourse that will be made available to them.

Negotiating the Investment Protocol

The ongoing discussions between Member States on the Investment Protocol have not been made public. However, investors will look to recent developments in the field of investment protection, in particular on the African continent, for an indication of what to expect.

There has been a sharp rise, in recent years, in the number of investment protection instruments in Africa. In October 2017, the African Union Commission adopted the first harmonised Draft Pan-African Code on Investment (the PAIC). Although this instrument is not binding, it provides clear insights into the pan-African approach to international investment protection.

Likewise, Africa's numerous regional economic communities (RECs)[15] have adopted legal frameworks to encourage the development of intra-African investments. 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 (the ECOWAS Supplementary Act). More recently, in 2016, the Southern African Development Community (the SADC) amended the annex relating to the Cooperation on Investment of the Protocol on Finance and Investment (the SADC FIP).

The approach undertaken by the RECs in developing these instruments will undoubtedly be of influence in the negotiations of the Investment Protocol under the AfCFTA. The RECs are officially considered as the 'building blocks' of the AfCFTA,[16] which aims to 'preserve the acquis' and allow Member States to build upon these prior regional initiatives.[17] In particular, the AfCFTA sets out to preserve the 'higher levels of regional integration' achieved by these RECs.[18]

Additionally, African states have entered into numerous bilateral investment treaties (BITs) in recent years, which shed light on the views taken by Member States on investment protection. The Investment Protocol is widely expected to reflect these views.

In light of these developments, this chapter considers the rights and obligations that are likely to arise under the AfCTA's Investment Protocol for African investors engaged across the continent.

Joining the line of second-generation BITs

The first generation of BITs, negotiated for the most part throughout the 1980s and 1990s, are

> *short bilateral treaties, providing little detail. They may simply require the government to provide covered foreign investors with 'fair and equitable treatment', for example, without further specification as to the nature or breadth of the obligation or the consequences of its breach.*[19]

First-generation BITs focus on investors' rights and account for the majority of treaties in force today.

Second-generation BITs, which have emerged since the turn of the new century, intend to restrict investors' rights and impose obligations upon them.[20]

There exists a clear trend in Africa in favour of second-generation BITs. The PAIC, ECOWAS Supplementary Act, SADC FIP and the recently-concluded BITs (such as the 2016 Morocco–Nigeria BIT) all place strict obligations on investors, reflecting this shift.

It is strongly expected that the future Investment Protocol will follow this line of second generation BITs and include, in their footsteps, provisions:

- preserving state's rights to regulate;
- limiting the rights of investors with respect to the substantive investment protection standards;
- imposing strict obligations on investors; and
- limiting the right of access to investor-state arbitration.

Preserving African states' rights to regulate

Second-generation investment instruments expressly carve-out a state's rights to regulate in key areas, such as the preservation of public health or the environment. These general exceptions clauses entitle host states to enact measures that would otherwise be inconsistent with their substantive obligations towards investors under investment agreements.[21]

The PAIC, for instance, contains a series of 'exceptions' to the substantive protection standards of most-favoured nation treatment, national treatment and expropriation, based on the state's right to 'protect or enhance legitimate public welfare objectives, such as public health, safety and the environment'.[22]

The PAIC more generally preserves the right of a state to:

> *adopt or enforc*[e] *measures relating to the protection of human, animal or plant life or health, or to the maintenance of international peace and security, or to the protection of its national security interests, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like circumstances or a disguised restriction on investment flow.*[23]

Equally, article 22.1 of the Common Market for Eastern and Southern Africa (COMESA) Common Investment Agreement provides that:

> [s]*ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investor where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures: (a) designed and applied to protect national security and public morals; (b) designed and applied to protect human, animal or plant life or health; (c) designed and applied to protect the environment; or (d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.*

A number of African BITs also include similarly-worded provisions[24].

It is clear from the language of the preamble to the AfCFTA that the Member States will pursue the same approach under the Investment Protocol. Indeed, the preamble to the AfCFTA expressly reaffirms

> *the right of State Parties to regulate within their territories and [their] flexibility to achieve legitimate policy objectives in areas of public health, safety, environment, public morals and the promotion and protection of cultural diversity.*[25]

In particular, the Investment Protocol may reproduce the specific and general exception clauses set out under the PAIC. It may further set out specific exceptions, such as article 38 of the ECOWAS Supplementary Act or article 21.3 of the SADC Model BIT, which guarantee a state right to regulate to protect or support 'categories of persons disadvantaged by long-term historic discrimination'.

Imposing strict obligations on investors

There has been a clear shift in second-generation investment instruments towards imposing strict obligations on investors, in particular with respect to the fight against corruption, the preservation of the environment, the protection of human rights and compliance with labor standards.

The PAIC, for instance, devotes an entire chapter to investor obligations, including socio-political obligations such as the non-interference in internal political affairs and the obligation not to exploit or use the host state's natural resources to the detriment of the rights and interests of the host state.[26]

The ECOWAS Supplementary Act sets out a series of obligations on investors, including to 'comply with and maintain national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices'.[27]

Similarly, the COMESA Common Investment Agreement and the SADC FIP both provide for extensive obligations, such as the obligation to make 'provisions for the continued improvement of environmental management technologies and practices […] [which] shall strive to exceed legally applicable standards'.[28]

As regards to bilateral treaties, under the Morocco–Nigeria BIT, investors (in addition to compliance with domestic laws and mandatory prior assessments of environmental and social impacts of the intended investment) must 'meet or exceed national and internationally accepted standards of corporate governance for the sector involved'.[29]

Investors who fail to comply with these obligations run the risk of losing the benefit of the protections afforded by the investment protection instrument and are at risk of liability towards the host state.[30]

The Investment Protocol is widely expected to include similar sets of obligations on investors.

A new standard of fair and equitable treatment?

Investment treaties frequently impose an obligation on host states to accord foreign investments fair and equitable treatment (FET). This standard of protection is generally meant to protect investors against arbitrary, discriminatory or abusive conduct by states.

However, FET clauses rarely provide a clear delineation of the corresponding standard of protection, such that their 'exact meaning has to be determined'.[31]

Tribunals have not always agreed on the exact scope of this standard of protection, thereby causing some uncertainty. However, there exists a large body of arbitral decisions interpreting the language of such FET clauses broadly. In the words of the tribunal in the case of *Waste Management v Mexico*:

> *the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is*

> *discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*[32]

Some commentators argue for the adaptation or removal of FET clauses from investment protection instruments because of these broad interpretations and a corresponding lack of predictability for the host state.

There appears to be no consensus between the Member States on this issue. The PAIC and SADC FIP do not include any FET provision whatsoever. The Drafting Committee of the SADC Model BIT was of the view that the FET standard should not be included because of the broad interpretations adopted by a number of arbitral tribunals.[33] Rather, it suggested an alternative version of the FET clause aimed at restraining a perceived 'creativity' of arbitrators to amplify the intended meaning of such provisions.[34] The 'Fair Administrative Treatment' standard suggested under the SADC Model BIT thus prescribes that the:

> *administrative, legislative, and judicial processes* [of the host State] *do not operate in a manner that is arbitrary or that denies administrative and procedural* [justice][due process] *to investors of the other State Party or their investments* [taking into consideration the level of development of the State Party].[35]

The COMESA Investment agreement also provides that account must be taken of the level of development of its members in the acceptation of the FET standard.[36]

Notwithstanding these approaches aimed at restricting the ambit of the FET standard, some African states, through their numerous BITs with non-African counterparts, have adopted standard FET clauses without specific limitations. Nigeria and Tanzania, for instance, both ratified BITs that provide a minimum standard of treatment as guaranteed under customary international law.[37]

In light of these differing approaches, the question of whether the Investment Protocol will include an FET provision and, if so, what scope of protection it may offer, remains open.

Investor-state arbitration

Despite the widespread criticism of investor-state dispute settlement, most African states continue to offer foreign investors the option to bring proceedings before an arbitral tribunal in the event of an alleged breach of an investment treaty standard.[38]

Only a minority of African states have chosen to remove entirely an investor's right of recourse to investor-state arbitration. For example, South Africa precludes the use of investor-state arbitration[39] and requires foreign investors to seek the diplomatic protection of their home state. Tanzania's 2017 Natural Wealth and Resources Act excludes the possibility for the resolution of disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources of the country, before courts of tribunals located outside of the country.[40]

The PAIC took note of this divergence between African countries and the right of each of its Member States to exercise discretion to accept or refuse investor-state dispute settlement.[41]

As the negotiation of the Investment Protocol is based on consensus,[42] it is likely that the Investment Protocol will also adopt this approach and leave the Member States to opt-in or opt-out of any investor-state dispute settlement mechanism.

Yet, such access to an investor-state dispute settlement mechanism could be conditional under the Investment Protocol. Some African states already limit the access of foreign investors to arbitration by imposing additional requirements, such as the consent in writing to arbitration of the host state or the prior exhaustion of local remedies.[43]

At the regional level, besides the SADC FIP, which removed entirely investor-state dispute settlement, the RECs favour a cautious approach to ISDS.[44] The ECOWAS Supplementary Act, the ECOWAS Protocol on Energy, the COMESA Common Investment Agreement and the SADC Model BIT all impose conditions to submit a claim to arbitration thereby strengthening the use of the amicable settlement mechanisms in those agreements.[45]

Under the RECs' investment protection instruments, investors seeking to initiate arbitration proceedings must issue a notice of intention to initiate arbitration and observe a minimum period of three to six months after the date the notice of intention before initiating proceedings. During this period, the parties involved must also make efforts to reach an amicable settlement of their dispute.[46]

Additionally, the COMESA Common Investment Agreement and the SADC Model BIT impose a time limitation of three years, from the date on which the investor first acquired knowledge of the breach to submit a claim to arbitration.[47] Under the PAIC and the SADC Model BIT, foreign investors must also exhaust local remedies before having recourse to arbitration.[48]

Another singular feature of the RECs' investment protection instruments is the transparency of arbitral proceedings. All procedural and substantive oral hearings are made available to the public under the ECOWAS Supplementary Act.[49] The COMESA Common Investment Agreement and the SADC Model BIT also render the arbitral proceeding transparent and made available to the public, with specific provisions on the publication of all pleadings, evidence and decisions and rendering the oral hearings open to the public.[50]

The Morocco–Nigeria BIT (2016) also has integrated a limited approach to investor-state arbitration and requires consultations and negotiations by the state parties' joint committee before initiating arbitration proceedings, as well as the prior exhaustion of local remedies.[51] Also under the BIT, the arbitral record (specifically all pleadings and the decisions of the tribunal) must be made available to the public and the hearing itself must also be open to the public.[52]

In these circumstances, it is unlikely that the African states will find a consensus on whether to use or prohibit investor-state arbitration. It is likely, however, that in any event the Investment Protocol will limit the availability of investor-state arbitration, provide for full transparency and put greater focus on amicable settlement mechanisms.

Risks of discrepancies between the various regimes?

A continental harmonised investment regime begs the question of its relationship with the numerous BITs that already exist between the Member States of the AfCFTA.

Maintaining all the pre-existing BITs would defeat the purpose of the AfCFTA to resolve the challenges of multiple and overlapping trade and investment protection regimes.[53] For these reasons, the drafters of the Investment Protocol might want to consider whether Member States would be willing to agree that the Investment Protocol would prevail in case of divergence

with pre-existing intra-African BITs, if these are not separately terminated.

Conclusion

The AfCFTA was negotiated for the purpose of increasing intra-African trade and create a thriving common African market. As such, the Investment Protocol should create a regime that welcomes investments and contributes to the development of trade within Africa.

Bearing in mind that the negotiations of the Investment Protocol are carried out in a global context of the reform of international investment agreements, it is very likely that the new investment regime will implement the consensus announced by the RECs and Member States in their pre-existing investment protection instruments.[54]

Prospective investors in Africa, therefore, should expect a text that strikes a fresh and welcome balance between the facilitation of cross-border investments within Africa and the promotion of the sustainable development of the host state.

The authors would like to thank Ms Alexandra Esmel, intern at DLA Piper, for her valued contribution to the preparation of this chapter.

Notes

1 Decision of the African Union Assembly on Boosting Intra-African Trade And Fast Tracking The Continental Free Trade Area, 31 May 2012, Assembly/AU/Dec. 394(XVIII), page 1, available at https://au.int/en/documents/20120531.

2 Ibid.

3 UNCTAD World Investment Report 2019 – Africa, p. 54 on 237 : The elimination of tariffs under the Agreement could support market-seeking FDI, as foreign investors venture to tap into a market of 1.2 billion people with a combined GDP of more than US$2.2 trillion. Available at https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

4 African Union Press release, AfCFTA Agreement secures minimum threshold of 22 ratification as Sierra Leone and the Saharawi Republic deposit instruments, April 29th, 2019, available at https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and.

5 Out of all 55 African Union Member States, Eritrea is the only state which has not signed the AfCFTA. The current Member States of AfCFTA are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau. Kenya, the Kingdom of Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Kingdom of Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe. See AfCFTA Preamble and Article 1.

6 See the Status list of countries which have signed and ratified the AfCFTA, available at https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%20%282%29.pdf.

7 AfCFTA, Preamble.

8 AfCFTA, Article 3.

9 The Protocol contains a number of annexes: Annex 1 on Schedules of Tariff Concessions; Annex 2 on Rules of Origin; Annex 3 on Customs Cooperation and Mutual Administrative Assistance; Annex 4 on Trade Facilitation; Annex 5 on Non-Tariff Barriers; Annex 6 on Technical Barriers to Trade; Annex 7 on Sanitary and Phytosanitary Measures; Annex 8 on Transit; and Annex 9 on Trade Remedies. Available at https://www.tralac.org/documents/resources/african-union/2163-compiled-annexes-to-the-afcfta-agreement-legally-scrubbed-version-signed-16-may-2018/file.html.

10 The Protocol on Trade and Services comports two annexes: an Annex on MFN Exemption and Annex of Air Transport.

11 African Union, Operational Phase on the African Continental Free Trade Area Launched, available https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched

12 AfCFTA, Article 20 and Protocol on Rules and Procedures on the Settlement of Disputes, Article 3.

13 Assembly of the Union (Assembly/AU/4(XXXII)), Report on the African Continental Free Trade Area by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AFCFTA 32nd Ordinary Session 10 – 11 February 2019 and Report to the Specialised Technical Committee on Trade, Industry and Minerals: Progress on the African Continental Free Trade Area (AfCFTA) for the period from May 2016 to December 2018, available at https://www.tralac.org/documents/resources/african-union/2830-report-on-the-afcfta-by-mahamadou-issoufou-with-annexes-february-2019/file.html.

14 See statement of Ambassador Alber Muchunga dated 12 February 2020, available at https://www.wto.org/english/thewto_e/acc_e/commissioner_muchanga_speech_at_wto_accession_workshop_003.pdf.

15 The Regional Economic Communities (RECs) are regional groupings of African states created to facilitate regional integration within the continent. The African Union recognizes eight RECs: the Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel–Saharan States (CEN–SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

16 AfCFTA, Article 5.

17 AfCFTA, Articles 3 and 5. The Abuja Treaty in 1991 already envisioned a gradual establishment of an African economic community built on the efforts of harmonization of the regional economic communities.

18 AfCFTA, Article 19.2.

19 OECD Business and Finance Outlook 2016, Chapter 8, The impact of investment treaties on companies, shareholders and creditors, p.3, available at https://www.oecd.org/daf/inv/investment-policy/BFO-2016-Ch8-Investment-Treaties.pdf.

20 Kluwer Arbitration Blog, Rebalancing the Asymmetric Nature of International Investment Agreements?, Kun Fan, April 30, 2018. Available at http://arbitrationblog.kluwerarbitration.com/2018/04/30/rebalancing-asymmetric-nature-international-investment-agreements; Yearbook on International Investment Law & Policy 2014-2015 edited by Andrea K. Bjorklund, p.50 et seq.

21 Boston College Law Review, Volume 59, Issue 8, 2018 Reforming International Investment Law, Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?', available at https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3716&context=bclr.

22 PAIC, Articles 8, 10 and 12.

23 PAIC, Article 14.

24 See for example the Nigeria-Morocco BIT (2016) – not in force, Article 13; Canada-Côte d'Ivoire BIT (2014), Article 15 and 17; Macedonia-Morocco BIT (2010), Article 2(6); Nigeria-Turkey BIT (2011) – not in force, Article 6 ; Cameroon-Turkey BIT (2012) - not in force, Article

5; Japan-Mozambique BIT (2013), Article 18 ; Nigeria-Morocco BIT (2016) – not in force, Article 13.

25 AfCFTA, Preamble.

26 PAIC, Chapter 4.

27 ECOWAS Supplementary Act, Chapter III, Article 15(1). See more generally, Articles 11 to 17, availabe at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download.

28 Amended Annex 1 SADC FIP Article 14.4, available at https://www.sadc.int/files/7114/9500/6315/Agreement_Amended_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf.

29 SADC Model BIT, Articles 10,11,13,14 and 16, available at https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf ; Morocco-Nigeria BIT, Article 19.

30 See SADC Model BIT, Article 19.

31 See OECD Working Papers on International Investment 2004/03,'Fair and Equitable Treatment Standard in International Investment Law, p.2.

32 *Waste Management, Inc. v. United Mexican States* ('Number 2'), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

33 See International Investments Protection: Comparative Law Analysis of Bilateral and Multilateral Interstate Conventions, Doctrinal Texts and Arbitral Jurisprudence Concerning Foreign Investments, Jan Schokkaert & Yvon Heckscher Bruylant, 2009 p.332 : 'However, the fact remains that the content of the fair and equitable treatment concept is not clear. International jurisprudence and doctrine may well be distilled […] but to guarantee a correct application of this principle in the relations between host State and foreign investors, it is necessary that the duty of fair and equitable treatment be confirmed expressly in conventional international law.'; See also Journal of World Trade 2007 Kluwer Law International, 'Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties', Graham Mayeda, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1427307; See also 'The Vague Meaning of Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications', Günes Ünüvar, May 2016, p.12 and seq., available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774078.

34 SADC Model BIT, Article 5 on Fair Equitable Treatment and commentary on the same.

35 SADC Model bIT, Article 5 on Fair Equitable Treatment, Option 2 and commentary on the same.

36 COMESA Investment agreement, Article 14.3, 'For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context'.

37 Nigeria-Morocco BIT (2016) – not in force, Article 7; Canada-United Republic of Tanzania BIT (2013), Article 6.

38 See for example Algeria Investment Promotion Law n°2016-09 (2016); Uganda Investment Code Act, Article 28 (1991), Angola Private Investment Law (2018), Article 15; DRC Investments Code (2002), Articles 37 et seq.; Mali Investments Code (2012), Article 29; Tanzania Investment Act (1997), Article 23.

39 South Africa Protection of Investment Act (2015), Article 13.

40 Tanzania's Natural Wealth and Resources Act (2017), Article 11 and seq.

41 PAIC, Article 42.1 and 42.1.c.

42 AfCFTA, Article 5.

43 See for example Namibia Investment Promotion Act (2016), Article 28.

44 UNCTAD, IIA Issue Note, Reforming Investment Dispute Settlement: A Stocktaking, available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf.

45 ECOWAS Supplementary Act, Article 33; ECOWAS Protocol on Energy, Article 26; COMESA Common Investment Agreement, Article 27; SADC Model BIT, Article 29.

46 COMESA Common Investment Agreement, Article 26; Amended Annex 1 SADC FIP, Article 28.

47 COMESA Common Investment Agreement, Article 28.2; SADC Model BIT, Article 29.4b.d.

48 PAIC, Article 42.1.c ; SADC Model BIT, Article 29.4.b.i.

49 ECOWAS Supplementary Act, Article 34.

50 COMESA Common Investment Agreement, Article 28.5 and 28.6; SADC Model BIT, Article 29.17.

51 Morocco-Nigeria BIT (2016), Articles 26.1 and 26.5.

52 Morocco-Nigeria BIT (2016), Article 10.5.

53 AfCFTA Preamble.

54 UNCTAD, Phase 2 of IIA Reform: Modernizing the Existing Stock Of Old-Generation Treaties, available at https://unctad.org/en/PublicationsLibrary/diaepcb2017d3_en.pdf.

Théobald Naud
DLA Piper

Théobald Naud is a partner at DLA Piper, based in Paris. He is a dual-qualified English solicitor and avocat at the Paris Bar. Théobald joined DLA Piper in London as a trainee solicitor in 2007 and was promoted to the partnership in 2018.

Théobald advises and represents clients with respect to investment and commercial arbitration disputes, with significant experience in proceedings administered by ICSID, the International Chamber of Commerce and the Permanent Court of Arbitration, as well as ad hoc arbitrations pursuant to the UNCITRAL Arbitration Rules. He also regularly represents clients in French courts to challenge or enforce international arbitration awards and arbitration clauses.

Théobald has worked on Africa-related investment disputes for a number of years, including the long-standing representation of the Republic of Guinea in parallel multi-billion dollar ICSID arbitrations against BSG Resources Limited and affiliated companies relating to a claim of expropriation of a mining concession and related rights (ARB/14/22). Current mandates also include the representation of Belgian investors in a multi-million dollar ICSID arbitration against the Republic of Madagascar relating to an investment in the textile manufacturing sector (ARB/17/18).

Théobald has particular experience in the interaction between international arbitration and parallel proceedings, having spoken at multiple conferences on the issue. In 2018, he published a chapter 'International Commercial Arbitration and Parallel Criminal Proceedings', in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* (2018).

In 2018, he was named as one of the 'Rising Stars' of commercial arbitration for France by *Expert Guides*.

Maxime Desplats
DLA Piper

Maxime Desplats focuses his practice on international disputes resolution. He is a counsel at DLA Piper, based in Paris. He regularly represents clients before arbitral tribunals in proceedings conducted in English or in French. He also frequently assists clients before various French courts and African jurisdictions.

Maxime is part of the team working on the consequences of the *Achmea* decision on the investor-state dispute settlement mechanisms included in the bilateral investment treaties concluded between member states of the European Union.

Maxime has also participated in internal investigations linked to allegations of corruption.

Ophélie Divoy
DLA Piper

Ophélie is a senior associate in DLA Piper's international arbitration practice, based in Paris.

Ophélie has experience advising and representing clients in arbitration cases administered by the ICSID, the International Chamber of Commerce, as well as in ad hoc arbitrations pursuant to the UNCITRAL Arbitration Rules, in English, French and Spanish.

She also represents clients in proceedings relating to the enforcement or setting aside of international arbitral awards, in France and abroad.

She has worked extensively with African clients and is familiar with OHADA Law. She also advises clients in proceedings before the OHADA Common Court of Justice and Arbitration.

27 Rue Laffitte
75009 Paris
France
Tel: +33 1 40 15 24 00

Théobald Naud
theobald.naud@dlapiper.com

Maxime Desplats
maxime.desplats@dlapiper.com

Ophélie Divoy
ophelie.divoy@dlapiper.com

www.dlapiper.com

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 it is also currently defending 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.

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.

Analysing Liquidity: When the State of Matter matters to Expert Valuers in Damages Assessments

Jonathan Ruffell, Steve Harris and James Church-Morley
FTI Consulting

Quantifying damages often requires an independent assessment of the market value of an asset. When this asset is a direct or indirect interest in a business, valuers may consider the price per share at which publicly listed shares have been exchanged. They may do so to:

- assess the market value of parcels of those shares on the same or different date;
- estimate multiples that apply to comparable companies, to value the subject matter on the basis of a relative valuation; or
- derive a beta factor to use in the estimation of a discount rate, to apply in a discounted cash flow valuation.

When performing such analyses, valuers often consider whether the shares under review are 'sufficiently liquid'. Insufficient liquidity may render the relevant data unreliable for the intended purpose. However, in the authors' experience, there is no consensus as to when a share should be deemed 'sufficiently liquid' or the weight a valuer should place on the prices of shares that do not meet that threshold.

In this chapter, we explain the concept of liquidity and explore the above issues in the context of shares in public companies. We consider how liquidity is measured, what causes it and the implications of illiquidity for valuation analyses. Simply put, is it correct to dismiss valuation evidence from a stock that is thinly traded?

We find that context is crucial. Faced with evidence of insufficient liquidity, a valuer should examine the causes of illiquidity and assess whether trades in the asset in question satisfy the relevant conditions of market value. For example, a lack of buyers may simply reflect current market conditions as opposed to 'illiquidity'. It may well be wrong to ignore data in these circumstances. Conversely, if some parties know things that others do not, this may mean that a party to a transaction is not 'acting knowledgeably', which may be a reason to place less weight on the data.

What is liquidity and why does it matter?

Liquidity refers to how easily an asset can be converted into cash. It has been described as 'a broad and elusive concept that generally denotes the ability to trade large quantities quickly, at low cost, and without moving the price'.[1] In practice, the liquidity of interests in businesses is observed across a spectrum. At the upper end of this spectrum are listed shares and bonds. These are frequently traded in an active market and can be traded in large quantities at the push of a button. At the lower end are uninfluential minority shareholdings in private companies controlled by their management, for which there may be few (or no) ready or willing buyers.

Cash provides advantages over less liquid assets – it can be spent, invested or saved for unforeseen consequences.[2] Liquidity preference theory posits that, all else equal, investors demand progressively higher expected rates of return on assets that they must hold for longer before they are free to sell them to another party. In other words, liquidity matters and can affect asset prices. From a valuation perspective, this means that metrics or returns observed for publicly traded but illiquid assets may incorporate a discount for illiquidity, rendering the metric or return less comparable to that of a liquid asset of otherwise equivalent risk.

For private companies, the lack of marketability (ie, the ability to market and sell an asset quickly) is often pronounced, compared to public companies. However, even in the case of shares in public companies – which this chapter focuses on – the liquidity of shares may differ significantly from one company to another or from one date to another. The liquidity of an entire market can also fluctuate over time. For example, during the global financial crisis, the liquidity of listed shares was on most measures markedly diminished.

Measures of liquidity: Easily measured, but difficult to judge

According to the Bank for International Settlements, 'no single universally accepted measure exists which can capture all the dimensions of liquidity'.[3] Consistent with this, practitioners typically consider a range of measures. These include measures of:

- market breadth, which concerns the extent of activity and price volatility in the relevant market – this affects the spread that intermediaries demand, to compensate for risks associated with the likelihood of price changes during periods when stock is owned;
- market depth, which refers to the market's ability to absorb relatively large orders without an effect on price; and
- immediacy, which relates to the period of time required to market and sell an asset.

Examples of measures of liquidity

Market breadth	Market depth	Immediacy
Bid-ask spread: The difference between the prices at which shares can be bought (ask price) and sold (bid price).	**Quote size:** The quantity of securities tradable at the bid and offer prices. **Trade size:** The quantity of securities traded at the bid and offer prices. **Price impact coefficients:** The increase in price that typically occurs with a buyer-initiated trade, and the decrease in price that typically occurs with a seller-initiated trade, relative to the size of a particular trade.	**Trading volume:** One such measure is 'share turnover' (calculated by dividing the total number of shares traded over a particular period by the number of shares outstanding during that period). **Trading frequency:** Common measures include the number of market days within a given period when shares are traded; and the number of trades executed within a specified interval.

Examples of common liquidity measures in each of these categories are set out below.

The measures in the table are readily identifiable for listed shares. However, there is little in the way of guidance to indicate when the measures indicate that a share should be considered 'sufficiently liquid' or what the measures mean for the position of a share on the liquidity spectrum.

Reports of the approaches taken in disputes provide some benchmarks. However, judgments are usually focused on establishing the liquidity or otherwise of a specific share or asset, rather than general benchmarks.[4]

Accounting standards, by contrast, tend to provide general information in respect of liquidity. For example, International Financial Reporting Standards (IFRS) establish that, in assessing 'fair value', valuers should have regard to matters of liquidity in the analysis of market data. This is observed in IFRS 13, which states: 'if there is a quoted price in an active market [. . .] for an asset or a liability, an entity shall use that price without adjustment'.[5] However, an active market is defined only as a 'market in which transactions for the asset or liability take place with sufficient frequency and volume to provide pricing information on an ongoing basis'.[6]

Accounting standards in the United States are more detailed, but similarly inconclusive. For example, Financial Accounting Standards (FAS) 157, identifies several factors to consider in an assessment of liquidity. However, it does not provide quantitative benchmarks. Rather, the standard advises that:

> [t]*he reporting entity shall evaluate the significance and relevance of the factors to determine whether, based on the weight of the evidence, there has been a significant decrease in the volume and level of activity for the asset or liability.*[7]

Accounting standards therefore recognise that an analysis of liquidity can be relevant in a valuation analysis. They also set out various factors and measures of liquidity that a valuer should evaluate when considering liquidity. However, the standards do not help valuers form conclusions on when an asset is 'sufficiently liquid'.

Accounting standards also emphasise that an absence (or reduction) of market activity does mean that the share price data is unreliable or should be disregarded. FAS 157 states that:

> [e]*ven if there has been a significant decrease in the volume and level of activity for the asset or liability, it is not appropriate to conclude that all transactions are not orderly (that is, distressed or forced).*[8]

International valuation standards (IVSs) also state: 'Low market activity for an instrument does not necessarily imply the instrument is illiquid'.[9]

How does the valuer reconcile these statements with the consensus view that that trades in a share needs to be 'sufficiently liquid' in order to be reliable? We suggest that an analysis of the cause of the illiquidity is required. The valuer can ask: 'Notwithstanding the illiquidity, do the underlying trades satisfy the conditions of market value?' We examine common causes of illiquidity, and their implications, below.

Causes of illiquidity

Amahid, Mendelson and Pederson identify the following factors as common causes of illiquidity:[10]

- demand pressure and inventory risk;
- asymmetric or private information; and
- search and bargaining costs and exogenous transaction costs.

Below, we consider the extent to which the first and second factors listed above may give rise to transactions that do not satisfy the conditions of market value and thus may be of limited (or less) relevance to a valuation analysis. We refer to the IVS definition of market value:

> *the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgably, prudently and without compulsion.*[11]

We do not consider the third factor. These relate to over-the-counter or privately traded securities and is outside of the scope of this chapter.

Demand pressure and inventory risk

Demand pressure arises because not all agents are present in the market at all times. This means that if an agent needs to sell an asset quickly, buyers may not be immediately on hand. As a result, the seller may sell to an intermediary who buys in anticipation of selling at a later date. The intermediary must be compensated for the risk of being exposed to price changes while they hold the asset in their inventory. This imposes a cost on the seller, such as a higher bid-ask spread.

Demand pressure may occur after prolonged periods of poor performance by a company, or alternatively, at times of increased uncertainty (relating either to the company, the industry it operates in, or the economy as a whole). In these circumstances, buyers often become wary of 'catching a falling knife' and choose to avoid entering into transactions.

If an asset's illiquidity relative to the rest of the market is driven by demand pressure, it is possible that the low levels of activity simply reflect the actual market (ie, the balance of supply and demand) for the asset at that point in time. Consideration of the actual market for an asset – active or otherwise - is an important requirement of market value. Indeed, the IVS market value definition also defines a 'willing buyer' as one:

> *who purchases in accordance with the realities of the current market and with current market expectations, rather than in relation to an imaginary or hypothetical market that cannot be demonstrated or anticipated to exist.*[12]

If this is the case, then it may still provide evidence of market value, with the caveat that the trade was entered into freely, between two knowledgeable parties, in spite of low volumes of trades. Indeed, if the low level of market activity is truly indicative of a lack of demand for the asset, it would be wrong to ignore it.

It is perhaps this logic that, when taken to its conclusion, means valuers may resolve to rely upon valuation metrics derived from a single, 100 per cent acquisition of a privately owned business involving just a single buyer and single seller, despite the fact that when considered against the standard measures of liquidity, the shares of that company would be considered highly illiquid.

Asymmetric or private information

Asymmetric or private information arises when market participants are concerned that the other party to a transaction may have access to pertinent information to which they do not. For example, the buyer may suspect that the seller has private information that the company is losing money, while the seller may be afraid that the buyer has private information that the company is

about to announce positive news. Suspicions may be exacerbated in situations where there is poor analyst coverage or a controlling shareholder. In such situations, courts have suggested that share prices may not necessarily be determinative of market value.[13]

With respect to the market value definition, the existence of asymmetric or private information can indicate that a buyer and seller are not both 'acting knowledgeably', in which case a transaction would not meet the definition of market value. Where such a scenario results in illiquidity, the facts may give a valuer cause to place less weight on the data.

Conclusions: Reliability is a question of degree

Liquidity is not a binary construct and a valuer should consider the reliability of data based on an analysis of the overall situation in context. There are not concrete guidelines to inform an assessment of whether an asset is 'sufficiently liquid'. The valuer must determine this on a case-by-case basis, in the context of their work and circumstances relevant to the asset under review. We suggest that the following factors are relevant in such a process.

- The relative liquidity of the assets in question, as compared to other comparable assets or the index on which it trades.
- The potential reasons for illiquidity. Do trades in the asset satisfy the relevant definition of market value? Is the sale an orderly sale? Are both buyer and seller in possession of sufficient information?
- The underlying purpose of the valuation exercise. Does the valuer require a liquid asset for his or her analysis?

The views expressed in this chapter are those of the author(s) and not necessarily the views of FTI Consulting, its management, its subsidiaries, its affiliates, or its other professionals

Notes

1 Pastor, Lubos and Stambaugh. 'Liquidity Risk And Expected Stock Returns', Journal of Political Economy, 2003.
2 A concept first developed by economist John Maynard Keynes in his book 'The General Theory of Employment, Interest and Money'.
3 Basel Committee on Banking Supervision, 'Guidance for Supervisors on Market-Based Indicators of Liquidity', Bank for International Settlements, 2014.
4 See, for example: Reasons in Integra Group (Cause No. FSD 92 of 2014 (AJJ) in Grand Court of Cayman Islands); Reasons in C.A. No. 11448-VCL in the Court of Chancery of the State of Delaware; and Reasons in No. 565, 2016, Court of Chancery of the State of Delaware.
5 IFRS 13: 69.
6 IFRS 13: Appendix A.
7 FAS 157: 29A.
8 FAS 157: 29C.
9 IVS Global Standards 2017: 110.2.
10 Yakov Amihud, Haim Mendelson and Lasse Heje Pedersen, *Liquidity and Asset Prices*, 2005.
11 IVS 104: 30.1.
12 IVS 104: 30.2(d).
13 Reasons in C.A. No. 11448-VCL in the Court of Chancery of the State of Delawar.

Jonathan Ruffell
FTI Consulting

Jonathan Ruffell is a senior director in FTI Consulting's economic and financial consulting practice, based in London. He provides clients with economic and financial advice in a number of different contexts. Jonathan specialises in the preparation of expert reports to help resolve disputes in both litigation and international arbitration. He has prepared reports relating to business valuations, assessment of lost profits and the quantification of damages, as well as numerous commercial valuations. Prior to focusing on valuation work, Jonathan worked in M&A, completing transactions in a range of sectors including travel and leisure and football clubs.

Steve Harris
FTI Consulting

Steve Harris is a senior managing director in FTI's economic and financial consulting practice, based in Dubai. Steve has 15 years' experience as a forensic accountant. His areas of expertise include the identification and valuation of lost profits, cost verification, the valuation of businesses and shareholdings, solving complex accounting issues and financial reporting. Steve has been instructed as expert in International Chamber of Commerce, Dubai International Arbitration Centre, Dubai International Financial Centre–London Court of International Arbitration, Abu Dhabi Commercial Conciliation and Arbitration Centre, Court of Arbitration for Sport, Swiss Federal Court and Hong Kong court proceedings, and has been listed in the *Who's Who Legal* survey of leading international arbitration expert witnesses in 2017, 2018, 2019 and 2020.

James Church-Morley
FTI Consulting

James Church-Morley is a senior director in the economic consulting segment at FTI Consulting, based in Dubai. James previously worked in FTI Consulting's Singapore and London offices. James has over eight years of experience in a financial and accounting context. James' areas of expertise include the identification and valuation of lost profits, and the valuation of shares and businesses in contentious and non-contentious contexts. James holds a BA (Hons) in Japanese and history from the School of Oriental Studies, University of London. He is a chartered accountant, and ICAS tax professional. James was a member of the drafting committee for the Chartered Institute of Arbitrators' *Guidelines for Witness Conferencing in International Arbitration*.

FTI Consulting
Office 1408, Level 14,
Burj Daman, Al Mustaqbal Street,
Dubai International Financial Centre
Dubai, UAE
PO Box 71253
Tel: +971 4 437 2131

Jonathan Ruffell
jonathan.ruffell@fticonsulting.com

Steve Harris
steve.harris@fticonsulting.com

James Church-Morley
james.church-morley@fticonsulting.com

www.fticonsulting.com

CRCICA Overview

Ismail Selim and Dalia Hussein
Cairo Regional Centre for International Commercial Arbitration

Introduction

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was established in 1979 by an international agreement signed between the Egyptian government and the Asian-African Legal Consultative Organisation (AALCO). CRCICA is an independent non-profit international organisation enjoying all the privileges and immunities of an international organisation fully independent from its host state. It provides a system of dispute settlement for parties engaged in trade, commerce and investment. It provides case management services and administers international and domestic arbitrations and other alternative dispute resolution (ADR) mechanisms according to the CRCICA Rules, which include both arbitration and mediation rules. CRCICA also provides administrative and technical assistance to parties involved in ad hoc arbitrations as well as high-tech hearings rooms to parties involved in other institutional proceedings under various rules such as International Chamber of Commerce, International Centre for Settlement of Investment Disputes, Permanent Court of Arbitration and Court of Arbitration for Sport rules, against or without a fee depending of the arrangement with the relevant institution.

In the Doha session of 1978, as well as in the exchange of letters between AALCO's secretary general and the Egyptian Minister of Justice on 21 January 1979 establishing CRCICA, AALCO expressed its argument on the necessity of establishing institutions in Africa and Asia, including, inter alia:

- providing a familiar forum for disputes arising from international transactions related to the two continents through institutions that will apply the UNCITRAL Rules;
- enhancing cooperation between regional and international institutions; and
- promoting international commercial arbitration in the Asian and African regions.

According to AALCO's exchange of letters, CRCICA adopted the UNCITRAL Rules with some amendments to adapt them to institutional arbitration. The CRCICA Rules, available in Arabic, English and French, reflect the best practices in the field of international institutional arbitration. They were amended in 1998, 2000, 2002, 2007 and 2011 with the aim of ensuring that they continue to meet the needs of their users. The 2011 amendments, in force since 1 March 2011, are based on the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications to fit CRCICA's role as an arbitral institution and an appointing authority. These amendments modernised the CRCICA Rules, promoting efficiency of the arbitral proceedings through many provisions, including, inter alia,

- introducing a mechanism to form tribunals in multiparty arbitrations;
- regulating joinder of third parties to the proceedings; and
- adjusting the original tables of costs to ensure more transparency and flexibility in the determination of the administrative and arbitrators' fees.

In 2016, CRCICA also issued the French version of the CRCICA Rules, in order to accommodate Sub-Saharan and North African users.

The institutional composition of CRCICA reflects its nature as an international and regional organisation, and its scope encompassing Asia and Africa as well as the rest of the world. The Board of Trustees, which meets once a year and oversees the centre's caseload, financial statements and general policy, is chaired by Dr Nabil Elaraby and is also composed of two vice-chairmen from Egypt and Saudi Arabia and 21 other eminent members from Bahrain, Cameroon, Chile, China, Egypt, France, Germany, Lebanon, Nigeria, Saudi Arabia, Somalia, Spain and Sweden. CRCICA's Advisory Committee (AC), includes African, Asian and European specialists and experts. At present, it is composed of 15 eminent members including arbitration specialists from Chile, France, Lebanon, Nigeria, the United States, the United Kingdom, Switzerland and Iraq in addition to Egypt. The AC is entrusted to opine on the requests not to proceed provided for in article 6 of the CRCICA Rules, on:

- rejection of arbitrators' appointments;
- the reduction or increase of the arbitrators' fees; and
- depriving a party of its right to appoint an arbitrator.

Tripartite committees formed to decide on arbitrators' challenges and removal are formed from among members of the AC. The day-to-day work and activities of CRCICA are entrusted with the director, the deputy director, legal advisers, counsels and the following CRCICA departments headed by associate directors and reporting to the director:

- the Dispute Management Department;
- the Conferences, Training and External Relations Department; and
- the Financial and Administrative Department.

CRCICA was recognised in 2014 by an assessment report mandated by the African Development Bank (AFDB) as one of the best arbitration centres in the African continent. The report stated that CRCICA fulfilled the AFDB's requirement of neutrality and independence. CRCICA has also featured on *GAR*'s White List of Regional Centres since November 2016.

The costs of arbitration in CRCICA, which include the centre's administrative fees and the arbitrators' fees, are reasonable and cost effective. According to a *GAR* report titled 'Arbitration costs compared' published on 25 January 2018, the centre ranks as the cheapest institution in case of one arbitrator and among the top three cheapest in case of three arbitrators in cases whose amount of dispute is US$1 million. For cases worth US$500,000, CRCICA is the cheapest institution irrespective of the size of

the tribunal. For disputes worth US$5 millions, CRCICA sits at the middle of the table for three-member tribunals. For disputes worth US$10 million, CRCICA costs continue increasing in comparison to its position in disputes of lesser amounts. For the US$100 million disputes, CRCICA nearly occupies the middle ground for three-member tribunals. The curve then retreats with CRCICA featuring among the most affordable for sole arbitrator disputes worth US$500 million. For sums in dispute exceeding US$3 million the arbitrators' fees are determined based on Table 3 annexed to the CRCICA Rules and comprise a minimum and a maximum scale of fees. Such spectrum fits different profiles of arbitrators and suits the users' needs. It is worth mentioning that hearings rooms are included in the administrative fees.

Arbitration before CRCICA is provided for in many bilateral investment treaties (BITs) concluded between Egypt and European parties (including, for instance, the 2001 Egyptian–Austrian BIT) or concluded between countries from the Middle East and Africa (including, for instance, BITs between Egypt and the UAE, Oman, Kuwait, Syria and Lebanon). It is also provided for in BITs where Egypt is not a party, such as the BIT between Libya and Morocco.

CRCICA has made important steps to enhance international and regional cooperation, in light of its original mission, as stated by AALCO, to promote arbitration and disputes settlements in Asia and Africa. Accordingly, CRCICA has adopted since 2016 a policy of cooperation with African and Asian parties, institutions and scholars. This was reflected, as mentioned prior, by the appointment of eminent African and Chinese experts in CRCICA's Board of Trustees and the AC.

More recently, in light of the 'One Belt, One Road' Initiative, CRCIA signed in 2017 the Belt and Road Arbitration Initiative Cooperation Agreement with the Beijing Arbitration Commission/Beijing International Arbitration Center and the Kuala Lumpur Regional Centre for Arbitration.

CRCICA's policy is to enhance regional, gender and age diversity as well as enhance transparency and neutrality. Not only is this policy reflected in the appointment of arbitrators, it has also been internally applied through the promotion of three female employees among six promoted, one of whom were promoted to Deputy Director of CRCICA.

Caseload

To date, CRCICA has administered 1,395 cases related to disputes arising of almost all type of commercial and economic activities, including the 10 cases filed since the beginning of 2020. In 2019, 82 new cases were filed, compared to 77 in 2018.

CRCICA has also administered a few treaty-based investment cases, including mediation cases, as well as cases involving small, medium and large amounts in disputes. It has administered cases where all the parties are Egyptian and their transaction relates to Egypt, international cases including one or more non-Egyptian parties, as well as purely international cases where all the parties were non-Egyptian and the contract in dispute performed outside Egypt.

Based on CRCICA's statistics, cases arising out of construction and contracts for works ranked at the top of the types of disputes for a number of years. CRCICA has also administrated cases in multibillion oil and gas and waste management industries, as well as telecommunications. The latter cases, despite being limited in number, involved all the GSM mobile and fixed lines operators in Egypt, and involved sums in dispute amounting to hundreds of millions, or even billions, of US dollars. In 2019, CRCICA has witnessed a more varied caseload, with industries ranging from hotel management to pharmaceuticals to public–private partnerships, as well as a marked increase in oil and gas cases. The parties to CRCICA cases are based across the globe in five continents.

Media and entertainment: A rising industry?

Since 2008, and following the 2011 uprisings in Egypt and the Arab world, an increasing number of cases originated in contracts related to the media and entertainment industry. Starting from 2008, and over the past 10 years, CRCICA has administered 55 cases related to media and entertainment.

Historically, Egypt was the region's leader in media and various arts production, including, theatre, cinema and television. Following the launch of the Arab Satellite Communications Organization (Arabsat) as a satellite service provider, Egypt started satellite broadcasting, being the first Arab state to use the organisation when it launched the Egyptian satellite channel in 1990. In 1998, Egypt launched the NileSat, the second Arab satellite service provider, becoming the first country in the region to have its own satellite. The NileSat carries over 450 digital TV channels. The launching of the NileSat encouraged the establishment of private Egyptian satellite channels, a phenomenon that increased significantly following the 2011 uprisings in Egypt and the region.

The media and entertainment industry operated without a clear regulatory framework before 2016. A media law was issued on 26 December 2016 (the 2016 Media Law), establishing three public entities concerned with different media providers.

Before the 2016 Media Law, there was no regulatory system for broadcasting in Egypt. Public broadcasters were subject to the Egyptian Radio and Television Union (ERTU) Law No. 13 of 1979 modified by Law No. 223 of 1989. ERTU worked under the supervision of the Ministry of Information. This system led to TV channels operating under a total state supervision. No private terrestrial broadcasters operated in Egypt, except a number of FM radio stations, while private satellite television stations were established according to the investment law. Private TV channels operated through satellite from the Egyptian Media Production City, a sort of offshore area. Accordingly, private TV channels obtained their licences from the General Authority for Investment. There was no specific law detailing the conditions or the rules of broadcasting or for the obtaining of a broadcasting licence.

The 2016 Media Law established a Supreme Council for Media Regulation and National Entity for Media, responsible for the operation of state-owned media entities providing services of broadcasting and TV, radio and digital production.

The 2016 Media Law was replaced by Law No. 180 of 2018, issued on 27 August 2018. The new law regulates all aspects of media and journalism. It established, among other institutions, a Supreme Council for Media Regulation (article 67 and 68 of the 2018 Law) responsible for the regulation of audio, visual, print and digital media and the granting of licences for their establishment.

It is under in this legal framework that many disputes were brought before CRCICA related to various private TV channel and satellite service providers as well as daily newspapers editors. Over the past 10 years, CRCICA has administered 55 cases related to media and entertainment, five cases being filed during 2018.

The majority of the cases provided for the application of Egyptian law, with the exception of one case applying English law chosen by the parties in the contract. The type of contracts that have been the basis of the disputes can be summarised into six major categories:

- contracts between producers and performers (actors or TV show presenters);
- contracts related to the granting of exclusive broadcasting rights of TV series and shows;
- contracts between satellite service providers and TV satellite channels;
- contracts related to the coverage of sports events, concluded between sport federations and broadcasters;
- contracts between advertising companies and newspapers; and
- contracts for the management of TV channels.

Other disputes of the past few years have related to the media industry, but did not arise from a media related contracts. For instance, in the first quarter of 2018, a case was filed arising out of a contract for civil works in a well-known cinema complex located in Cairo.

Four cases will be briefly studied below, as an illustration for these different types of contracts and disputes.

The first, filed in 2012, was administered by CRCICA while being an ad hoc case. This case involved a contract between a production company and an actor for the performance of the main role in a TV series. The contract provided for arbitration according to the Egyptian Arbitration Act, to be administered by the CRCICA. The contract gave the company the right to terminate it unilaterally. The actor obtained the down payment, but the producing company (claimant) was not satisfied by the series's scenarios and scripts. The producer cancelled the production of the TV series, terminated the contract with the actor unilaterally and requested the actor to reimburse the amounts he received. The actor (respondent) refused to reimburse the producer; the latter thus filed a case against him requesting the tribunal to order the actor to reimburse the amount paid to him, in addition to a compensation of a similar amount due to his delay in repaying the down payment he received. The actor argued that he was not responsible for the cancellation of the production and should not be liable for a third party's non-performance. The claimant company asserted that it had the right to terminate unilaterally the contract according to the contract's provisions and that the exercise of its right to terminate was not abusive. The tribunal interpreted the clear wording of the contract and the clause it included as conferring the right of unilateral termination upon the producer. Therefore, the tribunal rejected the claim for compensation, while awarding the producing company the amount of the down payment.

The second case was filed in 2014. It related to a contract made between an Egyptian sport federation and a private company, granting the latter the exclusive rights to broadcast various competitions and sports events held by the federation. However, due to some security issues, which occurred during 2012, the competitions were cancelled by a governmental decree. The company was not able to pay the amounts due under the contract. To remedy to this situation, the parties concluded an amendment annexed to the contract reducing the amount of the payments and extending the contract's duration to another year. Despite the amendment, the company defaulted and the federation brought arbitration proceedings against it before CRCICA, in accordance with the arbitration clause included in the contract. Before the tribunal, the parties discussed many legal issues. An important issue related to whether the cancellation of the competition amounted to a force majeure event discharging the company from its obligations under the contract and whether the federation had the right to terminate the contract for non-performance. The company also claimed to set off some of the amounts due to the federation with other debts that the federation owed to it. The arbitral tribunal granted the respondent its request to set off a part of its dues and obliged it to pay the remaining amount to the federation. The tribunal rejected the application of the force majeure theory because the parties had remedied its consequences through the contract's amendment by reducing the amount of the payments.

The third case, filed also in 2014, was brought by a satellite provider against an Arab TV channel, with respect to a contract for broadcasting. The satellite provider had first filed a case against the company that owns the TV channel for non-payment of amounts due under the contract. However, the case was terminated following the conclusion of a settlement agreement between both of them, which also provided for arbitration before CRCICA in case of dispute. Following the non-payment by the TV channel of the amounts rescheduled in the settlement agreement, the satellite provider filed a case against it for the payment of the amounts due according to the settlement agreement. The tribunal obliged the respondent jointly with its CEO to pay the amounts due under the settlement agreement.

The fourth case was filed in 2016 by a company owning and operating a number of TV satellite channels against a company for media production and advertisement. The case was based on two contracts made between the two companies and including identical arbitration clauses. Both contracts (a contract was made for each TV channel) granted the media production company exclusive rights for marketing and advertising, and included the implementation by the latter of an advertisement campaign to promote the two TV satellite channels. The claimant company undertook the task of developing the TV channels and obtaining broadcasting rights for TV series and movies. The profits generated by these activities would be divided between the two parties according to a formula provided for in the contracts. The claimant filed the arbitration proceedings requesting compensation for breach of contract. The respondent made a number of counterclaims, including ordering the claimant to pay amounts due under the two contracts.

The identical arbitration clauses provided that disputes that were not settled amicably between the parties within a period of 60 days from the date on which they arose would be settled by arbitration in accordance with the CRCICA Rules.

This case raised many important issues. This article will only focus on two of them, the first being the consequences of the multiple contracts and the effect of the multi-tier arbitration clause.

The first issue relates to the existence of multiple contracts. The respondent argued that it concluded with the claimant two separate independent contracts that did not make references to each other and included two separate arbitration agreements. Accordingly, in the respondent's view, the claimant should have filed two separate cases and then the parties should have been given the opportunity to agree on the consolidation of the proceedings. In its award rendered in 2018, the tribunal rejected this claim and decided that filing a single arbitration case based on two contracts, whether connected or not, is neither a consolidation of two separate cases nor an extension of the arbitration agreement. According to the tribunal, the claimant filed a single case based on the two contracts, which was valid under the CRCICA Rules since the contracts included identical arbitration agreements.

The respondent also requested the tribunal to declare the case inadmissible because it was filed before the expiry of the 60-day period provided for amicable settlement. Interestingly, the

claimant also objected to the respondent's counterclaims because they were filed before the expiry of the 60-day period.

The tribunal rejected both claims. It decided that the date of the claimant's notice to the respondent requesting the payment of amounts due under the contracts was the date of the dispute. The tribunal considered that the requirement of the expiry of the 60-days period was fulfilled since the notice of arbitration was filed more than 60 days following the date of the notice requesting the payment, that is, following the date of the dispute that the parties failed to settle amicably.

The media, entertainment, broadcasting and advertising sectors are becoming increasingly important in Egypt's economy, especially after the issuance of the new investment law in 2017, which kept many of the advantages of free zones and granted investors more rights, guarantees and incentives and the new 2018 media law. The interaction between the new 2018 media law and the new investment law and their impact on investments in the media sector is yet to be observed.

Ismail Selim
Cairo Regional Centre for International Commercial Arbitration

Dr Ismail Selim is the director of CRCICA and secretary treasurer of the International Federation of Commercial Arbitration Institutions.

He graduated from Cairo University in 1997 with a LLB, where he also obtained an LLM in international business law from the Institute of International Business Law (IDAI) in 1999. He then earned his master's degree in public administration from the Ecole National d'Administration, in Paris in 2001.

He also earned a certificate in international commercial arbitration from Queen Mary University of London in 2005. In 2007, he accomplished an internship programme at the ICC Court of International Arbitration. In 2009, he earned his PhD from Burgundy University in France.

Dr Selim started off his career at the judiciary, until he joined Zulficar & Partners in 2009 as a partner. In May 2015, Dr Selim joined Nour & Selim in association with Al Tamimi & Company as partner and head of dispute resolution.

Dr Selim has taught private international law at the IDAI since 2011. He also teaches comparative international arbitration law at the LLM Business Law Arab World and Middle East at Pantheon-Sorbonne University in Paris since 2018. He has been consistently appointed as presiding arbitrator, sole arbitrator and co-arbitrator and has acted as a counsel in various ad hoc and institutional cases under various rules such as CRCICA, Swiss Rules, UNCITRAL, the International Chamber of Commerce and the Dubai International Financial Centre-London Court of International Arbitration. Dr Selim provides expert opinions on Egyptian and Libyan laws in international proceedings.

He is enrolled on the Court of Arbitration for Sport panel of arbitrators, December 2017. He has been a board member of Francarbi as of 1 January 2018.

Dalia Hussein
Cairo Regional Centre for International Commercial Arbitration

Dr Dalia Hussein is the deputy director of CRCICA since September 2017. Prior to her promotion as deputy director, she was a legal adviser and was entrusted with case management of complex arbitration proceedings at CRCICA. She is also a lecturer at the faculty of law, commercial law department at Zakazik University as well as at the American University of Cairo.

Before joining CRCICA, Dr Hussein worked as an administrative prosecutor in Cairo for many years, during which she was seconded at the department of international cooperation at the Ministry of Justice. After her resignation, she was a practising lawyer in an arbitration law firm based in Cairo where she represented states and private parties in complex commercial and investment disputes before many institutions including CRCICA, the International Centre for Settlement of Investment Disputes and the Dubai International Financial Centre. She also taught business and contract law at the French and British universities in Egypt and international commercial arbitration for LLM students at the French section of the faculty of law at Ain Shams University. She was a visiting scholar at Lyon III University in 2005 and worked as an external legal expert for Arab and Islamic laws at the Swiss Institute of Comparative Law.

Dr Hussein has participated as speaker in many conferences and has several articles published in learned Egyptian and international journals.

She holds a Maîtrise en Droit from Pantheon-Sorbonne University, an LLB from Cairo University (2000), an LLM in international law from Panthéon-Assas University (2001), an LLM in private law from Cairo University (2003), and a PhD in international arbitration from Cairo University (2007).

CRCICA

1 Al-Saleh Ayoub St 11211
Zamalek, Cairo
Egypt
Tel: +20 2 2735 1333 / 5 / 7
Fax: +20 2 2735 1336

Ismail Selim
i.selim@crcica.org

Dalia Hussein
dalia.hussein@crcica.org

www.crcica.org

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) is the oldest arbitration centre in Africa and the Middle East, being established in 1979 under the auspices of the Asian-African Legal Consultative Organisation (AALCO).

The Headquarters Agreement concluded in 1987 between AALCO and the Egyptian government recognised CRCICA's status as an independent non-profit international organisation and conferred upon the centre, its director and staff all necessary privileges and immunities ensuring its independent functioning.

CRCICA has a solid institutional structure governed by an international board of trustees composed of 25 eminent figures from 12 countries and is supported by an advisory committee of 16 eminent practitioners from seven countries.

CRCICA is considered a neutral forum by the host state, regional governments and state entities, based on its long record of administration of high value and complex disputes.

The African Development Bank recognised CRCICA as one of the best arbitration centres across the African continent and elsewhere. CRCICA fulfils the African Development Bank's requirement of neutrality even in cases of commonality of origin between one of the parties to the arbitration (notably if it is the state party) and the hosting state of the centre.

The CRCICA Arbitration Rules are based on the UNCITRAL Arbitration Rules with some minor amendments emanating mainly from the centre's role as an arbitral institution and an appointing authority.

Since its establishment, CRCICA has administered 1,248 cases, many with international elements.

Awards of the centre are published in both Arabic and English, without disclosing the identities or nationalities of the concerned parties.

Energy Arbitrations in the Middle East

Thomas R Snider, Jane Rahman and Aishwarya Suresh Nair
Al Tamimi & Company

Introduction

The Middle East is synonymous with energy. It has just under half of the world's oil and 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 also the world's largest oil producing region.[4] It accounts for more than a third of global oil production[5] and is responsible for roughly 34.5 per cent of global oil exports. [6] Saudi Arabia is the largest oil producing nation in the region (second globally), followed by Iran (fifth globally), Iraq (sixth globally) and the UAE (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 proved gas reserves (second globally), followed by Qatar (third globally) and then Saudi Arabia and the UAE (both tied at sixth globally).[9]

The region is the third largest producer[10] of natural gas in the world. In 2018, and notwithstanding the imposition of sanctions, Iran remained the largest producer of natural gas in the region (third globally), followed by Qatar (fifth globally) and then Saudi Arabia (ninth globally).[11]

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

This is set to continue. Demand for energy is increasing both within the region and internationally. Current estimates are that global energy demands will increase by 25 per cent by 2040.[12] In line with this, the Middle East is likely to increase its oil and gas production. One estimate suggests that by 2040, oil and gas production in the region will have grown by 17 per cent and 60 per cent, respectively.[13]

Notwithstanding the significance of the size and proportion of its oil and gas resources, and not least because of the likely increase in demand for energy in the near future, the Middle East has begun to look to other sources of energy including nuclear,[14] coal[15] and renewables.[16]

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.[17] Saudi Arabia, Kuwait, Bahrain, Syria, Yemen and Oman also vest ownership rights to natural resources in the state.[18] 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.[19] 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'.[20] 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,[21] its failure to come into effect continues to leave this issue unresolved.

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.[22]

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 that 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.[23] Following its historic initial public offering (IPO) in 2019, it raised approximately US$25.6 billion and is now the world's most valuable listed company.[24]

- Abu Dhabi National Oil Company (ADNOC): Abu Dhabi, which has the vast majority of hydrocarbon reserves in the UAE, created ADNOC to manage, produce and preserve these reserves.[25] ADNOC manages approximately 95 per cent of the UAE's proven oil reserves and 92 per cent of the country's gas reserves.[26] ADNOC's board of directors is the Abu Dhabi Supreme Petroleum Council, which is also responsible for setting and regulating Abu Dhabi's petroleum related policies, objectives and activities.[27]
- Qatar Petroleum: Qatar's NOC manages upstream, midstream and downstream oil and gas operations in Qatar[28] and acts as the state's investment arm in the oil and gas sector both domestically and internationally.[29]
- Iraqi Ministry of Oil/Iraqi National Oil Company (INOC): INOC was reconstituted in 2018[30] and a decree transferred the ownership of nine state-owned oil companies from the Ministry of Oil to INOC.[31] However, in January 2019, the law establishing INOC was challenged before Iraq's Federal Supreme Court and was declared, in part, to be unconstitutional.[32] At present, the Iraqi Ministry of Oil continues to control and supervise the oil and gas exploration process in Iraq.[33]
- 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 National Iranian Oil Company, National Iranian Gas Company, National Iranian Oil Refining & Distribution Company and, the National Petrochemical Company)[34] 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 to hydrocarbons and only grants legal title to petroleum to the international oil company (IOC) partner once recovered at the wellhead;
- 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;
    - production sharing agreements[35] in the KRG, 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;[36] and
- historically, risk service 'buy-back' contracts in Iran, but recently (until the restoration of US sanctions) the Iran petroleum contract was being developed to adopt some of the features of a production sharing agreement in an effort to attract investors.[37]

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.[38]

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.[39]

Reflecting this preference, energy disputes accounted for approximately 13 per cent of the ICC's 2018 caseload.[40] However, parties to energy agreements are not only choosing ICC arbitrations. In 2018, energy and resources disputes constituted 19 per cent of the London Court of International Arbitration's (LCIA) caseload.[41]

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 618 BITs in force in the Middle East.[42] Arbitrations under the ICSID Convention and the UNCITRAL Arbitration Rules are the most preferred options for investor-state disputes.[43] The popularity of ICSID arbitrations is reflected in ICSID's caseload statistics. In 2019, 42 per cent of ICSID's caseload involved the energy industry.[44]

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[45] and the Arab League Agreement[46] 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 13 reported arbitrations relating to the OIC Agreement[47] and two relating to the Arab League Agreement.[48]

The ECT is notable for its lack of Middle Eastern state signatories. From the region, currently, only Jordan is a contracting party to the ECT.[49] However, Iran, Iraq and the UAE have signed the International Energy Charter,[50] which is often seen as the first step towards acceding to the ECT.[51] 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 should be expected.[52]

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 will be interesting to see 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 in 2019 declared that governmental 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 some other licenced Saudi arbitration centre.[53]

As NOCs and governments in the Middle East become more familiar with arbitration and more confident in their dispute resolution choices, we consider it 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 the UAE (unless otherwise agreed by the parties) including any arbitrations already on foot when the law came into effect.[54] One of the significant changes brought about by the Federal Arbitration Law is the inclusion of express provisions relating to interim measures.[55] In addition, the Federal Arbitration Law clarifies the process for enforcing UAE arbitral awards with a fast-tracked and over-hauled procedure.

In February 2019, new regulations came into force regarding the enforcement of foreign arbitral awards in the UAE.[56] These regulations are a positive step and early indications are that they are being put into effect by the relevant UAE courts. In March 2019, the Sharjah Court recognised a foreign arbitral award as being capable of enforcement pursuant to these new regulations.[57]

In addition to the Federal Arbitration Law, the UAE government also made another significant arbitration-related legislative change. In September 2018, the UAE repealed article 257 of the UAE Penal Code.[42] 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.[58] 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.[59]

In 2018, the Iraqi government announced its intention to accede to the New York Convention.[60] In November 2019, the Cabinet of Iraq approved a recommendation to expedite the legislation on Iraq's accession to the New York Convention.[61] Although it has not yet taken place, such a step would be a significant move towards improving Iraq's perception as an arbitration-friendly jurisdiction and may, in turn, lead to an increase in energy arbitrations connected to Iraq.

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,[62] 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. 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'.[63] In 2016, the DIFC-LCIA released its updated rules of arbitration, which closely follow the LCIA Rules. The Abu Dhabi Global Market (ADGM) is another financial free zone with its own common law legal system[64] and an independent court system.[65] The ADGM has incorporated English common law and certain English statutes

into this own legal system.[66] The ICC has opened a representative office in the ADGM[67] and in October 2018 the ADGM Arbitration Centre was opened.[68] The courts of 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.[69] 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.[70]

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, and, considering their cost, energy arbitrations in particular.

The DIFC has already made some provisions in respect of TPF[71] and, in April 2019, the ADGM issued its litigation funding rules.[72]

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. In particular, 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 will continue to feature in Middle Eastern energy arbitrations. In addition, it is likely that some of the following factors will have some impact on future energy disputes within the region.

Politics

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

As things currently stand, Saudi Arabia, the UAE, Egypt and Bahrain on the one side, and Qatar on the other, have been locked in a political stand-off since July 2017 that has resulted in, among other things, restrictions on the movement of goods to and from Qatar, and Qatar withdrawing from the Organization of Petroleum Exporting Countries. While Qatar has taken significant steps to try and prevent the blockade from disrupting its energy industry, and in particular its export of liquefied natural gas,[73] there remains potential for energy related arbitrations commenced as a result of the direct or indirect impact of this situation.

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

- The war in Yemen; in September 2019, drone attacks were carried out on Aramco oil facilities in Saudi Arabia reportedly by Yemen's Houthi rebels,[74] with the attack immediately impacting Saudi Arabia's oil production[75] and global oil prices.[76]
- US–Iran tensions which have escalated, resulting in oil prices spiking[77] and supply issues developing.[78]
- The war in Syria.[79]
- The civil unrest in Iraq.[80]
- At the time of writing, political tensions between Saudi Arabia and Russia had triggered a significant drop in oil prices that is likely to lead to disputes if not resolved quickly.

Whether or not the protests in Lebanon that took place in the last few months of 2019 will impact on the country's first offshore oil and gas exploration is not clear – though, in late December 2019 reports indicated that it would not.[81]

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.[82] 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.[83]

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.[84] A similar dispute between Saudi Arabia and Kuwait was drawn to a close in December last year, which enabled the renewed production of 500,000 barrels of crude per day.[85]

Sanctions

The reimposition of US sanctions on Iran's energy sector in 2018 has had and will continue to have an impact on the energy industry globally and in the Middle East. The scope of the US sanctions is far-reaching, both in respect of those who must comply with the sanctions and also in respect of the prohibited activities. The reimposed sanctions target Iran's energy, shipping and banking industries.[86] They include, 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.[87]

There is no doubt that the reimposition of these sanctions has 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),[88] 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.

The reimposition of the Iranian sanctions may also impact ongoing energy arbitrations involving Iran or Iranian-related entities, including in respect of a party's or an institution's ability to accept payment from sanctioned parties.

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, 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 in 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 Project, brought ICC proceedings against Hyundai Heavy Industries regarding alleged problems with the pipeline that Hyundai had installed.[89] 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),[90] 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.[91]

Disputes may also arise from transitions within the oil and gas industries to address environmental challenges. Among other things, we consider it 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[92] and in Saudi Arabia, Aramco has set up a pilot project that uses CCS technology.[93] The increased application of CCS in the region may result in disputes, especially in the context of transboundary CCS projects.[94]

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.[95] 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[96] so 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.[97]

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.[98] In 2019, SAEV invested in Data Gumbo, a company that developed a block chain platform to streamline smart contracts and reduce disputes relating to payments among other things.[99]

Considering the focus on technology in the energy industry in this region, we anticipate an increase in the number of technology-related energy disputes. In particular, we can see that a mismatch in expectations from parties to these sorts of deals[100] 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.[101] 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.[102] According to reports, this marked the first time that China State Construction was working on a UAE oil and gas project.[103] 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.[104]

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.[105] 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.[106]

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,[107] 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 has a representative office in the ADGM in Abu Dhabi, has created a Belt and Road Commission to support BRI disputes.[108]

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.[109] These platforms, especially in the early period where investors and owners are exploring new ground, are likely to lead to disputes.

Coronavirus

At the time of writing, it is too early to know what impact COVID-19 will have on the energy industry, but it seems likely that energy disputes will result. In early February 2020, the Chinese National Offshore Oil Corporation invoked force majeure to try and avoid its obligation to take delivery of shipments of liquefied natural gas from Shell and Total. It is reported that other Chinese companies, including PetroChina and Sinopec Group, are considering similar measures.[110]

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. However, the outlook of the parties is beginning to shift. Now, governments are increasingly confident and have well-established and sophisticated institutional NOCs who are active participants in the sector. Governments are, in general, more open to international partnerships and new concession structures but want to see more of the disputes being handled in their own region using their own arbitral institutions.

Notes

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Thomas R Snider
Al Tamimi & Company

Thomas R Snider is a partner and the head of arbitration at Al Tamimi. He is experienced in international commercial arbitration, international investment disputes, state-to-state arbitration and foreign sovereign immunity issues. His experience covers a wide range of industries, sectors and types of disputes.

From 2001 to 2009, Tom was a member of the legal team representing the Ethiopian government before the Eritrea-Ethiopia Claims Commission. Prior to relocating to Dubai, he was a professorial lecturer in law at the George Washington University Law School in Washington, DC. Tom has been recognised multiple times in *Who's Who Legal: Future Leaders – Arbitration*, a listing of the world's leading international arbitration practitioners under the age of 45.

Jane Rahman
Al Tamimi & Company

Jane Rahman is a senior counsel in the arbitration team at Al Tamimi. She has represented clients in arbitration proceedings under ICSID, UNCITRAL, International Chamber of Commerce, London Court of International Arbitration, DIFC-LCIA and the Dubai International Arbitration Centre. She has advised private clients and states across multiple jurisdictions and industries, including energy and natural resources, pharmaceuticals, automobile manufacturing, sport, insurance and banking and finance. Jane also has extensive court experience and has litigated complex disputes, including arbitration-related disputes and foreign sovereign immunity issues, in the English High Court, Court of Appeal and Supreme Court as well as in the courts of the Cayman Islands.

Aishwarya Suresh Nair
Al Tamimi & Company

Aishwarya Nair is an associate in the Arbitration team. She has represented clients in arbitration proceedings under key institutional rules in the UAE including the Dubai International Arbitration Centre and the DIFC-LCIA. She has advised private clients across multiple jurisdictions and industries..

Mining Arbitrations in Africa

Audley Sheppard QC and Louis-Alexis Bret
Clifford Chance

In 2019, the mining industry worldwide again had to contend with the impact of significant price volatility driven by economic slowdown, trade wars and technological disruption. As this chapter goes to press, the global coronavirus outbreak promises to have a significant impact to the global supply chain for metals and minerals. A slowing demand for base and industrial metals driven by a significant drop in economic activity in China and elsewhere is likely to depress prices for these commodities, at least in the short to medium term. Conversely, the anticipated 'bear market' for securities may result in a durable increase in precious metal prices, with gold regaining its status as a safe haven in times of economic trouble.

Mining projects in Africa are significantly impacted by these changes, as they may be more vulnerable to the economic and political risks inherent to operating in emerging or developing countries. The decision to close the world's largest cobal mine in late 2019 in response to a downturn in cobalt prices and adverse measures from the government of the Democratic Republic of the Congo (where it is located) illustrates this sensitivity.

From a mining perspective, the African continent offers some of the richest mineral resources in the world, much of which remain to be exploited. From the perspective of many African countries, mineral exploration and production is of critical economic importance, representing a substantial component of their economy. However, the rich abundance of resources in sub-Saharan countries is also a fertile ground for commercial and investment disputes involving mining projects.

The likelihood of these 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 governmental and political interference due to a climate of political instability, lack of stable and consistent governance and political structure and limited infrastructure and public services.
- Another corollary of Africa's structural and political challenges consists of an increased exposure to security threats, ranging from trespass by artisanal miners to attacks by military or paramilitary groups.
- Finally, an important feature of the modern mining sector in sub-Saharan Africa is the extensive role played by new investors today, which are often state-controlled entities (such as from China). It remains unclear whether this surge in Chinese investments will result in an increase in cases under Sino–African bilateral investment treaties (BITs).

While none of these distinguishing features is purely Africa-specific, they may be particularly relevant to parties and practitioners involved in mining disputes in Africa. This chapter aims at providing a concise overview of the risks and characteristics of mining disputes in Africa, rather than a definitive theoretical framework for approaching them.

Continuous sensitivity to political risk and resource nationalism

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

Mining investments often involve very long time frames, during which the regulatory and administrative environment of a given project must remain stable. Political instability often means changes in applicable law. Similarly, policies and regulations enacted outside a transparent, democratic process are less likely to gain broad acceptance among the population and other relevant stakeholders. Laws perceived as illegitimate are more likely to be overturned, sometimes abruptly. A dearth of independent and appropriately mandated administrative officials will considerably complicate and delay the obtention of necessary permits and regulatory monitoring processes enabling mining projects to move forward. A lack of effective and stable administration also means that foreign mining investors will have no one to turn to to protect their rights and investments against adverse third-party actions. All these factors will increase a given mining project's exposure to political risk, which may in turn diminish its value and, in some cases, threaten its viability.

Political risk also manifests itself in host governments' measures aimed at increasing governmental control over the development of natural resources in their territory and capturing a larger share of the value of these resources – a situation often described as resource nationalism.[1]

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 African colonies wished to regain control of their own resources.[2] In 1962, the United Nations General Assembly adopted resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources (Resolution 1803).[3] Resolution 1803 consecrates many of the host government's rights (including regarding nationalisation and expropriation of natural resources on their 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.[4]

The past five years have witnessed a significant increase in the adoption of resource-nationalist measures by African governments. This resurgence of resource nationalism 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.[5] 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. For example, the Mining Law and Mining Tax Law enacted by Mozambique in August 2014 include provisions such as a 10 per cent tax on mining exploration and a 32 per cent capital gains tax on transfer of mining titles, as well as a provision enabling the government to revoke a mining title if the holder is indebted to the state.[6] Similarly, Zambia promulgated a new mining regime in January 2015, including provisions to increase underground mining royalty rates from 6 per cent to 8 per cent and open pit mining royalty rates from 6 per cent to 20 per cent.[7] Zimbabwe, Kenya and Namibia have also all announced new legislation increasing their entitlement to revenues in recent years. As recently as February 2019, Ghana's President Nana Akufo-Addo made a speech before hundreds of mining investors and executives in Cape Town, stating that African nations should not be expected to give special financial incentives to secure investment that producers would not get in other parts of the world.[8] Zambia's Mine Minister Richard Musukwa also stated that 'the mismatch that exists between the huge resources that the country sits on and the poverty levels in the rest of the country cannot continue.'[9]

Hence, in this climate of increasing resource nationalism, the financial pressure felt by host states is 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' unprecedented reliance on debt financing in recent years, investors may increasingly be forced to take whatever measures they can to meet their repayment obligations.[10] In this context, impacted investors are likely to challenge state measures that they view as punitive and not reasonably expected. Challenges may be based on contracts providing for arbitration as the dispute mechanism, or on investor-state dispute settlement through international investment agreements, such as BITs, linking African host states with hundreds of countries.[11]

Tanzania's mining reform of 2017 represents a prime example of potential arbitration disputes driven by resource nationalism. In 2017, the United Republic of Tanzania announced two new laws: the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act 2017 and the Natural Wealth and Resources (Permanent Sovereignty) Act 2017. These laws prohibit natural resource exploitation by private parties, as well as the export of raw resources. The laws also introduce a unilateral review and renegotiation of any existing contract containing an 'unconscionable' term, require the establishment of beneficiation facilities in Tanzania and purport to void any existing contract terms that submit the state to foreign court jurisdiction.[12] However, despite the new legislation's attempt to avoid foreign jurisdiction, Tanzania's commitment to numerous BITs leaves it potentially exposed to investor-state treaty claims (such as unlawful expropriation or fair and equitable treatment (FET) standard claims) challenging the provisions of the new laws.[13]

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. The arbitrations were followed by the state's imposition of the new mining laws and its ban on that company's mineral exports, amid allegations that it owed approximately US$40 billion in unpaid taxes and approximately US$150 billion in penalties and interest.[14] The dispute remains ongoing at the time of writing and may result in a BIT claim following additional measures adopted by Tanzania.[15]

In the same vein, the Democratic Republic of the Congo (DRC) enacted a mining code on 28 March 2018, which provides for increases in taxes and royalties and imposes more stringent requirements regarding the repatriation of export income. The new law 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 (including the tax, customs and exchange rate regimes) of the previous legal regime for a further 10 years from the promulgation of a new law, such as the 2018 mining code.[16] Certain key investors will be especially affected by the creation of a special royalty rate of 10 per cent (instead of the previous 2 per cent) applicable to 'strategic substances', which include cobalt, as well as the possible adoption of an entirely different regulatory regime for such substances, including the conditions for access, research, exploration and marketing thereof.[17] As the key metal in lithium-ion batteries, used in the production of mobile devices, laptops and electric vehicles, cobalt is increasingly in demand.

The mining reform has had a significant adverse impact on investors' interests and may thus give rise to significant international arbitration claims against the DRC, as has occurred in countries that have implemented similar reforms. Arbitration claims may occur under BITs that the DRC is a party to, under ad hoc mining conventions or pursuant to the 2002 and 2018 mining codes, which both provide for ICSID arbitration.

This trend of mining reforms shows no sign of slowing down. 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.[18] 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.'[19] Investors in Sierra Leone may be watching the reforms closely to ensure that such rights are indeed preserved. Similarly, the government of Mali, Africa's third-largest gold producer, 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.[20]

Security issues and their impact on mining disputes

Another significant corollary of the political and economic situation in parts of sub-Saharan Africa concerns the physical security of mining assets. While host states generally have a duty to protect the physical integrity and private property of their residents and investors, this may be difficult to achieve in remote or inhospitable areas.

One devastating episode was the suicide bomb attack carried out in 2013 on the then-largest uranium mine in Niger, located in

Arlit and operated by French company Areva. A worker was killed and 14 others were injured in the attack. The plant also was forced to halt production because of the significant damage caused by the blast.[21] The attackers were affiliated with the jihadist terrorist movement MUJAO whose spokesperson said the operations targeted 'France, and Niger because of its cooperation with France, in the war against Sharia'.[22] In a similar vein, a few months before the Niger attack, near In Amenas, Algeria, a terrorist commando invaded the Tiguentourine Gas Facility run by BP and Statoil, taking hundreds of workers hostage for four days.[23]

These targeted attacks against natural resources projects with foreign investment and ownership illustrate how investors may grapple with potential threats and hostility from certain people on the ground in the host state. Operators may be required to adopt costly and cumbersome security measures to protect their projects, which will have an adverse impact on the value and profitability of their investment.

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 of protection, which are present in most international investment agreements currently in force.[24] 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.[25] 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.[26] A series of arbitral awards confirm the application of 'full protection and security' to investments in Africa.[27]

Security issues may also stretch beyond highly visible attacks by paramilitary or terrorist groups. Large-scale mining companies increasingly encounter unauthorised artisanal and small-scale mining activities in areas where they hold exclusive mining or access rights. While artisanal mining can help create employment in rural, 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.[28] Artisanal mining may therefore create direct safety risks for local populations and for large-scale mining companies.

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. 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 measures of protection. 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 and artisanal miners. This risk is particularly high in areas where government presence and economic opportunities are limited.

Large-scale mining companies that have acquired exclusive rights to explore or exploit a mineral resource from the host state, and that may have invested significant amounts to develop a mining project, may legitimately expect that the host state will guarantee and protect such rights, including by ensuring that they are not infringed upon by artisanal mining workers.

Previous investor-state cases provide relevant examples. In *Quadrant Pacific v Costa Rica*, the claimant alleged that the Costa Rican state failed to take reasonable steps to address the continuing illegal trespass on the claimant's citrus farm holdings located in Costa Rica and that Costa Rica's failure to enforce its own laws for the protection of private property caused damages to their farm landholdings in violation of a Canada–Costa Rica 1998 BIT.[29] The claim was based on the state's alleged breach of the FET and full protection and security standards the BIT had granted over the claimant's investments. The respondent state argued that it had acted reasonably under the circumstances considering the limited resources available in such rural territory and that the claimant's own actions and inactions were responsible for any damage suffered.[30] The case was discontinued following the claimant's failure to pay its share of the advance on costs.

More recently, in *Gran Colombia v Colombia*, the claimant alleged that the Colombian government breached its obligation to provide full protection and security by failing to address civil strikes and other disruptions to the claimant's mining projects, caused by illegal artisanal miners and a guerrilla group.[31] The case is currently pending and its outcome should be of interest to mining investors in developing and emerging countries, including certain African countries.

Impact of Chinese investments in Africa on African mining disputes

Another key driver of mining arbitrations in Africa is a surge of Chinese investments in African mining projects over the past decade. Around half of China's outbound investments between 2005 and 2016 were in foreign energy and mining projects, a third of which was invested in sub-Saharan countries such as the DRC, Zambia, Zimbabwe and South Africa.[32] In 2015, China's president Xi Jinping pledged to invest US$60 billion into African projects over the following three years and made another matching US$60 billion pledge in 2018.[33] China's 2018 US$60 billion pledge 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'.[34] These investments have and will continue to strengthen China's economic influence and control over vast reserves of metal and mineral resources on the African continent.

One particular characteristic of Sino–African mining contracts over the past decade has been 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.[35] These arrangements increase the potential for disputes between foreign investors and host states as these disputes 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 May 2018, the UNCTAD's database had registered 35 BITs signed between China and African states, of which 22 had already entered into force.[36] However, even though they may have been signed and entered into force, these BITs are not necessarily published or easily accessible.[37]

The content of Chinese BITs with African countries varies according to the year they were signed and the counterparty involved.[38] These BITs are divided in roughly four generations[39] and the standards of protection they offer vary quite significantly from one generation to another.[40] However, a common characteristic of these treaties is that they tend to offer limited guarantees in terms of transparency, environmental and social protections, and investment facilitation.[41] In keeping with China's socialist market economy policies, Sino–African BITs also present some notable specificities that make them more deferential to national regulation.[42] Some commentators have criticised Sino–African BITs for lacking a clearly articulated policy backbone,[43] while others have praised China's flexibility and willingness to give African states an opportunity to set agendas and negotiate effectively.[44]

Another salient issue regarding Sino–African BITs concerns the definition of a 'Chinese' investor and, in particular, whether individuals or companies from 'special administrative regions' of China (Hong Kong and Macau) are included in this definition. The wording of Chinese investment treaties typically protects Chinese nationals or companies, without elaborating on the criteria for establishing such nationality.[45] Two recent awards suggest that investors from Hong Kong and Macao are protected by Chinese BITs. In *Tza Yap Shum v Peru*, an ICSID tribunal held that a Chinese citizen from Hong Kong was entitled to claim damages under the China–Peru BIT.[46] Similarly, in *Sanum v Laos*, an UNCITRAL tribunal held in 2013 that a Macau corporation could take advantage of the China–Laos BIT.[47]

Although no notable Sino–African BIT arbitration claims are reported to have arisen yet, the arbitration of China–Africa disputes may become increasingly prevalent in light of the substantial Chinese investment in Africa. One example may be seen in the reaction to the promulgation of the 2018 DRC mining code discussed above. Two Chinese mining companies have reportedly invoked an investment treaty between China and Congo in an effort to initiate talks with the government, failing which the companies may initiate ICSID arbitration, under the China–DRC BIT.[48]

In the context of an increasing potential for Sino–African arbitrations, the African continent is also seeing the increasing 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'.[49] Hence, it may be that the industry will see an increasing number of China–Africa disputes being resolved in these forums.

Relevance of business human rights principles to mining disputes in Africa

Human rights risk management is a key element of responsible business practice for all businesses, regardless of their size, sector, geographic location or reach. 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 compliance and human rights issues. 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.[50] 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.

The authors thank Minty Hamer, trainee solicitor at Clifford Chance, for her contribution in preparing this chapter.

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Audley Sheppard QC
Clifford Chance

Audley Sheppard QC is a partner in the London office of Clifford Chance LLP. He is global co-head of the firm's international arbitration group. He has over 30 years' experience in the resolution of disputes arising out of major infrastructure and energy projects and international trade and investments, as counsel and arbitrator. He is a frequent speaker and writer on investment protection issues. In January 2017, he was named chairman of the London Court of International Arbitration Board and, in February 2015, he was made QC. Audley has been a member of the ICC Court of Arbitration, co-chair of the International Bar Association arbitration committee and rapporteur of the International Law Association arbitration committee. He has degrees from the Victoria University, New Zealand (LLB (Hons) and B Comm) and the University of Cambridge, United Kingdom (LLM).

Louis-Alexis Bret
Clifford Chance

Louis-Alexis Bret is a senior associate in the international arbitration group at Clifford Chance. He has extensive experience acting as counsel in both commercial and investor-state arbitrations, primarily in the energy and mining sectors. Louis-Alexis also advises natural resources companies in connection with their investments abroad and writes frequently on international arbitration, with a particular emphasis on energy and mining disputes. Prior to joining Clifford Chance, Louis-Alexis practised in Houston, New York and Paris. Louis-Alexis is featured in *Who's Who Arbitration – Future Leaders*.

Recent Developments in OHADA Arbitration

Gaston Kenfack Douajni
The Association for the Promotion of Arbitration in Africa

The Association for the Promotion of Arbitration in Africa

The Organisation for the Harmonization of Business Law in Africa (OHADA) was created by the treaty signed at Port-Louis, the capital of Mauritius, on 17 October 1993 (the OHADA Treaty) and modified at Quebec in Canada on 17 October 2008.

The purpose of the OHADA Treaty is to promote the development of the contracting states by elaborating a business law that is simple, modern and adapted in order to stimulate and secure investment in the OHADA territory, both at legal and judiciary level.

OHADA is made up of the 17 contracting states: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Ivory Coast, Gabon, Guinea Conakry, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

OHADA has five institutions:

- the Conference of the Head of States and Governments of the Contracting parties – it solves OHADA problems relating to the OHADA Treaty that the Council of Ministers has deemed out of its competence;
- the Council of Ministers, made up of the ministers in charge of justice and those in charge of finance of the contracting states – this is the legislative body of OHADA, it adopts the regulations including the new common business law called uniform acts;
- the Common Court of Justice and Arbitration (CCJA), a supranational state court, based in Abidjan in Ivory Coast – its task is to ensure the common interpretation and application of the OHADA business law and also to administer arbitration proceedings under the CCJA arbitration rules;
- the Regional High Judiciary School based in Porto-Novo in Benin – in charge of the training of judges and other lawyers from contracting states in business law; and
- the Permanent Secretary based in Yaounde in Cameroon – in charge of the administration of OHADA.

According to article 10 of the OHADA Treaty, the uniform acts are directly applicable and overriding in the OHADA states.

To date, 10 uniform acts have already been adopted by the Council of Ministers, relating to:

- general commercial law;
- commercial companies and economic interest groups law;
- sureties law;
- debt recovery law and enforcement law;
- bankruptcy law;
- arbitration law, together with the Rules of Arbitration of the Common Court of Justice and Arbitration (the CCJA Rules);
- accountancy law;
- carriage of goods law;
- cooperatives law; and
- mediation law.

Some of these uniform acts have been modified, to take into consideration the recent international developments concerning the subject of the said uniform acts. In this regard, the General Commercial Law, the Commercial Companies and Economic Interest Group Law, the Sureties law, the Bankruptcy Law and, more recently, in November 2017, the OHADA Arbitration Law have been modified by the OHADA Council of Minister that has at the same occasion adopted a uniform act on mediation.

OHADA arbitration is governed by two bodies of rules: the Uniform Act on Arbitration (UAA) and the CCJA Rules.

Concerning the recent developments in OHADA arbitration, we will raised two points: the modification in 2017 of the bodies of rules that governed OHADA arbitration and the ruling issued on the 26 April 2018 by the CCJA relating to the immunity from execution of public corporate bodies, this ruling highlighting an evolution of the CCJA case law on the topic.

The modification of the bodies of rules governing OHADA arbitration

As already indicated, OHADA arbitration is governed by the UAA and CCJA Rules.

The initial versions of these two bodies of rules were adopted on 11 March 1999 and, after nearly 20 years of application, they were modified by the Council of Ministers on 23 November 2017 to take into consideration the recent developments in international arbitration.

The Uniform Act on Arbitration

The provisions of the UAA take into consideration some important principles of French, Belgium and Swiss international arbitration law, while being more closely inspired by the UNCITRAL Model Law on International Arbitration.

Concerning its scope of application, the UAA applies

- if the seat of arbitration is within the OHADA territory;
- for the settlement of a contractual dispute when the contract is to be applied, partially or totally, in the OHADA territory; or
- if at least one contractual party has its domicile or residence in the OHADA territory.

One important development to mention here is that investment arbitration has been added to the scope of application of the UAA. In this regard, the new article 3 of the UAA states that arbitration can take place on the basis of an arbitration agreement or investment law, notably an investment code or a bilateral or multilateral investment treaty.

The arbitral tribunal is composed of one or three arbitrators, and the competent state judge of the seat of arbitration can be solicited if a party fails to appoint an arbitrator or when the two arbitrators already appointed do not agree on the choice of the chairman of the arbitral tribunal.

The state court may also be solicited, if need be, for the extension of the arbitration deadline.

The UAA outlines that the duration of arbitration is six months from the time the last of the three arbitrators or the sole arbitrator accepted his or her appointment. An extension of this time can be agreed by the parties or ordered by the competent state court upon request of one of the parties or of the tribunal.

The state court decision to appoint an arbitrator is rendered by motion on notice and the said decision is not subject to any appeal.

The parties shall conduct the proceedings with celerity and shall avoid dilatory tactics and, going further with this innovation, the updated UAA states that the tribunal shall take all necessary measures to conduct the proceedings with celerity.

Another innovation to mention here is that the new UAA text indicates that the arbitral procedure may be terminated either with the rendering of the final award or with a procedural order if:

- the claimant withdraws its request, unless the respondent objects;
- the parties agree to terminate the proceedings;
- the arbitral tribunal finds that it is useless to move forward with the proceedings;
- the initial or extended arbitral time limit for rendering the award expire; or
- the claim is acknowledged, settled or discontinued.

After the rendering of the award, the interested party can set it aside one month later and the new text provides that the parties can renounce to the setting aside of the award, provided that this award is not contrary to international public policy.

A party wishing to enforce the award shall act by an ex parte procedure. The decision of the state court that grants exequatur is non-recourse, whereas its decision dismissing the request for enforcement can only be reversed by a ruling of the CCJA.

Rules of the Common Court of Justice and Arbitration

Apart from being the Supreme Court of the 17 current OHADA states, the CCJA is also an international arbitration centre modelled on the International Chamber of Commerce (ICC) Court of Arbitration

However, contrary to ICC arbitration, where the terms of reference are elaborated 60 days after the arbitral tribunal has received the file, the CCJA terms of reference, called 'report framing', is to be established in 45 days instead.

Here, also, the parties are requested to avoid dilatory tactics and the arbitral tribunal (also one or three arbitrators) must conduct the proceedings with celerity.

Arbitrators acting under the CCJA Rules are granted diplomatic immunities (like international employees of OHADA and CCJA judges) and they shall be and remain available, impartial and independent vis-à-vis the parties.

Like the UAA, the CCJA Rules provide that the arbitration may be terminated either with a final award or with a procedural order. CCJA awards may also be set aside on the same grounds as those provided for in the UAA. If the CCJA award is not spontaneously executed by the loosing party, the winning party can look for an exequatur in view of the forceful execution of the said award. The president of the CCJA, or one of the CCJA judges designated by the former, is solely competent to grant exequatur within 15 days from the filing of the request. The CCJA president's decision granting exequatur is final and not subject to any recourse.

If the request for the enforcement of the award is rejected by the president of the court, the interested party shall introduce an appeal before the whole court within 15 days and shall notify this appeal to the other party.

Even though the rules are silent concerning the deadline that the court must issue its ruling related to this appeal, the idea here is that the court must act with speed and should not render its ruling beyond six months after its seizure.

Concerning the setting aside of the CCJA award, the updated CCJA Rules contain a provision in article 24.4 according to which:

> *If the circumstances of the case exceptionally so require, the Court may fix, at its own initiative or upon motivated request of the arbitrator, the fees of the arbitrator at a higher or lower rate than would apply pursuant to the schedule of fees.*
>
> *Any decision on the fees made without the approval of the Court is null and void, but may not be used as a ground for annulment of the award.*

This provision that is to prevent arbitrators and parties from concluding agreement on fees different from what the CCJA scale of fees foresees, contains the important detail that, in any case, an agreement that violates the CCJA Rules cannot give rise to the setting aside of the CCJA award. Otherwise said, a separate agreement between the parties and the arbitral tribunal on fees different to those provided for by the CCJA scale of fees on arbitration is not a ground for the setting aside of the CCJA award.

Indeed, the grounds for the setting aside of such an award are contained in article 29.2 of the updated CCJA Rules. These grounds are the same as those stated by the UAA and do not comprise the separate agreement on fees between the parties and the arbitral tribunal.

The purpose of this innovation is to prevent the situation that arose in the *GETMA* case, where the CCJA annulled the award rendered by the arbitral tribunal because, contrary to the opinion of the court, the arbitral tribunal and the parties concluded an agreement on the fees that permitted the arbitrators to receive from the parties fees higher than those provided for by the CCJA scale of fees.

The new CCJA ruling concerning immunity from execution of public corporate bodies

Immunity from execution of public corporate bodies is governed in OHADA states by article 30 of the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures.

The said provision states as follows:

> *Compulsory execution and protective measures shall not apply to persons who enjoy immunity from execution.*
>
> *However, any debt which is certain, due and owed by state corporations or firms, regardless of their legal form and mission, shall give rise to a set-off against debts which are also certain, due and owed them, subject to an agreement of reciprocity.*
>
> *The debts of the state corporations and firms referred to in the preceding paragraph may only be considered certain, within the meaning of this article, where they arise from either an acknowledgement by the said corporations and firms of the debts or from a writ which is enforceable within the territory of the State where the corporations and firms are located.*

The CCJA has applied this provision in absolute.

In this context, even semi-public companies engaged in commercial activities were protected by the court through

the all-encompassing expression of 'public enterprises', which extended immunity from execution to semi-public companies, explaining that these companies, being nevertheless partially public, enjoy immunity from execution despite their commercial activities.

This was the case in the CCJA ruling of 7 July 2005 (No. 043/2005 *Aziablévi Yovo v Togo Telecom*). The facts in this case were simple: the Togolese semi-public mobile phone company, Togo Telecom, was condemned to indemnify some of its employees for unfair dismissal.

With the Togolese courts having authorised the seizure of the Togo Telecom bank account for the payment of the amount of the said indemnity, the appeal introduced by Togo Telecom before the CCJA offered this court the opportunity to state that even semi-public companies engaged in commercial activities enjoyed immunity from execution.

The OHADA court has modified its position since a decision handed down on 26 April 2018 in the *Mbulu Museso* case (Ruling No. 103/2018 of 26 April 2018). The facts here were also simple: the justiciable beneficiary of the ruling made a seizure of garnishment on the amount owed to Grands Hotels du Congo by many banks in Kinshasa.

Arguing that the Grands Hôtels du Congo enjoys immunity from execution according to article 30 of the above-cited uniform act, the Democratic Republic of Congo internal courts released that seizure.

Following an appeal against this released decision, the CCJA issued its ruling in 26 April 2018. The CCJA determined the beneficiaries of the immunity from execution and, as per article 30 of the a uniform act in subsection 2, indicated a first category of public entities that enjoy immunity from execution. This category comprises state, public corporate bodies and public enterprises, regardless of their form and mission.

The CCJA specified in the same ruling that for the other public entities, the criteria to take into consideration is the nature of the activity of such entities and the form in which these entities carry on those activities.

As for the semi-public entities, the CCJA specified that the semi-public corporate bodies, as is the Grands Hôtels du Congo, do not enjoy immunity from execution, owing to the commercial nature of their activities, even though the state is a shareholder of such a company.

Applying this CCJA ruling in a decision rendered on the 26 June 2018, the president of the tribunal of the first instance of Douala Bonanjo in Cameroon, in a case where the Cameroonian national aircraft – Camair-Co – was seized by an England creditor, the president of the court indicated that, as the state of Cameroon was the only owner of the aircraft company, the latter enjoyed immunity from execution, in accordance with article 30 of the Uniform Act Organizing Simplified Recovery Procedures and Enforcement Measures.

It follows from this decision that a public entity belonging to a state, because that state is the only shareholder of that public entity, enjoys immunity from execution, even though its activities are of commercial nature. Yet the CCJA ruling nevertheless specifies that a semi-public company where the state has 50 per cent of the capital, and the other 50 per cent belongs to non-public persons, this semi-public company does not enjoy immunity from execution.

Even though one must acknowledge that the CCJA has evolved in its jurisprudence concerning immunity from execution, it is important for that supranational court to reach the position put forward by the 2004 United Nations Convention on jurisdictional immunities of states and their property. According to articles 13, 14, 15 and 16 of that convention, not yet in force but already introduced in the domestic law of a country such as France, the immunity from execution of a state or of other public corporate bodies disappears when such state or other public entity has undertaken commercial activities.

Hence, more than the public nature of a company, or the public nature of the state or the other public entities, the commercial nature of their activities should also, in the OHADA territory, be the decisive criterion to restrict, or not, their immunity from execution. In other worlds, the principle here should remain immunity from execution in favour of states or of public corporate bodies in OHADA; but as stated in the 2 December 2004 United Nations Convention on jurisdictional immunities of state and their property, the commercial activities of a public corporate body should give rise to the restriction of such immunity.

Gaston Kenfack Douajni
The Association for the Promotion of Arbitration in Africa

Gaston Kenfack Douajni is a Cameroonian magistrate, currently the director of legislation at the Ministry of Justice in Cameroon. He has obtained a doctorate in international economic law at the University of Paris I (Pantheon Sorbonne) in 2005, a certificate on trade, negotiations and settlement of trade disputes at the Kennedy School of Government, Harvard University in 2004 and an habilitation to direct researches at the University of Pau in France. He is the editor of the *Revue Camerounaise de l'arbitrage*, a former member of the International Chamber of Commerce Court of Arbitration, the vice-president of the African Arbitration Association, the president of the Association for the Promotion of Arbitration in Africa and was the chairman of the 49th Session of UN-CITRAL. He also teaches at different universities around the world.

BP 4683 Yaoundé Nlongkak
Cameroon
Tel: +237 222 219 273

Gaston Kenfack Douajni
william.kenfack@yahoo.fr

www.apaafrique.org

The Association for the Promotion of Arbitration in Africa (APAA) is an international non-government organisation created in Geneva, Switzerland in 2005, with its headquarters located in Yaounde, Cameroon. The purpose of the APAA is to promote in Africa the culture of the alternative dispute resolution in general, and of arbitration in particular.

Angola

Filipe Vaz Pinto, Ricardo do Nascimento Ferreira and Frederico de Távora Pedro
Morais Leitão, Galvão Teles, Soares da Silva & Associados and ALC Advogados

Introduction

According to the World Bank statistics, Angola has a population of 30.8 million, while having recorded a gross domestic product of US$105.7 billion in 2018.

Notwithstanding the recent slowdown, caused mostly by the decrease in oil prices – on which the Angolan economy is still deeply dependable – Angola has experienced an exponential growth of its economy since the end of the civil war in 2002, having attempted to create conditions to become more attractive to investments, both domestic and international, in several economic areas in recent years. According to the World Bank, foreign direct investments in Angola reached their peak in 2015 with US$9.2 billion, compared to US$1.7 billion in 2002 when the civil war ended. Since 2015, the amount of foreign direct investment has been decreasing, but there is an expectation that it will improve again in the near future.

The country's development in the 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 new government is focused on enhancing the efficiency of said judicial system, for instance via the creation of a new body that carries out the enforcement of judicial awards that declare the loss of assets to the state. Other recent measures relate to the adoption of new legislation addressing issues such as money laundering and the financing of terrorism, as well as a new criminal code.

In recent years, Angola's legal community has been demonstrating an increasing interest in the use of arbitration as an alternative means of dispute resolution between companies and individuals, and also involving the state and other public entities. This is reflected in the many general and sectorial legal instruments providing for and promoting the use of arbitration. In addition, an arbitration community is developing in Angola, demonstrated by the increase of 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, a very ambitious privatisation programme known as PROPRIV was approved by the 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 due to be triggered until 2022. 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 in case a dispute arises therefrom, and therefore the introduction of arbitration agreements in said 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 (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 legal persons of public law, the Angolan Arbitration Law establishes that these entities 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).

In an arbitration agreement or in a subsequent document, the parties may agree on relevant matters pertaining to the arbitration, such as the rules of the arbitration proceedings and the seat of arbitration (articles 16 and 17 of the Angolan Arbitration Law). In this respect, the parties may choose to apply the rules of an arbitral institution. If an agreement concerning these matters is not reached by the parties before the acceptance of the first-appointed arbitrator, the arbitrators will be responsible for determining the rules of the proceedings and the seat of arbitration.

Article 19 of the Angolan Arbitration Law provides that the parties may be represented or assisted by a lawyer.

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 or 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 a period of six months after 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).

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 further discussed below, Angola acceded in 2017 to the New York Arbitration 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 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, 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 (article 34 of the Angolan Arbitration Law).

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 arbitral tribunal applies to the case the substantive law agreed to by the parties. If such 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).

Contrary to domestic arbitration, the Angolan Arbitration Law establishes the default rule that arbitral awards rendered in the context of international arbitration are not appealable, 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 the best practices in international arbitration.

Subject to the above-mentioned rules specifically applicable to international arbitration, and in the absence of further regulation agreed to by the parties, international arbitration is 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 to the Minister of Justice the powers to authorise the creation of those centres and establishes the 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, considering that it operates under the auspices of an institution.

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

- the Centre for Extrajudicial Dispute Resolution (CREL);
- the Angolan Centre for Arbitration of Disputes (CAAL);
- the CEFA Arbitration Centre;
- the Harmonia Dispute Resolution Centre;
- the Arbitral Juris; and
- the Mediation and Arbitration Centre of the Angolan Industrial Association (CAAIA).

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 government 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 scope.

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 imposes 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 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 sectorial 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 of the State 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 the state of Angola.

Therefore, since 4 June 2017, the date of 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 New York 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 obviously not new to the protection of foreign investments and has introduced several reforms to encourage those investments (such as the PROPRIV approved in 2019). 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. As explained above, this provision also contemplates the possibility of arbitration to resolve disputes concerning disposable rights arising from this law. 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 five bilateral investment treaties (BITs) that are currently in force with the following countries: Italy, Cape Verde, Germany, Russia and Brazil. Those bilateral investment treaties 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 a careful structuring of investments to be able 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 the 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 the 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 the 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.

As stated, Angola is not a member of the ICSID and is not a party to the ICSID Convention. However, as mentioned above, at least 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 bilateral investment treaties with other states, but those have not yet entered into force. An example is the BIT between Angola and Portugal, which was signed around 10 years ago but is not yet in force, although the expectation is that it may become effective shortly.

The BIT between Angola and Portugal also provides for amicable discussions to resolve investment disputes and, failing such discussions, it provides for:

- 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.

Through 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 contrary 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 and, in case of failure of those consultations, 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 a first example of a new generation of BITs after the approval of the 'model BIT' through the referred Decree No. 122/14. Contrary to 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.

Still 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 (MIGA).

Angola is also a member of several multilateral treaties that establish either arbitration clauses or other alternative dispute resolution mechanisms. One example of said treaties is the Cotonou Agreement, signed between the European Union and the African, Caribbean and Pacific Group States (ACP States), in which Angola participates via the Southern African Development Community (SADC). This agreement advises the contracting parties entering into investment agreements to thoroughly study the main clauses aimed at protecting said investment, which includes, among others, 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 especifically 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 the Council of Ministers, which comprises, on one hand, the members of the Council of the European Union and of the European Commission and, on the other hand, a member of the government of each ACP State. In case 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 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 government are very recent and still need to be implemented. 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 the openness to arbitration, but still requires testing in practice. In any event, there seems to be a clear tendency 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 call for the end of investment arbitration, with several proposals being presented for the implementation of a more judicial-based system (as opposed to an arbitration-based system) to resolve investment disputes, it remains to be seen how Angola will cope with the need to catch up in its development in terms of promotion and protection of private investment and, at the same time, to follow the international trends regarding the resolution of investment disputes.

Filipe Vaz Pinto
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Filipe Vaz Pinto is a partner of Morais Leitão since 2014. He co-leads Morais Leitão litigation and arbitration department and focuses his practice on arbitration, particularly international arbitration.

He acts as counsel in domestic and international arbitrations in a variety of industry sectors, including aviation, banking, construction, defence, energy, food and beverage, infrastructures, insurance, media and advertising, mining, public-private partnerships, transfers of technology and trusts.

He is also regularly appointed as arbitrator.

Until recently, Filipe Vaz Pinto was a vice president of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry and is now a Board member of the Portuguese Arbitration Association and of the International Chamber of Commerce (ICC) Arbitration Commission, as well as of the Executive Commission of the Portuguese Committee of ICC.

He regularly participates as lecturer in postgraduate courses on arbitration and participates as speaker in seminars and conferences.

He is listed by *Who's Who Legal: Arbitration* as 'Future Leader (Partner)'. In 2015, Filipe Vaz Pinto was awarded with the '40 under 40 award', organised by *Iberian Lawyer*, which distinguishes 40 lawyers under the age of 40 in Portugal and Spain.

Ricardo do Nascimento Ferreira
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Ricardo do Nascimento Ferreira joined Morais Leitão in 2005. He leads one of the four litigation and arbitration teams within the department.

He works in judicial and arbitration proceedings in several areas of civil and commercial law and in contentious and non-contentious matters of intellectual property and pharmaceutical law, notably involving patents. He assists and represents national and foreign clients in pre-litigation matters and conducts and participates in domestic and multi-jurisdictional judicial and arbitration proceedings.

Ricardo is an arbitrator at the Portuguese Arbitration Centre for Industrial Property Disputes, and also at the Oporto Institute of Commercial Arbitration.

He is a co-chair of the under 40 Commission of the Portuguese Arbitration Association, a member of the Intellectual Property Commission of the International Chamber of Commerce in Portugal and a member of the editorial board of *Lisbon Arbitration by Morais Leitão*.

Ricardo is currently listed by *Who's Who Legal: Arbitration* as 'Future Leader (Non-Partner)' and has been consistently listed in *Best Lawyers*.

He is a regular speaker at conferences and academic activities related to litigation, arbitration and intellectual property.

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

Rua Castilho 165
1070-050 Lisboa
Portugal
Tel: +351 21 381 74 00
Fax: +351 21 381 74 99

Filipe Vaz Pinto
fvpinto@mlgts.pt

Ricardo do Nascimento Ferreira
rnferreira@mlgts.pt

Frederico de Távora Pedro
ftpedro@mlgts.pt

www.mlgts.pt

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.

With a team comprising over 250 lawyers at a client's disposal, Morais 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.

Frederico de Távora Pedro
Morais Leitão, Galvão Teles, Soares da Silva & Associados and ALC Advogados

Frederico de Távora Pedro joined Morais Leitão in 2019 and has experience in supporting the establishment of Angolan and international companies in the Angolan market and assisting them in many day-to-day issues in the fields of corporate law and regulation, as well as arbitration and other dispute resolution mechanisms.

He also provides legal assistance on acquisitions and sales of shareholdings, joint venture contracts, private investment matters, infrastructures, energy, among others.

Frederico is also a consultant for ALC Advogados since 2019.

ALC
ADVOGADOS

Masuika Office Plaza
Edifício MKO A, Piso 5, Escritório A
Talatona
Município de Belas, Luanda
Angola
Tel: +244 926 877 478

Frederico de Távora Pedro
ftpedro@alcadvogados.com

www.alcadvogados.com

ALC Advogados is a market leader law firm in Angola. Recognised by 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

Amr Abbas and John Matouk
Matouk Bassiouny & Hennawy

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 2019, two new investment treaty cases were registered with ICSID against Egypt. To date, a total of 34 cases against Egypt have been registered with ICSID. Of these 34 cases, 10 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 new investment law of 2017,[7] as well as the new criminal procedural law.[8] These are beside 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 is yet to be seen whether and to what extent such a possibility exists.

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.[10] That being said, the criteria of international arbitration has been subject to different judicial views in the recent years. The High Administrative Court,[11] following a reading of a judgment by the constitutional court,[12] 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.[13] The Cairo Court of Appeal took the same position in 2018.[14] However, in 2019, the Court of Appeal adopted the stance of the High Administrative Court holding that:

> *institutional arbitration awards rendered by CRCICA are considered 'international' awards regardless of the commercial relationship nature subject of the dispute, even if such relationship does not relate to international commerce. It is only sufficient that the award is registered, issued by the said centre and within the scope of its objects, competence and system to be considered an international award.*[15]

The Court of Cassation[16] has indicated a change in its position by stating dicta that resorting to arbitration under a 'reputable' permanent arbitral organisation would suffice to consider the arbitration 'international' similar to the Court of Appeal and the High Administrative Court stance.

The Arbitration Act is applicable without prejudice to the international conventions that Egypt is party to[17] and applies to all arbitrations between public or private law persons, irrespective of the nature of the legal relationship that the dispute revolves around,[18] 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.[19] 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.[20]

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[21]; or
- 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.[22] 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 such document or contract and the included arbitration clause will be invoked; and
- the reference should be explicitly made to the arbitration clause itself and to the fact that it is an integral part of the contract (a general reference to the existing document or its terms is not sufficient).[23]

In terms of the scope of the arbitration agreement, the Court of Appeal has recently held that the arbitration agreement scope excludes disputes related to the execution of the respective contract, in case 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.[24]

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.[25] 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.[26]
- The arbitration agreement must be in writing, otherwise it shall be null and void.[27] 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.[28] 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,[29] or where proceedings are initiated without objection from the opposing party.[30]
- 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,[31] 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.[32]

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.[33]

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.[34] The power to approve the arbitration agreement may not be delegated.[35] The approval of the competent minister for the validity of an arbitration agreement is a matter of public policy.[36] Egyptian courts had held that the absence of ministerial approval invalidates the arbitration agreement.[37]

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,[38] which was similarly upheld by the Supreme Administrative Court in 2011.[39] 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.[40] 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).[41] Other tribunals have, as recently as 2011, taken the view that the arbitration agreement is void in the absence of ministerial approval.[42] 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.[43]

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.[44] 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 in order for the arbitration agreement in a dispute under 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.[45] The Constitutional Court seemed to support that view.[46] Nonetheless, in a recent Court of Appeal Judgement, dated 19 September 2018, the court decided that the law did not require a specific form of the competent minister's approval.[47]

Competent court with regards 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 was no arbitration agreement, to the jurisdiction of the Administrative Court.[48] Therefore, a challenge of the respective arbitral award would be within the jurisdiction of the Supreme Administrative Court. Yet, 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), except if the parties agree to the jurisdiction of another Egyptian court of appeal.[49] 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 international in nature.[50]

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.[51] 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.[52] The same principle applies in the CRCICA Rules.[53]

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 of choosing the arbitrator whose jurisdiction had been terminated.[54] Where the arbitration is institutional and the agreed appointing authority – for example, CRCICA – made an appointment, the Court of Appeal 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.[55]

If an arbitrator is substituted for any reason, the Cairo Court of Appeal 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 principle of confrontation) and that all members of the arbitral tribunal have had the opportunity to deliberate with each other before rendering the award.[56]

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 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 as per article (53) (e) of the Arbitration Act. However, a party may do so only if it objected to such 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 considered this to be the case especially where the party elects to pay such arbitrator's fees among the fees of other arbitrators.[57] 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 challenge to be admissible and cancelled a decision of the first instance court upheld by the Court of Appeal. The court reasoned that such decision becomes challengeable if rendered in contradiction with law, the parties' agreement or jurisdiction rules that are of public policy.[58]

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.[59]

According to the general rules of substitution of arbitrators, a substitute arbitrator shall be appointed by the same mechanism used to appoint his predecessor.[60] 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. [61]

In 2011, the Cairo Court of Appeal held that in certain situations where the behaviour of an arbitrator is unjustified or in bad faith, and provided that the arbitrator has resigned or failed to undertake his mission after the conclusion of all hearings and pleadings, an award rendered by a truncated tribunal shall not be annulled.[62] 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 Arbitration Act.[63]

Recently, the Court of Cassation in 2015 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.[64]

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.[65] The arbitral tribunal is obliged to then refer the challenge to the competent court to decide the challenge.[66] 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.[67] 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 to the very same outcome.[68]

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 a conduct that obstructs and unnecessarily delay the proceedings. Accordingly, the court found that such conduct justifies the removal the presiding arbitrator, but not a party's appointed arbitrator in the same tribunal on the basis that this would interfere with such party's freedom to choose its arbitrator.[69]

The possibility for an Egyptian minister to serve as an arbitrator

According to article 10 of the Presidential Decree No. 106 of 2013, governmental 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' governmental position.[70]

Procedural law

The Arbitration Act grants parties the freedom to choose the applicable procedural law that will be applied by the arbitral tribunal, including their right to subject such arbitration to the applicable rules of any institution or arbitration centre in Egypt or outside. However, if the parties fail to agree on this matter, the arbitral tribunal will be granted the freedom to select the applicable procedural law.[71]

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,[72] except where these norms are considered 'basic guarantees of adjudication'.[73]

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 respective 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.[74] In such case, the arbitral tribunal shall suspend the proceedings until a final judgment is rendered in this respect by the competent authority.[75] This results in the suspension of the time limit for rendering the final arbitral award where such limit applies.[76]

The Court of Appeal judgments seem to narrow the scope where the arbitral tribunal shall suspend the 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.[77] 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.[78] 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.[79]

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[80] 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.[81]

The arbitral award: Time limit

The Arbitration Act grants the parties the right to agree upon the time limit of arbitration proceedings. In 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.[82] 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, such rules shall be applied. For example, if the parties agree to subject the dispute to the CRCICA Rules, which do not include any time limits for arbitration proceedings, such proceedings shall not be subject to the time limit set forth in the Arbitration Act and shall not be limited to a certain time limit unless otherwise is agreed by the parties.[83] 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.[84] 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.[85] In a recent case,[86] 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 with a court judgment that has the authority of res judicata, an issue that pertain to public policy.

However, the parties' continuance in the proceedings beyond the determined time limit is considered as an implied extension to such limit.[87] Recently, the Cairo Court of Appeal has 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.[88]

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 such basis, the omission of information may only lead to the annulment of an arbitral award when the objective of mentioning such 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 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.[89] 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.[90]

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. The Supreme Constitutional Court held that the right to bring annulment proceedings against arbitral awards is a constitutional one.[91] 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 to file a nullity suit. However, waiver of an annulment lawsuit after the arbitral award is permitted under Egyptian law.[92]

In 2018, 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 renders the award without reasoning.[93] 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.[94]

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.[95]

In another case,[96] 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 the 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 such judgment.[97]

Conversely, 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.[98]

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.[99] However, the Court of Cassation rejected this view. In its reasoning, the court decided that the 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.[100] The latter court rendered a second judgment maintaining its initial position.[101] However, the Court of Cassation[102] 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.

Recently, Cairo Court of Appeal found that its jurisdiction to decide setting aside cases does not extend to amending the arbitral award, and, in particular, its dispositive part.[103] The case pertained to an application made under article (192)(1) of the Procedural Law to interpret a previous Court of Appeal's 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 is not empowered to amend such dispositive part.

The Cairo Court of Appeal still maintains that only the binding final arbitral award may be subject to annulment.[104] Accordingly, any other decisions, orders or evidence proceedings may not be subject to independent annulment proceedings. On such grounds, the court found that it lacks jurisdiction to decide on the annulment of a notice of an arbitration hearing.

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

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 economic nature', as per article 2 of the Arbitration Act, as long as his or her determination is based on reasonable grounds. The court further provides that the judge may rely on the parties' intent in the contract to reach his determination.[105]

The Court of Cassation 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 of public policy before the Court of Cassation, even if such 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 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.[106]

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.[107] 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.[108] 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.[109] 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),[110] and, as such, are subject to the same enforcement rules applicable to national arbitral awards under the Arbitration Act.[111] 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 were in contradiction with the provisions of domestic Egyptian law, the provisions of the New York Convention would prevail.[112] 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 New York Convention.[113]

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 already ruled that article 58(3) of the Arbitration Act is unconstitutional because it allows for the challenging of the judge's order to refuse enforcement of an arbitral award while prohibiting the challenging of the judge's refusal to grant such order. A Constitutional Court judgment is binding for the courts.[114] Accordingly, the Cairo Court of Appeal ruled that the period to challenge the enforcement order, as per the Constitutional Court's judgment, should be 30 days equal to the period allowed for challenging the refusal to grant such order, not 10 days as per the general rules of challenging orders on application under the CCPL.[115]

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 obtaining the enforcement order.[116]

For the first time, on 9 May 2018, the Court of Appeal rendered a judgement enforcing a foreign arbitral interim measure that was issued by an International Chamber of Commerce (ICC) tribunal. The judgment found that arbitral interim measures are to be applied according to the same legal procedures to enforce a final arbitral award – that is, by an order on application without notification or hearing of the parties. The court went further and required such interim measure:[117]

- to be final, and is considered so if it is 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
- is not against public order.

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.[118]

2019 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.[119]

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 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 procedurals guarantees and principles of the CCPL. The Sports Law empowered the Olympic Committee to put its own mediation and arbitration rules, which was issued by Decision No. 88 of 2017. As per the Sports Law, absent a provision in it or in the centre's rules, the Arbitration Act shall apply.[120]

The centre's rules organises not only the mediation and arbitration proceedings but also the summary decisions, which are to be decided by a sole arbitrator,[121] challenging the arbitral awards and the enforcement thereof.

Annulment of awards by the Sports Centre

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 centre's rules, which are given precedence over the Arbitration Act by the Sports Law.[122] 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.[123]

On the contrary, there were other judgments by the Court of Appeal that held that sports arbitration awards are subject to the same annulment procedures stipulated in the Arbitration Act.[124] Confirming the same view, the Court of Appeal set aside a sports arbitration award because it was made by three arbitrators,[125] while the default clause of the Rules of the Sports Centre requires, in absence of an agreement, that the tribunal is composed of a sole arbitrator,[126] and because the award was not signed by the three arbitrators

The stance of the courts from the mandatory arbitration under the Sports Centre

The Court of Appeal has previously described arbitration under the Sports Law as being mandatory, [127] although mandatory arbitration is systematically declared by the Constitutional Court as unconstitutional.[128] 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.[129] 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.[130] The Court of Cassation found in its landmark judgment that article 66 and 69 are possibly in contradiction with the guarantee of impartiality and independence of judiciary stipulated in article 94 of the Constitution. The court 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 such rules 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,[131] which require equality between citizens before the law, prohibit immunisation from judicial review, define the limits of legislative mandates and the hierarchy of different legislative instruments.

In particular, the Court of Cassation found articles 2 and 81 of the Sports Centre's Rules are potentially exceeding the legislative mandate granted by article 69 of Sports Law to the Olympic Committee. Specifically, the court's view is that such mandate requires the rules to be consistent with international standards and requires the Sports Centre to abide to 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 immunised the arbitration awards from judicial review inconsistently with the international standards. The court draw such standards from the rules governing the Court of Arbitration for Sports (CAS), which allows for the review of sports arbitration awards by the Swiss Federal Courts.

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, 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 to take any action with respect to an arbitral dispute, without first referring the matter to the Supreme Committee.[132]

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 (NBF Centre). The centre is competent with all disputes that arise from application of the laws concerning non-financial transactions, in particular those disputes between shareholders, partners or members of the companies and entities that work in the non-banking financial markets. It is also competent with disputes between those dealing with those companies and the beneficiaries from the non-banking financial activities. However, the NPF Centre is only competent if the parties agree to its jurisdiction, whether before or after the disputes. The centre offers mediation and conciliation services before starting arbitration proceedings, unless the parties agree otherwise.

Principles from the Egyptian courts issued in 2019: Impartiality and independence of arbitrators

Criteria of impartiality and independence

The Court of Cassation[133] defined independence and impartiality to mean the freedom of the arbitrator from any hierarchal, material or mental relationship with any of the parties that contradicts the arbitrator's independence, and that it requires a prevailing assumption by the parties that the arbitration award to be rendered will be just. In its analysis, the court made reference to the IBA Guidelines on Conflict of Interest in International Arbitration as a reference in determining whether any conflict of interest of the arbitrators exists or not.

Proof of breach of impartiality and independence

The Cairo Court of Appeal[134] refused the allegation by one of the parties that a telephone conversation between one of the parties' counsels and the arbitrators proves partiality of the arbitrator in question. The appellant was able to obtain, by virtue of a request to the public prosecution, the log of phone calls between the other party's counsel, its appointed co-arbitrator and the presiding arbitrator during the arbitration proceedings. Despite the logs showing that there were such calls, the court, while recognising that a breach of independence and impartiality is a reason for annulment, found that a breach of impartiality or independence must be certain, not based on assumptions and absent of proof that the conversations made during these calls related to the arbitration proceedings that no proof of such breach exist.

Failure to disclose is a breach of impartiality and independence

In another case, the Court of Appeal found that acting as an attorney for one party without disclosing such issue to the other party breaches the requirements of independence and impartiality, and, thus, leads to the annulment of the arbitral award.[135]

The criteria for determining the seat of arbitration

In a Court of Appeal[136] judgment, the court found that the place of issuance of the award is the criteria for determining whether the arbitration proceedings were conducted in Egypt or abroad. In this case, the court refused to annul an award on the basis that it was conducted in London and thus is not subject to annulment in Egypt as per the provisions of New York Convention. The court also confirmed that a judgment by Egyptian courts annulling an arbitral award rendered abroad would bear no legal effect absent the parties' agreement to subject the arbitration to the Arbitration Act.

The Court of Cassation refused to adopt a physical criterion in identifying the place where the award is issued. In one case, the court held that 'holding deliberations and signature of the award by the tribunal outside Cairo does not change the fact that it was issued in Cairo, being the seat of arbitration.'[137]

The applicable interest rate

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.[138] Absent agreement, the applicable rate shall be 4 per cent in civil matters and 5 per cent in commercial matters.[139] 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. The Court of Appeal did not consider it as such, which it confirmed in a recent judgment.[140] The court held that the interest rate does not relate to public policy and awarding a higher interest rate than that stipulated by the Civil Code is merely a wrong application of the legal provisions that is not subject to review by the annulment court. The court, 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 since 1948, is no longer necessitated by an essential public interest that justifies maintaining it as a public policy rule.[141]

Criteria of 'arbitral institution' for purposes of defining what would be an international arbitration award

The Arbitration Act adopts in article 3 certain criteria for what would be considered an international arbitration thereunder. Among these criteria is where the arbitration is institutional.[142] Categorising an arbitration as international is of specific importance for defining the court competent for annulment and enforcement purposes. If the arbitration is international, the competent court for both matters is the Cairo Court of Appeal. For national arbitration, the competent court for annulment shall be the appellant court that was originally competent to decide the dispute absent the arbitration agreement, and the first-degree court for purposes of enforcement.

It has been a matter of debate in the judgments of the Court of Appeal and the Court of Cassation, whether institutional

arbitration is international per se, particularly the arbitration held under the auspices of CRCICA. In 2019, the Court of Cassation drew a distinctive line in respect of the institutions whose arbitrations are deemed international.[143] The court held that, for institutions located in Egypt, their arbitrations are international only 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 clients 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, drew an example in the ICC in Paris. Arbitrations held under the auspices of institutions that do not fulfil either of these criteria are deemed national.

Constitution of the tribunal

Appointment of arbitrator: Application may be by an order rather than by a lawsuit

In a Court of Cassation judgment,[144] the court decided that, according to article 17 of the Arbitration Act, the request for appointment of an arbitrator shall be through a judgment rendered in a case that filed to the court and not through an order upon an application. The latter is much quicker as the order is granted or denied in the absence of the opponent. Therefore, issuance of an enforcement order appointing an arbitrator is considered null and void as a matter of public policy. However, the court decided that the order on application in question would be considered valid since it already achieved the goal of the procedures, which is to ensure due process, attendance of the parties and the opportunity that each party expresses its views. The approach adopted by the Court of Cassation might imply that appointment of an arbitrator could be made through an order on application; specifically in that the Court of Appeal judgment that was challenged was considered, by the Court of Cassation, to have reached a correct reasoning and the fact that the Court of Appeal accepted an application of an order on application to appoint the arbitrator in question.

Article 26 of Law No. 211 of 1994 requiring mandatory arbitration deemed unconstitutional

The Supreme Constitutional Court has considered article 26 of the Cotton Exporters Union Law No. 211 of 1994 to be unconstitutional.[145] The article stipulated that disputes between the cotton exporters union and buyers must be settled by means of arbitration. In 2019, the Cairo Court of Appeal has taken note of the judgment issued by the Supreme Constitutional Court, holding certain provisions of the Law No. 210 of 1994 unconstitutional and has annulled arbitral awards rendered in reliance of those same provisions.[146]

CRCICA in 2019

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 an international body enjoying judicial immunity in practicing its role as an arbitration institution and thus may not act as defendant in challenging its arbitration-related function.[147]

The total number of cases filed before CRCICA until 30 September 2019 was 1,354 cases. In the third quarter of 2019, 15 new cases were filed, demonstrating a slight increase in new cases when compared to the 13 new cases filed in third quarter of 2018.[148]

CRCICA's caseload in the third quarter of 2019 involved disputes related to construction, oil and gas, public–private partnership, media and entertainment, international sale of goods, tourism and hospitality, pharmaceuticals, telecommunications, and retail and real estate development. CRCICA has also highlighted that it has signed a total of 88 cooperation agreements with three new agreements in 2019, with the Nairobi Centre for International Arbitration, the Lagos Court of Arbitration and the Abu Dhabi Global Market.[149]

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.

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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, S.A. 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 (119) of Customs Law No. 66 of 1963.
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 Article (3) of Arbitration Act No. 27/1994.
11 High Administrative Court, Appeal No. 3623 JY 56.
12 Supreme Constitutional Court, Appeal No. 47 JY 31, Hearing Session dated 15 January 2012.
13 Court of Cassation Judgement, Challenge No. 8777 of 87 JY, dated 7 March 2018.
14 Cairo Court of Appeal, Challenge No. 53 JY 135, session dated 28 November 2018.
15 Cairo Court of Appeal, Circuit (7), Challenge No. 28 of JY 135, dated 6 February 2019.
16 Court of Cassation, Challenge No. 14126 of JY 88, dated 22 October 2019.
17 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.
18 Article 1 of Arbitration Act No. 27/1994.
19 Article 10(1) of Arbitration Act No. 27/1994.
20 Cairo Court of Appeal Judgment, Circuit 91 – Commercial, Case No. 95/ 120 JY, session dated 27/4/2005.
21 Article 10(2) of Arbitration Act No. 27/1994.
22 Article 10(3) of Arbitration Act No. 27/1994.

23 Court of Cassation Judgment, Challenge No. 495/72 J, session dated 13 January 2004.
24 Cairo Court of Appeal, Challenge No. 3 of 136 JY, session dated 27 May 2019.
25 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).
26 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.
27 Article 12 of Arbitration Act No. 27/1994.
28 Fathy Waly, *Arbitration Act in Theory and Practice*, 2014, p. 162.
29 Professor Mahmoud El Briery, *International Commercial Arbitration*, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 59.
30 Cairo Court of Appeal, Circuit (50), Challenge No. 59 of 135 JY, session dated 28 November 2018.
31 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.
32 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.
33 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.
34 Article 1 of the Arbitration Act as amended by Law No. 9/1997.
35 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.
36 Administrative Judiciary Court, Investment and Economics Disputes Section, 7th Section, Lawsuit No. 11492/65 JY, session dated 7 May 2011.
37 CRCICA Arbitration Case No. 676/2010, award dated 21/08/2011, Journal of Arab Arbitration, Issue No. 17, pp. 263-264.
38 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.
39 Id and also see Administrative Court Judgment No. 11492/65 JY, session dated 7 May 2011.
40 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.
41 Id and also see CRCICA Arbitration Case No. 464/2006, session dated 2 July 2006; CRCICA Arbitration Case No. 553/2007, session dated 5 November 2009 referred to in *Journal of Arab Arbitration*, Issue No. 13, December 2009, p. 237; CRCICA Arbitration Case No. 567/2008, session dated 12 September 2009 referred to in *Journal of Arab Arbitration*, Issue No. 13, December 2009, p. 237; CRCICA Arbitration Case No. 495/2006, award dated 17 May 2007, referred to in *Journal of Arab Arbitration*, Issue No. 12, pp. 121–123.
42 Id and also see CRCICA Arbitration Case No. 292/2002, session dated 29 May 2003 and CRCICA Arbitration Case No. 390/2004, session dated 12 March 2005 referred to in Walid Mohamed Abbas, *Arbitration in Administrative Disputes of Contractual Nature*, 2010, Dar El Gama'a El Gadida, pp222–223; CRCICA Case No. 676/2010, award dated 21 August 2011, *Journal of Arab Arbitration*, Issue No. 17, p. 262.
43 Id and also see CRCICA Arbitration Case No. 793/1201 (Ad Hoc) Award dated 18 July 2012, published in the *Journal of Arab Arbitration*, December 2012, Issue 19, p. 193, referred to in Fathy Waly, *Arbitration Act in Theory and Practice*, 2014, p. 138.
44 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.
45 Supreme Administrative Court-Unification of Principles Circuit, Challenge no. 8256 JY 56 dated March 5, 2016.
46 Supreme Constitutional Court, Appeal No. 1 JY 38, Hearing Session dated 6 May 2017.
47 Cairo Court of Appeal, Challenge no. 48 of 134 JY, dated 19 September 2018.
48 Fathy Waly, *Arbitration Act in Theory and Practice*, 2014, p.775.
49 Fathy Waly, *Arbitration Act in Theory and Practice*, 2014, p.775.
50 Supreme Constitutional Court, Judgment dated 15 January 2012, the Malicorp decision, referred to in Fathy Waly, *Arbitration Act in Theory and Practice*, p. 775.
51 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.
52 Article 15 of the Arbitration Act No. 27/1994.
53 Article 7(1) of CRCICA Rules.
54 Article 21 of the Arbitration Act No. 27/1994; Article 14(1) of CRCICA Rules.
55 Cairo Court of Appeal, Circuit (7), Challenge No. 38 of 135 JY, session dated 3 September 2018.
56 Cairo Court of Appeal, Challenge no. 71 of 131 JY, dated 4 March 2015.
57 Court of Appeal, Circuit (50), Challenge No 3 of JY 136, dated 30 January 2019.
58 Court of Cassation, Challenge no. 12459 of 85 JY, dated 1 June 2016.
59 Gary B Born, *International Arbitration: Law and Practice*, 2012, p. 142.
60 Article 21 of Arbitration Act No. 27/1994.
61 Article 14(2) of CRCICA Rules.
62 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.
63 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.
64 Cairo Court of Cassation, Case No. 2047 of 83 JY Session dated 26/05/2015.
65 Articles 18 and 19 of the Arbitration Act No. 27 of 1994.
66 Article 19(1) of the Arbitration Act No. 27/1994; Court of Cassation, Challenge No. 9568/79 JY, session dated 14 March 2011.
67 Article 13(6) of CRCICA Rules.
68 Court of Appeal, Circuit (62), challenge No. 73 of 134, session dated 4 April 2018.
69 Court of Appeal, Circuit (50), Challenge No 3 of JY 133, dated 30 January 2019.
70 Cairo Court of Appeal, Challenge no.37 of 131 JY, dated 4 March 2015.

71 Article 25 of the Arbitration Act No. 27 of 1994.
72 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.
73 Court of Cassation Appeal No. 145 of 74 JY, session dated 22 March 2011.
74 Prof Fathi Wali, *Arbitration in the Domestic and International Commercial Disputes*, 2014, p. 488.
75 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.
76 Article 46 of Arbitration Act No. 27/1994.
77 Cairo Court of Appeal, Circuit (91), Challenge No. 33 of 135 JY, session dated 12 August 2018.
78 Cairo Court of Appeal, Circuit (7), Challenge No. 20 of 135 JY, session dated 6 August 2018.
79 Cairo Court of Appeal, Circuit (18), Challenge No. 91 of 133 JY, session dated 13 May 2019.
80 Article 14 of Arbitration Act No. 27/1994.
81 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.
82 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.
83 Professor Mahmoud El Briery, *International Commercial Arbitration*, Fourth Edition 2010, Dar El Nahda El Arabi'a, pp. 516–517.
84 Article 45(2) of the Arbitration Act No. 27/1994.
85 Professor Mahmoud El Briery, *International Commercial Arbitration*, Fourth Edition 2010, Dar El Nahda El Arabi'a, p. 525.
86 Cairo Court of Appeal, Circuit (63), Challenge No. 1 of JY 135, dated 6 February 2019.
87 Article 8 of the Arbitration Act No. 27/1994; Court of Cassation, Challenge No. 3869/78 JY, session dated 23 April 2009.
88 Cairo Court of Appeal, Circuit (18), Challenge no. 27 of 135 JY, dated 13 May 2019.
89 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.
90 Court of Cassation, Challenge No. 10473 of JY 78, Session dated 16 November 2016.
91 Supreme Constitutional Court, Challenge No. 95 of 20 JY, session dated 11 May 2003.
92 Cairo Court of Appeal, Challenge no.78 of 131 JY, dated 4 May 2015.
93 Cairo Court of Appeal Judgment, Case No. 11, 12, 14/132 JY, Session dated 6 January 2016, the Bassem Youssef case.
94 Court of Cassation, Challenge no. 2698 of 86 JY, dated 13 March 2018.
95 Court of Cassation, Challenge No. 10132 of 78 JY, session dated 11 May 2010.
96 Court of Appeal Judgment, Case No. 2 of 132 JY, Session dated 3 February 2016.
97 Court of Cassation, Challenge No. 4715 and 4868 of JY 86, hearing session dated 18 January 2017.
98 Cairo Court of Appeal, Circuit (8), Challenge No. 48 of 134 JY, session dated 19 September 2018.
99 Cairo Court of Appeal, Challenge No. 39 of 130 JY, session dated 5 February 2014.
100 Court of Cassation, Challenge No. 6065 of 84 JY, session dated 4 November 2015.
101 Cairo Court of Appeal, Circuit (62), Challenge No. 39 of 130 JY, session dated 6 August 2018.
102 Court of Cassation, Challenge No. 18615 of JY 88, dated 10 December 2019.
103 Cairo Court of Appeal, Circuit (50), Application for Interpretation No. 310 of JY 135, dated 25 March 2019.
104 Cairo Court of Appeal, Circuit (91), Challenge No. 61 of JY 135, dated 14 May 2019.
105 Court of Cassation, Challenge no. 5162 of 79 JY, dated 21 January 2016.
106 Court of Cassation, Challenge no. 12459 of 85 JY, dated 1 June 2016.
107 Article 55 of Arbitration Act No. 27/1994.
108 Article 56 of Arbitration Act No. 27/1994.
109 Article 58 of Arbitration Act No. 27/1994.
110 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.
111 Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
112 Court of Cassation Judgment, Case No. 5000/78 JY, Session dated 6 April 2015.
113 Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
114 Court of Cassation, Challenge no. 7088 of 78 JY, dated 11 January 2016.
115 Court of Appeal, Circuit (50), Challenge No. 3 of 133 JY, session dated 28 August 2016.
116 Cairo Court of Appeal, Circuit (50), Challenge No. 17 of 135 JY, session dated 31 December 2018.
117 Cairo Court of Appeal, Circuit (7), Challenge No. 44 of 134 JY, session dated 9 May 2018.
118 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.'
119 Article 66 and Article 67of the Sports Law No.71 of 2017.
120 Article 70 of the Sports Law No.71 of 2017.
121 Article (38) of the Egyptian Sports Arbitration Centre Internal Regulations issued by the Egyptian Olympic Committee Decree No. 88 of 2017.
122 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.
123 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.
124 Cairo Court of Appeal, Circuit (50), Challenge No. 47 of 135 JY, session dated 25 November 2018.
125 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.
126 Article (38) of the Egyptian Sports Arbitration Centre Internal Regulations issued by the Egyptian Olympic Committee Decree No. 88 of 2017.
127 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.
128 The Supreme Constitutional Court Judgement, Challenge No. 130 of 34 JY, session dated 13 January 2018.
129 Court of Cassation, Challenge No. 1458 of JY 89, dated, 24 December 2019.
130 Court of Cassation, Challenge No. 1458 of JY 89, dated, 24 December 2019.
131 Court of Cassation, Challenge No. 1458 of JY 89, dated, 24 December 2019.
132 Article (6) of Prime Minister decree No. 1062 of 2019 reorganizing the rules governing the Supreme Committee for Advising on International Arbitration Cases.
133 Court of Cassation, Challenge No 10103 of JY 86, dated 23 April 2019.
134 Cairo Court of Appeal, Circuit (80), Challenge No. 69 of JY 134, session dated 26 February 2019.
135 Cairo Court of Appeal, Circuit (18), Challenge No. 92 of JY 135, dated 12 January 2019.
136 Cairo Court of Appeal, Circuit (7), Challenge No. 63 of JY 135, dated 9 January 2019.
137 Court of Cassation, Challenge No 10103 of JY 86, dated 23 April 2019.
138 Article (227) of the Egyptian Civil Code.
139 Article (226) of the Egyptian Civil Code.
140 Cairo Court of Appeal, Circuit (7), Challenge No. 28 of JY 135, dated 6 February 2019.
141 See also Cairo Court of Appeal, Circuit (7), Challenge No. 55 of JY 135, dated 6 February 2019.
142 Article (3) of Arbitration Act No. 27/1994.
143 Court of Cassation, Challenge No. 14126 of JY 88, dated 22 October 2019.
144 Court of Cassation, Challenge No. 145 & 221 of 74 JY, session dated 22 March 2011.
145 The Supreme Constitutional Court Judgement, Challenge No. 130 of 34 JY, session dated 13 January 2018.
146 Court of Appeal, Circuit (50), Challenge No. 5 of 136 JY, session dated 28 July 2019.
147 Cairo Court of Appeal, Circuit (7), Challenge No. 38 of 135 JY, session dated 3 September 2018.
148 http://news.crcica.org/2019/09/30/crcica-recent-caseload-hearing-at-the-crcica/.
149 http://news.crcica.org/2019/09/30/cooperation-agreements-concluded-across-the-globe-2/.

Amr Abbas
Matouk Bassiouny & Hennawy

Dr Amr A Abbas is a partner and the head of arbitration at Matouk Bassiouny. Dr Abbas is also a lecturer at the Faculty of Law, Cairo University. Dr Abbas' practice focuses on international commercial arbitration, international investment arbitration as well as competition and international trade disputes. Prior to joining Matouk Bassiouny, he worked with White & Case LLP and the World Bank in Washington, DC as well as Sharkawy & Sarhan and Ibrachy & Dermarkar law firms in Cairo. He has also acted as the legal adviser for the Egyptian Competition Authority. Dr Abbas is currently representing clients in Cairo Regional Centre for International Commercial Arbitration (CRCICA), International Chamber of Commerce and International Centre for the Settlement of Investment Disputes arbitrations and acting as co-arbitrator, sole arbitrator and presiding arbitrator in CRCICA and Abu Dhabi Commercial Conciliation and Arbitration Centre arbitration.

John Matouk
Matouk Bassiouny & Hennawy

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.

12 Mohamed Ali Genah
Garden City
Cairo
Egypt
Tel: +202 2796 2042
Fax: +202 2795 4221

John Matouk
john.matouk@matoukbassiouny.com

Amr Abbas
amr.abbas@matoukbassiouny.com

www.matoukbassiouny.com

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 four partners, two counsels and eight 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) 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

Nayla Comair-Obeid
Obeid Law Firm

Introduction

Lebanon is an arbitration-friendly jurisdiction. Its arbitration legislation is modern and embraces well-established principles of international arbitration. The Lebanese courts are also familiar with and supportive of the laws and practices 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 in order 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.

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 to make such 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 might be liable for his/her gross fault as it 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 or not 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]. It should be noted that 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 defense;
- 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;
- the free trade agreement between the European Free Trade Association States and Lebanon;
- the Organisation of Islamic Cooperation Agreement of 1981; and
- the Arab Investment Agreement of 1980.

In addition, Lebanon is a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[23]

The Lebanese Investment Law[24]

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.[25] It applies to investors willing to benefit from its provisions.[26]

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,[27] 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.[28] Under the Investment Law, a number of features pertaining to arbitration must be agreed upon in advance.

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[29] (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.[30]

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.[31]

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 in order 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.

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.[32] 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 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 Law no. 360 of 16 August 2001.
25 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.
26 Ibid.
27 '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.'
28 Article 18 of the Investment Law.
29 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).
30 Rania Ghanem, '11.8 billion promised at the Paris CEDRE Conference' (Businessnews.com.lb,6April2018) available at: http://www.businessnews.com.
31 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'.
32 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.

Nayla Comair-Obeid
Obeid Law Firm

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.

OBEID
LAW FIRM

Obeid Law Firm
Stratum Building
Omar Daouk Street
Beirut
Lebanon
Tel: +961 1 363 790
Fax: +961 1 363 791

Nayla Comair-Obeid
nayla@obeidlawfirm.com

www.obeidlawfirm.com

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

Filipe Vaz Pinto, Joana Galvão Teles and Paula Duarte Rocha
Morais Leitão, Galvão Teles, Soares da Silva & Associados and HRA Advogados

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.

Year	Foreign direct investment, net inflows (current balance of payments, US dollar)
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

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 to the increase of the foreign investment and the economic growth.

In any case, according to African Economic Outlook 2019, Africa's general economic performance continues to improve, with gross domestic product growth reaching an estimated 3.5 per cent in 2018, about the same as in 2017 and up 1.4 percentage points from the 2.1 per cent in 2016. Looking forward, African economic growth is projected to accelerate to 4 per cent in 2019 and 4.1 per cent in 2020. Mozambique will hopefully follow this trend.

Last year's economic performance 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 last year, corresponding to 6.8 per cent of the total revenue collected by the state in 2018 (211.9 billion meticais) and a decrease 62.4 per cent, compared to the 2017 record.

The low performance was due 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 of the banking sector and the result of international legal processes in the face of scandals of 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.

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 223(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 (New York Convention), which entered into force at 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 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 sectorial legislation ruling arbitration

Internal sources of legislation regarding arbitration are multiple and sometimes conflicting: there are general and sectorial laws, as well as private and administrative.

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 special framework of Rovuma Basin Project

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 relevant 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 the investors of mitigating the 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 such reform may occur in the near future, strengthening Mozambican pro-arbitration attitude.

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Filipe Vaz Pinto
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Joana Galvão Teles
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Filipe Vaz Pinto is a partner of Morais Leitão since 2014. He co-leads Morais Leitão litigation and arbitration department and focuses his practice on arbitration, particularly international arbitration.

He acts as counsel in domestic and international arbitrations in a variety of industry sectors, including aviation, banking, construction, defence, energy, food and beverage, infrastructures, insurance, media and advertising, mining, public–private partnerships, transfers of technology and trusts.

He is also regularly appointed as arbitrator.

Until recently, Filipe Vaz Pinto was a vice president of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry and is now a board member of the Portuguese Arbitration Association and of the International Chamber of Commerce (ICC) Arbitration Commission, as well as of the Executive Commission of the Portuguese Committee of ICC.

He regularly participates as a lecturer in postgraduate courses on arbitration and participates as a speaker in seminars and conferences.

He is listed by *Who's Who Legal: Arbitration* as 'Future Leader (Partner)'. In 2015, Filipe Vaz Pinto was awarded with the '40 under 40 award', organised by *Iberian Lawyer*, which distinguishes 40 lawyers under the age of 40 in Portugal and Spain.

Joana Galvão Teles is a managing associate and a member of the dispute resolution team, working in litigation and, essen-tially, in arbitration, including international arbitration and acting in a variety of industry sectors, including banking, con-struction, energy, infrastructures, insurance, public-private partnerships, transfers of technology, among others.

She participates, as counsel and as co-counsel with other foreign teams, in several international and national, institu-tional and ad hoc arbitrations (ICC, the Arbitration Centre of the Portuguese Chamber of Commerce and Industry and several ad hoc international and national arbitrations) for international and national clients.

Joana is a member of Morais Leitão's Africa team, actively participating in international arbitrations and also in the nego-tiation and inclusion of arbitration clauses in Mozambique and in Angola, acting for international clients.

She regularly participates as lecturer in postgraduate courses on arbitration and as speaker in several seminars and confer-ences in the field of arbitration.

She is listed by *Who's Who Legal: Arbitration* as 'Future Leader (Non-Partner)'.

MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

Rua Castilho 165
1070-050 Lisboa
Portugal
Tel +351 21 381 74 00
Fax +351 21 381 74 99

Filipe Vaz Pinto
fvpinto@mlgts.pt

Joana Galvão Teles
joanagteles@mlgts.pt

www.mlgts.pt

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

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 lo-cal firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advoga-dos), Hong Kong and Macau (MdME Lawyers) and Mozambique (HRA Advogados).

The Morais Leitão international arbitration team focuses on arbitra-tion 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 lan-guages, 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
HRA Advogados

Paula Duarte Rocha is a partner with 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 nation-al and foreign investors, as well as national and foreign private companies.

Paula is a registered arbitrator with the Mozambican Centre for Arbitration, Conciliation and Mediation (since 2002) with relevant experience in commercial arbitration, as a nominated arbitrator by the parties and as chairman of the Arbitral Tribunal, and was the IBA Tax Reporter for Mozambique (2012–2014).

Paula was president of the Training and Bar Access Examination Committee of the Mozambique Bar Association (2014–2016) and is a member of the National Council of the Mozambique Bar Association (since 2016).

She is listed by *Who's Who Legal: Project Finance* as 'Future Leader (Partner)'.

HRA
ADVOGADOS

Avenida Marginal, 141
Torres Rani, Torre de Escritórios, 8.º piso
Maputo - Moçambique
Tel +258 21 344 000
Fax +258 21 344 099

Paula Duarte Rocha
pdrocha@hrlegalcircle.com

www.hrlegalcircle.com

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

Introduction

Arbitration as a means of settling of commercial disputes has continued to gain prominence in Nigeria. Recent judicial decisions from Nigerian courts indicate that the courts in Nigeria are maintaining a supportive approach to arbitration and are committed to ensuring that parties who have agreed to submit their disputes to arbitration are held to their bargain and not allowed to either resile from their agreement when it seems inconvenient or to attack the resulting arbitral award on frivolous grounds usually dressed up as grounds of misconduct.

In this chapter, we will examine some of the decisions of the Nigerian courts in 2019 and their significance to the law and practice of arbitration in Nigeria. While some of the decisions reiterate settled principles of Nigerian law relating to arbitration, some of them opened new dimensions of discussions in relation to the specific subject matter. Yet again, some of the decisions could and should indeed serve as a guiding tool or compass to parties who wish to enter into contracts with arbitration clauses, in situations or circumstances where Nigeria would be either the seat of the arbitration or the agreement would be governed by Nigerian law.

Challenging an arbitrator

Nigerian National Petroleum Corporation v Total E & P Nigeria Limited and 3 Others[1]

Summary of facts

In this case, the applicant, the Nigerian National Petroleum Corporation[2] (NNPC) and the respondents entered into a production sharing contract (PSC) whereby they lifted and shared crude oil. In the year 2014, the respondents alleged that the NNPC lifted crude oil in excess of its entitlement as contained in the production sharing contract terms. On the 16 June 2015, the respondents issued a notice of arbitration to the NNPC in respect of the alleged breach. Following that, the NNPC and the respondents appointed arbitrators, both of whom then appointed Dr Wolfgang Peter as the chairman of the tribunal. The parties also agreed that the venue of the substantive hearing would be in Lagos, Nigeria.

A procedural timetable was also drawn up to govern the proceedings. The NNPC did not file its papers according to the timetable, did not pay their own share of the costs of the arbitration and did not notify the tribunal of the reason for the default. It was not until the tribunal invited the NNPC to explain the reason for these delays that it applied for an extension of time to file its papers with reasons. Although the respondents objected to the NNPC's application for extension of time, the tribunal directed that no further correspondence was required on the issue of extension and granted the NNPC five weeks to file its statement of defence.

The NNPC then filed an application challenging the impartiality of Dr Wolfgang Peter and requesting also that the other members of the tribunal be removed or, alternatively, terminating their mandate. The NNPC alleged that Dr Wolfgang failed to make certain disclosures upon his appointment regarding his relationship with it (the NNPC) and considered him to be biased and partial. On the 15 February 2018, the tribunal published its decision on the challenges made by the NNPC and dismissed the objection.

The NNPC thereafter filed an application in the Federal High Court seeking an order of the court disqualifying Dr Wolfgang Peter from acting as the presiding arbitrator, terminating the mandate of Dr Wolfgang Peter or setting aside the interlocutory award of the arbitral tribunal made by the arbitral tribunal comprising Dr Wolfgang Peter with Stephen L Drymer and AB Mahmoud SAN on the wings.

The grounds of the application were that Dr Wolfgang Peter is the founding partner of a law firm known as Python & Peter and that that since 1997 the law firm of Python & Peter had become involved in the representation of Interocean Oil Development Company Nigeria and Interocean Oil Exploration Company Nigeria against the NNPC, which culminated in an investment arbitration at the International Centre for Settlement Disputes (ICSID) against the Federal Republic of Nigeria in ICSID Case No. Arb/13/20. It was argued that the said ICSID arbitration was, in reality, against the NNPC only and that the Federal Government of Nigeria was the party of record because it was an ICSID arbitration; that Dr. Wolfgang Peter was fully abreast and part of the matter and indeed participated as one of the counsel in the said investment arbitration; that Dr Wolgang Peter deliberately made a vague disclosure where he described a Jacques L Jones of his firm as 'of counsel' and that Jaques L. Jones has a stake in Interocean Oil Development Company Nigeria (the claimant in the ICSID arbitration) and gave evidence as the principal witness in the investment arbitration. The NNPC argued that the facts basing the challenge were discovered by the NNPC in December 2016 and that they gave rise to justifiable doubts as to Dr Wolfgang's impartiality in the arbitration.

Other grounds in support of the application were that on 19 January 2017, the NNPC applied for oral hearing of its challenge in Lagos and that although the respondents initially opposed the request for an in-person or oral hearing in Lagos and proposed instead a hearing via video conference, they subsequently withdrew their objections and agreed to the request for an in-person hearing in Lagos or anywhere else. However, an order made on 6 September 2017 by the arbitral tribunal refused the NNPC's request for an in-person hearing in Lagos or anywhere else and gave the parties the opportunity to make summary oral submissions during a hearing to be held by video conference or conference call. Then, by a procedural order made on 15 February 2018, the arbitral tribunal dismissed the NNPC's challenge applications, thereby evincing bias and partiality. Based on the foregoing grounds, the NNPC stated that it had lost confidence in the arbitral tribunal.

In its decision, the Federal High Court noted that section 9(3) of the Arbitration and Conciliation Act[3] (ACA) provides that

unless the arbitrator who has been challenged withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. The court further noted that article 12(1) of the arbitration rules contained in the first schedule to the ACA provides that, where an arbitrator is challenged and the challenged arbitrator does not withdraw and the other party does not accept the challenge, then the challenge shall be decided by:

- the court where the arbitrator was appointed by the court;
- the appointing authority, if the appointment was made by an appointing authority; or
- in all other cases, the appointment shall be made by the court.

The court noted that the arbitration agreement between the parties did not contain any provision on the procedure for challenging an arbitrator and did not also refer to the Arbitration and Conciliation Rules. The court took the view that while section 9(3) of the ACA and article 12(1) of the Arbitration Rules are complementary rather than in conflict, section 9(3) being a substantive provision in the ACA itself, would prevail even of both provisions were to be in conflict. The court then concluded that it was the section 9(3) that governed the challenge in this case.

Based on the foregoing, the court held that, since the arbitral tribunal had already decided the challenge in its decision of 15 February 2018, the decision was final and binding on the parties and that the ACA has not given court the power to review such a decision. On this basis the court declined jurisdiction to determine the merits of the challenge.

Comments

The case draws attention to the apparent conflict[4] between the provisions contained in section 9(3) of the ACA and article 12(1) of the Arbitration Rules that are scheduled after the ACA, and the need for parties to consider indicating in their arbitration agreement which of the two provisions should apply in the case of a challenge to an arbitrator or to the entire arbitral tribunal. The implication of the court's decision is that the provisions of section 9(2) of the ACA would become the default challenge procedure where the parties have not agreed a challenge procedure, which is just as well given that, in this event, the challenge would be decided by the arbitral tribunal rather than the courts were article 12(1) to apply.[5]

It is to be noted that the court declined jurisdiction to entertain the NNPC's challenge application on the grounds that the ACA has vested the tribunal with the jurisdiction to determine arbitrator challenge in circumstance where, as in this case, the arbitration agreement did not contain a procedure for challenging the appointment of an arbitrator and has not given the court the jurisdiction to review or second guess the tribunal's decision on that issue. According to the Federal High Court:

> *the position that the decision of the arbitral tribunal on a challenge to its authority is final is a deliberate policy choice, and indeed done to demonstrate the wider policy of zero or minimal judicial intervention in arbitration, and to deny parties the utilization of the courts to scuttle the arbitration contract which they have freely entered into.*

The court's decision is a welcome development and echoes the policy of minimal judicial intervention in arbitration matters that is encapsulated in section 34 of the ACA, which provides that a court shall not intervene in any matter governed by the ACA except where so provided in the act.

Felak Concept Ltd v A-G, Akwa Ibom State[6]

Summary of the facts

In this case, the appellant, Felak Concept Limited (FCL) had placed adverts in some national newspapers raising a caveat against the attempt by the Akwa Ibom state government of Nigeria (AKSG) to appoint a transaction adviser or project consultant for the third phase of the Ibom Deep Seaport Project, a project being executed by the AKSG in partnership with the federal government of Nigeria, and in respect of which FCL was a consultant or transaction adviser. The attorney-general of the AKSG, who was the respondent in the appeal, then approached the High Court of Akwa Ibom State (the trial court) and obtained interim injunctive reliefs against FCL contending, inter alia, that the contract with FCL had a lifespan of 16 weeks, which had expired without being renewed, and that the implications of the emerging controversy for the said project were dire and irreparable. On being served with the writ of summons and the interim injunctive orders, FCL approached the trial court with an application seeking:

- to set aside the interim injunctive orders granted against it on the grounds that the trial court lacked jurisdiction;
- an order referring the dispute between the parties to arbitration; and
- an order of stay of proceedings pending arbitral proceedings.

The application was opposed by the AKSG and, after taking arguments from the both parties, the trial court refused the application. FCL was aggrieved and appealed to the Court of Appeal. At the Court of Appeal, it was considered whether the trial court was right to have refused the application of the appellant to discharge the interim orders of injunction, to grant stay of further proceedings and refer the dispute between the parties to arbitration in line with the provision of clause 9.1 of the consultancy agreement between the parties. Clause 9.1 of the consultancy agreement provided that:

> *Any dispute arising between the parties hereto from the execution of this agreement, which cannot be mutually settled, shall be resolved in accordance with the Arbitration Law applicable in Akwa Ibom State and each party shall bear the cost of arbitration.*

However, clause 9.2 provided that

> *Notwithstanding provisions of paragraph 1 above either party may apply to a court of competent jurisdiction for settlement.*

FCL argued that the refusal of the trial court to stay proceedings in the suit instituted by the respondent and to refer the suit to arbitration was in breach of the arbitration agreement contained in clause 9.1 of the consultancy agreement between the parties, as well as section 5 of the ACA. FCL further argued that the right of a party to litigation, irrespective of an arbitration clause, is automatic and need not be specifically set out as was done in clause 9.2, as arbitration does not oust the jurisdiction of a court but merely puts it in abeyance pending the outcome of the arbitration. Once parties agree to resolve their disputes by arbitration, FCL argued, a saving clause which preserves the right to litigation as in clause 9.2 must be construed to preserve the primacy of arbitration clause. FCL urged the Court of Appeal to hold that the effect of clauses 9.1 and 9.2 of the consultancy agreement was that any disputes arising thereunder must be resolved by arbitration. FCL finally contended (in relation to arbitration) that the trial court ought to have granted stay of proceedings in the suit as envisaged

by section 5 of the ACA and that it met all the conditions precedent to the grant of stay of proceedings in the application before the trial court, while the respondent failed to establish any reasons why the matter should not be referred to arbitration. Finally, FCL urged the Court of Appeal to set aside the decision of the trial court and grant a stay of proceedings pending arbitration.

In response to FCL's submission, the AKSG submitted that from the construction of clauses 9.1 and 9.2 of the consultancy agreement it would be seen that the parties had no binding arbitration clause as found by the trial court; that the word 'notwithstanding' contained in clause 9.2 completely neutralised the arbitration agreement in clause 9.1 and thereby gave unfettered right to the respondent to commence the action.

The court's decision

The Court of Appeal reviewed earlier cases on the binding nature of an arbitration clause and held that to be binding, an arbitration clause must be mandatory, precise and unequivocal. The court also held that a court is bound to stay proceedings in favour of arbitration unless it is satisfied that there is sufficient reason to justify the refusal to refer the dispute to arbitration. The Court of Appeal took the position that the word 'notwithstanding' used in clause 9.2 of the consultancy agreement had the effect of excluding or neutralising the the arbitration agreement comprised in the preceding clause 9.1. According to the court:

> *While litigation may be open to parties and need not be stated in contracts between parties as contended by the appellant, the presence of an arbitration clause would have superceded litigation but by expressly subjugating arbitration to litigation, the parties herein by their own hands stated their preference and it is not for the courts to contradict them simply to promote arbitration.*

Comments

The arbitration agreement contained in clause 9.1 of the consultancy agreement was a specie of a 'pathological arbitration clause'. The arbitration agreement was, for that reason, ineffective and unworkable having provided for arbitration and litigation at the same time but with primacy given to litigation.

The decision above emphasises the need for parties to be much more circumspect in expressing their intention to resort to or their preference for arbitration rather than litigation. As demonstrated in the case under discourse, the presence of an arbitration clause simpliciter will not move a court to order a stay of proceedings. The court will look at the relevant arbitration clause in conjunction with other clauses to determine whether such clause is mandatory, precise and unequivocal. Where it is found that an arbitration clause is not mandatory, precise and unequivocal, or has been made subject to another clause which demonstrates the preference of the parties for another form of dispute resolution such as litigation, the party who seeks a stay of proceedings pending arbitration will be unsuccessful in such application. It has been said that equivocation is a cardinal sin when drafting an arbitration clause.

> *If the parties want arbitration, they should say so clearly. Some negotiators seem to believe that they can remain in limbo, poised timorously somewhere between arbitration and ordinary court action and not needing to strike out on one path or the other until a dispute arises. This is a fallacy. If the arbitration clause does not exclude recourse to the jurisdiction of the ordinary courts, one simply cannot rely on the arbitration agreement.*[7]

This decision therefore underscores the need for parties who intend to refer their commercial disputes to arbitration, rather than litigation, to carefully think through their choice of arbitration clause with a view to ensuring that such clause is enforceable and does not suffer from a pathological defect that would render it ambiguous and unenforceable.

Mekwunye v Imoukhuede[8]

Summary of the facts

In this case, Mr Charles Mekwunye (the appellant), as landlord, and Mr Christian Imoukhuede (the respondent), as tenant, entered into a tenancy agreement containing an arbitration clause. Clause 3(c) of the tenancy agreement between the parties provided inter alia that:

> *…any conflict and/or disagreement arising out of these presents… shall be referred to a sole Arbitrator that shall be appointed by the President of the Chartered Institute of Arbitrators, London Nigeria Chapter…*

A dispute arose between the parties and the appellant requested the President of the Chartered Institute of Arbitrators (UK) Nigerian Branch to appoint an arbitrator. They appointed a sole arbitrator to determine the dispute between the parties. Upon the appointment of the arbitrator, the respondent protested and challenged the arbitration but subsequently withdrew his objections and participated in the proceedings. An award was made against the respondent who applied to the High Court to set aside the award. The Court of Appeal overturned the decision of the High Court and set aside the award on the grounds, among others, that the notice of arbitration was defective.

The appellant, as the award creditor, prosecuted further appeal to the Supreme Court. At the Supreme Court, the contention of the respondent were that the notice of arbitration was defective in that it did not comply with the requirements of article 3(3) of the Arbitration Rules made pursuant to the ACA. Specifically, the respondent contended that the notice of arbitration failed to indicate:

- the general nature of the claim;
- the amount involved; and
- the relief or remedy sought as contained under sub-paragraphs (e) and (f) of article 3(3) of the Arbitration Rules.

Other grounds on which the respondent sought to have the award set aside were that the 'Chartered Institute of Arbitrators, London Nigeria Chapter', is a non-existent body and therefore the arbitration agreement was unenforceable; that the parties to the arbitration ought to have been involved in the appointment of the sole arbitrator and that the arbitrator was guilty of misconduct by delegating her duties to a third party when she wrote to the parties on the letterhead of her law firm rather than her personal letterhead.

The court's decision

On the issue of the notice of arbitration not complying with the provisions of article 3(3) (e) and (f) of the Arbitration Rules, the Supreme Court held that the notice of arbitration met the condition precedent required to commence an arbitration under the ACA. The court held that the respondent could not feign ignorance of the general nature of the claim, the amount involved or the relief or remedies sought by the appellant particularly because the notice of arbitration had attached to it every necessary and available document regarding the claim. The court also held that

even if the notice of arbitration did not comply strictly with the requirements of article 3 (3) (e) and (f) of the Arbitration Rules, that there was substantial compliance with the law and that the doctrine of substantial compliance meant that the technical failure that does not amount to substantial deviation from the statute would be overlooked. Furthermore, the court held that the respondent had waived any rights that he might have had to challenge the award because he participated in the proceedings and withdrew his initial objections to the proceedings.

On the respondent's contention that the arbitration agreement was unenforceable because it referred to a non-existing body, the Supreme Court restored and upheld the High Court's decision, which had described the error as a matter of semantics. According to the Supreme Court:

> *there is no doubt that there was an error in the name as contained in clause 3(c) of the arbitration agreement wherein reference was made to the President of the Chartered Institute of Arbitration (London) Nigerian Chapter instead of the Chairman of the Chartered Institute of Arbitrators (United Kingdom) Nigeria Branch.*

However, the court also noted that in the appellant's letter of request dated 5 August, 2005, the appointing authority was properly referred to and described. The court held that the trial court was right to have given effect to the intention of the parties, as there was no evidence that the respondent was misled by the error or that he was in doubt as to who the appointing authority was.

On the issue of alleged misconduct on the ground that the sole arbitrator wrote a letter dated 7 May 2006 on the letterhead of her law firm, Sola Ajilola & Co, the Supreme Court described the decision of the Court of Appeal, which set aside the award on this ground, as a technicality taken too far. The court held that what happened did not amount to a delegation of the arbitrator's duties to another person, particularly because the law firm of Sola Ajilola & Co does not enjoy a separate legal personality from its owner.

Finally, on the issue of whether the parties to the arbitration ought to have been involved in appointing the sole arbitrator after vesting the power to appoint him in an appointing authority, the Supreme Court held that the Court of Appeal went outside the express agreement of the parties and in fact made a new agreement for them when it held that the two parties must have a say in the appointment of the arbitrator even after delegating that function to a third party in their arbitration agreement. The court also held, on this point, that the respondent participated in the arbitration proceedings and failed to utilise all the available provisions under the ACA to ventilate any grievances that he had regarding the appointment of the arbitrator.[9]

The Supreme Court held on this issue that the notice of arbitration complied with all the required conditions precedent to the commencement of arbitration. Having received the notice of arbitration, the court held that the respondent could not feign ignorance of the general nature of the claim and an indication of the amount involved, if any and the relief or remedy sought as contained under (e) and (f) in article 3(3) of the Arbitration Rules. Moreover, the appellant in the said notice attached every document and information available and necessary for the use of the respondent. The court further held that even if the condition precedent was not fulfilled, there was substantial compliance. The court further held that the respondent waived the right to challenge and object to any irregularity and non-compliance to the commencement of the arbitration proceeding and was therefore bound by section 33 of the ACA.[10]

Comments

Interpretation of pathological arbitration clauses

The decision of the Supreme Court in this case laid down several important principles in relation to the interpretation of an arbitration agreement and the attitude of the court to pathological arbitration clauses. The court emphasised the need to give effect to the intention of the parties to refer their dispute to arbitration rather than adopt an approach that would defeat their intention even where the arbitration agreement suffers from some defects. The court held that, having regard to the fact that Nigeria is an arbitration friendly jurisdiction, the approach of the trial court in giving effect to the intention of the parties, notwithstanding the defective clause, is the correct approach. According to the court:

> *It defeats the purpose of an agreement to refer a dispute to arbitration, if, after fully participating therein, a party is allowed to raise technical objections to defeat the award.*

It is our view that although the court's decision on this point was clearly influenced by the fact that the respondent raised the issue of the pathological defect in the arbitration clause only after he had participated in the arbitral proceedings, the principle laid down by the court, being the highest court in the land, will permeate through and cascade down the judicial hierarchy and applied even where an objection is raised at the early stages of an arbitration.

Attitude to non-material defects in a notice of arbitration and frivolous misconduct allegations

Other important takeaways from the decision include the point that the courts will not allow non-material defects in the process of commencing an arbitration, particularly in the notice of arbitration to defeat the parties' intention to refer their dispute to arbitration and that frivolous allegations of misconduct cannot be used by a disgruntled award debtor to set aside an award. The court held that the respondent was merely 'clinging to some technical strings' in relation to his allegations that the notice of arbitration was faulty and did not meet the requirements of the law. The court described the decision of the Court of Appeal, that the arbitrator misconducted herself and delegated her duties to a third party, as a 'technicality taken too far clearly leading to a perverse decision as substantial justice was sacrificed for the trivial'.

Delegating appointment function to an appointing authority: You cannot eat your cake and have it

Finally, the decision shows that where, as in this case, the parties have agreed to a third party appointing their arbitrators, any grievances regarding the appointment of the arbitrator must be raised at the earliest opportunity. A party cannot be allowed to participate fully in an arbitration and then turn around to argue that the appointment of the arbitrator was irregular or that he was not consulted.

Conclusion

The recent decisions of Nigerian courts discussed above show the attitude of Nigerian courts to arbitration, which is encapsulated in the judgment of the Supreme Court in the case of *Mekwunye v Imoukhuede* – where the court declared that Nigeria is an arbitration friendly jurisdiction. The Federal High Court decision in the case of *NNPC v. Total E & P Nigeria Limited and others* further

shows that the court reached its decision not to decide the merits of the NNPC's application based on what the court described as a deliberate policy choice, intended to demonstrate the wider policy of zero or minimal judicial intervention in arbitration and to deny parties the utilisation of the courts to scuttle the arbitration contracts which they have freely entered into. Finally, the case of *Felak Concept Ltd v A-G, Akwa Ibom State* shows that, while Nigerian courts will give effect to parties' agreement to refer their dispute to arbitration, they would not enforce an irredeemably defective pathological clause such as one where the parties are poised timorously between arbitration and the courts.

Notes

1 Unreported Judgment of the Federal High Court of Nigeria (Abuja Division) per Hon. Justice (Dr.) Nnamdi Dimgba delivered on 1st March 2019. The other respondents were: Esso Exploration and Production Nigeria (Offshore East) Limited, Chevron Petroleum Nigeria Limited and Nexen Petroleum Nigeria Limited.

2 NNPC is the Nigerian state-owned oil corporation.

3 Chapter A18 Laws of the Federation of Nigeria 2004 compilation.

4 Although the court thought that the two provisions were not in conflict with each other but were complementary, we think otherwise. There is an obvious conflict between the two provisions. The court was, however, right in its decision that even if they were in conflict, the provisions of Section 9(3) would prevail. Indeed Article 1 of the Rules actually recognises that the Rules are subservient to the ACA in the case of conflict. Art. 1 declares: 'These Rules shall govern any arbitration proceedings except that where any of the Rules is in conflict with a provision of this Act, the provision of this Act shall prevail.'

5 It is to be noted that challenge procedure set out under Section 9 of the ACA relate to domestic arbitration. The challenge procedure in relation to international commercial arbitration is set out in Section 45 of the ACA. While both provisions are substantially the same, there is however a marked difference in relation to who decides a challenge. Section 44(9) of the ACA provides that if the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by: (a) an appointing authority, if the initial appointment was made by an appointing authority (b) an appointing authority even where the initial appointment was not made by an appointing authority although one has been previously designated by the parties and (c) in all other cases by an appointing authority to be designated in accordance with the procedure for designating an appointing authority as provide for in section 44 of the Act.

6 (2019) 8 NWLR (Part 1675) 433.

7 W. Laurence Craig, William W. Park and Jan Paulson, *International Chamber of Commerce Arbitration* , Second Edition, page 158, para. 9.02.

8 (2019) 13 NWLR (Pt. 1690) 439.

9 Such provisions include Section 7(3) which allows a party to request the court to take the necessary measure where, a third party, including an institution, fails to perform any duty imposed on it under the appointment procedure agreed by the parties; Sections 8 and 9 which provides the procedure for challenging an arbitrator.

10 Section 33 of the ACA provides that: 'A party who knows – (a) that any provision of this Act from which the parties may not derogate; or (b) that any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance within the time limit provided shall be deemed to have waived his right to object to the non-compliance.'

Uzoma Azikiwe
Udo Udoma & Belo-Osagie

Uzoma Azikiwe is a partner and the head of the Udo Udoma & Belo-Osagie's litigation, arbitration and alternative dispute resolution team. 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, 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 benefitted 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.

Festus Onyia
Udo Udoma & Belo-Osagie

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.

UDO UDOMA & BELO-OSAGIE

St. Nicholas House (12th Floor), Catholic Mission Street
Lagos, Nigeria
Tel: +234 1 4622307
Fax: +234 1 4622311

Uzoma Azikiwe
uzoma.azikiwe@uubo.org

Festus Onyia
festus.onyia@uubo.org

www.uubo.org

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.

Qatar

Thomas Williams, Ahmed Durrani and Umang Singh
Sultan Al-Abdulla & Partners

Introduction

Insolvency law is at the intersection of all areas of legal practice.[1] This is particularly the case in international arbitration, where the insolvency regime in one of the parties' home jurisdictions may become relevant, irrespective of the nature of the underlying dispute between them; and there are common issues that arise when insolvency law and international arbitration cross paths.

This chapter considers one of these issues: the effect of foreign insolvency legislation and judgments on arbitrations seated in other jurisdictions. In particular, the chapter addresses whether the moratorium prescribed by section 14 of the Indian Insolvency and Bankruptcy Code 2016 (the IBC) applies to a Qatar-seated arbitration brought against the Qatari branch of an Indian company which is insolvent in India under the IBC. With reference to a recent decision in a Qatar-seated ICC arbitration involving such a party, this chapter concludes that the moratorium does not apply.

This is an issue of considerable importance because of the large number of Indian nationals and Indian companies in Qatar, and the widespread use of arbitration in this jurisdiction. Indeed, Indian nationals make up the largest expatriate community in Qatar and account for almost a quarter of its population.[2] Indian businesses play a significant part in the Qatari economy. In an estimate issued in 2017 by the then Indian Ambassador to Qatar, the number of Indian firms working in partnership with Qatari entities exceeded 6,000, while two dozen Qatari companies are fully owned by Indian nationals or entities[3] and some of these entities have been involved in major projects in Qatar, including projects relating to the FIFA World Cup 2022. As a result, disputes frequently arise between Qatari companies and Indian entities based in Qatar, and those disputes are often referred to Qatar-seated arbitration. The interplay between Qatari and Indian law is therefore regularly engaged in the context of arbitrations, and it is expected that the advent of the IBC will make this all the more prevalent.

The scheme under the IBC

Section 14 of the IBC prescribes a moratorium to be imposed on the initiation and continuation of litigation and arbitrations during the pendency of insolvency proceedings in India (the Moratorium). Section 14 states:

> *(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: –*
>
> *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
>
> *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
>
> *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
>
> *(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*
>
> *(3) The provisions of sub-section (1) shall not apply to –*
>
> *(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*
>
> *(b) a surety in a contract of guarantee to a corporate debtor.*
>
> *(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*
>
> *Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*

In other words, the Moratorium prohibits both the initiation and continuation of proceedings against an insolvent company, as well as other adverse measures such as the transfer or disposal of its assets, actions to foreclose security and the recovery of property in its possession. It is aimed at providing a buffer period during the insolvency process, whereby the insolvent company is in a position to engage in that process without the risk of facing new claims or the enforcement of earlier judgments or awards. The Moratorium is valid until a resolution plan (a scheme proposed by a potential buyer to salvage the insolvent company) is accepted by the adjudicating authority (the National Company Law Tribunal), or when it orders the liquidation of the company. Therefore, it is likely that the imposition of the Moratorium will be a relevant consideration for commercial creditors who are suing or looking to sue insolvent Indian companies within or outside India.

However, section 14 does not itself distinguish between domestic and foreign proceedings. The extra-territorial effect of that section is addressed by other provisions of the IBC, discussed below.

Section 1 of the IBC states:

> *1. Short title, extent and commencement. –*
>
> *(1) This Code may be called the Insolvency and Bankruptcy Code, 2016.*
>
> *(2) It extends to the whole of India:*
>
> *Provided that Part III of this Code shall not extend to the state of Jammu and Kashmir.*

Although the default position is that the IBC's application is restricted to India, the IBC also specifically recognises

the contingency that may arise in relation to its cross-border application. Section 234 provides for the possibility of a treaty and agreement-based approach as between India and foreign countries for international recognition and enforcement of its provisions. That section states:

> *234. Arrangements with foreign countries. –*
> *(1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.*
> *(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.*
>
> *235. Letter of request to a country outside India in certain cases. –*
> *(1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.*
> *(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request.*

It is understood that sections 234 and 235 are aimed at facilitating the National Company Law Tribunal in taking control over the assets of an insolvent company in a foreign jurisdiction. This can be done through a letter of request to the appropriate court of authority in that country, but this is subject to the existence of a treaty or agreement between that country and India.

Case study

A Qatari entity (the Claimant) initiated an ICC arbitration against the Qatari branch of an Indian entity (the Respondent) for the recovery of outstanding payments due under a contract. The substantive law of the contract was Qatari law and the seat of arbitration was Doha, Qatar.

During the course of the arbitration proceedings, the National Company Law Tribunal made an order admitting the Respondent into insolvency in India further to the provisions of the IBC. This led to the suspension of its board of directors; the appointment of an insolvency practitioner (called a resolution professional under the IBC) to handle its affairs; and, most relevantly for the purposes of this chapter, the Moratorium was imposed.

The Respondent then applied to the Tribunal for an order placing the arbitration in abeyance. The Respondent's application was based on section 14 of the IBC: as a result of the Moratorium, the Respondent claimed it would be detrimental to it and its creditors if the arbitration were allowed to continue. Anticipating that there would be an issue as to the IBC's applicability to a Qatar-seated arbitration, the Respondent also sought to rely on the Qatari Civil and Commercial Procedures Code (Law No. 13 of 1990) (the Qatari Civil Procedures Law) to argue that the Moratorium did so apply. Its position was based on articles 379 and 381 of the Qatari Civil Procedures Law, which provide:

> *379. Judgments and orders passed in a foreign country may be ordered for execution within the State of Qatar under the same conditions provided for in the law of the said foreign country for the execution of judgments and orders passed in the State.*
>
> *A request of the execution of order shall be made by summoning the litigant to appear before the judge of execution of the Higher Civil Court in compliance with the normal procedures of filing a lawsuit.*
>
> *381. The provisions of the preceding two Articles shall apply to the arbitration decisions passed in a foreign country. Arbitration decisions shall be passed on a matter which may be decided on by arbitration according to the laws of the State of Qatar.*

However, the Claimant resisted the Respondent's application for the reason that, although the IBC (and the Moratorium) applied in India, it did not apply in Qatar:

- Pursuant to section 234 of the IBC, to extend the application of the IBC (and the Moratorium) to Qatar, there would have to be an agreement or treaty between Qatar and India. Such an agreement or treaty does not exist and therefore the IBC only applies in India, further to section 1.
- The Claimant also argued that principles of comity would not apply: the terms of the order made by the National Company Law Tribunal were such that it did not intend that the Moratorium should have effect in Qatar, nor (in the absence of a relevant treaty or agreement under section 234) did it have the power to extend the operation of the Moratorium to Qatar.

The Claimant also denied the relevance of articles 379 and 381 of the Qatari Civil Procedures Law cited by the Respondent.

- Under article 379, the Qatari courts have the power to enforce judgments and orders of a foreign country only if that foreign country has a reciprocal enforcement arrangement with Qatar. India is not a reciprocal country for the enforcement of judgments of Qatari courts, and therefore orders of Indian courts and tribunals (including the National Company Law Tribunal) have no legal effect in Qatar.
- Article 381 does not apply to the enforcement of the Moratorium, as it merely prescribes a mechanism for the enforcement of foreign arbitral awards in Qatar.

In its decision, the Tribunal framed the issues for its consideration as being 'whether and under what conditions, [the] rules of an insolvent party's home jurisdiction, providing for the stay of arbitral proceedings or the non-arbitrability of claims against an insolvent party should be given effect in other jurisdictions'; and whether a Moratorium adversely impacted 'a Qatar-seated international arbitration that has been agreed to by the Respondent'.

The Tribunal had to consider two competing objectives: on the one hand, the wish of the Claimant to resolve its dispute expeditiously and, on the other, the Respondent's desire that the proceedings be stayed to allow its orderly reorganisation under the IBC. However, having noted the absence of any treaty or agreement between India and Qatar to extend the operation of the IBC to Qatar, the Tribunal held that the Moratorium did not apply to the arbitration, and therefore refused a stay.

In reaching its decision, the Tribunal took guidance from leading practitioners and scholars such as Gary Born and Stefan Michael Kroll. Mr Born (2014) is of the view that:

> *International arbitral proceedings occasionally present the question whether rules in an insolvent party's home jurisdiction, providing for the invalidity of arbitration agreements or non-arbitrability of claims of an insolvent entity, should be given effect in other jurisdictions.* […] *Although different courts have reached different results, both national courts and arbitral tribunals have generally been reluctant to give automatic effect to foreign bankruptcy legislation that forbids arbitration by an insolvent party.*
>
> *A representative approach was that of the English Court of Appeal in an arbitration, seated in England, involving an insolvent Polish entity which argued that, under Polish law, it lacked the capacity to continue to arbitrate. (As noted above, Polish bankruptcy legislation provides that '*[a]*n arbitration agreement concluded by the bankrupt shall lose its force from the date of the declaration of bankruptcy and pending proceedings shall be subject to discontinuance.') The English court upheld the arbitral tribunal's refusal to discontinue arbitral proceedings against the insolvent Polish entity; the English court reasoned that the Polish legislation addressed issues of capacity and that the applicable EU Insolvency Regulation provided for application of English, not Polish, law to the capacity of a party to English-seated arbitral proceedings. The English court concluded that, under English law, the Polish company retained its capacity to arbitrate, notwithstanding Polish legislation allegedly withdrawing that capacity.*
>
> […]
>
> *In practice, most international arbitral tribunals have proceeded with arbitrations notwithstanding the pendency of bankruptcy proceedings involving one of the parties in that party's home jurisdiction. Tribunals have usually rejected arguments, based on national insolvency law, that the arbitration agreement became invalid or that the arbitration could not proceed, often requiring at a minimum clear and convincing evidence that a foreign law applicable to a party prohibits its continuing participation in bankruptcy proceedings and that this law should be recognized.*
>
> *Tribunals have also generally been reluctant to stay arbitral proceedings based on a pending insolvency involving one of the parties: 'Even in circumstances in which the suspension seems mandatory, if the other party – with full awareness of the relevant particulars – requests to proceed with the arbitration, the arbitrator should refuse to suspend the proceedings, for no one knows best what suits the party's interests than the party itself.' Arbitral awards are almost uniformly consistent with this view.*[4]

Mr Kroll (2006) agrees with this analysis, as follows:

> [A]r*bitral tribunals which owe allegiance primarily to the parties may not be bound at all or at least not in the same way as courts by the provisions of the national system in which they are situated. As a result, tribunals, when requested by one of the parties, have often rendered awards despite restrictions by a given insolvency law. The willingness to do so may differ depending on whether the place of arbitration and the place where the insolvency proceedings were initiated are in the same country or not.*
>
> *In cases where the place of arbitration was outside the country of insolvency tribunals have, upon the request of one party, often disregarded the restrictions imposed by the applicable insolvency law. The underlying rationale is that though the award may not be enforceable in the country of insolvency it may be enforceable in other countries.*[5]

The same approach has been followed in several ICC arbitrations. For example, in ICC Case No. 12993, the arbitral tribunal held:

> *In response to* [Respondent No. 2]*'s contention that the Korean Bankruptcy Court has exclusive jurisdiction over claims against* [Respondent No. 2], [Claimant] *contends that Korean Bankruptcy law has no extra territorial affect* [sic] *and hence cannot deprive this Tribunal of jurisdiction.*
>
> […]
>
> *The Claimant has referred the Tribunal to the Commentary on the Korean Code of Civil Procedure* […] *The learned editors state* […] *that based on the principle of territorial sovereignty, civil jurisdiction cannot be exercised in a foreign territory but can only be exercised within Korea. The Tribunal is satisfied that this commentary accurately states Korean law and that Article 239 of the Korean Code of Civil Procedure* [which provides for placing in abeyance of litigation proceedings against a bankrupt estate] *does not purport to apply to* […] *arbitration occurring outside Korea.*[6]

Conclusion

It might be considered reasonable to protect an insolvent party's assets from separate enforcement proceedings by creditors. However, practitioners and arbitral tribunals largely are of the view that the insolvency laws of an insolvent party's home jurisdiction should not affect arbitral proceedings in other jurisdictions.

This is not mere pragmatism: it is an approach that respects territorial boundaries. Indeed, as demonstrated by the case study, the Moratorium does not apply to Qatar-seated arbitrations for the reason that the IBC does not have extraterritorial jurisdiction in Qatar: there is no agreement or treaty between India and Qatar to extend the jurisdiction of the IBC to Qatar; and Qatar and India are not reciprocal countries in respect of the enforcement of judgments of one jurisdiction in the other.

Notes

1 Stefan M. Kroll, 'Chapter 18: Arbitration and Insolvency Proceedings – Selected Problems', in Loukas A. Mistelis and Julian D. M. Lew (eds), Pervasive Problems in International Arbitration, (Kluwer Law International, 2006).

2 https://www.gulf-times.com/story/588892/Indian-population-in-Qatar-touches-691-000 (accessed on 4 February 2020).

3 http://www.qatar-tribune.com/news-details/id/58882 (accessed on 4 February 2020).

4 Gary Born, 'Chapter 6: Nonarbitrability and International Arbitration Agreements', in Gary B. Born, International Commercial Arbitration (Second Edition), (Kluwer Law International, 2014), p. 1003 and 1006.

5 Stefan M. Kroll, 'Chapter 18: Arbitration and Insolvency Proceedings – Selected Problems', in Loukas A. Mistelis and Julian D. M. Lew (eds), Pervasive Problems in International Arbitration, (Kluwer Law International, 2006), p. 374.

6 ICC Case No. 12993 of 2009.

Thomas Williams
Sultan Al-Abdulla & Partners

Thomas Williams is an English qualified barrister and partner and leads the firm's arbitration practice. He specialises in domestic and international arbitration and litigation.

Prior to joining the firm, Thomas was head of arbitration and commercial dispute resolution at the London office of an international law firm. He is an experienced advocate in arbitrations under all of the major institutional rules and in ad hoc arbitrations, and has also appeared regularly as an advocate in the English High Court (including the Commercial Court) and the Court of Appeal.

He has particular experience of complex commercial disputes arising in the fields of energy, oil and gas, banking and financial services, and construction and engineering. Much of his work involves cross-jurisdictional issues and the conflicts of laws, such as asset-tracing and the enforcement of judgments and arbitral awards. He has substantial experience in international cases, and frequently works with overseas lawyers in common law and civil law jurisdictions.

Thomas accepts appointments as an arbitrator, and is on the panel of arbitrators at the London Court of International Arbitration, the Stockholm Chamber of Commerce, the Mumbai Centre for International Arbitration, and the Qatar International Centre for Conciliation and Arbitration.

He is a graduate of Cambridge University and was called to the Bar by Lincoln's Inn in 2002.

Ahmed Durrani
Sultan Al-Abdulla & Partners

Ahmed has been in the legal profession since 2015. Prior to joining the firm, he was part of the leading law firm in Pakistan, where he worked in the dispute resolution and advisory departments on civil and commercial law matters.

He is experienced in all forms of commercial dispute resolution, with a focus on arbitration. His arbitration practice encompasses a wide range of construction and commercial disputes arising under all of the major institutional rules and ad hoc arbitration.

Ahmed was called to the Bar by Gray's Inn in 2015, and is a licensed advocate of the Punjab Bar Council in Pakistan. He read law at City, University of London, graduating with an LLB (Hons) degree.

Umang Singh
Sultan Al-Abdulla & Partners

Umang has been in the legal profession since 2014. Prior to joining the firm, he was working with a leading law firm in India as a commercial disputes lawyer. His practice with the firm focuses on arbitration and general corporate advisory work.

Umang holds a Bachelor of Laws (Hons) degree from NALSAR University of Law, India. He is a member of Bar Council of Maharashtra & Goa (India) and the Bombay Bar Association.

سلطان العبدالله ومشاركوه
Sultan Al-Abdulla & Partners

Level 20, Al Fardan Towers
Al Funduq Street
West Bay
PO Box 20464
Doha
State of Qatar
Tel +974 44 42 0660
Fax +974 44 42 0663

Thomas Williams
twilliams@qatarlaw.com

Ahmed Durrani
adurrani@qatarlaw.com

Umang Singh
usingh@qatarlaw.com

www.qatarlaw.com

Sultan Al-Abdulla & Partners (SAP) is a full-service Qatar law firm that 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

Yaseen Bin Khalid Khayyat
Saudi Center for Commercial Arbitration

Introduction

From its inception, the Saudi Center for Commercial Arbitration (SCCA) Board and its diverse stakeholders understood the need to transform the entire context that arbitration and other forms of alternative dispute resolution (ADR) were practiced at home and perceived abroad. Only through a comprehensive, substantial and strategic overhaul that engaged and invested 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.

Global challenge and local diversity

Given gender diversity remains a challenging issue internationally for the ADR industry, the SCCA has and continues to work to address these challenges directly. Diversity in our field is about recognising the worth of each individual professional and acknowledging how these differences can benefit businesses and the economy as a whole.

This chapter provides an overview of how Saudi Arabia's ADR ecosystem has been transformed and created a blueprint of ongoing enhancements that have and continue to be required to ensure momentum is sustained and the efficiency and engagement is successful for all those involved. All the key elements of this transformation are set out within the contextual focus of one of the top priorities of the Saudi Arabia's strategic Vision 2030: gender diversity across the Saudi economy.

This chapter makes clear how increased gender diversity has been transforming all aspects of the Saudi ADR practice, profession and industry.

Strategic approach: Meeting ADR users' demand for institutional leadership

One of the most respected surveys of the ADR industry's users is the annual Queen Mary University and White & Case International Arbitration Survey. The 2018 survey, entitled 'The Evolution of International Arbitration', reported that: 'whilst nearly half of respondents agreed that progress has been made in terms of gender diversity on arbitral tribunals over the past five years, less than a third of respondents believe this in respect of geographic, age, cultural and ethnic diversity.' It further added finding, among users surveyed: 'Arbitral institutions are considered to be best placed to ensure greater diversity across tribunals, followed by parties (including their in-house counsel) and external counsel.' Users also urged that 'to encourage diversity all stakeholders should expand and diversify the pools from which they select arbitrators; more education and awareness is required about the need for, and advantages of, diversity; and legal education and professional training in less developed jurisdictions should be improved to lead to a larger, more diverse pool of arbitrators.'[1]

Encouragingly, these portions of the executive summary of the 2018 Queen Mary Survey read like the template adopted by the SCCA since 2014. Anticipating the needs and aspirations of commercial arbitration users, the SCCA developed a comprehensive and sophisticated multilayered, multi-year strategy to engage all segments and sectors to transform Saudi Arabia's arbitration ecosystem.

Strategy

In the case of Saudi ADR, and the SCCA in particular, we wanted to begin with ensuring we achieve diversity in engagement and delivering on the promise among our various industries, regions, ages, experiences, processes and professions while engaging both men and women throughout all aspects.

Through our diversity strategy, we managed to engage with a multiplicity of industries (mining, telecoms, energy, manufacturing, tourism and more) regions (with offices and outreach across all three main provinces of East, Central and West), ages and experience levels (from university students to those young and new to the sector to the most senior experienced individuals), processes (negotiation, facilitation, mediation, arbitration and online dispute resolution, in all their roles (whether as parties, advisors, counsel, experts and neutrals)) and from an array of professions (accountants, business leaders, lawyers, et al) while engaging both men and women throughout all aspects, sectors and situations.

While these figures are significant and indicative of the serious focus, commitment and investment being undertaken, we recognise that these efforts must be sustained and redoubled in order to fully meet our responsibilities to the private and public sectors, along with our thought leadership role in our professional ADR service industry.

Campaign of initiatives

As part of the Saudi strategic professional ADR development programme, with its over 50 initiatives undertaken, thousands of female applicants and over 1,400 female stakeholders participating, diversity is now playing a critical role in making the legal and ADR system more accessible, responsive and successful.

Throughout this chapter, we wanted to draw attention to the set of challenges and solutions with the aim of helping practitioners and users to develop their own assessment, according to the resources brought to bear and the capacity building that have been realised. This report contains many of the specifics concerning the use of outreach, engagement and training to facilitate access to effective ADR and justice for parties involved in commercial relationships.

This chapter presents a practical, workable and sustainable approach that is yielding transformational results and is proof that these are the right steps for businesses, the legal community, the judiciary and the ADR industry to meet the evolving and complex legal and dispute management and resolution needs of all those doing business in Saudi Arabia and the wider region.

Networking

Due to the diverse and complex nature of ADR and the challenges this presents for practitioners, it remains imperative that networking opportunities alongside training and professional skills development programming is provided. As diversity in arbitration promoters such as ArbitralWomen and others have noted, only with the requisite support and delivery of the platforms that enable professional women to make the relevant professional connections, acquire the insights, learn the necessary skills, will local and regional professionals have the opportunities to hone their people and professional skills efficiently, meaningfully and quickly.

Young SCCA

In order to create similar networking opportunities for young people consistent with the best jurisdictions and centres around the world, we established Young SCCA, our international youth platform to encourage young men and women to launch themselves into this increasingly important industry. As elsewhere, we anticipate a huge response from the fast-growing, enthusiastic group of young Saudi ADR professionals.

Student Arbitration Moot Competitions

Among the most important contributions to transforming the arbitration ecosystem in the Saudi Arabia and meaningfully increasing gender diversity have been the two Student Arbitration Moot Competitions with distinct, yet complementary, mandates.

Middle East Pre-Vis Moot Competition

Last year, the SCCA became involved in US Department of Commerce's Commercial Development Program's (CLDP) major, long-standing regional initiative to advance the awareness and use of international arbitration in the region. Specifically, CLDP, alongside its regional partners, had developed an annual English language Middle East pre-moot programme that also engaged and enhanced the participation of key countries in the Wilhelm C International Commercial Arbitration Vis Moot, a UNCITRAL education tool that encourages the use of the Convention on Contracts for the International Sale of Goods, the New York Convention on the Enforcement of Foreign Arbitral Awards and other key arbitration rules. CLDP's Vis Pre-Moot has drawn global attention and the SCCA has promoted the participation of Saudi universities' faculty and student teams.

In this, Saudi female students have a longstanding and remarkably successful track record of participation in regional and domestic arbitration moot competitions. One example is the Middle East Vis Pre-Moot. Around 18 teams participate in this competition from over 10 different countries from the Middle East. From 2014 through 2018, an all-female team from Dar-Al-Hekma University from the Kingdom of Saudi Arabia was consecutively crowned as the best oral team in the Middle East. Initially, the team from Dar Al-Hekma University was the only Saudi team participating in the Middle East Vis Pre-Moot. However, since 2018, two additional Saudi teams from Prince Sultan University and Prince Mohammad Bin Fahad University, composed of both men and women, have joined the moot.

World's first Arab Arbitration Moot

In 2019, the SCCA also partnered with the CLDP to develop and launch the first Arabic Commercial Arbitration Moot. The SCCA and CLDP identified and engaged select Saudi judges, lawyers, officials, law school faculties and students to promote this historic Arabic moot competition, including the development and support of the training of arbitrators, university faculties and students across Saudi Arabia in Riyadh, Jeddah and Dammam.

This important initiative provided Saudi students with the necessary legal skills, tools and resources to compete in the moot. Further, the Arab Arbitration Moot is, as CLDP explained:

> *an educational platform that engages students, academia, and practitioners to promote the use of international commercial arbitration in the Middle East. Its aim is to initiate the use of clinical legal education, develop Arabic legal scholarship, and improve the capacity of the next generation of Arabic speaking arbitration specialist in the region.*

By design, the SCCA worked hard to ensure that this is a truly regional and gender diverse student competition with 17 of the 39 participating teams being all-female teams from 12 different cities across Saudi Arabia when it was kicked off in 2019–2020.

Our competition case drafting committee was chaired by Saudi female arbitration lawyer Ms Dara Sahab, of Squire Patton Boggs, who observed:

> *this competition is a game changer in the Saudi legal education system and will reap tremendous benefits for the future generation of lawyers by exposing them to key international arbitration and commercial law principles and practices. It is an added advantage and privilege that it is conducted in Arabic, producing a rare co-existence of the practice with the Arabic language.*

Law firms

Law firms in Saudi Arabia are making great advances towards achieving gender diversity – not merely implementing quotas, but making changes at the ground level and ensuring that the pipeline of talent itself is diversified. These law firms day-to-day processes have been tailored to promote diversity and inclusion across the firm and to provide a safe and respectful work environment for all of their people – with several women leading the way.

Women leaders

Saudi ADR has also benefitted greatly from being able to learn from the example and draw on the experiences of inspiring female leaders living and working in the Saudi Arabia, focusing on their diverse backgrounds, surmounted challenges and success stories.

Our various forums offer both engagement among male and female professionals as well as private, all-female gatherings where these professionals can engage in open discussion format that provides audiences with a unique opportunity to learn, connect and support one another; thereby finding tangible solutions to a range of issues faced by women in developing their expertise and professional practices through this invaluable networking, often across the country, the wider region and beyond.

Success and role models

Equally valuable, we increasingly have Saudi women professionals who serve as role models in Saudi law firms and leadership positions across sectors and in other jurisdictions. In particular, the legal sector has become a leading performer in the empowerment of women and the SCCA is committed to contribute to this success by doing all it can to advance the role of females in the ADR industry, as is being undertaken globally, with increased efforts to encourage female leadership.

Among the increasingly prominent women in leading positions at law firms and large companies - we have the example

of Shihana Alazzaz, the General Counsel of the Saudi Public Investment Fund (PIF), among the largest sovereign wealth funds in the world – and the major commercial law firms in Saudi Arabia have partners and associates recruiting the best of both men and women practitioners. Saudi law firms have women practitioners in important roles, to name just a few: DLA Piper (with its head of the Jeddah office), Khoshaim & Associates (affiliated with Allen & Overy) and White & Case LLP with the Law Office of Megren M Al-Shaalan are all among the many law firms who have all hired exceptional Saudi women lawyers.

We expect this growing trend to continue as the number of qualified and experienced female legal practitioners grows and their high quality contributions are seen and appreciated.

Multilayered structural initiatives

Among those contributing to the change has been the Saudi Ministry of Justice (MoJ) in its role to empower women in the work force, with an emphasis on increasing not only MoJ staffers but also lawyers and private notaries. In 2019, the MoJ launched a new initiative to increase roles and participation of women in the ministry and the legal profession. Leading by example, since the announcement of competitive exams for jobs in 2018, the MoJ has recruited 220 women so far. These new employees are contributing to ongoing social and legal research, administration and software development. The MoJ has also rolled out a programme aimed at raising women's legal awareness through fairs in various regions, media campaigns and partnerships with relevant government agencies.

Increase in gender diversity among lawyers

Importantly, women are increasingly working and handling matters across the sector, including more women being granted licenses for private notary roles, providing the ability to issue and terminate powers of attorney and to notarise corporate charters and property conveyances, according the MoJ. Moreover, the number of licensed female lawyers has tripled in 2019 compared to previous years. The MoJ granted law practice licenses to 478 female lawyers, trained 3,140 others and licensed 67 women to be legal representatives of private companies. Given the huge enrolments of women registered in the law schools, and the size of those able to qualify already, these numbers are set to rise each year for years to come.[2]

This trend goes beyond exclusively lawyer activities. In February 2020, a local newspaper reported that 46 per cent of women were among 17,000 Saudis registered to become conciliators. This story highlights an important trend of awareness, inclusivity and diversity when it comes to access to and provision of services related to justice and conflict resolution. Surprising as this may be to people living and working outside Saudi Arabia, it is simply more good news underscoring the increased strategic importance placed on and investment in diversity.[3]

Overall, in fact, women are playing an increasingly important role in the Saudi workforce. The World Bank has taken notice of the successful implementation and impact of the government's strategic national economic policies, which are beneficially transforming the diversity of the workforce. As Al-Arabiya, a major regional newspaper, reported:

> *The remarkable pace and breadth of the reforms has yielded rapid improvements in female labor force participation, going from 18 percent in 2017 to 23 percent in 2018 according to World Bank statistics.*

As this trend continues, it can only improve the competitiveness and productivity of the Saudi economy, which will in turn attract even more foreign investment.[4]

Enhancing standards in the legal profession

According to the CIArb's London Principles 2015, among the conditions necessary for an effective, efficient and 'safe' seat for the conduct of international arbitration is:

> *An Independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat or in the International Arbitration proceedings conducted at the Seat.*

In 2019, in a welcomed move, the Saudi Bar Association launched the Saudi Accreditation Standards for Lawyers, describing it as 'a professional qualification set of processes that endeavors to set national legal profession standards that meets international best practices and maintains a high level of professionalism'. Initiatives such as these are ensuring that Saudi lawyers will be competitive domestically and internationally - and will be effective as counsel in mediation and arbitration. It is important for Saudis to continue with all of these high-quality ongoing professional development programmes – they install confidence among clients at home and abroad – and enhance marketability of our men and women lawyers. Further, clients will increasingly be looking for quality and diversity among those they retain – looking for the best practitioners.

Arbitrator and mediator accreditation

In order to provide practitioners with an opportunity to enhance their skills and have a locally and internationally recognised accreditation designation, the SCCA partnered with the world-renowned, London-headquartered Chartered Institute of Arbitrators (CIArb) to bring a fully Arabic programme (along with offering an English version) to Saudi Arabia for all those wishing to avail themselves of the SCCA-CIArb Pathways to Fellowship. The uptake was immediate and broad based: within a week of opening, enrolment spiked and all 150 places were filled, with 30 per cent being women.

Training: In high demand

We are also working with the best international partners to develop the requisite high-quality professional development courses which will equip our young professional female lawyers. Working with the CLDP, we have offered several programmes each year allowing several hundred women practitioners to secure the training they need and seek.

Each course offered has been met with overwhelming demand; for example a three-day SCCA course in December 2017 offered in cooperation with the CLDP, a Women's Legal Workshop on Negotiation and Mediation for a group of 35 distinguished female lawyers and legal professionals involved a rigorous application process, conducted by the SCCA, involving over 500 applications.

To meet this overwhelming demand, we continue to hold courses with our strategic partners. The SCCA has worked with the important encouragement and support of the Saudi Chambers of Commerce. The SCCA has also partnered with some of the world's top ADR institutions, like the American Arbitration Association (AAA) and International Centre for Dispute Resolution.

In addition to our programmes for men and women, we have also held some exclusively for women, whether students or practitioners. We have received consistently high ratings for both formats – with some noting the appeal of all-female events to create a format that can focus on challenges and the collegiality of networking opportunities in both formats.

The requisite technical workshops encompassing all types and aspects of ADR have included fundamental skills, like contract drafting workshops and ADR clause drafting seminars. More advanced sessions have been oversubscribed - including our joint SCCA–AAA Arbitrator Symposia, which bring together more seasoned practitioners to discuss issues and challenges that working arbitrators face to discuss forensically and prospectively with some of the world's top arbitrators. Specialised trainings like our ADR & Capital Markets Disputes event with the head of the worlds largest provider of such ADR, the Financial Industry Regulatory Authority, have attracted hundreds of participants.

The SCCA has also conducted professional mediation training for several hundred professionals over the past four years, including hundreds of female practitioners and students who have gone on to successfully advise clients and mediate themselves.

Our hugely successful SCCA18 and SCCA19 international commercial arbitration conferences in Riyadh have likewise attracting over 900 and 1,200 participants respectively with over 30 per cent female participation.

SCCA Secretariat

Within SCCA itself, the young layers hired as case counsel are now 50 per cent female.

In the three years since the SCCA Arbitration Roster was established, there are already 17 per cent women arbitrators. The development and increase of both these numbers remain priorities and the SCCA is assiduously committed to increasing both year upon year. This task being made easier by the vast pool of capable young practitioners emerging from all the capacity building and professional training undertaken by the SCCA over the past few years and still ongoing across Saudi Arabia.

ICSID investor–state arbitration

Saudi Arabia has appointed prominent international female arbitrators. In a recent ICSID case, Saudi Arabia nominated an internationally recognised female American arbitrator, New-York-based Ms Jean Kalicki, as its party appointed arbitrator.

Party autonomy and choice: Appointments, representation and more

Under the Saudi Arbitration Law, parties can appoint any arbitrator, mediator, lawyer, expert or other representative irregardless of gender, nationality or religion.

Parties are availing themselves of their freedom of choice and are retaining women ADR and legal professionals among others. 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 Saudi administrative Court of Appeal in Dammam approved the appointment of Saudi female arbitrator, Ms Shaima Aljubran¸ in the field of commercial disputes. Moreover, the Court of Appeal in Makkah Province confirmed the appointment of Ms Rabab Ahmed Al-Ma'bi as an arbitrator to settle commercial disputes between two companies in Jeddah.[5]

Given the confidential nature of much 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 that are in the public domain. Others may simply 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, we anticipate, more news of female appointments.

SCCA CEO Dr Hamed Merah's determination to ensure the engagement of men and women of all ages across the professional spectrum and regions of Saudi Arabia has yielded promising results:

> *Our team is clear that one of my top priorities is diversity in all its manifestations. It's essential to realizing the full potential of ADR for all stakeholders: parties and neutrals. Thankfully, the response has been overwhelmingly positive in terms of enrolment and overall participation. Now that we have an ever growing pool of talent – it is up to all of us, especially as ADR providers, to build the requisite awareness and buy-in needed to see diversity among arbitrators and mediators, counsels and parties themselves. SCCA is here to provide a platform and a service for all parties.*

Commitment to the future

Chapters in the *GAR: Middle Eastern and African Arbitration Review* often feature updates and re-evaluations of the state of affairs in the relevant areas impacting ADR within their particular markets. This chapter speaks to the comprehensive strategy and undertakings that have already transformed Saudi Arabia into an Arbitration-friendly jurisdiction with increasing gender diversity.

We encourage all readers to monitor our efforts and progress – as we commit to sustain and realise the promise of all our people and all those who come to partner, invest and do business across Saudi Arabia and beyond.

This chapter outlines the vision, the actions and brings together the recent results – which are broad and substantial – representing the impact already of this strategic direction. The results of our first three years will continue and we will ensure these trends increasingly yield the results of making diversity a reality.

The vast numbers of Saudi women successfully completing their university and professional studies, the dramatic growth of participation of women in the Saudi workforce and our increasingly inclusive and diverse legal and ADR services sectors all point to a sustained transition that will continue until it is fully realised. We also have the added expectation that, as a strategic industry for commercial development in Saaudi Arabia, ADR will continue to do its part to tap into all segments of society across regions, generations, genders and professions.

The SCCA and all its many partners and stakeholders within Saudi Arabia and beyond continue to be fully invested and committed to a fully level and inclusive and diverse commercial environment that enables all those working in good faith to prosper

and benefit, as is their right and due. Participation and access to justice are fundamentally linked.

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.

There is still a way to go, but through our collective and individual efforts and engagement and investment we are empowering women to develop, contribute and lead. We commit to the requisite patience, persistence, inclusiveness to get 'better diversity', which internationally acclaimed arbitrator Ms Lucy Reed suggested was needed to keep heading in the right direction.

Let us conclude with the words of another successful female Saudi lawyer, Ms Waad Alkurini, a project finance lawyer in Riyadh office of White & Case LLP with The Law Office of Megren M. Al-Shaalan: 'A lot is changing, and I think it's important to celebrate how far women have come.'

Appendix:

The findings of ArbitralWomen also appear to support our approach. Even before becoming aware of ArbitralWomen, and their important work promoting women and diversity in arbitration, we decided to approach it in a comprehensive manner that fortuitously addresses many of the key undertakings identified by ArbitralWomen as strategic objectives and vital deliverables to achieve gender diversity.

Specifically (and selectively, with thanks):

- 'advancing the interests of female practitioners and promote women and diversity in international dispute resolution';
- 'enable women to meet for professional, cultural, and academic purposes';
- assist in the professional development of women in dispute resolution;
- provide mentoring for women to advance their careers in dispute resolution;
- foster communications and exchanges of information of interest to members and other practitioners in dispute resolution;
- organise meetings, conferences, training seminars and other events connected with dispute resolution;
- publish information papers, notes of conferences or other research documents; and
- provide sponsorship, to the extent possible and under the conditions established by the Board, for women law students or young women lawyers to participate in law competitions.

Notes

1 The Evolution of International Arbitration, 2018 Survey by Queen Mary University / White & Case International Arbitration (http://www.arbitration.qmul.ac.uk/research/2018/), page 2.

2 "MoJ boosts women's access with legal practice licenses and jobs" - Saudi Gazette, March 7, 2019. http://saudigazette.com.sa/article/560685

3 "46% women among 17,000 Saudis registered to become conciliators" Saudi Gazette http://live.saudigazette.com.sa/article/588133/SAUDI-ARABIA/46-women-among-17000-Saudis-registered-to-become-conciliators

4 "How Saudi Arabia has increased female employment, and why the country benefits" http://english.alarabiya.net/en/views/news/middle-east/2019/08/12/How-Saudi-Arabia-has-increased-female-employment-and-why-the-country-benefits-.html Al Arabiya newspaper, Sept 2019

5 KLUWER http://arbitrationblog.kluwerarbitration.com/2016/08/29/the-first-female-arbitrator-in-saudi-arabia/ Press release on this appointment is available in Arabic and http://saudigazette.com.sa/article/581186.

Yaseen Bin Khalid Khayyat
Saudi Center for Commercial Arbitration

Yaseen Bin Khalid Khayyat is the chairman of the SCCA Board and holds a masters degree in law and professional practice, with excellent grade, from King Abdul-Aziz University in Jeddah.

His extensive professional experience includes his role as a lawsuit researcher in Ministry of Hajj and Ummra from 1996 to 1998; obtaining a legal consultation license since 1997; obtaining a license to practise law number from Ministry of Justice; becoming a certified arbitrator, Saudi Ministry of Justice; becoming vice-chairman of the Lawyers Committee at the Chamber of Commerce and Industry in Jeddah for the 19th session and becoming chairman of the for the 21st and 22nd sessions; becoming a member of the National Lawyers Committee, Council of Saudi Chambers; becoming chairman of the Board of Directors, GCC Commercial Arbitration Center and Representative of the Kingdom of Saudi Arabia in 2012 and 2016; becoming a member of the Board of Directors, General Commission of the Guardianship of Trust Funds for Minors and their Counterparts; being a former member of the Standing Committee for Saudi Arbitration Centers; and being a member of the Bankruptcy Committee (Amiable Conciliation against Bankruptcy Committee).

المركز السعودي للتحكيم التجاري
Saudi Center for Commercial Arbitration

7982 King Fahad Branch Road
Almutamarat
8th Floor Riyadh 12711-4183
Saudi Arabia
Tel +96 6112 909 605

Yaseen Bin Khalid Khayyat
ykhayyat@sadr.org

www.sadr.org

The Saudi Centre for Commercial Arbitration (SCCA) is not-for-profit organisation established by Cabinet Decree number 257 dated 14/6/1435 H – 15/03/2014 G to administer arbitration and other ADR 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.

The SCCA's independent Board of Directors was established by a Resolution from the Council of Saudi Chambers in coordination with the Standing Committee for Arbitration Centers. All SCCA Board members must be from the private sector and may not hold a government position.

The SCCA provides alternative dispute resolution services (ADR), including arbitration and mediation. SCCA services are provided in accordance with international and professional best standards in both Arabic and English (with additional translation and transcription services available upon request).

The SCCA also provides users with professional services by staff trained to international best practice standards at the AAA-ICDR, 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

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. Having replaced the previous legislation pertaining to international arbitration codified in the Code of Civil Procedure (CCP) No. 1086, the question of how to determine the applicable law has been placed before the Turkish courts. In a 2007 decision, the Court of Appeals saw a case where the arbitration agreement was signed by the parties in 1993, at which time the CCP No. 1086 governed international arbitration. However, the dispute arose in 2005, after the IAL had come into effect. The Court of Appeals ruled that the date of the arbitration agreement, regardless of when the dispute began, determined the governing law. Furthermore, the Court stipulated that proceedings initiated or agreements made prior to the IAL's enactment would require explicit accord from the parties in the form of a new arbitral agreement in order for the IAL to be the governing legislation.[1]

When it comes to the matter of arbitrable subjects, article 1 of the IAL provides that disputes regarding issues independent of the parties' wills may not be arbitrated. Therefore, commercial matters may be referred to arbitration, yet disputes concerning criminal issues, family law or issues related to employees' payments arising from labour contracts are not eligible.[2] Article 1 further provides that disputes relating to rights in rem over immoveable properties located in Turkey are not arbitrable. Thus, any disputes regarding ownership of real estate may not be submitted to arbitration, a position that the Court of Appeals has upheld. In one case regarding the cancellation of title deeds, the Court ruled that a dispute requiring a change in the land register is non-arbitrable, as such a matter pertains to public policy.[3] It has also been held by the Court of Appeals that only disputes capable of being settled by the parties' agreement without requiring a court decision are arbitrable. In this particular decision, dated 2012, the Court found that the arbitration clause in the company's articles of association was invalid because general assembly resolutions may only be annulled by the courts.[4]

The IAL also governs a number of procedural issues, including the form and validity of the arbitration agreement, the appointment of arbitrators and any challenges to arbitrators. Moreover, the IAL codifies the procedure for challenging awards and determining arbitration expenses.

Form and validity of the agreement

Article 4 of the IAL, which governs the form and validity of the arbitration agreement, states that agreements to arbitrate may either be included in a contract as an arbitration clause or in the form of a separate agreement, whether or not the legal relationship between the parties is contractual in nature.

The form of the arbitration agreement is also regulated by article 4 of the IAL. 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 in cases where a party advances the existence of a written arbitration agreement in a statement of claim and the other 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.[5]

As regards validity, the Court of Appeals has held that for an arbitration agreement to be binding, there must be clear intent, without any doubt, that the parties intended to submit the issue to arbitration.[6] In this case, the parties had agreed that the dispute would be submitted to arbitration, but also that 'the dispute shall be resolved at the courts'. Since it was unclear whether the parties actually intended to submit the dispute to the courts or to arbitration, the Court of Appeals ruled there was insufficient intent to arbitrate and, as a result, the arbitration agreement was invalid. This requirement of unambiguous party agreement to arbitration has been and continues to be applied by Turkish courts.[7] Contrarily, in a subsequent case, the Court of Appeals affirmed the decision of a lower court that found an arbitration clause providing arbitration under the IAL to be valid despite the fact that the agreement also stated that '[i]n the event of a dispute, the Bursa Courts and Execution Offices shall have jurisdiction'.[8] The lower court dismissed the case after the defendants raised an arbitration objection as per article 5 of the IAL,[9] finding that the provision granting jurisdiction to the Bursa courts and execution offices was only related to those procedural matters of arbitration that must be resolved by the courts (such as interim injunctions), and thus did not invalidate the arbitration clause. The Court of Appeals affirmed this decision by stating that the arbitral tribunal has competence to determine whether the arbitration agreement is valid. 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.[10]

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 regarding his power of attorney will be invalid, to a case where an attorney had signed an arbitration agreement on behalf of his client.[11] Thus, it was ruled that if a representative signs an arbitration agreement, the power of attorney authorising him to act on behalf of his principal must clearly specify that the attorney has been granted the authority to sign an arbitration agreement or to bind his principal to arbitrate.

In the same vein, amendments to arbitration agreements signed by representatives have also been examined by the Court of Appeals.[12] 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 entering into arbitration agreements on behalf of the parties.[13] It further stated that the terms of reference cannot be considered as either an amendment to an arbitration agreement or a new arbitration agreement. Likewise, the Court of Appeals ruled in a similar case that amendments to arbitration agreements may not be made through the terms of reference.[14] 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, stating that, in principle, 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. It 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.[15]

Jurisdictional concerns

Observing the principle of competence-competence as codified in the Model Law, article 7(h) of the IAL governs the procedure for jurisdictional challenges to be brought before the arbitral tribunal. Since a jurisdictional objection is decided by the tribunal as a preliminary matter, any objection should be made with the first reply brief at the latest. A party is required to submit an objection as soon as they believe that the arbitral tribunal has exceeded its powers or 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) goes on to provide further parameters for jurisdictional challenges. When ruling on the tribunal's jurisdiction, an arbitration clause shall be treated as independent from the other terms of the contract. Therefore, even if the tribunal decides that the main contract is null and void, this doesn't invalidate the arbitration clause. 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.

The IAL presents the issue of jurisdictional objections as one to be contested within the confines of arbitral proceedings. In a case where the validity of an arbitration agreement was contested before a court, the Court of Appeals ruled that, under the IAL, challenges of this sort should first be brought before the arbitrator or the arbitral tribunal.[16] The Court of Appeals also stated that the decision of the arbitrator or the arbitral tribunal on jurisdiction would be subject to review in an annulment action brought against the final award.

One such review was undertaken after an annulment action was brought before the Turkish courts. In this instance, the Court of Appeals annulled an award in which the arbitral tribunal denied that it had jurisdiction despite the existence of an arbitration agreement.[17] The Court noted that the dispute between the parties was within the scope of the contract and that the procedure outlined by the arbitration agreement had been properly followed. As a result, the tribunal's award denying its jurisdiction was found to be invalid and, consequently, set aside.

In another decision on the issue of the arbitral tribunal's jurisdiction, the Court of Appeals found that arbitrators are bound by the requests of the parties and they cannot render a decision exceeding those requests.[18] In this dispute, the defendant requested in its defence for an amount to be deducted from the claimed receivables and stated that it reserved its right to file a counterclaim regarding this deductible; however, the defendant did not file such a counterclaim. The arbitrators ruled 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 which may lead to annulment of arbitral awards.[19]

Annulment of arbitral awards

In accordance with the IAL, challenges to an arbitral award may only take the form of an annulment action, although the court's decision regarding annulment may be appealed. Article 15 of the IAL states that an arbitral award may be annulled if one of the following grounds is proven by the party filing an annulment action:

- invalidity of the arbitration agreement stemming from incapacity of one or both of the parties subject to the arbitration agreement, invalidity of the agreement to arbitrate under the law the parties chose or, if the parties did not make a choice of law, under Turkish law;
- non-compliance in arbitrator appointment procedure under either the IAL or, if the parties had agreed otherwise, as defined in the parties' agreement;
- failure to make a timely award during the arbitration period;
- unlawful decision of the arbitrator or the tribunal regarding the competence of the arbitrator or the tribunal;
- 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; or
- unequal treatment of the parties.

Or if the court ex officio determines that:

- the subject of the arbitration is non-arbitrable under Turkish law; or
- the award violates 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.[20]

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. The Court of Appeals had interpreted this provision differently. 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.[21] 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.[22] With the 2018 amendments, the competent courts for cases other than annulment actions have also been 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.[23]

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 first instance 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.[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. In this case, the Court held that an interim attachment order may be granted in the enforcement proceeding of a foreign arbitral award, even if an enforcement decision has not yet been issued on the basis that the assets or rights of the debtor are only temporarily attached by the interim attachment orders. Consequently, an enforcement decision of a foreign arbitral award is not a required condition for granting an interim attachment order.[25]

There are different decisions of the Court of Appeals regarding the issue of 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 stated that the dispute between the parties regarding whether the award was made by an arbitral tribunal or a court was not examined sufficiently, and that the existence of an arbitration agreement would be required if the award was made by an arbitral tribunal. It also held that the cases for the request for enforcement are in the nature of declaratory actions rather than actions of performance; therefore, the court fees in such cases shall be subject to fixed fees.[29] The 11th Chamber decided likewise on the enforcement requests for foreign court decisions.[30]

However, in 2016, the provision which 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'.

Recently, the Regional Judicial Court dealt with the question whether an application of a party for the correction and interpretation of an award from the tribunal would suspend its enforcement in Turkey. 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.[31]

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.[32]

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 stating that the conditions for recognition was established for the said partial award on jurisdiction.[33]

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.[34]

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.[35] 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.[36] 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.[37]

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, the agreement is valid and cannot be considered to be against public policy.[38] 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.[39]

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 stated that the merits of the case and the application of the law cannot be reviewed during an annulment case.[40] 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.[41] 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. The purpose of the LIAC is to regulate the procedures and principles regarding the organisation and operations of the ISTAC. Pursuant to article 1 of the LIAC, the ISTAC shall oversee the settlement of disputes, including those containing a foreign element, through arbitration or alternative dispute resolution methods.

It is stated in article 2 of the LIAC that the ISTAC, which has legal personality and is subject to private law provisions, is established in order to perform the duties assigned to it by law.

Pursuant to article 4 of the LIAC, the duties of the ISTAC are as follows:

- to determine the rules regarding arbitration and alternative dispute resolution methods;
- to ensure the conduct of services;
- to promote and issue publications regarding arbitration and alternative dispute resolution methods and to incentivise, support and realise scientific works on this subject; and
- to cooperate with relevant individuals, institutions and organisations that are inside and outside Turkey.

The LIAC provides in article 5 that the ISTAC shall be composed of the General Assembly, the board of directors, auditors, the Advisory Board, national and international arbitration tribunals, and the Office of the Secretary General.

One of the duties of the board of directors, as stated in article 9, is to draft the rules applicable to arbitration and alternative dispute resolution methods, and the procedures and principles regarding operation of the ISTAC. The board of directors shall then submit them to the General Assembly for approval after obtaining the opinion of the Advisory Board.

The General Assembly, board of directors, auditors and the Advisory Board were established in May 2015, and the ISTAC Arbitration and Mediation rules went into effect on 26 October 2015.[42] The ISTAC offers services such as fast track arbitration and emergency arbitrator procedure.

The Prime Ministry's Office of Turkey has also issued a circular that stated all public authorities shall consider including ISTAC arbitration clauses in their domestic and international agreements.[43]

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) have been amended with the Official Gazette dated 30 December 2017, which came into force on 19 January 2018. 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.

In case 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.[44]

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 is to regulate the procedure and practice to be followed where mediation and arbitration are together determined as the dispute resolution mechanism.

Conclusion

There have not been any fundamental changes in the Turkish international arbitration system since its enactment in 2001. However, there have been changes to domestic legislation; namely, the ratification of a new CCP, which entered into force on 1 October 2011, in addition to a new Code of Obligations and 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 Plenary Session of Civil Law Chambers, 18 July 2007, File No. 2007/15-444, Decision No. 2007/554; Court of Appeals, 13th Civil Law Chamber, 17 April 2012, File No. 2012/8426, Decision No. 2012/10349.

2 Court of Appeals, 9th Civil Law Chamber, 22 March 2004, File No. 2004/5846, Decision No. 2004/5621.

3 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.

4 Court of Appeals 11th Civil Law Chamber, 5 December 2012, File No. 2011/13485, Decision No. 2012/19915.

5 Court of Appeals 11th Civil Law Chamber, 18 April 2013, File No. 2012/6961, Decision No. 2013/7612.

6 Court of Appeals 15th Civil Law Chamber, 18 June 2007, File No. 2007/2680, Decision No. 2007/4137.

7 Court of Appeals 15th Civil Law Chamber, 13 April 2009, File No. 2009/1438, Decision No. 2009/2153.

8 Court of Appeals 15th Civil Law Chamber, 1 July 2014, File No. 2014/3330, Decision No. 2014/4607.

9 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.

10 Court of Appeals 13th Civil Law Chamber, 23 October 2019, File No. 2018/2348, Decision No. 2019/10372.

11 Court of Appeals 19th Civil Law Chamber, 21 May 2007, File No. 2007/380, Decision No. 2007/5114.

12 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.

13 Court of Appeals Plenary Session of Civil Law Chambers, 18 October 2006, File No. 2006/15-609, Decision No. 2006/656.

14 Court of Appeals Plenary Session of Civil Law Chambers, 18 July 2007, File No. 2007/15-444, Decision No. 2007/554.

15 Court of Appeals 11th Civil Law Chamber, 25 June 2015, File No. 2014/9538, Decision No. 2015/8707.

16 Court of Appeals, 15th Civil Law Chamber, 27 June 2007, File No. 2007/2145, Decision No. 2007/4389.

17 Court of Appeals, 11th Civil Law Chamber, 16 July 2009, File No. 2007/13799, Decision No. 2009/8820.

18 Court of Appeals, 15th Civil Law Chamber, 11 May 2011, File No. 2010/7197, Decision No. 2011/2857.

19 Court of Appeals, 15th Civil Law Chamber, 11 July 2019, File No. 2019/1234, Decision No. 2019/3335.

20 Court of Appeals, 15th Civil Law Chamber, 15 November 2007, File No. 2007/3708, Decision No. 2007/7216.

21 Court of Appeals, 11th Civil Law Chamber, 15 March 2012, File No. 2012/ 2110, Decision No. 2012/3915.

22 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.

23 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.

24 Court of Appeals, 13th Civil Law Chamber, 13 November 2012, File No. 2011/19737, Decision No. 2012/25406.

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.

30 Court of Appeals, 11th Civil Law Chamber, 11 May 2015, File No. 2015/1353, Decision No. 2015/6701; Court of Appeals, 11th Civil Law Chamber, 23 June 2014, File No. 2014/9333, Decision No. 2014/11865.

31 Istanbul Regional Judicial Court, 14th Civil Law Chamber, 11 October 2018, File No. 2018/130, Decision No. 2018/1042.

32 Court of Appeals, 19th Civil Law Chamber, 18 December 2003, File No. 2003/7270, Decision No. 2003/12888.

33 Court of Appeals, 11th Civil Law Chamber, 11 June 2019, File No. 2017/3469, Decision No. 2019/4259.

34 Court of Appeals Plenary Session of Civil Law Chambers, 8 February 2012, File No. 2011/13-568, Decision No. 2012/47.

35 Court of Appeals, 13th Civil Law Chamber, 17 April 2012, File No. 2012/8426, Decision No. 2012/10349.

36 Court of Appeals, 13th Civil Law Chamber, 16 March 2017, File No. 2015/16140, Decision No. 2017/3322.

37 Court of Appeals Plenary Session of Civil Law Chambers, 26 November 2014, File No. 2013/11-1135, Decision No. 2014/973.

38 Court of Appeals Plenary Session of Civil Law Chambers, 9 June 1999, File No. 1999/19-467, Decision No. 1999/489.

39 Court of Appeals, 19th Civil Law Chamber, 07 June 2011, File No. 2011/4149, Decision No. 2011/7619.

40 Court of Appeals, 11th Civil Law Chamber, 22 June 2016, File No. 2016/4931, Decision No. 2016/6886.

41 Court of Appeal's General Assembly for Unification of Judgments, 10.02.2012, File No. 2010/1, Decision No. 2012/1.

42 http://istac.org.tr/en/istanbul-arbitration-center-arbitration-and-mediation-rules-come-into-force/.

43 Circular No. 2016/25, published in the Official Gazette dated 19 November 2016 and No. 29893.

44 www.ihale.gov.tr/Duyuru/243/sozlesme_uyusmazliklarinin_cozumunde_tahkim_yolunun_tercih_edilebilmesine_yonelik_duzenlemeler_yayimlandi.html.

45 https://istac.org.tr/en/istac-med-arb-kurallarini-ilan-etti/.

Utku Coşar
Coşar Avukatlık Bürosu

Utku Coşar is a partner at Coşar Avukatlık Bürosu. She acts as counsel in commercial and investment treaty arbitrations, with experience representing both state and private parties, and sits as an arbitrator.

Utku is a member of the ICCA publications advisory board and serves on the editorial board of *Dispute Resolution International*, the journal of the dispute resolution section of the International Bar Association (IBA), as well as the editorial board of the ICC *Dispute Resolution Journal*. She is also a fellow at the Chartered Institute of Arbitrators (CIArb). She is the author of multiple publications, including 'Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Conse-quences and Sanctions' Legitimacy: Myths, Realities, Challenges', in *ICCA Congress Series* No. 18, van den Berg (ed), published by Kluwer Law International (2015); 'Annex ID to the Energy Charter Treaty: Limitation on Consent to Interna-tional Arbitration' in the *Turkish Commercial Law Review,* Vol. 1(1), February 2015, and the Turkey chapter of *Freezing and Attaching Assets* (co-authored with Suat Sarı), edited by Jorgensen, published by Kluwer Law International (2016). She has also authored Turkey's chapter in *Privilege and Confidentiality: An International Handbook* (IBA), *International Mergers: The Antitrust Process* (Sweet & Maxwell) and the *IBA Arbitration Guide*. A graduate of Marmara University Law School, Utku received two LLM degrees from Georgetown University Law Center. She is admitted to practise law in New York and Turkey.

For the past 13 years, Utku has been ranked in Band 1 for dispute resolution lawyers by *Chambers Global* and *Chambers Europe* and as a leading individual in dispute resolution by *The Legal 500 EMEA*.

İpek Sumbas Çorakçı
Coşar Avukatlık Bürosu

İpek Sumbas Çorakçı is a senior associate at Coşar Avukatlık Bürosu. She specialises in arbitration and litigation, and has represented state and private parties in commercial and investment treaty arbitrations as well as before Turkish courts.

İpek is a graduate of Ankara University Law School (2006). She obtained an LLM in international legal studies from Georgetown University School of Law in 2009. She is a member of Istanbul Bar Association.

Hakan Yakışık
Coşar Avukatlık Bürosu

Hakan Yakışık is a senior associate at Coşar Avukatlık Bürosu. He specialises in dispute resolution, particularly international and local arbitration. He has represented private parties in commercial arbitrations before ICC and Swiss Chambers' Arbitration Institution tribunals.

Hakan is a graduate of Koç University Law School (2008). He also received an LLM in international business law from Tilburg University. He is a member of Istanbul Bar Association.

COŞAR
AVUKATLIK BÜROSU

İnönü Cad. No. 18/12
34427 Taksim
Istanbul
Turkey
Tel +90 212 334 60 80
Fax +90 212 334 60 90

Utku Coşar
utku.cosar@cosar.av.tr

İpek Sumbas Çorakçı
ipek.sumbas@cosar.av.tr

Hakan Yakışık
hakan.yakisik@cosar.av.tr

www.cosar.av.tr

Coşar Avukatlık Bürosu is one of the leading law firms in Turkey, with a dedicated dispute resolution team that has particular expertise in litigation and arbitration. For the past 12 years, both the firm and its senior partners have been ranked in the first tier for dispute resolution by *The Legal 500* and *Chambers*.

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United Arab Emirates

Charles Lilley, Stephen Rigby and Justin Jie Zhang
Bryan Cave Leighton Paisner LLP

Introduction

While 2019 perhaps fell short of being as important and as exciting a year as 2018, which saw the introduction of the new UAE Federal Arbitration Law, 2019 did see the launch of the Abu Dhabi Global Markets' (ADGM) arbitration guidelines, the first successful enforcement of an arbitration award in the ADGM courts and a welcomed softening in local court attitude towards the validity of arbitration agreements.

ADGM Arbitration Guidelines

Last year we discussed the ADGM's desire to be recognised as a leading arbitral venue for the region, as shown by the opening of the ADGM Arbitration Centre: a state-of-the-art hearing centre open to all arbitrations, regardless of the institutional rules governing the arbitration.[1]

To further this ambition, in September last year, the ADGM Arbitration Centre published its arbitration guidelines. The guidelines have the stated intention of providing arbitral tribunals and the parties to arbitration with best practice procedures in order to bring greater certainty and efficiency to the arbitral process, while ensuring fairness, equality and due process. The guidelines were produced in consultation with in-house counsel and private practitioners from both civil and common law backgrounds and, as a result, are considered to be more neutrally drafted than existing guidelines which tend to favour either common or civil law approaches.

One of the most attractive aspects of the guidelines is the amount of flexibility it offers to the parties. The guidelines are entirely optional, with parties free to opt-in to some or all of the provisions (or modules, as they are called). Parties can opt-in even if the seat of the arbitration is not the ADGM and even if the proceedings will not take place at the ADGM Arbitration Centre.

Parties are also free to amend the modules as they see fit. The guidelines are available in Word format so that parties can easily adapt the guidelines and tailor them for their particular arbitration.

The guidelines are structured into the following six modules:

- written submissions, issues and applications;
- fact witness evidence;
- expert witness evidence;
- documentary evidence;
- hearings; and
- counsel conduct.

While a detailed review of each of these modules is beyond the scope of this chapter, it is worth noting that a central theme running through each of the modules is to help ensure that the arbitration proceeds as efficiently, expediently and in as cost-effective manner as possible. For instance, the guidelines provide the following.

- The parties are to agree, following the exchange of written submissions, a list of issues of both fact and law (an exercise traditionally carried out only much later in the proceedings shortly before an evidentiary hearing, if at all). The identification of the pertinent issues in dispute at such an early stage could be useful in focusing subsequent submissions and evidence, thus bringing greater efficiency to the arbitration and minimising costs. Indeed, a tribunal may use this list of issues as a reference by ordering that both expert and factual witnesses limit their evidence to those matters set out in the list of issues.
- The parties are to identify, before the submission of witness and expert evidence, the issues in the written pleadings that each witness statement will be relevant to and explain why the witness testimony would materially assist the tribunal. This early identification should serve to focus witness evidence on the issues in dispute and minimise irrelevant evidence.
- Controversially, the tribunal may, on application by a party, exclude expert and factual witness evidence on the grounds that the evidence will not materially assist the tribunal in its decision-making. It will be interesting to see how tribunals approach such an application given the potential for a party to later challenge an arbitral award on the grounds of procedural irregularity or bias should witness evidence be excluded.
- Response submissions and witness evidence (both expert and factual) are required to be strictly responsive and are not to be used to raise new arguments or give evidence on other matters. While this seems common sense, in practice it is not unusual for response submissions and evidence to creep beyond being purely responsive.
- Parties are not permitted to request documents that support the other party's claims: a common tactic deployed to identify evidentiary gaps in the other party's case.
- Parties are encouraged, where possible, to make use of electronic bundles and minimise the use of hard copy bundles at evidentiary hearings.

The ADGM Arbitration Guidelines are further evidence of the ADGM's continued efforts to contribute to the arbitral community in the UAE. While it will be interesting to see how widely the guidelines are adopted, both in the region and further afield, the guidelines serve as a welcome addition to the palette of 'soft law' options available to parties to arbitration. This is particularly true as the guidelines can be seen as a more neutral approach to existing guidelines that favour common or civil law approaches, and offers the parties the opportunity to pick and choose and even amend elements of the guidelines so as to tailor their application to their arbitration. After all, parties elect to arbitrate their disputes over submitting to the jurisdiction of local courts, it therefore makes sense for the parties to be able to agree what provisions will govern how their arbitration is to be conducted.

Enforcement of arbitral awards in the ADGM courts

An essential component to the success of arbitration is the ability to enforce arbitral awards in the local courts. This is particularly

true when enforcement is to take place in a different country to where the award is issued. International conventions and treaties such as the New York Convention play pivotal roles in facilitating the enforcement of foreign arbitral awards in signatory nations and making arbitration a viable and, indeed, attractive method of dispute resolution.

Last year saw the first successful enforcement of a foreign arbitral award in the ADGM courts under the ADGM's Arbitration Regulations. In *A4 v B4*,[2] Justice Sir Andrew Smith approved the claimant's application for the recognition and enforcement of an arbitral award that was issued in England and Wales under the rules of the London Court of International Arbitration (LCIA).

Reassuringly, in his judgment, Justice Sir Andrew Smith confirmed that section 56 of the ADGM's Arbitration Regulations is drafted in mandatory terms; meaning that the ADGM court is obliged to recognise and enforce arbitral awards that are covered by the ADGM Arbitration Regulations (such as the one in this case), unless one of the grounds under the regulations for refusing recognition or enforcement is satisfied.

In *A4 v B4*, the defendant did not attend the hearing. However, the defendant did argue, before the proceedings were commenced in the ADGM court, that the arbitration agreement between the parties was not valid – a ground under section 57 of the ADGM's Arbitration Regulations for challenging the recognition and enforcement of an arbitral award.

Importantly, B4 did not advance such an argument in the proceedings or at the hearing before Justice Sir Andrew Smith. As a consequence, Justice Sir Andrew Smith confirmed that the court was not entitled to entertain any question about the validity of the arbitration agreement since the onus was on B4 to advance such an argument and furnish proof to support its contention. In other words, the ADGM court will not, at its own volition, investigate the validity of an arbitration agreement. It will only do so if submissions are made to it by the defending party and the defending party is able to furnish proof to support its arguments.

Justice Sir Andrew Smith did not, however, consider it necessary to engage with the question as to whether, in this case, the claimant was seeking to use the ADGM as a conduit jurisdiction (ie, to secure an ADGM court order and seek to enforce that in the onshore courts, rather than seek to enforce the arbitral award directly in those onshore courts) – an issue which has been a hot topic between the Dubai International Financial Centre (DIFC) and Dubai onshore courts in recent years. Justice Sir Andrew Smith remarked that the defendant had made no such submission and there was no evidence to suggest that was indeed the case. It is once again comforting that the court appears unwilling to commence investigations into the grounds of refusing recognition and enforcement of arbitral awards unless the defending party has made such submissions to the court.

In light of the issues that have arisen in Dubai with parties attempting to use the DIFC as a conduit jurisdiction to enforce arbitral awards in onshore Dubai, prompting the creation of the Joint Judicial Tribunal, it will be interesting to see how the ADGM courts approach this difficult question when a party makes such arguments before it.

However, putting that matter to one side for now, the claimant's success in having a foreign arbitral award recognised and enforced in the ADGM courts bodes well for arbitral award creditors and suggest that the ADGM will have an increasingly prominent role in shaping the arbitral landscape of enforcement of arbitral awards in the UAE.

Enforcement of arbitral awards pursuant to the Federal Arbitration Law

In last year's *Middle Eastern and African Arbitration Review*, we considered the introduction of the UAE Federal Arbitration Law and, in particular, the new regime for the enforcement of arbitration awards. Significantly, following the ratification and enforcement of an arbitration award, an order must be issued within 60 days.[3] At the time of writing this chapter, there is very little coverage on the enforcement of arbitral awards, although it does seem from initial cases[4] that the courts have adhered to the short and challenging timeline. This is very positive news. We must now wait to see whether the courts continue to adhere to this, and await cases where a party challenges an award.

ADGM enters into additional memoranda of understanding

In 2018, the ADGM courts entered into a memorandum of understanding with the Judicial Department of the Emirate of Abu Dhabi. The effect of this arrangement was that court judgments of the ADGM courts (including those ratifying arbitral awards for enforcement) could be enforced in the onshore courts in Abu Dhabi and vice versa.

Last year, the ADGM courts expanded this to include the UAE Federal Courts and the local courts in Ras Al Khaimah (one of the seven other Emirates in Abu Dhabi) by entering into two new memoranda of understanding.

While the impact of these memoranda is likely to carry less significance than that entered into in 2018, the extended coverage of courts that will recognise and enforce court orders of the ADGM courts (including those ratifying arbitral awards for enforcement) will certainly assist in making the ADGM courts a more attractive forum for seeking to enforce foreign arbitration awards in the UAE.

Authority to enter into an arbitration agreement

Traditionally, arbitration in the UAE has been seen as an exceptional means of dispute resolution as the parties are effectively disposing of their right to refer disputes to the local courts. As a result, parties are required to enter into express agreements to arbitrate and the person who enters into that agreement must have the requisite authority to do so.

Over the years, the lack of authority of the signatory has been a common ground for a party seeking to set aside an arbitral award and prevent recognition and enforcement of that award in the local courts.

As confirmed by the Dubai Court of Cassation, it is settled law that an agreement to arbitrate shall not be valid unless made by persons having the requisite authority to do so. General managers of limited liability companies are presumed to have the requisite authority to enter into agreements to arbitrate,[5] unless the constitution of the company provides otherwise. The general manager may delegate this authority under an instrument such as a specific power of attorney.

However, last year the Dubai Court of Cassation appeared to limit the circumstances in which the local courts would consider the question of whether an individual had the requisite authority to enter into an agreement to arbitrate. In March, the Dubai Court of Cassation ruled that, where an agreement containing an arbitration clause has the company name in the preamble, and is silent as to the name and authority of the signatory on its behalf, there is a presumption that the person who signed the agreement on behalf of the company had the requisite authority, and it is not permissible for that party to argue otherwise, as to do so would be contrary to the requirement of good faith.[6]

While the decision is a welcomed one, and is somewhat reflective of the shift in the UAE to being more pro-arbitration, parties are still cautioned to ensure that a person entering into an agreement to arbitrate has express authority to do so.

Interim measures under the UAE Federal Arbitration Law

Last year we discussed the significant introduction under the new UAE Federal Arbitration Law of the arbitral tribunal's power to order interim and conservatory measures in support of arbitral proceedings. A party may then, with the written permission of the arbitral tribunal, apply to the courts to enforce any such order within 15 days of the request.

At the time of authoring this chapter, there is limited information on how this process has operated in practice in the local onshore courts. It is, therefore, presently a watching brief as we wait to see how the local courts, which will not be familiar with playing a supporting role to an ongoing arbitral process, will approach enforcing interim measures ordered by an arbitral tribunal. In particular, whether the local courts will seek to look behind the arbitral tribunal's order, or whether the local courts will comply with the tight 15 day time frame provided under the new law.

The Joint Judicial Tribunal

Over recent years, the use of the DIFC as a conduit jurisdiction to enforce foreign court judgments and arbitration awards in onshore Dubai has been a hotly contested subject – so much so that it prompted the creation of the Joint Judicial Tribunal (JJT). In last year's *Middle Eastern and African Arbitration Review*, we explored the creation of the JJT to determine conflicts of jurisdiction between the DIFC and Dubai courts, and how its earlier judgments showed an apparent default preference in favour of the Dubai courts having jurisdiction over the DIFC, a preference that appeared to indicate the end of the DIFC being used as a conduit jurisdiction.

However, in last year's chapter we touched upon a number of published judgments that suggested a move away from the apparent default preference for the Dubai courts to have jurisdiction over the DIFC. Based on the JJT's decisions in 2019, this shift appears to be continuing. Of the nine applications before the JTT in 2019, the JJT determined the DIFC had jurisdiction in eight of the cases. A stark contrast to the JJT's earlier and apparent default preference towards the Dubai courts.

It is worth noting, however, that few of the cases before the JJT had what one would consider as a 'real' conflict of jurisdiction. In most of the cases the conflict was artificial as one of the parties had commenced proceedings in the Dubai courts as a delay or interference tactic with the proceedings in the DIFC.

It is reassuring, however, for those seeking to litigate in the DIFC that the JTT has recognised this[7] and has indeed considered such an approach to be a party 'abusing the process of the JJT'.[8]

New Dubai International Arbitration Centre rules remain unpublished

It is now over two years since the Dubai International Arbitration Centre (DIAC) announced the launch of its proposed new rules during the Dubai Arbitration Week in November 2017. The rules were expected to be issued in early 2018. However, two years on, the rules remain unpublished with no update on when they might be issued, or what is causing the delay.

New DIAC statute

Despite the new DIAC rules remaining unpublished, last year did see the issuance of a new governing statute for the DIAC (Decree No. 17 of 2019).

The new statute has reclarified the organisational structure of the DIAC. We await with interest as to whether these amendments and clarifications will have any significant impact on the organisation and operation of DIAC, and whether its issuance is a pre-cursor to the launch of the much anticipated new DIAC rules.

Conclusion

Since the introduction of the UAE Federal Arbitration Law in 2018, the UAE's reputation as an arbitration-friendly country has improved and the key developments in 2019 have certainly helped to enhance that reputation.

The ADGM continues to be at the forefront of regional arbitral innovation. The new ADGM Arbitration Guidelines and the level of flexibility they offer to parties are a welcomed addition to the existing 'soft law' options. Coupled with the ADGM's new Arbitration Centre, and the ADGM Court's first, and seamless, recognition and declaration on the enforcement of a foreign arbitral award, it is clear that the ADGM is making giant strides in its bid to become a serious player in the regional arbitral community.

With the enforceability of foreign awards in the ADGM and DIFC now being settled, we turn our attention to the onshore regime. We will have to wait and see how the landscape develops in 2020. In particular, we look forward to seeing how the local courts approach enforcing interim measures awarded by arbitral tribunals.

Notes

1 It should be noted that the ADGM does not presently have its own arbitral institution to administer arbitral proceedings and does not have its own set of arbitral rules.
2 *A4 v B4* [2019] ADGMCFI 0007
3 Article 55(2).
4 See Case No. 6/2018, Chief Justice, Dubai Courts, 31st October 2018, unpublished and Case No. 9/2018, Chief Justice, Dubai Courts, 17 September 2018, unpublished.
5 Dubai Court of Cassation Judgment 946-2018 dated 11 November 2018.
6 Dubai Court of Cassation Judgment 1125 of 2018 dated 17 March 2019.
7 See Cassation No.1/2019(Judicial Tribunal) – *Globemed Gulf Healthcare Solutions L.L.C. vs Oman Insurance Company PS* in which the JJT stated that such an approach was 'an artificial dispute created . . . solely for the purpose of avoiding or at least delaying resolution of the merits of the claim'.
8 Cassation No. 5/2019 (Judicial Tribunal) – *Appellant: Essar Projects Limited v Respondent: McConnell Dowell South East Asia Pte Limited.*

Charles Lilley
Bryan Cave Leighton Paisner LLP

Charles specialises in construction and engineering claims and disputes. He has worked for clients from all sides of the construction industry and has experience in litigation, adjudication, arbitration and mediation as well as in project advisory and forensic investigation work.

Charles has worked on a number of projects in the Middle East and in February 2009 was one of the first wave of employees to move to Abu Dhabi to help start-up the firm's new office there and to promote the firm's international construction and engineering capabilities.

Stephen Rigby
Bryan Cave Leighton Paisner LLP

Stephen specialises in construction and engineering disputes and advises employers, contractors and sub-contractors on both contentious and non-contentious matters. Stephen has worked in our international arbitration and civil litigation practice group and is experienced in all dispute resolution processes. He has worked on a range of arbitrated (International Chamber of Commerce, Abu Dhabi Commercial Conciliation and Arbitration Centre and UNCITRAL) and litigated claims (English and Dubai International Financial Centre) for a number of international clients, including those based in the Middle East. Stephen has also advised on dispute adjudication board proceedings under the FIDIC suite of contracts.

Justin Jie Zhang
Bryan Cave Leighton Paisner LLP

Justin is an associate in the firm's construction and engineering team. Justin is a China-qualified lawyer with extensive experience in the region working as both in-house counsel and private practitioner. He has been based in the UAE for over six years. Prior to joining BCLP, Justin worked as the deputy legal director at one of the largest contractors in the region. He frequently advises on construction-related contracts, claims and dispute resolution processes. Justin speaks fluent Chinese and English.

BRYAN CAVE LEIGHTON PAISNER BCLP

London Office
Adelaide House
London Bridge
London
EC4R 9HA
United Kingdom
Tel: +44 20 3400 1000
Fax: +44 20 3400 1111

Abu Dhabi Office
Level 20
Al Sila Tower
ADGM Square
PO Box 109403
Abu Dhabi
United Arab Emirates
Tel: +971 2 652 0300
Fax: +971 2 635 9837

Charles Lilley
charles.lilley@bclplaw.com

Stephen Rigby
stephen.rigby@bclplaw.com

Justin Jie Zhang
justin.zhang@bclplaw.com

www.bclplaw.com

At Bryan Cave Leighton Paisner, we have built one of the premier international arbitration teams in the world. Our team of over 100 lawyers sits across the globe, based in our offices in Abu Dhabi, Dubai, Hong Kong, London, Miami, Moscow, New York and Singapore, meaning we can effectively service our clients' arbitration needs 24 hours a day. We have teams with deep experience of disputes arising from projects in Latin America, Russia and the Commonwealth of Independent States, the Middle East, Africa, East Asia, Southeast Asia and South Asia.

Our team covers a variety of specialist areas, including construction and engineering projects, investor–state disputes, energy and natural resources, banking and finance, insurance and reinsurance, commodities, sports and the full range of corporate and commercial matters.

We have experience in 20 different sets of arbitral rules – including the International Chamber of Commerce, UNCITRAL, the London Court of International Arbitration, the Singapore International Arbitration Centre, the Arbitration Institute of the Stockholm Chamber of Commerce, Dubai International Arbitration Centre, the International Centre for Settlement of Investment Disputes, the Hong Kong International Arbitration Centre, the American Arbitration Association, the Abu Dhabi Commercial Conciliation and Arbitration Centre, DIFC–LCIA, the Cairo Regional Centre for International Commercial Arbitration and the Arbitration Foundation of Southern Africa.

We have represented market leaders in investment arbitration, construction and engineering disputes and commercial arbitration – our team members take leading roles in the arbitration community, in terms of teaching, writing, speaking and taking leadership positions. They are regularly appointed to sit as arbitrators. Members of the team have previously worked at international courts and tribunals, including the London Court of International Arbitration, the International Court of Justice and the International Criminal Court.

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